Illegal Fishing as a Criminal Act at Sea

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SECTION 1 INTRODUCTION

Nowadays, nobody questions the fact that illegal fishing, as part of Illegal, Unreported and Unregulated (IUU) fishing, constitutes one of the most serious threats for the public order of the oceans. Its consequences are extremely damaging and encompass a broad range of very varied sectors. Indeed, illegal fishing represents not merely an environmental problem, failing as it does to respect the rules on conservation and management of living marine resources. This type of fishing also entails significant economic consequences worldwide, leading to the impoverishment both of those operators who do respect the marine environment, whose profits are harmed by the criminal activities of illegal fishing, and of local traditional fishing communities, and even of coastal States. Moreover, illegal fishing diminishes the ability of millions of people who depend on the state of marine resources to feed themselves. We must not overlook the fact that the seas make up 90 per cent of the habitat of life on Earth, and that over 140 countries are carrying on some kind of activity related to marine fishing.

These illegal fishing activities are taking place at a moment when the world’s fishing stocks are rapidly diminishing, as reported by the Food

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and Agriculture Organization of the United Nations (FAO), which estimates that, currently, 85 per cent of the world’s fishing stocks are either over-exploited, exhausted or recovering from depletion, while just 3 per cent are under-exploited and 12 per cent moderately exploited. Nevertheless, in the case of the ten most fished species in the world, representing 30 per cent of global fishing catches, the data are even more worrisome: most of these fish stocks are fully exploited. But this situation does not come as surprise; bearing in mind that the world’s fishing fleet is up to 250 per cent larger than is needed for sustainable fishing practices.

Illegal fishing, as part of IUU fishing, is primarily responsible for this difficult situation that the seas currently face. It is not known exactly how much fish is caught in this way; there is merely data indicating that it makes up a significant percentage of the total volume of fish caught annually. Certain data, such as those used by FAO, the Organisation for Economic Co-operation and Development (OECD) and the European Union, reveal that IUU fishing constitutes between 15 per cent and 30 per cent of the total volume of annual fishing catches worldwide. This would mean that between 11 and 26 million tonnes of fishery products caught annually are the result of IUU fishing.

The economic agents involved in these fishing activities pursue them in fishing areas where it is difficult to carry out thorough checks (for example, remote high seas areas), or where the capacities of the national authorities are not enough to deter them, especially in maritime waters of developing countries. It is first and foremost these countries that have to pay a price too high, due to the devastating consequences of IUU fishing on their fisheries. Thus, in the Exclusive Economic Zones (EEZs) of West African countries, where abundant fishing stocks are to be found, it is estimated, for example, that 40 per cent more is caught than is actually registered officially. It must be added that these catches


6. Data available in “Policy Brief — Illegal, Unreported and Unregulated Fishing”, MRAG, 8 (2009), p. 1; “Record of the 1st Meeting of the Stop Illegal
are mixed together with those made legally, making it even harder to trace these activities.  

The proliferation of illegal fishing activities can be largely explained by the dynamics of international fishing relations. The transformations in the fishing world, above all from the second half of the twentieth century on, have not been halted by the signing of the United Nations Convention on the Law of the Sea in 1982 (UNCLOS). The problems posed by this type of fishing go beyond the provisions of this Magna Carta of the Sea regarding the international fishing regime.

Also, the dynamics of international fishing relations brings into question some of the institutions and mechanisms provided for in this Convention.

At the same time, this very practice does no more than develop new patterns of illegal fishing. Amongst them, suffice it to mention: fishing without a licence, fishing out of season, using forbidden fishing gear, failure to respect fishing quotas. It is by these means that those who practise this kind of fishing are attempting to avoid detection. Often, they fish in areas where monitoring, control and surveillance are insufficient.

This entails that a part of fishing is carried out by vessels registered in the coastal States themselves, especially in the form of captures undeclared or declared in an unsatisfactory way, and, also, that foreign fishing vessels act without the permission of the coastal State, that is, ILLEGAL FISHING AS A CRIMINAL ACT AT SEA


7. For example, this holds true in the waters under Guinean sovereignty or jurisdiction where illegal fishing has been pursued for several years. This is an area where there is practically no control over fishing activities, due, basically, to the lack of economic resources. Thus, it is reckoned that over the period 2009-2010, there were approximately 1,300 illegal fishing boats in the area, of which only 58 were arrested. The loss for Guinea is estimated up to $100 million per annum. See in this regard T. M. Ndiaye, “Illegal, Unreported and . . . ”, op. cit., pp. 376-377. Other States from the same geographical area, such as Nigeria or Ghana, also are very affected by illegal fishing. In this regard, see A. Eyiwunmi Falaye, “Illegal Unreported Unregulated (IUU) Fishing in West Africa (Nigeria & Ghana)”, Marine Resources Assessment Group Ltd. (MRAG), London, January 2008.

engaging in unauthorized fishing, or fishing activities which violate the conditions of access set by the coastal State.\(^9\)

On the other hand, it must be said that such criminal fishing activities, unforeseen by UNCLOS, are not subject to any national or international legal regulation, or at least they have not been until recently. This has enabled a large number of vessels to devote their activity to illegal fishing. The diversity of these marine activities as well as the very provisions contained in UNCLOS relating to the flag State and the coastal State, the port State, and, in particular, those relating to fishing, should make us reflect on the complex legal framework currently in force regarding fishing. It is as if the international community were attempting to combat illegal fishing without being aware, or wishing to be aware, that, at present, there is no international authority with powers of control and police of fishing as a whole. It seems also as forgetting that most of this type of fishing is carried out on high seas or in EEZs of failed States or States which do not have sufficient means to deal with the marine fishing stocks found in waters under their sovereignty or jurisdiction.

Evidently, a real turning point in this matter was the adoption, in the year 2001, of FAO’s International Plan of Action to prevent, deter and eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). It actually comprises the *ratione materiae* scope of illegal fishing activities. While it lacks any binding effect as such, its provisions have been adopted in several legal texts drawn up at both regional (by the Regional Fisheries Management Organizations and the European Union) and national levels.

This legal framework has progressed significantly with the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted on 22 November 2009 within the FAO framework (2009 Agreement on Port State Measures). This Agreement once come into force, will be the first legally binding text, of international scope, and specific to the area of the fight against illegal fishing. Its primary aim is to prevent illegally obtained fishing catches from entering the markets along and across the world by way of a myriad of existing ports. Suffice it to say, for example, that under this Agreement, foreign fishing vessels wishing to enter a port must previously have applied for an entry permit. In this sense, port States will regularly inspect, those fishing vessels that fail to comply with regulations will be denied access to use port facilities or certain port services, and database will be set up that can be shared by all interested parties.

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It is a trite knowledge that illegal fishing is a global phenomenon. It is found in all seas, and currently it constitutes one of the greatest challenges to the existing international fisheries law. Thus, it is a widespread and complex phenomenon in which a large number of actors and situations take part. This makes its prevention and eradication more difficult. As it has been stressed many times, an effective fight against illegal fishing must tackle not only fishing activities themselves, but also operations taking place before and after the act of fishing itself. Such operations could be: ranging from the organizational details of the ship’s ownership, registration and obtaining a flag, the activities strictly related to fishing, including supply at sea and transfer of fish, the transfer of fish to specially prepared reefers or to cargo ships, their arrival at ports, the fish landing, the transhipment of fish, its processing and its marketing in the State or in the States of final destination. On the other hand, the legal instruments to combat these illegal activities are found not only in international law of the sea. This is also due to the fact that the recipient States of the respective regulations are not exclusively the traditional States concerned (flag, coastal and port States), but also the market State and the State of nationality of the fishing crews.

In recent years, this complex situation has also been recognized by various international organizations. Moreover, it is evident that as the international community has begun to work on the prevention and suppression of illegal fishing, the criminal networks involved in this type of fishing have changed their modus operandi, to the extent that they have become integrated in transnational organized criminal networks. This is in accordance with what the United Nations Secretary-General stated when he warned, in his Annual Report on “Oceans and the Law of the Sea” (10 March 2008), that illegal fishing “has also been associated with organized crime and other illicit activities”. This new scenario has


been acknowledged by the United Nations Office on Drugs and Crime, too, in its report presented in Vienna in 2011, “Transnational Organized Crime in the Fishing Industry”\textsuperscript{12}. It has been reiterated also by the European Parliament and INTERPOL.

Besides the international regulations, both of hard law and soft law, that set out the rights, duties and responsibilities of the States involved in the prevention and suppression of illegal fishing (flag State, coastal State, port State, market State and the State of the nationality of the fishing crews involved in illegal fishing), there is also a series of provisions concerning the competences of these States to apply these rules. These provisions reflect the common principles governing the assertion of jurisdiction in the international law of the sea\textsuperscript{13}.

The present chapter will be divided further into three main sections: in Section 2, we will address the issue of what is understood by “IUU fishing” and how far illegal as part of IUU fishing constitutes a criminal activity at sea. We will devote Section 3 to a study of the normative framework currently existing in this field. And in Section 4 we address the enforcement jurisdiction of States over the prevention and suppression of illegal fishing.

SECTION 2 \textbf{DEFINITION OF ILLEGAL FISHING AS A CRIMINAL ACT AT SEA}

The inclusion of illegal fishing in the international agenda is, to a great extent, due to the initiatives of the Regional Fisheries Management Organizations (RFMOs). In 1997, illegal fishing was included in the seventh session of the Standing Commission on Observation and Inspection of the Canberra Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) in relation with the stocks of deep-sea cod\textsuperscript{14}. Henceforth, this type of fishing was


regulated by these RFMOs. At the same time, FAO has discussed many of the measures at successive meetings of its Committee on Fisheries (COFI), while later they have been provided for in different international legal instruments.

For its part, from 1999 onwards, the United Nations General Assembly has given serious consideration to the issue of illegal fishing in frequent resolutions, stressing how it has turned into “a serious threat to fish stocks and marine habitats and ecosystems, to the detriment of sustainable fisheries as well as the food security and the economies of many States, particularly developing States”\(^\text{15}\). And in its latest resolutions, it has paid particular attention to marine issues.

On the other hand, specific reference must be made to the IPOA-IUU, adopted in 2001. Its purpose is to assist FAO Members and other interested parties to become familiar with the legal tools already in force in this matter\(^\text{16}\), and also to propose which of these it was appropriate to use in each case, as well as to offer a range of alternative solutions in order to apply them in the struggle against illegal fishing\(^\text{17}\). In the opinion of the author, one of its main achievements is certainly the consensus regarding the meaning of “illegal, unreported and unregulated fishing”. Nevertheless, as it has been noted by Judge Treves\(^\text{18}\), this conceptual definition, apart from shedding some light on the range of meaning of each of its elements, is not very relevant in practice, as the three types of criminal fishing tend to act in conjunction. These definitions try to include all the possible manifestations of this type of criminal act;

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17. In this regard, see “Aplicación del Plan de Acción Internacional para prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada”, FAO, Rome, 2002, p. xiii.

further, they have later been gathered together in other legal instruments adopted at international, regional and national level.\(^{19}\)

By virtue of paragraph 3.1 of IPOA-IUU, by *illegal fishing* it is understood all those fishing activities

> “3.1.1. conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

> 3.1.2. conducted by vessels flying the flag of States that are party to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

> 3.1.3. in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization”.

In paragraph 3.2. of IPOA-IUU it stipulates that *unreported fishing* is made up of those fishing activities

> “3.2.1. which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

> 3.2.2. undertaken in the area of competence of a relevant RFMO which have not been reported or have been misreported, in contravention of the reporting procedures of that organization”.

Meanwhile, in paragraph 3.3. of IPOA-IUU, reference is made to *unregulated fishing*, which is constituted by those fishing activities performed

> “3.3.1. in the area of application of a relevant RFMO that are conducted by vessels without nationality, or by those flying a flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

> 3.3.2. in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State

responsibilities for the conservation of living marine resources under international law”.

For present purposes, illegal fishing is understood as those activities performed by foreign persons or vessels, regardless of their flag, which contravene the fishing regulations of a coastal State in waters under its jurisdiction or which contravene fishing conservation and management measures established by an RFMO on the high seas; by unreported fishing, it is understood those activities that go unreported or are reported misleadingly to the competent national authority or the relevant RFMO; and by unregulated fishing it is understood those activities performed either by vessels without nationality or flying the flag of a State which is not part of a certain RFMO, contravening the conservation and management measures of the said Organization, or in a manner incompatible with the responsibility of the State established by international law in relation to the conservation of living fishing resources.

Likewise, it should be stressed that not all forms of IUU fishing can be designated as criminal acts at sea and nor does every form of criminal act fall under the heading of illegal fishing, according to the definition of IUU fishing. Paragraph 3 (4) of IPOA-IUU leaves open the door to the possibility that “certain unregulated fishing may take place in a manner which is not in violation of applicable international law”. That is to say, unregulated fishing may be considered a criminal act if, and only if, it is proven that it has been in violation of general international law. Inevitably, if the fishing is carried out on the high seas where an RFMO has competences of conservation and management, those States which are not members of this Organization will be performing unregulated fishing according to the provisions of IPOA-IUU. Such fishing will also be illegal in the case of a violation of international law, if the conservation measures adopted by the State concerned are identical to those applicable by the RFMO in question.

It is worth pointing out in this regard that only the minority of the international doctrine argues that unregulated fishing should also be

22. This is a hypothesis suggested by authors like Prof. Gemma Andreone. See G. Andreone, op. cit., p. 126.
considered illegal, due to the fact that the rules governing the conservation and management of living marine resources on the high seas are binding and, thus, have \textit{erga omnes} obligations. Accordingly, regulations governing the conservation of fishing stocks adopted by a RFMO would be, likewise, binding on all the States which are not parties to the said Organization, under Articles 117\textsuperscript{24} and 118\textsuperscript{25} of UNCLOS. Undoubtedly, this is not free of controversy. It is the view of the present author that the regulations of an RFMO cannot really constitute conventional obligations for all the States in the international community, since by virtue of the well-known principle of the relative effect of treaties (\textit{res inter alios acta}), such a rule can create neither obligations nor rights for a third party State without its consent.

\noindent \textbf{SECTION 3} \hspace{0.5cm} \textbf{INTERNATIONAL LEGAL FRAMEWORK FOR THE PREVENTION AND SUPPRESSION OF ILLEGAL FISHING}

The international community, RFMOs, the European Union and States have embarked on a series of initiatives to address the problem of illegal fishing. The first fruits have been borne in the spirit rather than in the letter of UNCLOS. But it has been chiefly since the 1990s when the greatest regulatory effort has been made in this matter, above all in the FAO framework. To this end, efforts have been made to complement the UNCLOS provisions; strengthen the regime established in the field of fisheries; clarify the field of application of co-operation between States in the case of shared, straddling and migratory fish stocks; and regulate the management of fisheries on the high seas, including the regime of monitoring, control and surveillance applicable\textsuperscript{26}.

\noindent \textsuperscript{24} Article 117, UNCLOS, refers to the duty of the States to adopt measures for the conservation of living resources of the high seas in relation to their own nationals:

\begin{quote}
"All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."
\end{quote}

\noindent \textsuperscript{25} Under Article 118, UNCLOS, the States bear an obligation of conduct, which is to co-operate in the conservation and management of living resources:

\begin{quote}
"States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end."
\end{quote}

\noindent \textsuperscript{26} In this regard, see D. M. Sodik, "Post-LOSC Legal Instruments . . . \textasciitilde", \textit{op. cit.}, pp. 71-72.
Indeed, at present, there are different legal instruments which, depending on their nature and scope, can be divided into two major groups: binding (para. 1) and non-binding (para. 2). In the following paragraphs of the present chapter, we will focus on the survey of the current international legal action for the prevention and suppression of illegal fishing. Particular emphasis will be placed upon the rights, obligations and responsibilities belonging to the different States which may intervene at certain stages of the chain of criminal fishing — that is to say, the flag State, the coastal State, the port State, the market State, and the State of nationality of those fishermen involved in illegal fishing.

Paragraph 1  Binding International Instruments for the Prevention and Suppression of Illegal Fishing


The Montego Bay Convention contains provisions relating to fisheries in the different marine areas. These provisions attempt to strike a balance among the interest of navigation, the interest for the conservation, management and exploitation of resources, and the interest in protecting the marine ecosystem. Hence, it is considered that in the first of these cases, protection has to be afforded by the flag State, in the second by the coastal State, while, in the third, responsibility would fall either on the coastal State in marine areas under its sovereignty or jurisdiction, or on the flag State in the other marine areas of interest for fisheries.27

Meanwhile, the remaining two binding legal instruments seek to complement UNCLoS, as far as fishing and the responsibilities of the flag States of fishing vessels are concerned. In fact, the 1993 Compliance Agreement, which has been in force since 24 April 2003, and to which

38 countries and the European Union are parties\textsuperscript{28}, defines and gives substance to the responsibility of the flag State of a vessel engaging in fishing on the high seas, paying special attention to the question of flags of convenience. The 1995 New York Agreement, which came into force on 11 December 2001 and currently includes 77 countries plus the European Union as parties\textsuperscript{29}, aims to develop, define and reinforce the obligations of States to co-operate in order to conserve and manage fishing on the high seas, but only as far as straddling and highly migratory fish stocks are concerned. This has been explicit in the context of the RFMOs, introducing, broadly speaking, a new regime in the field of access to resources and control. This situation draws attention to the unsatisfactory reality of the problems caused by the practice of flags of convenience.

\textbf{A. The role of the coastal State}

Under Article 21 (1) (d) and (e) of UNCLOS, the coastal State has legal competence in its territorial waters for “the conservation of the living resources of the sea”, as well as for “the prevention of infringement of the fisheries laws and regulations”. And in the EEZs, the coastal State enjoys “sovereign rights for the purpose


of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed”. But these States must take into account the rights and obligations of other States provided for by UNCLOS. It must be stressed that Article 58, UNCLOS, ensures freedom of navigation for all States, whether coastal or landlocked, although Articles 88-115 of this Convention regarding high seas will be applied insofar as they are not incompatible with the provisions relating to the EEZ.

The position of the coastal States in respect of fisheries is strengthened by the provisions of Article 297 (2) (a) and (3) (a) of UNCLOS, by which the coastal State “shall not be obliged to accept the submission to such settlement” in Part XV

“relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations” 30.

It is true that even though the coastal States have the same competences when dealing with illegal fishing, not all of them have the same capability to address this problem. Therefore, in this context, a deep fracture exists as to the coastal States’ role in the fight against illegal fishing. It must be recalled that more than 90 per cent of the world’s fishing catches are in waters controlled by coastal States, that an important part of this fishing is carried out in these same waters, and that most of this fishing is performed by vessels registered in these same States. In other cases, foreign vessels fish without the coastal State’s permission (that is, illegally) or transgress the conditions of access imposed by the coastal State. However, it is submitted that illegal fishing in these waters is not so much due to the absence of a legal framework to regulate these activities as to the lack of means on control and enforce this regulation by many countries, especially underdeveloped ones 31.

30. For a commentary of this matter, see T. Treves, “Jurisdiction over Vessels in . . .”, op. cit., p. 2.
31. Regarding this problem, certain proposals have been put forward which could contribute to the suppression of illegal fishing, among which are the following: the acceptance as an evidence in a court of the electronic information obtained by satellite monitoring systems; the introduction of a system of civil penalties (lower standards of proof, faster decision-making procedures); the indirect limitation of freedom of navigation, via the establishment of the obligation to inform of entry and exit; or the definition of certain transition zones as an exception, in these cases, to the principle of freedom of navigation in EEZs.
B. The role of the flag State

The premise on which any analysis of the position of flag States must be based, with regard to fisheries, is that current international regulations grant them wide-ranging competences on the high seas. In fact, these States enjoy both freedom of navigation (Articles 87 (1) (a) and 90 of UNCLOS) and freedom to fish on the high seas (Articles 87 (1) (e) and 116 of UNCLOS). And, at the same time, they have exclusive competence over administrative, technical and social matters regarding all fishing vessels flying their flag (Article 94 (1) of UNCLOS).32

But these competences are not unlimited. By virtue of Article 117, UNCLOS, the flag State is obliged “to take, or to cooperate with other States in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”. This is a duty already provided for in the 1958 Geneva Convention on the High Seas (Article 1 (2))33. Its content coincides with that of Article 118, UNCLOS, according to which the flag State has the possibility to co-operate with the other States “in the conservation and management of living resources in the areas of high seas”34, and even that of setting up “subregional or regional fisheries organizations to this end”. With the passage of time, this co-operation has borne fruit in three different ways35: the first of them, via bilateral agreements between neighbouring States regarding joint management of the fish stocks they share36; secondly, the RFMOs set up within the FAO framework37; and thirdly, those RFMOs set up by means of an international treaty, but outside the FAO framework38.

32. In this regard, see T. Treves, “La pesca ilegal . . .”, op. cit., p. 143.
33. “All States have the duty to adopt or to cooperate with other States in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”
34. To this we might add Article 119, UNCLOS, dealing with the conservation of living resources on the high seas.
36. We are referring to two such organizations created by Canada and the United States, namely: the International Pacific Halibut Commission (IPHC) and the Pacific Salmon Commission (PSC).
37. For example, amongst others: the Indian Ocean Tuna Commission (IOTC), the General Fisheries Commission for the Mediterranean (GFCM), the Asia-Pacific Fisheries Commission (APFIC), the Regional Commission for Fisheries (RECOFI), the South West Indian Ocean Fisheries Commission (SWIOFC), and so on.
38. Suffice to mention now the following: North-East Atlantic Fisheries Commission (NEAFC), the Northwest Atlantic Fisheries Organization (NAFO), the South-East Atlantic Fisheries Organization (SEAFO), and so on.
These UNCLOS provisions were complemented some years later with the 1993 FAO Compliance Agreement and the 1995 New York Agreement.

Thus, the 1993 FAO Compliance Agreement, after it had established that its provisions would be applied “to all fishing vessels that are used or intended for fishing on the high seas” (Article II (1)), seeks to define and give substance to the responsibility for the flag State of a fishing vessel performing its activities on the high seas (Article III (I) (a)), when it lays down that

“[e]ach Party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures”.

It is argued that this treaty pays also special attention to the problem of flags of convenience, when it stipulates that

“[e]ach Party shall, for the purpose of this Agreement, maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas, and shall take such measures as may be necessary to ensure that all such fishing vessel are entered in that record” (Article IV).

For its part, the 1995 New York Agreement considers that this obligation borne by the States needs to be expressed especially by the conduct of the RFMOs, and broadly introduces a new regime with regard to access to resources and controls. Thus, in accordance with Article 8 (4), it is laid down that the only States that will enjoy access to fishery measures whose conservation and management are the responsibility of an RFMO are Member States of the RFMO in question, or those who are participants in it, or those who agree “to apply the conservation and management measures established by such organization or arrangement”. Furthermore, by virtue of Article 8 (3), these States are under

“the duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement”.

This regime is completed by the provisions of Article 17 of the 1995 New York Agreement: in its first paragraph, it is laid down that the obligation to co-operate in this field exists also for non-members of an
RFMO\(^{39}\). And as for the control framework is concerned, Article 18 (1) of this Agreement stipulates that

“[a] State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures”.

However, it is currently observed that certain States are in no condition to, or do not wish to, exercise an effective control over those fishing vessels flying their flag. It is beyond doubt that there is a dangerous, general correlation between illegal fishing and flags of convenience. According to the relevant rules of international law, the flag State is obliged to exercise “its jurisdiction effectively” over ships which fly its flag (Articles 92 (1) and 94 of UNCLOS, Article 18 of 1995 New York Agreement), in such a way that these vessels shall respect the sovereign rights of coastal States over those fisheries stocks in their EEZ, and shall comply with those obligations imposed on fishery on the high seas by international law, and, in some of their zones, by rules proceeding from the RFMOs. Also, it falls exclusively upon each State to determine the necessary prerequisites in order to grant its nationality to the vessels (1958 Geneva Convention on the High Seas, Article 5, and Article 91 (1), UNCLOS).

Nevertheless, it is very frequently observed that certain countries are in no condition to exercise jurisdiction effectively, as there is no real relationship between themselves and the vessels flying their flags, a genuine link (in Spanish, relación auténtica; in French, lien substantiel), as required by Article 91 (2), UNCLOS. This situation is encouraged by those countries which have adopted systems of open registers\(^{40}\), favour-


\(^{40}\) In our view, the issue of countries that practise open registers offers some very illustrative data on the complexity of activities at sea. For instance, Mongolia, the world’s largest land-locked country, due to the fact that it adopted the system of open registers in 2003, currently has over 250 vessels flying its flag. This situation seems to be favoured by North Korea’s decision to introduce very strict controls over vessels flying its flag, which encouraged Japan to decide to register its ships in Mongolia. See A. Syrigos, “Developments on the Interdiction of Vessels on the High Seas”, in A. Strati, M. Gavouneli and N. Skourtos (eds.), *Unresolved Issues and New Challenges to the Law of the Sea: Time before and Time After*, Martinus Nijhoff Publishers, Leiden, 2006, p. 153.
ing the existence of numerous vessels which sail and engage in their fishing activities under flags of convenience 41, making most international provisions aimed at ensuring long-term conservation and sustainable use of fish stocks practically devoid of substance 42.

In short, it is clear from UNCLOS, the 1993 FAO Compliance Agreement 43 and the 1995 New York Agreement 44 that the flag State has a duty to exercise effective control over fishing vessels that fly its flag, as well as over any vessels that serve as auxiliaries to them, and ensure that the activities of such vessels do not lessen the effectiveness of conservation and management measures adopted in accordance with international law and approved at national, regional, sub-regional or global level. It is submitted that compliance with this duty would inevitably lead to the elimination of illegal fishing. However, it could hardly be complied with by a State which does not demand that the vessels having its nationality should have a real and effective link with it, keeping open registers and favouring flags of convenience. This scenario has led certain shipowners and operators to register their vessels in certain countries offering significant benefits, generally of a fiscal or administrative nature, or related to industrial relations 45. But for the purpose of tackling this type of fishing, it is perhaps not so much that some States grant this type of

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43. Article III. Flag State Responsibility.

44. Articles 21 and 22. The exclusive jurisdiction of the flag State on the high seas is enshrined in this treaty.

45. This has frequently produced a situation where economic benefits are obtained at the cost of the ship’s safety, human lives, and exploitation, and has facilitated numerous cases of maritime fraud and tax evasion. For a wider analysis of these matters, see E. Andrews-Chouicha (ed.), Pourquoi la pêche pirate perdure : les ressorts économiques de la pêche illégale, non déclarée et non réglementée, OCDE, Paris, 2005; P. Bender and G. Lugten, “Taxing Illegal Fishing: A Proposal for Using Taxation Law to Reduce Profiteering from IUU Fishing Offences”, International Journal of Marine and Coastal Law, 22 (2007), No. 4, pp. 517-544; U. R. Sumaila, J. Alder and H. Keith, “Global Scope and Economics of Illegal Fishing”, Marine Policy, 30 (2006), No. 6, pp. 696-703.
facilities as that, once flags are granted to ships, States should exercise their jurisdiction and a real effective control over them. At present, there are many fishing vessels that fly a flag of non-compliance, that is, of a State that, even though it may belong to an RFMO, and therefore its flag cannot be considered a flag of convenience, fails to comply with its duty regarding the control of the vessels flying its flag 46.

It is submitted that without a real and co-ordinated fight against the significant economic benefits provided by illegal fishing to certain participants in international fishing, it is hard to see how this global scourge can be eradicated. On the other hand, we believe that the genuine link could serve as a support in order to demand to the flag State to fulfil its duties in accordance with the international law regarding all ships flying its flag. This idea may be developed along three lines of reasoning in an attempt to reach an explanation of what a genuine link may mean from the perspective of the suppression of illegal fishing 47.

(i) First argument (a non-formalistic solution)

It is a truism that international law of the sea recognizes exclusive competences for each State in the question of granting nationality to a vessel, allowing it a great deal of freedom when determining the criteria which led it to grant the right to fly its flag 48. In the light of UNCLOS and the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS), the flag State is responsible for the damage caused by a vessel of its nationality. In this sense, Article 18 of the 1995 New York Agreement requires certain conduct from the flag States of vessels that sail the high seas 49. Thus, otherwise, the absence of such conduct would allow us to deduce the existence of a purely formal relationship and the absence of an authentic one.

46. This is the case, for example, of Equatorial Guinea or Panama, which are members of the International Commission for the Conservation of Atlantic Tunas (ICCAT). The concept of “flags of non-compliance” was first used by the CCAMLR in 2002. See, for example, the Resolution (ROI/XXI) or the Conservation Measure 10-07 (2006), available at www.ccamlr.org.

47. For a deeper study of these three possible solutions in order to identify the genuine link, see J. M. Sobrino Heredia, “Pabellones de conveniencia . . .”, op. cit., pp. 1341-1345.


49. For example, the granting of fishing licences, the authorization, different controls and prohibition of fishing in certain areas, the national register of fishing vessels, systems of periodical reports from vessels, verification of catches of certain species, and so on.
From this point of view, it would be possible to argue that Article 5 of the 1958 Geneva Convention on High Seas and Article 91, UNCLOS, should be read in the light of the development of international law, in the sense that granting nationality to a vessel is conditional on the existence of a genuine relationship. This is an obligation that falls on the flag State and which must be complied with in good faith. It is an obligation that not only interests the flag State but all coastal States and the whole of the international community, precisely due to the risks of contamination and destruction of the marine ecosystem, which may be entailed by ships’ navigation and the effects of their fishing activities on fishing resources (above all long-term conservation and the sustainable exploitation of fishing stocks). In this sense, it is not enough merely to comply with the administrative formalities of registration and licensing, but also that this genuine link should in fact exist. These would be two cumulative conditions, so that the other States could disregard the nationality of the vessel’s flag State when non-compliance took place.

But also, the development of the international law of the sea sets out certain limits for the freedom of flag States, when it introduces the concept of genuine link. This concept incorporates the idea of effectiveness of the nationality, in the same line as the sentence given by the International Court of Justice on 6 April 1955, in the \textit{Nottebohm} case, in the sense that requires an effective nationality as a condition for opposing third party States\textsuperscript{50}. Besides, as ITLOS states in the \textit{Saiga 2} case, Article 91, UNCLOS, attempts to ensure that flag States respect their obligations more effectively, not the establishment of criteria which might be invoked by other States in order to contest the validity of vessels’ registration in a flag State\textsuperscript{51}.

\textbf{(ii) Second argument (a formalistic solution)}

The competence to grant a vessel the right to fly its flag, whether via registry or registration, is accorded exclusively to each State, as evident from Article 5 of the 1958 Geneva Convention on the High Seas and Article 91, UNCLOS. These provisions set forth that there must be a genuine link between the flag State and the vessels of its nationality. Besides, Article 94 (1) of the latter legal text adds that all States must exercise their jurisdiction and control over those vessels flying their flags in an effective way, in administrative, technical and social matters.


\textsuperscript{51} \textit{ITLOS Saiga 2 (Saint Vicent and the Grenadines v. Guinea)}, Case No. 2, 1 July 1999, point 83.
And Article 94 (6) of UNCLOS specifies that

“[a] State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.”

It is readily apparent from Article 5 of the 1958 Geneva Convention on the High Seas and from Articles 91 and 94 of UNCLOS, that the absence of effective jurisdiction does not allow to disregard the nationality but rather, on the contrary, compels to refer to it. In relation to this, it must be stressed that the European Union Court of Justice, in the Poulsen case, has ruled in the sense that it is for the State to establish the conditions necessary to obtain its registration or to have access to its registry, and it is also for it to control the existence of a genuine link when nationality is granted.\(^{52}\)

International law is not interested in the elements of socio-economic linkage existing between the vessel and a certain national legal order. But it is concerned with whether the flag State can ensure in real terms the enforcement jurisdiction and control over the vessel registered in its registry. This formalistic solution is based on the characteristics which the international jurisprudence attributes to the genuine link. Hence, it can be concluded that, even though there exists no more than a formal genuine link, this produces an obligation for the flag State with regard to both third-party States and the international community — which in some cases can be an erga omnes obligation — due to the fishery activities of the vessels flying its flag.

(iii) Third argument (mixed solution)

This mixed solution is premised upon the combination of the flag State obligation to ensure effective jurisdiction and control over the vessel flying its flag and the effectiveness of the genuine link (obligation of due diligence). Given that a merely “formal” link means that it is impossible, more than likely, for the State to comply with its obligations. Hence, practically from the moment when the State grants its nationality to a vessel heedless of whether a genuine link exists, it could be argued that it is already beginning to fail to comply with the obligations imposed on it by the international law regarding the conservation and management of marine living resources and the environment protection.

But, ultimately, what could make up a genuine link within the framework of the fight against illegal fishing? As is well known, the flag is the external manifestation of the link existing between a vessel and the State. This link is the nationality, which is a manifestation of the State’s sovereignty. Then, granting of the nationality to a vessel is an act of sovereignty and it falls upon the State to establish the conditions as it wishes. The attribution of the nationality means, on the one hand, that national legal norms of a State will be applied to that vessel and, on the other hand, that the State has the obligation to control that vessel’s activity, with the possibility that such obligation may result in international responsibility. Formally, apart from some historically based exception or one derived from the existence of international organizations, nationality and flag coincide: as a vessel has a nationality and, thus, it may fly that State’s flag. The nationality and its external expression, the flag, are a significant factor of legal certainty.

Therefore it seems necessary that they should express the existence of a genuine link in an effective relationship. But what makes up this link? In our view, in the case of the nationality of physical persons this legal link includes the existence of a pre-existing and effective real relationship (see the Nottebohm case), so that its absence results in the loss of international effects of such nationality. And in the case of vessels’ nationality, this link gives rise to a State’s obligation to ensure the international inviolability of the vessel, imposing on it the respect for its safety, labour, fisheries, environmental, etc. norms. Hence, the absence of a genuine link does not result in the loss of its international effects, and does not impede its effects against third countries. It means the responsibility of the State which has failed to observe its obligations of surveillance and control regarding fisheries, and, moreover, has failed to comply with the obligation of due diligence, registering a vessel in its registry heedless of the existence of a genuine link with it.

From this point of view, the genuine link that should exist between a State and a vessel to which it has granted its flag could be the capacity of that State to exercise an effective control over that vessel’s activities, and work diligently to this end. If this control does not exist, it is illusory to speak of a genuine link. The definition thus proposed of the genuine link would distance it from the traditional economic and internal view, whereas it would approach that of international responsibility (the breach of a behaviour obligation). It is argued that it would be of greater benefit from the point of view of the fight against illegal fishing, as it would seem more effective and conclusive to act repeatedly against a State with open registry because it fails to control its vessels that are involved in illegal fishing, than to act against the ship and consider it stateless because it lacks such a genuine link.
C. The role of the port State

Unlike the coastal State and the flag State, which have specific regulations in the three binding international legal instruments concerning fisheries, no specific legislative competences are recognized to the port State, though it does possess executive and judicial competences in this field. Until very recently, the emphasis in international regulations concerning fisheries had been on the role of coastal and flag States, respectively. It was even the case, on occasions, that some of the provisions regarding coastal States’ competences were applied to port States by virtue of the internal national legislation of the State concerned. The International Court of Justice aligned itself with this opinion in the case of Military and Paramilitary Activities in and against Nicaragua, when it ruled that the coastal State had the right to regulate access to its ports in virtue of the sovereignty it exercises in these areas.\(^{53}\)

It is argued that, in this way, a very significant aspect was ignored that is strictly related to fishing engaged in EEZs or on the high seas. In the last few decades, the changes in international fishing relations have brought to light the need to establish a specific legal framework for the port State that would enable it to adopt effective measures for the prevention and suppression of illegal fishing. These measures, which currently have no binding effect, would cover, by analogy, the provisions of Article 218, UNCLOS, whereby the port State’s right of control over the protection of the environment is recognized, as we will discuss further in Section 4.

This shift of direction is largely due to the work carried out by FAO, which in the last ten years has spared no effort in drawing the attention of the international community to the importance of the port State in the fight against illegal fishing. As has been already stressed, the flag State is often in no condition to, or has no wish to, control the fishing activities of the vessels flying its flag. Thus, for example, Article 23 (1) of the 1995 New York Agreement provides that the port State has not only the right but also the duty, to adopt measures in accordance with international law, with the aim of promoting “the effectiveness of sub-regional, regional and global conservation and management measures”. But this would be possible if the port State, by doing so, shall not discriminate against the vessels of any State “in form or in fact”. For its

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53. “It is also by virtue of its sovereignty that the coastal State may regulate access to its ports”. ICJ Reports 1986, p. 111, para. 213. For an analysis of these issues, see R. Casado Raigón, “El Acuerdo de la FAO de 2009 sobre medidas del Estado rector del puerto destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada”, Noticias de la Unión Europea, No. 326, 2012, pp. 4-5.
part, in the Review Conference of the 1995 New York Agreement in May 2010, many delegations recognized the importance of the adoption of the 2009 Agreement on Port State Measures, and considered it “as a major development in combating” illegal fishing⁵⁴.

Paragraph 2  Non-Binding Instruments in the Field of Fisheries

Along with these new trends in international fisheries law, which tend towards the introduction of a greater degree of responsibility in fishing activities, the work has been on-going in recent years within the framework of the United Nations on the implementation of a scheme with a universal scope, in which concrete measures in the fight against IUU fishing, including illegal fishing, would be defined. As a result of this work, IPOA-IUU was approved by consensus in COFI in March 2001. Its adoption has represented a watershed in the legal regulation of the problem of IUU fishing on an international scale⁵⁵. Even though, at first sight, it is not legally binding, this does not signify, by any means, that IPOA-IUU is bereft of any legal effectiveness. On several occasions it refers to the UNCLOS provisions or it states that it is according to other relevant rules of international law⁵⁶. This interna-


⁵⁶. For example, the 1995 New York Agreement, the 1993 FAO Compliance Agreement, the Code of Conduct for Responsible Fishing mentioned above, or what was agreed on in the 1992 Cancun Declaration, the 1992 Rio Declaration on Environment and Development, especially Chapter 17 of Programme 21, and also in other declarations and international instruments related to this problem. For more details, see W. Edeson, “The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument”, The International Journal of Marine and Coastal Law, 16 (2001), No. 4, pp. 612-617.
ational text defines what is understood by IUU fishing, and proposes different measures to combat and eliminate this type of fishing, specifically for each of the five possible categories of States that can intervene at a particular point in the fishing chain. These are measures that are distinguished depending on the role that the States have to play in the global fight against illegal fishing.

Since the implementation of the 2001 IPOA-IUU, some concrete actions have been proposed by various States and the European Union, affected by these fishing activities, and in particular, those that strengthen the content of the responsibilities that could be derived in general for all the States, and specifically for coastal States, port States, flag States, and, more recently, for market States and State whose nationality those fishermen involved in illegal fishing have. And the 2009 Agreement on the Port State Measures could not be clearer, noting in the Preamble that the measures to address this type of fishing

“should build on the primary responsibility of flag States and use all available jurisdiction in accordance with international law, including port State measures, coastal State measures, market related measures and measures to ensure that nationals do not support or engage in”

illegal fishing.

Moreover, different measures have been adopted by the different parties involved in the fight against illegal fishing. This comprehensive body of soft law norms certainly invites discussion. In this regard, special attention will be paid to the provisions of the 2009 Agreement on the Port State Measures, as it is the only international text of these characteristics that has the possibility to be binding at international level in the future, and, from that moment on, to be applicable to all ports. And, there will be the possibility to see whether any role is granted to the market State and also to the State whose nationality the fishermen who are involved in illegal fishing have.

As far as IPOA-IUU is concerned, the measures laid down for the fight against illegal fishing can be grouped together under the following headings: in the first place, general measures to strengthen and broaden the scope of monitoring, control and surveillance, as well as to penalize non-compliance; secondly, concrete measures to improve and increase flag States’ control; thirdly, parallel measures to enhance the trans-

57. Article 3 (5) of the 2009 Agreement on Port States Measures stipulates that

“[a]s this Agreement is global in scope and applies to all ports, the Parties shall encourage all other entities to apply measures consistent with its provisions. Those that may not otherwise become Parties to this Agreement may express their commitment to act consistently with its provisions”.
parency of markets and hamper the commercialization and profitability of illegal fishing; and lastly, we could speak in general of other measures to combat illegal fishing.

Many of these measures have also been set out in the Model Scheme on Port State Measures to Combat IUU Fishing adopted in 2005 (2005 Model Scheme). This is a voluntary fishing instrument which, to a great extent, follows the basic approach of regional schemes or mechanisms of measures of port State control — the so-called Memoranda of Understanding (MoU) — which will be addressed in Section 4 of this chapter, and which were already in being in the field of the prevention of marine pollution, though it is true that in this particular case they are applied to the fight against illegal fishing. The main aim of the 2005 Model Scheme is that of facilitating the application of effective measures on the part of the port State to prevent, discourage and eliminate illegal fishing, not exclusively from a unilateral or national point of view, as has occurred up to now, but by means of a co-ordinated, harmonized approach of consultation and co-operation between several port State schemes. What is being sought is that there should be surveillance as to whether ships voluntarily entering ports comply with the pertinent measures of fishing conservation and management.

RFMOs have played a great role in the consolidation of this international legal framework, at both normative and operational levels. Indeed, most of them have already taken steps in this field, among which the following are some of the most outstanding: establishing important programmes of control and inspection; the adoption of measures of control by the port State; ships’ obligation to fit vessel monitoring systems (VMS); registration of catches, regulation of fishing gear; listing of vessels authorized to fish and of vessels considered involved in illegal fishing activities; trade measures applicable to States which do not respect those measures in force, and so on. It suffices to mention the case of the “ship-rider” agreement signed in 1993 within the framework of the North Pacific Anadromous Fish Commission (NPAFC) by the United States (which is a member of this RFMO) with China (a State which is not part of this Organization), or the “ship-rider” agreement signed between Australia and France in 2007 within the framework of

58. The 2005 Model Scheme was drawn up in September 2004 on the occasion of a technical consultation meeting, and was adopted the following year by the FAO Committee on Fisheries. For a further development of these issues, see D. J. Doulman, “FAO Action to . . . ”, op. cit., pp. 136-138; T. Lobach, “Combating IUU Fishing: Interaction of Global and Regional Initiatives”, in D. Vidas (ed.), Law, Technology and Science for Oceans in Globalisation. IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf, Martinus Nijhoff Publishers, Leiden/Boston, 2010, pp. 113-117.
the CCAMLR Convention, and the importation schemes for fishery products adopted by different RFMOs, the North-East Atlantic Fisheries Commission (NEAFC), the South East Atlantic Fisheries Organization (SEAFO) or the Western and Central Pacific Fisheries Commission (WCPFC) 59.

There are, also, measures dealing either with the fisheries products marketing, by means of which the RFMOs have attempted to curtail the access of such products to the markets, or which have sought to establish checks and other measures intended to prevent fish caught by illegal fishing from being unloaded in ports. All of them are measures that the RFMOs are trying to apply, above all, to non-member States of these organizations. But, as the problems of illegal fishing have not been eliminated, quite the opposite, in recent years the RFMOs have attempted to diversify the measures adopted in this matter, and their efforts have been directed towards measures that market States could bring in, as well as those of the fishermen’s national States, in the same direction as the efforts made by the international community in this field 60.

The international instrument elaborated to have the greatest prominence in this field, that is, the 2009 Agreement on Port State Measures 61, is a legal text that, due to its binding nature, when it eventually comes into force, will be a watershed in the legal approach to these problems. At present, only four States or regional economic integration organizations have ratified, accepted, approved or acceded to it 62, while it

59. In this regard, see D. Guilfoyle, Shipping Interdiction and . . ., op. cit., especially pp. 119-120, 125-128, 145-146 and 156-158.


62. So far, only Norway has ratified it, the European Union has approved it, Myanmar and Sri Lanka have acceded to it. However, there are many more signatories. So, besides Norway and the European Union, another 8 States signed it on 22 November 2009, that is, the same day when it was adopted (these
needs 25 of such instruments of these characteristics in order for it to come into force, though there are hopes that other countries will soon take this step forward.

By virtue of this Agreement, States enjoy the sovereign prerogative to make decisions concerning which foreign ships may enter their ports. At the same time, it sets a global minimum standard about actions that must be taken against those vessels that engage in or support the activities of illegal fishing. States and international organizations can adopt more restrictive measures in this field, as long as these are in accordance with international law. Some of the key provisions include: the prohibition of known or suspected illegal fishing vessels or support ships to enter a port or use port facilities; the standardization of requirements of information from vessels that seek to enter ports; improvements in information-sharing, including verification of authorization to fish, between the flag State and the port State; designation of those ports that allow unloading; the establishment of specific functions for the flag States in co-operation with port States; standardization of ship inspections and training of inspectors, and recognition of the necessity to assist developing countries in order for them to apply this instrument.

Together with the significant role ascribed by the international law of the sea to the port State in this field, a new participant has joined these relations; we are referring to the market State of the fishery products. In fact, in the respective international texts, it is generally proposed to establish internationally agreed trade measures in order to prevent the commercialization of catches obtained by illegal fishing. These are exceptional and never unilaterally applied which must be interpreted and applied in consistency with the principles, rights and obligations established by the World Trade Organization. Furthermore, these trade

were: Angola, Brazil, Chile, the United States of America, Indonesia, Iceland, Samoa and Uruguay); and another 13 States have done so subsequently (Australia, Benin, Canada, Russia, France, Gabon, Ghana, Kenya, Mozambique, New Zealand, Peru, Sierra Leone, and Turkey). See http://www.fao.org.

63. Article 29 of the 2009 Agreement on Port State Measures lays down:

“1. This Agreement shall enter into force thirty days after the date of deposit with the Depositary of the twenty-fifth instrument of ratification, acceptance, approval or accession in accordance with Article 26 or 27.

2. For each signatory which ratifies, accepts or approves this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of ratification, acceptance or approval.”


65. As is well known, it is forbidden for States to apply unilaterally rules hampering trade for reasons of protection of the environment, for example. We
measures should take into consideration the principles of equity, transparency and non-discrimination.

Undoubtedly, the most effective way to put an end to this lucrative business is to eliminate the incentive for crime, making it extremely difficult, if not impossible, to commercialize products of this type of fishery with significant economic benefits. As the European Commission points out, this is far from easy, international trade in fisheries products has grown considerably as part of economic globalization, and this has provided illegal operators with many lucrative new opportunities. In order to disguise the illegal origin of catches, they usually follow complex routes before reaching the final market, including transhipments on the high seas, landings in ports of convenience and processing in a country which is different from both the flag and the market States. Therefore, the transnational nature of the phenomenon of illegal fishing requires the adoption of an integrated approach to address these activities throughout the whole supply chain “from the net to the supermarket”. On this issue, it will be necessary to pay more attention to the commercial side of illegal fishing so as to ensure that those products that reach the markets have been caught in compliance with relevant management and conservation rules.

In relation to this issue, it is interesting to note that Point 11 (1) (11) of the Code of Conduct for Responsible Fisheries establishes that

“[t]he States should ensure that international and domestic trade in fish and fishery products accords with sound conservation and management practices, improving the identification of the origin of fish and fishery products traded”.

66. COM(2007) 601 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a new strategy for the Community to prevent, deter and eliminate Illegal, Unreported and Unregulated fishing, Brussels, 17.10.2007, p. 3.

One way in which to improve this identification would be to establish a comprehensive system of traceability enabling us to identify fishery products throughout all stages of extraction, transport, storage, importation, processing, distribution, sale or supply to the final consumer. Moreover, when uncertainty persists, the precautionary principle should be taken into account, aimed, at the international level, at ensuring that the measures of conservation and management of fishery resources should be applied to the highest possible degree; such measures should be proportionate and temporary, and should not restrain trade any more than is required in order to reach the objective of preventing illegal fishing.

At the Review Conference of the 1995 New York Agreement, held in May 2010, several delegations stressed the need for the RFMOs to reinforce measures of control throughout the chain of commercialization, among other measures by means of the adoption of catch documentation schemes. Within this context, it seems to be urgent that these organizations draw up a harmonized system of certification of fishing catches, which should be required on landing, transhipment, importation or exportation. In a similar vein, Council Regulation (EC) No. 1005/2008, adopted by the European Union, contains the principle according to which fishery products proceeding from illegal fishing cannot be imported into the European Union. And at the same time, it is intended that only those fishery products accompanied by a catch certificate can be imported. This certificate must be validated by the flag State of the


vessel or vessels that have made the catches from which the fishery products were obtained, and gather together those data required by the pertinent regulations. It is also possible that the flag State agrees with the certificate being established, validated or presented electronically or substituted by electronic traceability systems which would guarantee the same level of control as would that of the authorities. It is argued that the fact that a catch certificate is required will allow fishing products to be monitored from the ship to the point of sale to the consumer. This certification regime is complemented with a series of detailed technical provisions.

All of these tools for the fight against illegal fishing have been strengthened by the recognition of the active personality principle, whereby a State will have jurisdiction to control the fishing activities engaged in by its nationals abroad. Such jurisdiction will be complementary to the competences of the flag State. Hence, where the State of fishermen’s nationality is concerned, national legislations (for example, the Spanish legislation, via Royal Decree 1134/2002), or the European Union’s legislation (see the Regulation (EC) No. 1005/2008) are concerned with the situation in which nationals who are on board third State vessels find themselves, and also the question of how to make them comply, independently of the obligations of the flag State of vessel in which they may find themselves, with the regulations applicable to fight against illegal fishing. For example, in Spain the offender will be pursued only in those cases where flag States fail to exercise the power to impose penalties inherent in its jurisdiction. It will be understood to be so when three months have passed since official notification of the infringement was sent, reliably attested, or when there has been no response to such notification, or when necessary steps have not been taken to sanction. Meanwhile, by expressly providing the responsibilities of the State of fishermen’s nationality, the Regulation (EC) No. 1005/2008 tries to avoid that all nationals of the Member States participate or support illegal fishing activities.

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73. Thus, with regard to the nationals of the Member States, it rules that they will be subject to the following obligations: they shall not assist illegal fishing (Article 39 (1)); they shall neither support nor engage in illegal fishing (Article 39 (1)); it is forbidden to export and sell fishing vessels to operators.
Paragraph 3  

New Challenges in the Fight against Illegal Fishing

Since the United Nations Secretary-General stated in his Annual Report on “Oceans and the Law of the Sea”, presented on 10 March 2008, that “a link has been established between some IUU fishing activities, organized crime and other criminal activities”74; different international organizations and organisms have expressed themselves in the same direction, such as the United Nations Office on Drugs and Crime (UNODC)75, the European Parliament76 and INTERPOL77. This position has already been made clear in the doctrine78. It has even been considered that illegal as part of IUU fishing is an international environmental crime79, and thus a crime against living marine resources, who participate in the exploitation, management or ownership of those fishing vessels included in the EU list as illegal fishing vessels (Article 40 (2)).


76. It is one of the seven institutions of the European Union. See “Resolution of the European Parliament on Combating Illegal Fishing at the Global Level — the Role of the EU”, A7-0362/2011, 17 November 2011.

77. “Combating the Problem of Transnational Organized Crime Committed at Sea. The Commission on Crime Prevention and Criminal Justice”, Resolution 20/5, E/2011/30, E/CN.15/2011/21. Above all, the Preamble and point 9 should be consulted. In recent years, INTERPOL has begun to consider illegal fishing as a transnational crime which needs to be combatted. On this issue, during the Conference held in Bangkok in February 2012 a Fishing Crimes Workgroup (FCWG) was set up, which will focus specifically on crimes committed in relation to fishing, above all in the West African coastal States. In the conference held in Lyon from 26 to 28 February 2013, the SCALE Project has been launched, by means of which INTERPOL will attempt to identify, combat and eliminate crimes in the field of fishing and thus improve the exchange of information between countries about actions to be taken with regard to fishing.


and, likewise, a new threat to a State’s maritime security, together with piracy, armed robbery, illegal trafficking in conventional weapons and weapons of mass destruction, trafficking in drugs and persons, etc.  

It should be pointed out in this regard that by environmental crimes it is understood those criminal activities that could have a negative impact on the environment. These are crimes that, due to their special characteristics, can be distinguished from traditional forms of criminal activities, are relatively easy to commit, and in which most criminals pursue economic benefits. Moreover, the damage caused to the environment is hard to identify and, even more so, to quantify. According to the UNODC, environmental crimes may consist either in natural resource crime or else in pollution crimes. Its economic impact is very great, and it is reckoned to be one of the most profitable forms of illicit activities that currently exist, with a turnover of between $20,000 million and $40,000 million annually. Among the most significant causes to be found in the origin of the appearance of environmental crimes we could mention, among many others: the gap between the costs occasioned by the activity and the value of the illegal products, the failure of regulation and the application of the regulatory framework in place in these fields, the liberalization in trade, which has meant that frontier controls are harder to enforce, the implication in multilateral environmental agreements of developing countries, which lack the necessary resources to comply with commitments undertaken in the international arena, etc.  

With respect to illegal fishing, apart from being understood as an  

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83. Namely, illicit trafficking in natural resources when such resources are gathered, transported or commercialized breaching regulations in force in the matter.  
84. Such as, illicit trafficking in substances which harm the ozone layer and hazardous waste products, together with the intentionally illegal transportation or dumping of hazardous waste products, etc.  
international crime against living marine resources, in some parts of the world it is also considered a new manifestation of transnational organized crime.\(^\text{87}\) Activities would include the illegal fishing of some marine species where it is reckoned that organized criminal groups could be involved transnationally, or crimes committed by different transnational fishing operators against living marine resources, such as could be the case of, for example, the toothfish.\(^\text{88}\) Here are included a whole range of activities which could fit perfectly well in the list of those dealt with in Article 3 (2) of the United Nations Convention against Transnational Crime.\(^\text{89}\) Even though, we consider that nowadays it would be hard to invoke the provisions of this legal instrument for the field of illegal fishing, given that its scope refers either to crimes which States parties should adopt in their domestic legal system when they are intentionally committed, or to serious offences, that is to say, those conducts which constitute “an offence punishable by a maximum deprivation of liberty of at least four years, or a more serious penalty”.\(^\text{90}\)

Moreover, it must not be forgotten that one of the greatest problems that the international community currently faces, unlike other environmental crimes,\(^\text{91}\) is the lack of a treaty of universal scope focusing

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\(^{89}\) The United Nations Convention against Organized Transnational Crime was open for signature on 12 December 2000 in Palermo (Italy), and came into force on 29 September 2003. So far, 147 States have signed it and 173 have ratified it; see: http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html. By virtue of Article 3 (2) it is ruled that a transnational offence will be one that:

“(a) is committed in more than one State; (b) is committed in one State but a substantial part of its preparation, planning, directing or control takes place in another State; (c) it is committed in one State, but involves an organized criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State”.

\(^{90}\) Article 2 (b) of the United Nations Convention against Transnational Organized Crime. See also Article 3.

\(^{91}\) For example, in the case of those species of flora and fauna in danger of extinction, the Convention on International Trade in Endangered Species
specifically on the problem of illegal fishing as a whole. This undoubtedly hampers the work of protecting the marine environment, which is greatly harmed by criminal fishing activities. To this we must add the multiplicity of sanctions that could be applied to illegal fishing, but which vary from one country’s domestic legal order to another: there are differences as to the nature of the competent bodies with the power to sanction an activity of these characteristics or as to those persons who can be considered responsible, the penalties applicable are different and even the elements that constitute an offence vary\textsuperscript{92}.

On the other hand, it should be mentioned that the European Union has had a great opportunity to criminalize illegal fishing conduct. Finally, it opted to typify as serious offences: (1) illegal fishing activities engaged in by fishing vessels in violation of measures of conservation and management applicable in the area where such activities have taken place: (2) trade activities directly related to illegal fishing; the falsification of documents referring to fishing activities or the use of such false or invalid documents\textsuperscript{93}. In relation to this, it is worth pointing out that in a judgment passed immediately after the publication of the proposed new Framework Regulation in the fight against illegal fishing, in the \textit{Commission/Council} case, the EU Court of Justice had made it clear that on the issue of pollution from vessels, the conduct of nationals or vessels flying the flag of a Member State could be criminalized, within the limits of its existing case-law. But, in all events, the decision as to the type and degree of penal sanctions that must be applied will not fall within the EU’s competence\textsuperscript{94}, as it is the national authorities who will


\textsuperscript{93} Regulation (EC) No. 1005/2008, \textit{doc. cit.}, Articles 3 and 42 (1).

punish infringements of the EU law committed by natural and legal persons. \(^95\)

**SECTION 4   THE ENFORCEMENT JURISDICTION IN THE INTERNATIONAL LAW OF THE SEA FOR THE PREVENTION AND SUPPRESSION OF ILLEGAL FISHING**

It is clear that UNCLoS is a watershed in the artificial compartmentalization of the physical unity that is the marine environment, creating a series of areas in which the States will not always enjoy sovereignty or exercise jurisdiction.\(^96\) As is well known, the State has competence to manage its own territory, and, from the law of the sea perspective, it exercises a series of rights and responsibilities in the marine domain, varying according to whether it is a coastal State, a flag State or a port State. In other words, each State may have access to a certain jurisdiction in matters concerning the sea, and even land-locked States will enjoy rights and responsibilities relating to the sea.

Fundamentally, by “jurisdiction” is understood “the extent of each state’s right to regulate conduct or the consequences of events.”\(^97\) And, observing the development of contemporary international law, it describes, likewise, “the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons”\(^98\). UNCLoS provisions on fisheries distinguish between, on the one hand, legislative jurisdiction (as we have seen in detail in the previous part of this study), and, on the other hand, enforcement jurisdiction\(^99\). In the words of Rüdiger Wolfrum, enforcement jurisdiction covers “all the actions taken by States or other entities to induce or compel States to comply” with their rules and regulations adopted in conformity with obligations existing in the international law of the sea, being “the reaction to an identified

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non-compliance". Therefore, even though a State or any other subject of international law has jurisdiction to apply the UNCLOS provisions, it will not always have jurisdiction to enforce compliance or to compel other States to respect these rules.

There are two overriding principles of international jurisdiction that have substantiated States’ actions in relation to fishing in the different areas of the sea. In the first place, there is the principle of territoriality, whereby a State is competent to penalize, in accordance with its domestic legal order, acts committed within its territory (locus regit actum), whatever the nationality of the author of the wrongful act. In this context, the legal concept of “territory” comprises both the territory in a geographical sense and those vessels or aircraft flying the flag of a State which are found in an area where the sovereignty of another State does not exist. Under the law of the sea, this principle constitutes “the single most important basis for States to assert jurisdiction”.

However, bearing in mind the development of the international community, several exceptions are accepted to this principle. Such is the case, among others, of the “personal or nationality principle”, which enables that a criminal rule of a State can be applied to acts committed by its nationals abroad, even though it has a limited character, as it cannot be applied to all the crimes committed by its nationals. As regards this point, it is worth mentioning that Article 117, UNCLOS, rules that it is the duty of all States either to adopt those measures referring to its own nationals, whom it esteems “necessary for the conservation of the living resources of the high sea” or “to cooperate with other States in taking such measures”. With reference to this Article, the European Union lays down in its secondary law referring to the Common Fisheries Policy that illegal activities performed by European citizens will be pursued also in waters not under the sovereignty or jurisdiction of its Member States, as well as against any other activity in support of illegal fishing. At the

102. B. Simma and A. T. Müller, op. cit., p. 141.
103. For example, in Spanish criminal legislation three exceptions are accepted to the principle of territoriality of criminal law, that is: the principle of personality, the real or protective principle, and the principle of universal justice. See F. Muñoz Conde and M. García Arán, Derecho Penal. Parte General, Tirant lo Blanch, Valencia, 2007, pp. 155-160.
104. This is the active personality principle, whereby the States possess jurisdiction to know of the criminal acts committed by its nationals outside
same time, Member States are obliged to co-operate with third-party States in order to identify those of their nationals who support or are engaged in this type of fishing. Moreover, in the EU system, it is provided that an illegal fishing vessel will be considered one that is proven to be infringing the measures of conservation and management applicable to the area where fishing activities have been engaged in.

To these situations it must be added the case of the absence of nationality of the fishing vessel according with the international law of the sea provisions. It must be remembered that Article 92 (2), UNCLOS lays down that

“[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”.

Moreover, by virtue of Article 110 (1) (d) UNCLOS, a warship has the right of visit on the high seas over a vessel not flying its flag if “there is reasonable ground for suspecting that . . . the ship is without nationality”. This UNCLOS provision is specifically relevant in the new international fishing scenario, being seen as a way to counter threats such as, among others, the transnational organized crime at sea.

On the other hand, it is worth recalling that States have different types of jurisdiction depending on the maritime zone involved, and that this will be reduced the further it is from the territory, understood in the sense of the mainland. This is, then, jurisdiction that is understood differently whether it covers marine areas under the sovereignty or the jurisdiction of a State or marine areas beyond national jurisdiction of a State.

In the field of fisheries, it is well known that UNCLOS grants a major

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105. Thus, the Member States will be able to impose penalties amounting to at least five times the value of the fishery products obtained, and eight times that value in the event of repeated infringements within a five-year period. And in order to calculate the cost of the damage caused by illegal fishing, the Member States will take into account the harm caused to fishing stocks and the marine ecosystem. See Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59, Article 1; Regulation (EC) No. 1005/2008, doc. cit., Articles 39-40.


107. In this regard, see E. Papastavridis, “The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited”, Leiden Journal of International Law, 24 (2011) 1, pp. 45-69.
role to the coastal States. In our view, the most important problems that coastal States face with regard to illegal fishing are related to enforcement jurisdiction in the EEZs. As was pointed out previously, the majority of illegal fishing on a global scale occurs in EEZs, above all those of developing nations with lengthy oceanic coastlines. In relation to this, Article 73, UNCLOS, rules in paragraph 1 that coastal States will have sovereignty in their EEZs for the exploration, exploitation, conservation and management of fishing resources. Furthermore, paragraphs 2, 3 and 4 of this article list the limits of enforcement jurisdiction of the coastal States; these are that (1) arrested vessels and their crews must be released as soon as possible once a reasonable bond or other guarantee has been fixed; (2) unless otherwise agreed between the interested States, the penalties fixed by the coastal State cannot be imprisonment; (3) in the event of arrest or detention of a fishing vessel, the coastal State must inform the flag State as soon as possible about the conducts, measures and penalties imposed.

Furthermore, Article 292, UNCLOS, sets forth the obligatory jurisdiction for coastal States regarding the prompt release of ships and their crews. Thus, if a coastal State fails to respect the provisions of Article 73 (2), UNCLOS, the dispute arising will be referred to a court or a tribunal chosen by the two parties, or to the ITLOS. The application for release may only be presented before the court or the tribunal by the flag State or in its name (Article 292 (2), UNCLOS). It will be dealt with as soon as the court or the tribunal receiving news of such release or liberation (Article 292 (3), UNCLOS). The bond will be fixed by the court or the tribunal and the coastal State will comply promptly with such a decision (Article 292 (4), UNCLOS). Undoubtedly, this obligatory jurisdiction will be, for the coastal States, in the words of ITLOS Judge, Professor Treves,

“a contrario from Article 298, paragraph 1 (b), of the 1982 Convention by virtue of which states may declare, if they so decide, that compulsory jurisdiction under Part XV of the 1982 Convention is excluded with respect to disputes relating to fisheries enforcement activities”.

Likewise, it is worth pointing out that the prompt release of vessels seized and their crews constitutes the limit of coastal States’ enforcement jurisdiction, to which the greatest attention has been paid on the part of ITLOS. Of the 20 cases brought before this Tribunal up to now,
eight refer precisely to this matter\textsuperscript{110}, of which seven relate to IUU fishing activities performed in the EEZ of some State forming part of UNCLOS — the \textit{Camouco} case\textsuperscript{111}, the \textit{Monte Confurco} case\textsuperscript{112}, the \textit{Grand Prince} case\textsuperscript{113}, the \textit{Volga} case\textsuperscript{114}, the \textit{Juno Trader} case\textsuperscript{115}, the \textit{Hoshinmaru} case\textsuperscript{116}, and the \textit{Tominmaru} case\textsuperscript{117}. In the present author’s view, ITLOS has thus far wasted the opportunities offered by each of these cases to expressly declare itself on the subject of illegal fishing, though numerous allegations have been presented by States involved in these cases, in which reference has been made to this type of criminal fishing activity. Nonetheless, so far the Tribunal has gone no further than to use UNCLOS provisions simply to curb actions by coastal States with regard to enforcement jurisdiction in their respective EEZs.

This stance of ITLOS regarding illegal fishing can be changed substantially in the near future, as on 28 March 2013, the Sub-Regional Fisheries Commission submitted to this Tribunal a request for an Advisory Opinion\textsuperscript{118}. Two of the questions raised by this RFMO in this occasion refer specifically to the enforcement jurisdiction of the coastal States in the fight against illegal fishing. On the one hand, the ITLOS is requested to rule on the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of

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\textsuperscript{111} “Camouco” (Panama v. France), Prompt Release, Judgment, \textit{ITLOS Reports} 2000, p. 10.

\textsuperscript{112} “Monte Confurco” (Seychelles v. France), Prompt Release, Judgment, \textit{ITLOS Reports} 2000, p. 86.

\textsuperscript{113} “Grand Prince” (Belize v. France), Prompt Release, Judgment, \textit{ITLOS Reports} 2001, p. 17.


\textsuperscript{118} See ITLOS Case No. 21. For more details, see “The International Tribunal for the Law of the Sea Receives a Request for an Advisory Opinion from the Sub-Regional Fisheries Commission”, Press Release, ITLOS/Press 190, 28 March 2013.
common interest, especially the small pelagic species and tuna. And, on the other hand, the Tribunal will have to express its position in relation to the possibility for a State or international agency to be held liable for the violation of the fisheries legislation of the coastal State by the vessel which received a fishing licence within the framework of an international agreement with the flag State or with an international agency\textsuperscript{119}.

Besides the territorial waters and the EEZ, enforcement questions may arise in other sea areas not under the sovereignty or jurisdiction of any States, without there being any resulting vacuum of jurisdiction\textsuperscript{120}. Reference is made to to the high sea, where, among others, the freedom to fishery exists (Article 87 (1) (e)) and where the principle of the flag States exclusive jurisdiction operates over those vessels flying their flags (Article 92 (1), UNCLOS)\textsuperscript{121}. The high seas is an area where illegal fishing also occurs due to the enormous complexity that the conservation and management of the marine living resources mean, and where the enforcement jurisdiction belongs, in principle, to the flag State. The flag State competence in this field is a personal competence, based on nationality, as we have already analysed in other parts of this chapter. In this context, the existence of States with open registers for the licensing of fishing vessels favours the existence of flags of convenience.

However, the Montego Bay Convention allows several exceptions to the flag State exclusive jurisdiction\textsuperscript{122}, such as the right of visit under Article 110, UNCLOS, and the right of hot pursuit stipulated by Article 111, UNCLOS. Thus, by virtue of Article 110, UNCLOS, warships and other duly authorized ships "being on government service" have the right to visit on the high seas those ships which are suspected on a “reasonable ground” to be engaged in activities such as piracy.

\textsuperscript{119} The Sub-Regional Fisheries Commission also asked the Tribunal on the following two matters: (1) the obligations of the flag State in cases where IUU fishing activities are conducted within the EEZ of third party States; (2) to what extent the flag State shall be held liable for IUU fishing activities conducted by vessels sailing under its flag.

\textsuperscript{120} As it was expressed rightly by the doctrine. In this regard, see D. Momtaz, “La haute mer”, in R.-J. Dupuy and D. Vignes, \textit{Traité du nouveau droit de la mer}, Economica et Bruylant, Paris, 1985, p. 353; B. Simma and A. T. Müller, \textit{op. cit.}, p. 138.

\textsuperscript{121} For an overview of the problem of jurisdiction on the high seas, and a specific approach to enforcement jurisdiction on the high seas referring to the particular case of the Mediterranean Sea, see E. Papastavridis, “Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas”, \textit{International Journal of Marine and Coastal Law}, 25 (2010), pp. 576-599.

slave trade, unauthorized broadcasting, to be a ship without nationality or to be suspected of having the same nationality as the warships and the other duly authorized ships.\(^{123}\)

The right to hot pursuit is especially relevant to the problems dealt with in this chapter. Thus, Article 111, UNCLOS, provides that the coastal State has enforcement jurisdiction regarding the vessel which does not fly its flag, when it has sufficient evidence to believe that the said vessel has breached its national rules. This is an exception to the principle of the flag State exclusive jurisdiction on the high seas, but it is also a limitation to the freedom of navigation on the high seas.\(^{124}\) The coastal State will only be able to have this jurisdiction insofar as the infringements have been committed in a maritime area where it has jurisdiction.\(^{125}\) This rule derives from the quasi-territorial principle of law of the coastal State, unlike other exceptions to the primacy of flag State’s jurisdiction on the high sea, such as piracy or slave trade, which stem from the principle of universality.\(^{126}\)

The UNCLOS provisions in this field have been complemented by other legal instruments adopted subsequently at the international level, to which we have already referred in the Second Part of this study. By means of these instruments further constraints have been placed upon the flag States’ exclusive jurisdiction on the high seas. Thus, the 1995 New York Agreement stands out, providing, as it does, for the possibility of an RFMO-authorized inspector going on board and also inspecting vessels flying the flag of a Member or non-Member State of the said Organization, to thus ensure compliance with the conservation and management measures of these fishing stocks. It is submitted that this is


\(^{125}\) UNCLOS has extended the provisions of the 1958 Geneva Convention regarding the right of hot pursuit, laying down that they can also be applied for infringements committed in EEZs and in archipelagic waters. In this regard, see I. A. Shearer, “Problems of Jurisdiction and Law Enforcement against Delinquent Vessels”, International and Comparative Law Quarterly, 35 (1986), p. 445.

a controversial issue because this Agreement is a conventional rule and, by permitting another State, which is not the fishing vessel’s flag State, to intervene unilaterally on the high seas seems to be ignoring the well-known principle of international law “res inter alios acta”¹²⁷.

In fact, Article 21 (1) of the 1995 New York Agreement rules that “[i]n any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement”.

In short, a State which is a member of an RFMO, but is not the flag State of a fishing vessel engaged in fishing activities in that part of the high seas regulated by the said Organization, can have enforcement jurisdiction over the said vessel that either flies the flag of another State or flies the flag of a State which is not a part of the RFMO. This has been interpreted by a part of the doctrine as a refined version of the mare clausum¹²⁸. It is submitted that the provisions of the 1995 New York Agreement should not be understood as a panacea for the problem of illegal fishing as, despite the fact that this international treaty entered into force several years ago, there is no evidence yet that the phenomenon of illegal fishing has diminished, neither has it been ratified by all the States with interests in the field of fisheries¹²⁹.

For its part, the European Union has adopted, by way of Council

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¹²⁹. On this issue, see the information regarding the 1995 New York Agreement contained in the Section 3 of this chapter.
Regulation (EC) No. 1224/2009\textsuperscript{130}, a fairly complex system of control of activities in the field of its Common Fisheries Policy. This system establishes, among other things, that the EU Member States can control fishing activities performed by those vessels flying their flag on the high seas or in the internal waters of third-party countries\textsuperscript{131}. In this way, the activities of European nationals performed on board vessels flying the flags of third States would be excluded, and these would come within the provisions of Regulation (EC) No. 1005/2008\textsuperscript{132}, regarding the EU system to fight against illegal fishing. All these aspects confirm the consensus among the EU Member States regarding the application of the personality principle in the control of this policy, which had already been set out in the Regulation (EC) No. 1005/2008\textsuperscript{133}.

The use of force on the high seas by a Member State of an RFMO against a fishing vessel flying the flag of a third State constitutes another controversial issue regarding States’ enforcement jurisdiction in their fight against illegal fishing. A minor part of the doctrine\textsuperscript{134} considers it to be a legitimate measure to ensure that fishing vessels of a third State do not engage in IUU fishing activities. On the one hand, it is considered that both an RFMO Member State and a third State have enforcement jurisdiction on the high seas because there is a duty of all States to co-operate in the conservation and management of resources. In this regard, it is considered that the obligation to co-operate in this matter provided by Article 118, UNCLOS, derives from \textit{jus cogens}, which thus creates \textit{erga omnes} obligations for all the States of the international community.

On the other hand, it is considered that Articles 20-22 of the 1995 New York Agreement would allow the use of force in international fishing relations by States not being flag States. These would start to act when the flag State of the fishing vessel fails to co-operate, as would be the case, for example, of States with flags of convenience, or non-compliant States. This approach would also be endorsed by the constitutive treaties of several RFMOs and their respective legal frameworks adopted by virtue of their competences of conservation and management, as well as by bilateral treaties, as is the case of the ship-rider

\textsuperscript{130} Regulation (EC) No. 1224/2009, \textit{doc. cit.}
\textsuperscript{131} \textit{Ibid.}, Article 5 (2).
\textsuperscript{132} Regulation (EC) No. 1005/2008, \textit{doc. cit.}
\textsuperscript{134} Above all, we are referring to the opinion of Professor Rosemary Gail Rayfuse. On this issue see R. G. Rayfuse, \textit{Non-Flag State Enforcement in High Seas Fisheries}, Martinus Nijhoff Publishers, Leiden/Boston, 2004, and “Non-Flag State Enforcement and Protection of the . . .”, \textit{op. cit.}
agreements. Thus, Article 22 (1) (f) of this international treaty, in relation with the basic procedures for boarding and inspection pursuant to Article 21 referred to subregional and regional co-operation for the purpose of implementation, lays down that

“The inspecting State shall ensure that its duly authorized inspectors: . . . avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.”

As is well known, Article 49 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts contemplates that in certain circumstances a State may adopt countermeasures against another State which is responsible for an intentionally wrongful act that has harmed it, in order to uphold their rights, recognized by the international law, and in order to induce that State to comply with the obligations derived from responsibility for the wrongful act committed. But it must be taken into account that the said State, in the words of James Crawford,

“acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment. In this respect there is no difference between countermeasures and other circumstances precluding wrongfulness.”

An obligation of this type could be, for example, the duty of the flag State to co-operate in ensuring the conservation of highly migratory species, provided by Article 64, UNCLOS.


136. ILC Articles on State Responsibility, as adopted by the ILC at its fifty-third session in 2001.


138. In this regard, P. Gautier, “Comments on Flag State’s Responsibility, Enforcement Measures against IUU Fishing Activities, and the Settlement of
It is submitted that it would be a serious mistake to consider countermeasures as a universal panacea for the absence of sufficient mechanisms to fight against illegal fishing in the existing legal framework. It is true that Article 42 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts allows an injured State “to invoke the responsibility of another State if the obligation breached is owed to (a) that State individually or (b) a group of States including that State, or the international community as a whole”\(^{139}\). And Article 48 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts refers to the invocation of responsibility by States “other than an injured State” acting in the collective interest.

But taking into account all the characteristics of illegal fishing it is quite impossible to identify which State is injured in the case of high seas fisheries or to consider that the breach of the obligation “is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”\(^{140}\). This would be possible regarding fishing only if there are obligations \textit{erga omnes partes} or obligations \textit{erga omnes}. In our view, it is very difficult to uphold this argument. Nevertheless, this scenario is different in the case of the RFMO measures, as the fishing obligations breached are easier to be identified. The challenge here is to demonstrate that an individual State has breached an obligation regarding the respect of a common resource\(^{141}\).

Another issue is the use of force. Undoubtedly, enforcement jurisdiction could consist of the detention of a vessel, and such application could involve the use of force, to some extent\(^{142}\). The international law of the sea allows this, but, in our view, only in those maritime areas where the State which employs force has jurisdiction. It is the view of the present author that a completely different situation exists with regard

\(^{139}\) For an analysis of Article 42 of the 2001 ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts, see J. Crawford, \textit{op. cit.}, pp. 304-309.

\(^{140}\) ILC Articles on State Responsibility, Article 42 (b) (ii). In this regard, see: J. Crawford, \textit{op. cit.}, pp. 259-260; D. Guilfoyle, \textit{Shipping Interdiction and . . .}, \textit{op. cit.}, pp. 164-165.

\(^{141}\) In accord seems to be Guilfoyle. See D. Guilfoyle, “Interdicting Vessels to Enforce the . . .”, \textit{op. cit.}, p. 166.

\(^{142}\) The Permanent Court of Arbitration has declared on this issue in the Guyana/Suriname case of 17 September 2007, in relation to Article 287 and Annexe VII of UNCLOS. See point 445. For further development, see P. Gautier, “Comments on Flag State’s Responsibility . . .”, \textit{op. cit.}, pp. 86-90.
to the high seas, where the principle of exclusive flag State jurisdiction exists, and where, therefore, the threat or use of force is prohibited.\footnote{143}

The focus of the analysis will shift now to the issue of the possible enforcement jurisdiction by the port State in the field of illegal fishing. It is worth reiterating that UNCLOS is silent on this issue, though it is true that, in accordance with general international law, a State can impose conditions for the entry into its ports of vessels that do not comply with certain requisites.\footnote{144} To our knowledge, this will be subjected to very prominent changes once the 2009 Agreement on Port State Measures comes into force. This Agreement will affect the practices followed by States during the coming decades in the establishment of regional regimes concerning port State controls — the so-called Memorandums of Understanding (MoUs).\footnote{145} Actually, the FAO Agreement mentioned above does not have the same legal standing as the MoUs: the former is a multilateral international treaty, containing the rights, obligations and responsibilities of the States in relation to the ports of all the States of the international community, and which, once it comes into force, will have highly significant repercussions for international fishing relations affected by illegal fishing; on the other hand, the MoUs are administrative agreements adopted between the maritime authorities of the States involved, are in accordance with the UNCLOS provisions, they have no binding legal force, and they do not create legal rights and obligations for the States adopting them.\footnote{146}

\footnote{143. For an analysis of the countermeasures that a State can adopt in the marine environment, and its relationship with the use of force in international fishing relations, see, amongst others, D. Guilfoyle, Shipping Interdiction and . . . , \textit{op. cit.}, pp. 160-169, and “Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force”, \textit{International and Comparative Law Quarterly}, 56 (2007), pp. 69-82.}

\footnote{144. Article 218, UNCLOS. Also see T. Treves, “Jurisdiction over Vessels . . .”, \textit{op. cit.}, p. 7.}

\footnote{145. I.e. Memorandum of Understanding.}

The case of the 2009 Agreement on Port State Measures is clearly different. From the moment it comes into force all port States will apply its provisions to all vessels which do not fly its flag and which request entry to or which are in its ports (Article 3 (1)). It contains minimum standards for the port States’ measures, for example, in relation to the information that has to be supplied before entry to ports (Article 8 (1)); for ship inspection by the RFMOs, FAO or other means (Article 12 (2)); the respect of the inspectors’ functions during inspections (Article 13 (1)); and for the results of inspections that need to be included in the written report containing the results of each of the inspections carried out (Article 14 (1)). These minimum standards will be complemented with more binding measures adopted both at the regional and national level.

With regard to this, the example of the European Union merits attention; the European Union has adopted several Regulations referring to the fight against illegal fishing and has shaped an extremely restrictive framework, based on port State controls, applied to all landings of sea products from non-Member countries. Indeed, conditions of access have been provided for fishing vessels from non-Member States calling at the ports of Member States with the aim of preventing, deterring and eliminating illegal fishing, and likewise the *modus operandi* of the inspections which will be performed in those ports designated to that end by Member States. Moreover, the European has set up an early warning system which informs the States, where appropriate, when doubts exist as to compliance with conservation and management measures by fishing vessels or the fishing products of certain third States.

SECTIoN 5 CONCLUDING REMARKS

Illegal fishing, as part of IUU fishing, constitutes one of the greatest challenges which international fisheries law faces. Its effects are felt directly and in a negative way in the conservation and management of living resources. Likewise, it affects maritime security and represents unfair competition with responsible operators within the fishing sector. In short, illegal fishing is a real and serious threat to the sustainable management of living resources at the global level.

In some cases, these illicit fishery activities are integrated within


transnational organized criminal networks, which, in certain societies and countries, corrode the social fabric, increase levels of corruption and encourage the violation of human rights. Moreover, such activities represent a serious danger for marine biodiversity and fragile marine ecosystems.

In order to tackle the proliferation of these fishing activities, since the last decade of the twentieth century, different legal instruments, varying in scope, have been created. It is suffice to mention, amongst others, the IPOA-IUU (2001) and, more recently, the Agreement on Port States Measures (2009). In this short period of time a significant legal development has taken place, going from simply a programming and incentive instrument to a legally binding text, once it comes into force. This legal framework has been developed at RFMO, EU and national level and aims to strengthen the contents of flag State, port State and coastal State responsibility. At the same time, it contemplates a series of commercial and market measures that aim to hamper these odious and harmful fishing practices.

It is precisely the need to tackle these criminal fishing practices that makes it necessary for flag States to exercise as effectively as possible their jurisdiction over the vessels flying their flag. In order for this to happen, it is essential that there is a genuine link between the States and the vessels flying their flag. As we have pointed out throughout this chapter, these requirements do not exist in the case of vessels with flags of convenience. We believe that, in order to fight against illegal fishing, it is urgent both to define the flag State’s responsibilities and to introduce mechanisms that will enable verification of whether such responsibilities are being shouldered appropriately. In our view, this would be possible by means of an effective system of registration (regulation and control of fishing vessels in the national register of each State), as well as fishing authorization (the exercise of a fishery to be subject to authorization).

In this context, the traceability of all business operations of the fishing sector can be seen as the key to guarantee that importers, transhippers, clients, consumers, suppliers of materials, banks, insurance companies and other service suppliers in the field of fishing refrain from maintaining commercial relations with vessels involved in illegal fishing. These mechanisms should be complemented by the introduction into national legislations of provisions whereby, on the one hand, fish trade or fish products from illegal fishing should be an offence and, on the other hand, proportionate, transparent and non-discriminatory trade sanctions should be established. Undoubtedly, this would reflect the present global scenario of fisheries relations. As Bruno Simma and Andreas Th. Müller so eloquently state, “[t]he world of international law
has become more differentiated and colourful also in terms of actors and beneficiaries.”

It is worth pointing out in this regard that the contemporary dimensions of the criminal acts at sea justify a change of course regarding the primacy of the flag State jurisdiction and the freedom of navigation. States cannot be indifferent to these new realities. Hence, we consider that it is not anymore possible to apply the classical rule according to which the flag State is responsible for the fight against criminal acts committed on high seas, and the coastal State is responsible for the fight against criminal acts committed in the different marine areas under its sovereignty or jurisdiction. Moreover, although all States are aware of this fact, none of them seem to be willing to change the rules of the game when they make decisions.

It is submitted that the main problem nowadays in the fight against illegal fishing is not so much the lack of sufficient legal instruments with pertinent provisions as the lack of will to apply the existing legal framework at the international, regional and national level. In short, all of these are legal instruments — many of them very recent ones — and actions which enable us to fight against illegal fishing and, hence, to improve the welfare of the fishing communities worldwide, to establish a fair trade for fish products, and to achieve sustainability of fishery resources and a better management and control of global fisheries.

149. B. Simma and A. T. Müller, op. cit., p. 156.