

# The Human Dimension of Fishing Activities: Towards A Broader Meaning of Illegal Fishing?

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## Abstract

Fishing has a tremendous impact on the environment. Poor governance, weak or inexistent enforcement mechanisms, and excessive and unregulated subsidies have resulted in the overexploitation of fish stocks around the world. Consequently, Target 14.4 under Agenda 2030 – i.e. ending overfishing of marine fisheries by 2020 – has clearly not been met. Yet, while scholars have focused mainly on the environmental dimension of fishing, concerns for the protection of the individual in the fisheries sector are progressively coming to the foreground. As a matter of fact, fishing activities may heavily impair the enjoyment of fundamental rights of numerous groups of people, ranging from coastal communities to end-consumers, from economic operators within the fishery sector to people on board fishing vessels, including fishers and fishery observers.

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Against this background, this paper calls for the integration of human security concerns into the existing instruments making up the regime for the sustainable conservation and management of marine living resources, specifically addressing the pressing living and working conditions on board fishing vessels. In this regard, it first provides an overview of States' obligations on the protection of the individual on board fishing vessels under both international human rights law and the law of the sea; then, it investigates the paradigm of IUU fishing and discusses possible ways to rethink such a paradigm with a view to addressing the growing concerns for human rights and the human security dimension, thereby contributing to shape a new global strategy to enhance the protection of the individual on board fishing vessels.

**Keywords:** IUU Fishing, Human Security, Fishing Vessels, Safety and Labour Standards, Human Rights, Illegal Fishing, Sustainable Fishing

## 1. Introduction

The regime on the conservation and management of marine living resources, as laid down in the United Nations Convention on the Law of the Sea (UNCLOS),<sup>1</sup> is primarily grounded on the paradigm of economic exploitation. Poor governance, weak or inexistent enforcement mechanisms, and excessive and unregulated subsidies have resulted in the overexploitation of fish stocks around the world, with devastating consequences both

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1. United Nations Convention on the Law of the Sea, adopted in Montego Bay on 10 December 1982 and entered into force on 16 November 1994, 1834 UNTS 397 (UNCLOS).

on the marine environment,<sup>2</sup> and on the economic sustainability<sup>3</sup> of such activities.<sup>4</sup> In the aftermath of the 1992 Rio Declaration on Environment and Development,<sup>5</sup> the growing attention for environmental considerations worldwide prompted the adoption of multiple instruments incorporating the principle of sustainability into the broader fisheries regime.<sup>6</sup> Particularly significant in this regard is the 2001 International Plan of Action against illegal, unreported, and unregulated fishing (IPOA-IUU),<sup>7</sup> aimed at eradicating the phenomenon of illegal, unreported, and unregulated (IUU) fishing. This notion is a catchall expression referring to any vessels' non-compliant behaviour with the laws and regulations under the

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2. In this regard, fish stocks within biologically sustainable levels have collapsed by nearly 30 percent in approximately 45 years, reaching 64.6 percent in 2019. Also, the overall number of fully fished and overfished stocks amounts to 92.8 percent, leaving only the remaining 7.2 percent of stocks fished below their capacity. 'The State of World Fisheries and Aquaculture 2022' (FAO, 2022) 46.

3. For instance, in 2017 the World Bank estimated an annual loss of approximately \$83 billion of revenues due to overfishing, a huge amount of money that could instead accrue to the global fisheries sector, bringing potential benefits and growth, including for developing States. 'The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries. Environment and Development' (World Bank, 2017) 83.

4. For a broader overview of current and future challenges within the international fisheries regime, see the recently published International Law Association's White Paper. Niki Aloupi, and Gabriele Göttsche-Wanli, 'White Paper 17 - Ocean' (International Law Association, 2022) 66.

5. UN General Assembly, 'Report of the United Nations Conference on Environment and Development – Annex I: Rio Declaration on Environment and Development', *A/CONF.151/26* (Vol. I) (3-14 June 1992).

6. See *inter alia*, the 1993 FAO Compliance Agreement, the 1995 United Nations Fish Stocks Agreement, the 1995 Code of Conduct for Responsible Fisheries. The literature on this is vast. See, *inter alia*, William Edeson, David Freestone, and Elly Gudmundsdottir, *Legislating for Sustainable Fisheries: A Guide to Implementing the 1993 FAO Compliance Agreement and 1995 UN Fish Stocks Agreement* (World Bank Publications 2001); Mary Ann Palma, William Edeson, and Martin Tsamenyi, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill Nijhoff 2010); Simone Borg, *Conservation on the High Seas – Harmonizing International Regimes for the Sustainable Use of Living Resources* (Edward Elgar 2012).

7. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; Food and Agriculture Organization, United Nations 2001.

broader sustainable fisheries regime,<sup>8</sup> thereby premised on its very same economic- and environmental-oriented foundations.

However, in recent years numerous factors have progressively brought the attention to the impact of fishing activities on the life and fundamental rights of a wide range of individuals, including coastal communities, economic operators and end-consumers, fishers and other crew-members on board fishing vessels. As a matter of fact, fish is vital for human consumption,<sup>9</sup> and constitutes a source of employment for many people, especially coastal dwellers and indigenous communities.<sup>10</sup> Whilst end-consumers and industrial enterprises are dependent on fish, the fishing sector remains a key one for numerous States, both developed and developing ones.<sup>11</sup> In addition, fishing is deemed as one of the most dangerous professions in the world,<sup>12</sup> both due to the inherent dangers

8. *ibid.*, para 3.

9. Fish is a key source of proteins. Recent data show that about 89% of fish production is reserved to human consumption: ‘Of the overall production of aquatic animals, over 157 million tonnes (89 percent) were used for human consumption. The remaining 20 million tonnes were destined for non-food uses, to produce mainly fishmeal and fish oil (16 million tonnes or 81 percent) [...] Per capita consumption of aquatic animal foods grew by about 1.4 percent per year, from 9.0 kg (live weight equivalent) in 1961 to 20.5 kg in 2019. Preliminary data for 2020 point to a slight decline to 20.2 kg’, ‘The State of World Fisheries and Aquaculture 2022’ (n 2) 1.

10. ‘In 2020, an estimated 58.5 million were engaged as full-time, part-time, occasional or unspecified workers in fisheries and aquaculture, and of these approximately 21 percent were women. By sector, 35 percent were employed in aquaculture and 65 percent in capture fisheries’, *ibid.*, 5.

11. UNGA Res 71/123, ‘Sustainable Fisheries’ (7 December 2016) UN Doc A/RES/71/123, 64.

12. ‘Deadly Life at Sea: UN Partners Spotlight Depths of Danger in Fishing Industry’ (UN News, 21 November 2019) <<https://news.un.org/en/story/2019/11/1051941>> accessed 31 December 2022. Some conservative data highlights an annual fatality rate of 80 lives lost per 100.000 fishers, whilst fisheries-related injuries and illnesses are far higher. Joint FAO/IMO/ILO Report ‘Joining Forces to Shape the Fisheries Sector of Tomorrow - Promoting safety and decent work in fisheries through the application of international standards’ (FAO, IMO, ILO 2020), Joint report. By contrast, a recent study has identified an alarming rate three to four times higher than previous estimates, suggesting that more than 100,000 fishing-related deaths occur each year, approximately 300 people per day. ‘More Than 100,000 Fishing-Related Deaths Occur Each Year, Study Finds’ (PEW Charitable Trust November 2022) Brief.

of working far from shore for weeks or months, in a limited space, operating under difficult working conditions, and due to the risk of abusive practices inflicted by operators or other crew members to fishers and fishery observers on board fishing vessels.<sup>13</sup>

Against this background, this contribution draws attention to the social and human dimension of fishing activities, specifically addressing the lack of protection of individuals on board fishing vessels. In this regard, the paper advocates for the integration of human security concerns into the existing instruments making up the regime for the sustainable conservation and management of marine living resources.<sup>14</sup> In particular, it calls for the rethinking of the illegal fishing paradigm so as to address the protection of persons on board fishing vessels, thereby reconciling the social dimension of sustainable fishing with the economic and environmental ones. Accordingly, the paper first provides an overview of States' obligations to protect the individual on board fishing vessels under both international human rights law, and the law of the sea; then, it investigates the paradigm of IUU fishing, and discusses possible ways to

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**13.** See, *inter alia*, 'Out of Sight, Out of Mind: Seafarers, Fishers and Human Rights' (International Transport Workers' Federation 2006); 'Caught at Sea: Forced Labour and Trafficking in Fisheries' (International Labour Office and Sectoral Activities Department 2013); 'Slavery at Sea: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry' (Environmental Justice Foundation 2014). As to the treatment of fishery observers see, *inter alia*, 'Independent Case Review into the Investigation of the Death of Kiribati Fisheries Observer Eritara Aati Kaierua' (Human Rights at Sea, 2021).

**14.** In a nutshell, human security calls for the protection of the individual from today's global challenges, moving beyond the traditional paradigm of State security with a view to complementing it. On the human security paradigm see, *inter alia*, United Nations, 'Human Development Report 1994' (United Nations, 1994) 24–33 <<https://hdr.undp.org/content/human-development-report-1994>> accessed 31 December 2022. See also Commission on Human Security, 'Human Security Now' (The Commission, 2003) <<https://digitallibrary.un.org/record/503749>> accessed 31 December 2022; Barbara Von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Hart Publishing 2007); Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Hart Publishing, 2016).

rethink such a paradigm with a view to addressing the growing concerns for human rights and the human security dimension, thereby contributing to shaping a new global strategy to enhance the protection of the individual on board fishing vessels.

## 2. How Sustainable Is Sustainable Fishing? An Overview of Human Rights Abuses on Board Fishing Vessels

Fishing activities<sup>15</sup> constitute by themselves a fundamental source of risk for the rights of individuals on board fishing vessels. Fishers may be exposed to the harshest weather conditions, forced to physical and mental fatigue, and far from their home and families for months, if not years.<sup>16</sup> In addition, the already inherently tough working conditions may at

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15. By ‘fishing activities’ the author refers to the searching for, catching and harvesting of marine living resources, as well as to activities in preparation for or in support of the searching, catching and harvesting, including bunkering and transshipping. Such a broader interpretation reflects the complex and multi-actor character of the fisheries sector, besides finding confirmation in the text of several regional fisheries frameworks as well as in the domestic legal orders of States. As to the first, see *inter alia* Article II(3)(a-b) of the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, which reads as follows: ‘3. “Fishing” means: (a) the catching, taking or harvesting of fish, or any other activity which can reasonably be expected to result in the catching, taking or harvesting of fish; or (b) any operation at sea in preparation for or in direct support of any activity described in sub-paragraph (a) above.’ As to States, see *inter alia*, the definition of ‘fishing’ under Title 16 (Conservation), Chapter 38, Subchapter 1, § 1802 of the US Code <[https://uscode.house.gov/view.xhtml?req=\(title:16%20section:1802%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:16%20section:1802%20edition:prelim))> accessed 31 December 2022.

16. Whilst the Covid-19 pandemic and the related restrictive measures have brought to the attention the vulnerability of the general category of seafarers, trapped at sea for several months without the possibility of going back home, fishers in some parts of the world are often forced to work out at sea for very long periods of time, especially due to the transshipping and bunkering mechanisms. In this regard, see *inter alia*, ‘Out of Sight, Out of Mind’ (n 13) 34; see more generally ‘Caught at Sea’ (n 13) 47.

times be only one side of the coin. On the one hand, shipowners' or charterers' negligent behaviour or bad faith may lead to fishing vessels operating with scarce safety equipment or in the absence of seaworthiness certifications and regular controls to the on-board machinery.<sup>17</sup> On the other, shipmasters and other crew members may inflict inhuman and slavery-like treatments to fishers and fishery observers on board vessels navigating far from the coast, thus fuelling a system of structural human rights violations hardly detectable in light of the exceptional features of the maritime environment.<sup>18</sup>

Even though new technologies and other innovations on board fishing vessels (e.g. smart navigation systems, modern life-saving equipment, and CCTVs) have generally improved safety at sea, such improvements are more tangible in Europe, North America, and East Asia, while being still not common in the small-scale fisheries sectors of developing countries.<sup>19</sup> Yet, ensuring the protection of individuals on board fishing vessels also remains a challenge for developed States. For instance, the February 2022 sinking of a Spanish fishing vessel off the coast of Canada, which caused the death of 21 fishers out of 24 crew members,<sup>20</sup> shows that the lack of

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17. For instance, though not concerning specifically a fishing vessel, in the *Bakanova v Lithuania* case, the European Court of Human Rights was confronted with the death of an engineer on board a Lithuanian-flagged cargo ship. Interestingly, the examination of the facts of the case showed a potential misconduct on the part of the shipowner with respect to the lack of technical checks and certifications as to the proper functioning of its engine and machinery. *Bakanova v Lithuania* [2016], ECtHR 11167/12.

18. See references at 13.

19. 'The State of World Fisheries and Aquaculture 2022' (n 2) 133.

20. Maria Cramer and Raphael Minder, 'At Least 10 Dead After Spanish Fishing Vessel Sinks in Atlantic' *The New York Times* (15 February 2022) <<https://www.nytimes.com/2022/02/15/world/europe/spanish-fishing-boat-sinks-canada.html>> accessed 31 December 2022. See also the recent investigation on the BBC website, '¿Cómo sobrevivió el capitán?: las preguntas sin resolver del naufragio de un pesquero español en el que murieron 21 de los 24 marineros' *BBC News - Mundo* (21 July 2022) <<https://www.bbc.com/mundo/noticias-internacional-62222619>> accessed 31 December 2022.

safety measures on board and the difficulties in enforcing them in the middle of the ocean are not problems limited only to the least developed regions of the world.<sup>21</sup> Similarly, evidence of forced labour within the fishing industry of some European countries draws attention to what is not an isolated phenomenon limited to least developed regions of the world, but rather a structural problem affecting the fisheries sector at large.<sup>22</sup>

Against this background, this section provides an overview of the human rights encroachment suffered by individuals on board fishing vessels and deriving from the State's failure to discharge its obligations at sea. In particular, it looks more closely at two sets of obligations applying to people on board fishing vessels and stemming from the numerous global and regional human rights law instruments, and the law of the sea rules on flag State jurisdiction. A third set of obligations, namely that applying in the context of law-enforcement operations, will not be discussed due to space limits; yet, future works might also take that into account to further strengthen the arguments presented in this paper.

## 2.1 Protecting the Individual on Board Fishing Vessels: State Obligations Under International Human Rights Law

International human rights law requires States to protect individuals, including in the maritime space. The past decade witnessed a growing liter-

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21. For instance, as far as it concerns the impairment of fishers' right to health see, *inter alia*, Elpida Frantzeskou and others, 'Risk Factors for Fishermen's Health and Safety in Greece' Int Marit Health 8.

22. In this regard, see *inter alia* the allegations of forced labour within the Irish fishing industry brought by the legal advocacy group Liberty Shared to the US Department of Home Security's Customs and Border Protection. Mark Godfrey, 'Ireland faces possible sanctions from US due to fisheries labor issues' *SeafoodSource* <<http://www.seafoodsource.com/news/environment-sustainability/ireland-faces-possible-sanctions-from-us-due-to-fisheries-labor-issues>> accessed 31 December 2022. Likewise, see also the 'Letting exploitation off the hook? Evidencing labour abuses in UK fishing' (The University of Nottingham Rights Lab, 2022).

ature on the enforcement of human rights obligations at sea, reflecting an interest in this subject matter within both academic and political circles.<sup>23</sup> Such a diffuse interest is mainly due to two factors. On the one hand, the piracy assaults off the coast of Somalia,<sup>24</sup> and the plight of migrants, especially in the Mediterranean Sea.<sup>25</sup> On the other, a number of judicial cases entertained by international courts and treaty bodies, involving direct human rights violations occurring in the maritime space or, more generally, questions regarding the protection of the individual at sea.<sup>26</sup>

By contrast, the enforcement of human rights obligations in the fisheries sector, specifically on board fishing vessels, has received little attention so far.<sup>27</sup> This is primarily due to the fact that these human rights

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23. On the enforcement of human rights obligations at sea see, *inter alia*, Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018). See also Bernard Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Colum. J. Transnat'l L. 399; Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J. Int'l L. 1; Tafsir Malick Ndiaye, 'Human Rights at Sea and the Law of the Sea', 10 Beijing L Review 261 (2019); H el ene Raspail, *Les droits de l'Homme et la mer. Actes du colloque du Mans, 24 et 25 mai 2018* (Pedone, 2020); Steven Haines, 'Developing Human Rights at Sea', 35 Ocean Yearbook 18 (2021). As far as it concerns the political debate see, *inter alia*, the numerous policy-making efforts carried out at the EU level with a view to addressing the migration flows in the Mediterranean Sea.

24. See, *inter alia*, Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff, 2014).

25. See, *inter alia*, Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press, 2016); Violeta Moreno-Lax and Efthymios Papastavridis (eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff, 2016).

26. See, *inter alia*, *M/V 'SAIGA' (No 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, p 10 (International Tribunal for the Law of the Sea). As far as it concerns the jurisprudence of human rights courts or treaty bodies see, *inter alia*, *Rigopoulos v Spain (dec)* [1999] ECtHR 37388/97; *Medvedyev and Others v France* [2010] ECtHR [GC] 3394/03; *Hirsi Jamaa and Others v Italy* [2012] ECtHR [GC] 27765/09. See also *The Haitian Centre for Human Rights et al v United States* [1997] Inter-American Commission on Human Rights 10.675; *AS and others v Italy* [2021] Human Rights Committee, Communication No 3042/2017; *JHA v Spain* [2008] UN Committee Against Torture, Communication No. 323/2007, CAT/C/41/D/323/2007.

27. The protection of human rights on board fishing vessels is only recently gaining momentum in legal scholarship and political arena, thanks to the increasing awareness of the link between IUU fishing and fisheries crime. See discussion *infra*, Section 2.

violations go easily unnoticed and undetected, for they mostly occur in the middle of the oceans, far from the State's enforcement apparatus. Consequently, human rights courts' and treaty bodies' case law is also very scarce.<sup>28</sup> This may be justified by at least two reasons. First and foremost, where victims on board fishing vessels manage to escape ashore, their access to said human rights courts or bodies may be subject to admissibility criteria such as the respondent State's acceptance of their jurisdiction, including for individual applications, or the prior exhaustion of local remedies, thereby rendering access to justice anything but a straightforward operation.<sup>29</sup>

Regarding the second reason, when they eventually manage to have such courts or bodies hear their case, establishing State responsibility for the human rights violation in question depends on two fundamental elements, namely the finding of State jurisdiction and the determination of the content and scope of the concerned State's human rights obligation allegedly breached. The first is commonly dependent on the State agents' exercise of *de facto* authority and control over the alleged victim

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**28.** To the best knowledge of the author, only three cases concerning aspects of fishing activities have so far been entertained by human rights courts, specifically by the ECtHR. In this regard, see the *Drieman* case, concerning the attempt by some Greenpeace activists to obstruct Norway's whale hunting, *Drieman and Others v Norway (dec)* [2000] ECtHR 33678/96; see also the *Plechkov* and *Yaşar* cases, related to illegal fishing activities in the Romanian Exclusive Economic Zone. *Plechkov v Romania* [2014], ECtHR 1660/03; *Yaşar v Romania* [2019] ECtHR 64863/13.

**29.** For a general account on reservations to human rights treaties, see *inter alia*, Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers 1995); Ineta Ziemele, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Springer, 2004). As to the rule of prior exhaustion of local remedies, see *inter alia* Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge University Press, 1983). See also Riccardo Pisillo-Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Giappichelli, 2004).

or human rights violation in question.<sup>30</sup> Therefore, establishing State jurisdiction for violations committed at sea in areas outside national territories - i.e. beyond the territorial sea - is problematic, especially where said violations are committed by private actors such as the shipowner or the master, meaning that no State official is directly involved in the harmful conduct.<sup>31</sup> By contrast, the second requires an *in concreto* as-

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**30.** The legal scholarship on extra-territorial jurisdiction in human rights law is vast. See, *inter alia*, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011); Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857; Lea Raible, 'Between Facts and Principles: Jurisdiction in International Human Rights Law' (2022) 13 *Jurisprudence* 52. For an interesting discussion on the extra-territorial jurisdiction, see also 'Litigating Jurisdiction before the ECtHR: Between Patterns of Change and Acts of Resistance Archives' (*QIL QDI*). As to human rights courts and treaty bodies, they tend to oscillate between different paradigms of State extra-territorial jurisdiction for human rights violations: see *inter alia*, *Lopez Burgos v. Uruguay* [1981] Human Rights Committee [Views] Communication No. R.12/52, 12.2; *Al-Skeini and Others v the UK* [2011] ECtHR [GC] 55721/07, 130-140; *The Environment and Human Rights* [2017] IACtHR [Advisory Opinion] OC-23/17, 104(h); *General Comment No. 36* [2019] HRC, CCPR/C/GC/36, 63; see also *AS and others v Italy* (n 26).

**31.** Indeed, virtually all cases of human rights violations at sea adjudicated so far concern law-enforcement operations where the enforcing State's agents exercised authority and control over the victims on board. In addition to the cases at n 26, see *inter alia*, *Xhavara and Others v Italy* [2001] ECtHR 39473/98; *Women on Waves and Others v Portugal* [2009] ECtHR 31276/05; *Safi et autres c Grèce* [2022] ECtHR 5418/15. In this regard, Papanicolopulu argued that jurisdiction should be instead interpreted in its *de jure* dimension. Accordingly, human rights violations at sea occurring extra-territorially might be attracted under the jurisdiction of a State by having resort to the rules allocating jurisdiction under international law such as, *inter alia*, the rules on flag State jurisdiction under Part VII UNCLOS. Papanicolopulu (n 23) 150-154. Such an understanding of jurisdiction was upheld in a number of cases adjudicated by the ECtHR, such as, *inter alia*, the *Leray, Guilcher, Ameon, Margue et Mad contre France* [2001] ECtHR 44617/98, en droit - 1; *Bakanova v Lithuania* (n 17), 63. In particular, the Court in *Banković* explicitly held that, though essentially territorial, the jurisdiction may be exceptionally attached to other grounds, including the flag. In this regard, see *Banković and Others v. Belgium and Others* [2001] ECtHR [GC] 52207/99, 59.

assessment of the State's due diligence obligations<sup>32</sup> to protect the alleged victims, whose content is informed by the concerned State's knowledge of and power over the source of risk.<sup>33</sup> Thus, when it comes to human rights violations committed by non-State actors on board fishing vessels, proving that the State had knowledge or ought to have had knowledge of said specific violations is highly controversial.

Overall, States do have human rights obligations at sea as they do on land,<sup>34</sup> yet, due to both practical difficulties and legal obstacles, these are seldom enforced *in concreto*. Given the wealth of human rights violations on board fishing vessels, an in-depth analysis of all international human rights norms allegedly violated would go beyond the scope of the present

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**32.** For a general account on due diligence obligations, see Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of Int'l Law 9; Heike Krieger, Anne Peters and Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (Oxford University Press, 2020); Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press, 2022). As for the case law, see *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, p 14, 101, as well as *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p 43, 430. As far as it concerns due diligence obligations in the law of the sea, see Doris König, *The Elaboration of Due Diligence Obligations as a Mechanism to Ensure Compliance with International Legal Obligations by Private Actors* (Brill Nijhoff 2018); Ida Caracciolo, 'Due Diligence et Droit de La Mer' in Sarah Cassella (ed), *Le standard de due diligence et la responsabilité internationale* (Pedone, 2018); Irini Papanicolopulu, 'Due Diligence in the Law of the Sea' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (Oxford University Press, 2020). See also *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p 10, 117–120.

**33.** Ollino, *ibid.*, 133–156. See also Pasquale De Sena, 'La 'Due Diligence' et le Lien entre le Sujet et le Risque qu'il Faut Prévenir: Quelques Observations', in Sarah Cassella (ed.) *Le Standard de Due Diligence et la Responsabilité Internationale* (Pedone, 2018) 248–255.

**34.** 'Geneva Declaration on Human Rights at Sea' (Human Rights at Sea 2022) <<https://www.humanrightsatsea.org/GDHRAS>> accessed 31 December 2022.

article.<sup>35</sup> Instead, the next sub-section delves into a further set of obligation binding upon the State, namely those under the law of the sea.

## 2.2 Protecting the Individual on Board Fishing Vessels: State Obligations Under the Law of the Sea

In addition to human rights obligations, the law of the sea also provides for States' substantive obligations to ensure the protection of individuals on board vessels. In particular, UNCLOS Part VII allocates exclusive jurisdictional powers to the flag State in respect of activities or operations occurring on board ships flying its flag.<sup>36</sup> Thus, the flag State has the obligation to 'effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag',<sup>37</sup> which translates into the State's duty to adopt measures relating to safety at sea including,

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**35.** Such norms are enshrined in all international and regional human rights instruments and apply in the different contexts depending on the concrete circumstances of the case. Amongst many, suffice it to mention the numerous relevant provisions protecting the right to life and the physical and moral integrity of the individual laid down under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights. In addition, a further level of protection is afforded by other more specific instruments such as, *inter alia*, the 1984 Convention against Torture or Other Cruel, Inhuman and Degrading Treatment or Punishment, the 1926 Slavery Convention, the 1956 Supplementary Convention, and other instruments targeting modern forms of slavery such as forced labour and trafficking in persons.

**36.** In addition to the flag State, also the coastal State and port State may contribute to the protection of the individual on board fishing vessels, at times even with better results than the flag State. In particular, see, *inter alia*, Urfan Khaliq, 'Jurisdiction, Ships and Human Rights Treaties', in Henrik Ringbom (ed.), *UNCLOS Developments in the Law of the Sea* (Martinus Nijhoff, 2015); Sofia Galani, 'Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain' (2020) 35 *The Int'l J. of Marine and Coastal Law* 325.

**37.** UNCLOS, Article 94.

*inter alia*, with regard to the construction, equipment, and seaworthiness of ships, the prevention of collisions, and labour conditions.<sup>38</sup> In particular, Article 94 of UNCLOS requires States to conform to ‘generally accepted international regulations, procedures and practices’<sup>39</sup> laid down in external instruments and potentially incorporated into the Convention system via the so-called ‘rule of reference’ technique, provided that they meet certain conditions.<sup>40</sup>

Safety on board vessels is premised on three primary categories of standards. First, those pertaining to the ship itself, i.e. to its construction, design and equipment. Second, those relating to the movement of ships, particularly concerned with regulating the maritime shipping traffic and reducing the risk of collisions. Third, standards relating to the manning and qualifications of the crewmembers, including the master. All these standards may be found in international instruments adopted mainly

**38.** UNCLOS, Article 94(3)(a-c).

**39.** UNCLOS, Article 94(3)(a-c).

**40.** The ‘rule of reference’ (or *renvoi* in French) is a legal writing technique that allows for the incorporation of rules and standards into a separate conventional system. Most significantly for the purpose of the present contribution, only those rules and standards that are ‘generally accepted’ or ‘applicable’ may be incorporated. Though subject to a doctrinal debate, these expressions commonly refer to both the number of States ratifying the instrument containing said rules and standards, and the gross world tonnage represented by them. In this regard, see W van Reenen, ‘Rules of Reference in the New Convention on the Law of the Sea, in Particular in Connection with the Pollution of the Sea by Oil from Tankers’ (1981) 12 Netherlands Yearbook of International Law 3; Budislav Vukas, ‘Generally Accepted International Rules and Standards’ in Halfred Soons (ed), *Implementation of the Law of the Sea Convention through International Institutions* (Brill Nijhoff, 2000); Bernard H Oxman, ‘The Duty to Respect Generally Accepted International Standards’ (1991) 24 52; Mathias Forteau, ‘Les renvois inter-conventionnels’ (2003) 49 *Annuaire français de droit international* 71; Catherine Redgwell, ‘Mind the Gap in the Gairs: The Role of Other Instruments in Losc Regime Implementation in the Offshore Energy Sector’ (2014) 29 *The International Journal of Marine and Coastal Law* 600; Lan Ngoc Nguyen, ‘Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits’ (2021) 52 *Ocean Development & International Law* 419.

under the auspices of the International Maritime Organisation (IMO).<sup>41</sup> Among these, the 1974 International Convention on the Safety of Life at Sea (SOLAS Convention)<sup>42</sup> is perhaps the most important with regard to construction, design and equipment. It lays down technical rules and standards covering virtually all aspects of safety on board vessels, ranging from the construction of ships to the carriage of equipment and goods, from fire-safety measures to more specific ones applying to nuclear ships or ships operating in polar waters etc. In a similar vein, the 1972 International Regulations for Preventing Collisions at Sea (COLREG)<sup>43</sup> and the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)<sup>44</sup> respectively regulate maritime traffic and ensure that seafarers have a certain qualification and training. Overall, all these instruments are ratified by a very high number of States amounting to about 98 or 99% of world gross tonnage. Therefore, they surely contributed to the harmonisation of the safety standards on board vessels.

However, some of these instruments explicitly exclude fishing vessels from their scope, resulting in their non-applicability to individu-

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**41.** For a complete list of IMO conventions recalled, see Myron Nordquist, Satya Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 A Commentary, Vol IV: Editor-in-Chief*, vol 16 (Elsevier, 1992) 142–143 and 148; Alexander Proelss and others (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos, 2017) 713; Louis B Sohn and others, *Cases and Materials on the Law of the Sea* (Brill Nijhoff, 2014) 153–154.

**42.** International Convention for the Safety of Life at Sea, adopted in London on 1 June 1974, entered in force on 25 May 1980, 1184 UNTS 278 (SOLAS).

**43.** Convention on the International Regulations for Preventing Collisions at Sea, adopted in London on 20 October 1972, entered in force on 17 July 1977, 1050 UNTS 151 (COLREG).

**44.** International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, adopted in London on 1 December 1978, entered in force on 28 April 1984, 1361 UNTS 2 (STCW).

als serving on board such vessels.<sup>45</sup> For this reason, the international community has adopted parallel instruments specifically providing for similar standards to be implemented on board fishing vessels. Yet, the latter instruments are far from receiving a comparable consensus worldwide. For instance, the International Convention for the Safety of Fishing Vessels<sup>46</sup> and its 1993 Torremolinos Protocol<sup>47</sup> failed to meet the ratification threshold and to enter into force,<sup>48</sup> prompting the adoption of the 2012 Cape Town Agreement (CTA),<sup>49</sup> containing looser standards with a view to increasing States' participation. However, this has not yet entered into force either.<sup>50</sup> Accordingly, the very low number of ratifications of said instruments highly undermines the incorporation of their rules and standards into the UNCLOS system via the rule of reference.

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**45.** In this regard, see SOLAS Convention – Chapter I – General Provisions – Part A – Application, definitions, etc. – Regulation 3 – Exceptions, which states that '(a). The present regulations, unless expressly provided otherwise, do not apply to: [...] (vi). Fishing vessels.' Likewise, see also Article III(b) STCW.

**46.** Torremolinos International Convention for the Safety of Fishing Vessels (Torremolinos Convention), adopted in London on 1 October 1977, not in force.

**47.** 1993 Protocol to the Torremolinos Convention, IMO, adopted on 2 April 1993, not in force.

**48.** IMO, 'Global Integrated Shipping Information System (GISIS)' <<https://gisis.imo.org/Public/ST/Treaties.aspx>> accessed 31 December 2022.

**49.** Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels of 1977, adopted in Cape Town on 11 October 2012, not in force.

**50.** GISIS <<https://gisis.imo.org/Public/ST/Treaties.aspx>> accessed 31 December 2022. At the time of writing, the CTA has been ratified by 17 States and is likely to enter into force in the coming years. A similar pattern may be identified with regard to the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, adopted in London in 1995, so far ratified by merely 35 States, amounting to less than 9% of the world gross tonnage. GISIS <<https://gisis.imo.org/Public/ST/Treaties.aspx>> accessed 31 December 2022.

A similar trend can be traced with regard to labour standards laid down in instruments adopted under the auspices of the International Labour Organization (ILO). Indeed, while the 2006 Maritime Labour Convention (MLC)<sup>51</sup> is ratified by 101 of States worldwide,<sup>52</sup> it explicitly excludes fishing vessels from its scope of application.<sup>53</sup> By contrast, the Work in Fishing Convention (WFC)<sup>54</sup> - the sister instrument adopted the year after the MLC and specifically addressing labour conditions on board fishing vessels - has so far received very little endorsement.<sup>55</sup> Accordingly, its rules and standards cannot be incorporated into the UNCLOS system via the rule of reference under Article 94 of UNCLOS. In addition, the WFC only applies to fishing vessels engaged in commercial fishing,<sup>56</sup> expressly defined as excluding recreational and subsistence fishing.<sup>57</sup> Therefore, a consistent number of fishing vessels not meeting these criteria are left outside of the material scope of the WFC, further reducing the effective number of fishers protected under such an instrument.

Overall, even though it would seem common sense to think that ensuring the protection of individuals at sea is amongst the primary ob-

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51. Maritime Labour Convention (no. 186), adopted in Geneva on 23 February 2006, entered into force on 20 August 2013, 2952 UNTS 3 (MLC).

52. ILO, 'Normlex - MLC, 2006 - Maritime Labour Convention, 2006 (MLC, 2006)' <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312331](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312331)> accessed 31 December 2022.

53. MLC, Article II(4).

54. Work in Fishing Convention (no. 188), adopted in Geneva on 14 June 2007, entered into force on 16 November 2016, 3209 UNTS 1 (WFC).

55. Only 20 States have ratified it so far, with Kenya being the last State to do so in February 2022. ILO, 'Normlex - Ratification of C188 - Work in Fishing Convention, 2007 (No. 188)' <[https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::no:11300:p11300\\_instrument\\_id:312333](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::no:11300:p11300_instrument_id:312333)> accessed 31 December 2022.

56. WFC, Article 2(1).

57. *ibid.*, Article 1(a).

jectives of States, when it comes to people on board fishing vessels the reality is different: human rights and law of the sea norms protecting the individual exist, but States tend to be little inclined to enforce them on board fishing vessels, since their actual implementation would come with higher costs for shipowners, ship operators and charterers, potentially resulting in the national registry's loss of attractiveness.<sup>58</sup> In particular, while the enforcement of States' obligations under human rights law highly depends on the circumstances of the case, IMO and ILO instruments applying to persons on board fishing vessels only bind a very limited number of States, thus contributing very little to their effective protection.

Under this perspective, it is submitted that fishing activities carried out without ensuring the protection of fishers and other crewmembers on board might be as illegal as those in breach of the norms on the conservation and management of marine living resources. Put differently, the States' failure to protect people on board fishing vessels under both international human rights law and the law of the sea arguably affects the lawfulness and sustainability of the concerned fishing activities. Accordingly, the protection of the individual should also be taken into account when assessing the legality of fishing activities. The next section discusses such an argument more thoroughly, first exploring the notion of IUU fishing and then advocating for the adoption of a broader notion of illegal fishing with a view to addressing the human and social dimension of fishing activities and enhancing the protection of people involved in such activities.

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58. Robin Churchill, Vaughan Lowe, and Amy Sander, *The Law of the Sea* (Manchester University Press, 2022) 458.

### 3. Illegal Fishing: A Limited Concept

#### 3.1 Illegal, Unreported and Unregulated fishing

The early 90s witnessed a fundamental development in the international fisheries law regime as crystallised in the UNCLOS. In the aftermath of the 1992 Rio Declaration, the growing attention for the problems of overfishing and fish-stock depletion progressively led to the adoption of hard- and soft-law instruments aimed at combating environmentally unsustainable fishing practices, thus prompting the formation of a framework to fight the phenomenon of IUU fishing.<sup>59</sup> This concept made its first appearance at the regional level, during the works of the Commission for the Conservation of Antarctic Marine Living Resources.<sup>60</sup> IUU fishing refers to any form of non-compliant behaviour or contravention with international, regional and national rules relating to the sustainable man-

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**59.** The literature on IUU fishing is vast. For a complete overview on IUU fishing, see *inter alia* Rachel Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer, 2006); Palma, Tsamenyi and Edeson (n 6); Mercedes Rosello, *IUU Fishing as a Flag State Accountability Paradigm - Between Effectiveness and Legitimacy* (Brill Nijhoff, 2021); see also, *inter alia*, Fish Piracy - 'Combating Illegal, Unreported and Unregulated Fishing' (Organization for Economic Co-operation and Development Publishing, 2004); Andrew Serdy, 'Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal' (2017) 48 *Ocean Development and International Law* 345.

**60.** William Edeson, 'The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument' (2001) 16 *The International Journal of Marine and Coastal Law* 603, 605. In this regard, it is worth mentioning that already Article 21(11)(a-i) of the 1995 UNFSA identified and qualified as 'serious violation' a series of conducts carried out in breach of the existing regulatory framework for the conservation and management of marine living resources. This provision, arguably, constitutes the seed for the subsequent IUU fishing paradigm.

agement and conservation of marine living resources.<sup>61</sup> The notion was later codified in the IPOA-IUU,<sup>62</sup> a soft-law instrument adopted in 2001 under the auspices of the FAO aimed at providing States with a set of rules and measures to undertake with a view to deterring and eliminating unlawful and irresponsible fishing practices.<sup>63</sup> Notably, the IPOA-IUU is a voluntary instrument and, accordingly, leaves States with a wide margin of appreciation in crafting implementation strategies at the national level to tackle the numerous illicit practices falling under IUU fishing.

The IPOA-IUU is also the first official instrument providing a definition of IUU fishing, or at least an explanation or description of it.<sup>64</sup>

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**61.** Numerous scientific studies have been conducted on the IUU fishing phenomenon, trying to appreciate its root causes and its adverse effects on State economy and on environmental and food security. For an economic analysis of IUU fishing, see David Agnew and Colin Barnes, 'Economic Aspects and Drivers of IUU Fishing: Building a Framework', (OECD Publishing 2004); Carl-Christian Schmidt, 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing' (2005) 20 *The International Journal of Marine and Coastal Law* 479. See also Sjarief Widjaja, Tony Long and Hassan Wirajuda, 'Illegal, Unreported and Unregulated Fishing and Associated Drivers' (World Research Institute 2019). As to IUU fishing economic impact, see David Agnew and others, 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4 *PLOS ONE* e4570. See also Rob Tinch, Ian Dickie, and Bruno Lanz, 'Costs of Illegal, Unreported and Unregulated (IUU) Fishing in EU Fisheries' (Economics for the Environment Consultancy Ltd 2008). As to its impact on environmental and food security, see *inter alia*, Jonathan White, 'Part I: Illegal Fishing – A Threat to National, Economic, and Food Security Worldwide' (Global Fishing Watch, 19 September 2017) <<https://globalfishingwatch.org/news-views/illegal-fishing-economic-food-security/>> accessed 31 December 2022.

**62.** IPOA-IUU (n 7). For an account on the IPOA-IUU see, *inter alia*, Edeson (n 60).

**63.** The IPOA-IUU lists all such measures in Section IV under seven distinct categories. See paras 10–84 IPOA-IUU. Some of these measures uphold duties enshrined in existing international instruments, thus reflecting the evolution and consolidation of the fisheries conservation and management legal regime. By contrast, others are rather innovative, e.g. the internationally agreed market measures, thus constituting an important effort to push forward the international regime on sustainable fisheries.

**64.** Edeson (n 60) 620. See also Palma, Tsamenyi and Edeson (n 6) 37. See also Jens Theilen, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28 *The International Journal of Marine and Coastal Law* 533, 534; see also Serdy (n 59) 353.

The IPOA-IUU spells out the meaning of the single components of IUU fishing by describing the conducts attracted within the scope of each of them and committed in breach or disregard of national, regional, or international regulations and standards. Thus, illegal fishing refers to fishing in a given area without the authorisation of the coastal State or competent regional fisheries management organisation (RFMO), as well as fishing in breach of the rules specifically adopted with respect to a given season, species or maritime area. Unreported fishing consists of any conduct of misreporting or not reporting data on a given catch. Unregulated fishing refers to fishing activities in an area not subject to any applicable rules for the conservation and management of fisheries resources, provided that such activities are conducted in a manner that is not consistent with States' responsibilities regarding sustainable fishing.<sup>65</sup>

Even though the conducts qualifying as IUU fishing are certainly not new,<sup>66</sup> the IPOA-IUU is to be praised for it provides policy makers with a toolbox of actions to be undertaken with a view to addressing the challenges underlying the fisheries conservation regime.<sup>67</sup> Yet, it is worth noting that the distinction among the three components admittedly appears at times blurred, with some commentators arguing that unreported and unregulated fishing are mere sub-categories of illegal fishing.<sup>68</sup> In particular, the first source of uncertainty lies with the overlapping meaning

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65. See the notions of illegal, unreported and unregulated fishing under para 3 IPOA-IUU.

66. Indeed, some of these conducts were identified in previous international fisheries law instruments, notably Article 21(11) UNFSA. See note 60.

67. Edeson (n 60) 623.

68. See Theilen (n 64) 543. See also Edeson (n 60) 619. In this regard, it is worth noting that the three components are treated as a single phenomenon throughout the whole text of the IPOA-IUU, while being referred to separately only in Paragraph 3. See *contra*, Serdy, who holds that 'the assumption that unregulated fishing is also illegal is groundless.' Serdy (n 59) 355.

of illegal and unregulated fishing.<sup>69</sup> The very text of Paragraph 3.4 IPOA-IUU fuels such uncertainty, hinting that some forms of unregulated fishing do in fact constitute illegal fishing. In addition, Van Der Marel suggests that a given conduct may qualify both as ‘unregulated’ and as ‘illegal’ depending on the national or international law point of view adopted.<sup>70</sup> By the same token, conducting fishing operations in an area under the competence of a RFMO may fall under the label of ‘illegal’ or ‘unregulated’ fishing depending on whether the concerned fishing vessel is registered under a State Party to the UNFSA or not.<sup>71</sup> Thus, the uncertain distinction between the two components contributes to their conflation also at the level of policy-making,<sup>72</sup> resulting in the narrow and, arguably, wrong understanding of unregulated fishing as a form of illegal fishing.<sup>73</sup> Most importantly, it shows that the bounds and content of illegal fishing are arguably less defined than what they seem.

Overall, the foregoing considerations highlight that the notion of IUU fishing as crystallised in the IPOA-IUU is concerned with virtually any illicit conduct undermining the environmental and economic security of

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69. See Serdy (n 59) 354. Paragraph 3.4 IPOA-IUU reads as follows: ‘3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action’ (IPOA).’

70. Eva Van Der Marel, ‘Problems and Progress in Combating IUU Fishing’ in Richard Cadell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing, 2019) 294.

71. *ibid.*, 295–297.

72. See the European Commission’s Communication on a New Strategy for the Community to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2007 [COM(2007) 601] paras 2 and 4 cited in Edeson (n 60) 623. Paragraph 3.4 IPOA-IUU reads as follows: ‘3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action’ (IPOA).’

73. See *inter alia* Theilen (n 64) 543.

the State.<sup>74</sup> Thus, in line with the broader tendency in the international fisheries regime, the IUU fishing paradigm entirely overlooks the social and human dimension of fishing activities. Put differently, IUU fishing frames unlawful fishing activities only in terms of lack of compliance with the environmental, and economic principles and rules enshrined in the fisheries regime; whether said fishing activities undermine the protection of individuals does not strictly affect their lawfulness or sustainability. For instance, a vessel may carry out fishing operations within a foreign exclusive economic zone (EEZ) in full respect of the coastal State's regulations on sustainable fishing, yet, the very same regulations might overlook the cultural rights of an indigenous population inhabiting the coast adjacent to the concerned fishing area, meaning that the concerned fishing operations will inevitably undermine the rights and interests of the coastal community. By the same token – and more relevant for the purpose of the present paper – while duly respecting the RFMO's regime for conducting fishing activities in a given area on the high seas, fishers on board might be subject to the most brutal forms of ill-treatment and abuse, thus questioning the legality of such activities in terms of the lack of enforcement of human rights and safety/labour standards on board.

Thus, certain fishing operations may be lawful under the IUU fishing lens, yet, they do not respect the international law obligations on the protection of the individual discussed in the previous section. Accordingly, the notion of legality that the IUU fishing paradigm aims to attain is too narrow, for it is limited to environmental, and economic sustainability, while leaving aside the human dimension of fishing. In the author's view, this conclusion is highly problematic, in light of the serious – and in some cases extreme – situations suffered by persons on

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74. UN General Assembly, 'Report of the Secretary-General on the Oceans and the Law of the Sea' (10 March 2008) UN Doc A/63/63, 98. In this regard, see also Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011).

board fishing vessels. The next section will offer some arguments in favour of rethinking the paradigm of IUU fishing so as to incorporate the protection of the individual on board and reconcile the social dimension of fishing with the economic and environmental ones.

### 3.2 Illegal Fishing: A Broader Paradigm?

Arguing that human rights norms and standards and, more generally, human security concerns should be attracted within the scope of illegal fishing is not a novelty. Oral suggested integrating international and transnational criminal law mechanisms and practices into those legal regimes concerned with the sustainable conservation and management of marine living resources and the broader law of the sea.<sup>75</sup> Likewise, Fitzmaurice and Rosello submitted that human rights treaties should be used to inform the meaning and scope of unregulated fishing, with a view to better protecting indigenous populations and contributing to a new and more inclusive understanding of IUU fishing.<sup>76</sup> Arguably, rethinking the paradigm of IUU fishing is a moral imperative today:<sup>77</sup>

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75. Notably, the FAO and the IMO, traditionally tasked with ocean-related works, as well as the World Trade Organization (WTO), which has recently promoted the adoption of the Agreement on Fisheries Subsidies (AFS). Nilufer Oral, 'Reflections on the Past, Present, and Future of IUU Fishing under International Law' (2020) 22 *International Community Law Review* 368, 373–374.

76. Malgosia Fitzmaurice and Mercedes Rosello, 'IUU Fishing as a Disputed Concept and Its Application to Vulnerable Groups: A Case Study on Arctic Fisheries' (2020) 22 *International Community Law Review* 410.

77. The social and human dimension in the law of the sea, which comprises the protection of the individual in the fisheries sector, is included among the main drivers of change in the law of the sea, expected to apply pressure to it for the next thirty years. See Aloupi and Göttsche-Wanli (n 4) 22. The protection of fishers on board vessels is also the subject of the inter-institutional cooperation among the FAO, the IMO and the ILO. In this regard, see the joint report 'Joining Forces to Shape the Fishery Sector of Tomorrow' (n 12).

both the adoption of the UN Sustainable Development Goals in 2015 and the persistent and emerging challenges for the international legal order – e.g. climate change – require States to rethink their actions and give thorough consideration to the protection of the individual, including in the context of fishing activities and the broader sustainable fisheries regime.<sup>78</sup>

Against this background, at least four arguments may be advanced with a view to broadening the definition of illegal fishing so as to incorporate compliance with the State's obligations on the protection of individuals on board fishing vessels. The starting point is the arguably open nature of the IUU fishing notion. As mentioned above, the IPOA-IUU is a voluntary instrument for policy making, containing a list of measures to strengthen the management of fisheries resources and discourage certain illicit behaviours. In this respect, some authors argue that it does not set forth a definition, but rather a description or explanation of the IUU fishing phenomenon.<sup>79</sup> Notably, IUU fishing is a hybrid concept, comprising both political and normative components.<sup>80</sup> Thus, in spite of

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**78.** In this regard see, for instance, Christine Voigt, who suggests that the sustainable fisheries legal regime needs to be diligently revisited so as to include as well considerations for the global climate change threat. See Christina Voigt, 'Oceans, IUU Fishing, and Climate Change: Implications for International Law' (2020) 22 *International Community Law Review* 377. See also Kate Cook, Kenneth Rosenbaum and Florence Poulain, *Building Resilience to Climate Change and Disaster Risks for Small-Scale Fisheries Communities: A Human-Rights-Based Approach to the Implementation of Chapter 9 of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (FAO 2021).

**79.** See (n 64).

**80.** Eve De Coning, 'Fisheries Crime' in Lorraine Elliott and William Schaedla (eds.), *Handbook of Transnational Environmental Crime* (Edward Elgar Publishing 2016) 157–158. With the IPOA-IUU, the United States have crafted their own definition of IUU fishing under the High Seas Driftnet Fishing Moratorium Protection Act, [2011] 76 FR 2011 <<https://www.federalregister.gov/documents/2011/01/12/2011-507/high-seas-driftnet-fishing-moratorium-protection-act-identification-and-certification-procedures-to>> accessed 31 December 2022.

being accepted nearly universally<sup>81</sup> and being incorporated into two subsequent hard law instruments,<sup>82</sup> the IPOA-IUU notion of IUU fishing may by its very nature be open to incorporating new elements, including the protection of the individual.

Second, a teleological approach may further support this conclusion. Paragraph 1 of the IPOA-IUU recognises that the notion of IUU fishing was crafted with a view to addressing not only the environmental, and economic dimensions of irresponsible fishing practices, but also the social one.<sup>83</sup> Given that the latter is traditionally associated with employment aspects, suggesting that ‘illegal fishing’ also attracts within its scope those fishing operations conducted in full disregard of the protection of people working on board would not be entirely at odds with the text of the IPOA-IUU. The Code of Conduct for Responsible Fisheries<sup>84</sup> - within which the IPOA-IUU was conceived - further supports this conclusion. The Code mentions the social dimension of fishing on numerous occasions throughout its text, including in the part dedicated to its ob-

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**81.** It is worth mentioning two notable exceptions: first, Council Regulation (EC) No 1005/2008 of 29 September 2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (EU Regulation on IUU Fishing), which endorses the definitions of illegal, unreported and unregulated fishing as laid down respectively in paragraphs 3.1, 3.2 and 3.3 of the IPOA-IUU, yet without including a provision equivalent to paragraph 3.4. In this regard, see Serdy (n 59). ‘EU Regulation on IUU Fishing’ [2008] OJ L286/1 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF>> accessed 31 December 2022. Second, in stark contrast with the IPOA-IUU, the United States have crafted their own definition of IUU fishing under the High Seas Driftnet Fishing Moratorium Protection Act, [2011] 76 FR 2011 <<https://www.federalregister.gov/documents/2011/01/12/2011-507/high-seas-driftnet-fishing-moratorium-protection-act-identification-and-certification-procedures-to>> accessed 31 December 2022.

**82.** Namely the 2009 FAO Port State Measures Agreement (PSMA) and the 2022 WTO Agreement on Fisheries Subsidies.

**83.** IPOA-IUU, Para 1.

**84.** Code of Conduct for Responsible Fisheries, Rome, FAO, 1995 (Code of Conduct).

jectives;<sup>85</sup> yet, subsequent instruments have entirely put this aside. Thus, the precise content and scope of the notion of ‘illegal fishing’ ought to be informed by references to national and regional laws and regulations adopted by States with a view to discharging their obligations on the protection of the individual on board fishing vessels discussed in Section 1 *supra*.

Finally, the very notion of illegal fishing under the IPOA-IUU may contain itself an element for an expansive interpretation, in contrast with the notions of unreported and unregulated fishing: while the latter specifically refers to ‘fishing activities’, the former only mentions ‘activities’, thereby suggesting a broader range of meanings that could be subsumed under it.<sup>86</sup> Put differently, illegal fishing may actually be interpreted as referring to breaches of norms and regulations other than those strictly related to the conservation and management of fisheries resources such as, *inter alia*, human rights norms as well as safety and labour rules and standards, all closely related or even instrumental to the conduct of fishing operations. Accordingly, compliance with such norms and standards may become a factor against which to assess the lawfulness and sustainability of fishing activities, thereby constituting an opening for the incorporation of concerns for the protection of the individual into the notion of illegal fishing.

Last but not least, recent investigations carried out by both international and non-governmental organisations are bringing to the forefront the link between IUU fishing and numerous instances of human

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**85.** ‘The objectives of the Code are to: a) establish principles, in accordance with the relevant rules of international law, for responsible fishing and fisheries activities, taking into account all their relevant biological, technological, economic, social, environmental and commercial aspects’. In addition to this, see, *inter alia*, also Articles 6.4 and 6.14.

**86.** IPOA-IUU, Paras 3.1, 3.2 and 3.3.

rights violations and crimes,<sup>87</sup> commonly referred to as ‘fisheries crime’.<sup>88</sup> Under this perspective, fisheries crime and IUU fishing address distinct but complementary phenomena. Indeed, the two notions have partially overlapping scopes: fisheries crimes also include some forms of economic and environmental misconducts,<sup>89</sup> yet put the accent on their criminal nature and on the best strategy to punish perpetrators.<sup>90</sup> By way of exam-

**87.** See, *inter alia*, ‘Transnational Organized Crime in the Fishing Industry’ (United Nations Office on Drugs and Crime 2011) Issue Paper; ‘Caught at Sea’ (n 13); ‘Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry’ (International Organization for Migration 2016). As to the legal scholarship, see *inter alia*, Anastasia Telesetsky, ‘Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime’ (2014) 41 *Ecology Law Quarterly* 939; De Coning (n 80); Teresa Fajardo, ‘To criminalise or not to criminalise IUU fishing: The EU’s choice’ (2022) 144 *Marine Policy* 1. See contra Mary Mackay, Britta Denise Hardesty and Chris Wilcox, ‘The Intersection Between Illegal Fishing, Crimes at Sea, and Social Well-Being’ (2021) 7 *Frontiers in Marine Science* 1.

**88.** This is ‘an umbrella term’ used for any crime within the fisheries sector and along the supply chain, ‘including food fraud at consumer levels [...] money laundering, document fraud, corruption, human trafficking or modern slavery.’ INTERPOL, ‘Strengthening Law Enforcement Cooperation Against Fisheries Crime’ (INTERPOL, Environmental Security Programme 2021) 4. <<https://www.interpol.int/es/content/download/16314/file/INTERPOL%20ENS%20Fisheries%20Crime%20Prospectus%202021.pdf>>. For an account on fisheries crime, see Mary Ann Palma-Robles, ‘Fisheries Crime: Bridging the Conceptual Gap and Practical Response’ (*Center for International Maritime Security*, 2014) <<http://cimsec.org/fisheries-crime-bridging-conceptual-gap-practical-response/12338>>; Henrik Österblom, ‘Catching Up on Fisheries Crime’ (2014) 28 *Conservation Biology* 877; De Coning (n 19); Eve De Coning, Emma Witbooi, ‘Towards a new ‘fisheries crime’ paradigm: South Africa as an illustrative example’ (2015) 60 *Marine Policy* 208; Valentin Schatz, ‘The Battle against Transnational Fisheries Crime’ (*Völkerrechtsblog*, 3 March 2017) <<https://voelkerrechtsblog.org/the-battle-against-transnational-fisheries-crime/>> accessed 31 December 2022; Patrick Vrancken, Emma Witbooi and Jan Glazewski, ‘Introduction and Overview: Transnational Organised Fisheries Crime’ (2019) 105 *Marine Policy* 116. De Coning clarifies that ‘fisheries crimes’ was initially used as ‘a “term of convenience” to facilitate the coming together of the necessary expertise to deal with a number of interrelated problems that seem to have caused a compliance gap in the fisheries sector.’ De Coning (n 80) 147.

**89.** See, *inter alia*, the discussion in Palma-Robles (n 88). See also De Coning, who acknowledges the possible environmental dimension of fisheries crime, yet also highlights that it ‘does not necessarily always involve an element of environmental harm.’ De Coning (n 80) 161.

**90.** De Coning, *ibid.*, 151–152.

ple, fishing with false documents (e.g. fishing licence or authorisation) meets the notion of ‘illegal fishing’ under the IUU fishing paradigm because it implies fishing without the coastal State or RFMO’s authorisation,<sup>91</sup> but may also constitute a breach of the criminal legislation on fraud. Likewise, fishing a particular species may both constitute IUU fishing and be attracted under the scope of the environmental crimes legislation that prohibits the harvest and trade of protected species.<sup>92</sup>

Thus, the emergence of the fisheries crime paradigm not only uncovers the profound and severe consequences that fishing activities may have on individuals, including persons on board fishing vessels; it also displays both the limits of the traditional IUU fishing paradigm and the blurriness of its boundaries, arguably raising some questions about its scope and further reinforcing the call for rethinking the notion of illegal fishing.

## 4. Conclusion

The analysis above showed that the social dimension of fishing is entirely left out of both the current regime on the conservation and management of marine living resources and the related IUU fishing paradigm, which is instead built upon economic and environmental rules and principles. However, living and working conditions on board fishing vessels are particularly worrisome and require urgent action on the part of the international community. The notion of IUU fishing currently fails to address

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91. IPOA-IUU, Para 3.1.

92. As far as it concerns environmental crimes, see ‘Environmental Crime: A Threat to Our Future’ (Environmental Investigation Agency 2008). For an overview on transnational environmental crimes, see Lorraine Elliott and William Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar Publishing, 2016).

the social aspects of fishing activities, including the safety of persons on board fishing vessels, thereby displaying the limits of the sustainability paradigm applied to fisheries.

Under this perspective, it has been suggested that fishing without paying due consideration to the fundamental rights and interests of individuals involved in it is far from being a lawful and sustainable practice. Accordingly, the paper has called for the rethinking of the notion of illegal fishing so as to encompass respect for human rights norms as well as for safety and labour standards on board, thereby giving them equal relevance as environmental, and economic rules and principles. The adoption of a broader notion of illegal fishing would require the implementation of costly cross-border coordination and cooperation strategies and is not exempt from critique.<sup>93</sup> However, it may ultimately serve two purposes: on the one hand, it might help reconcile the existing paradigms of IUU fishing and fisheries crime, whose compliance strategy at times leads to opposite outcomes.<sup>94</sup> For instance, States' action to deter and eliminate IUU fishing would require a State Party to the PSMA to deny access to vessels involved with IUU fishing.<sup>95</sup> By contrast, the fisheries crime paradigm would instead lead port States to encourage foreign fishing vessels to enter their ports with a view to enforcing criminal law more easily – i.e. boarding and inspecting the vessel and the crew as well as carrying out investigations and, eventually, proceedings.<sup>96</sup> On the

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**93.** De Coning argues that any attempt at criminalizing fishing activities on the basis of a broad and undefined notion of illegal fishing may fail the legality test at the basis of modern criminal law systems. De Coning (n 80) 158.

**94.** *ibid.*, 152.

**95.** PSMA, Article 9(4).

**96.** De Coning (n 80) 152. Arguably, implementing policies aimed at protecting individuals would most likely lean towards the fisheries crime paradigm in this case, since the vessel entry into port might help victims file a complaint to local authorities and have them investigate the matter, thus triggering justice mechanisms.

other hand, the adoption of a broader notion of illegal fishing might help strengthen the protection of individuals involved in the fisheries sector as a whole, making it more inclusive and human rights-based while striking a new balance among the economic, environmental, and social dimension of sustainable fishing.

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