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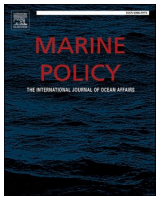

Regional fishery management organisation measures and the imposition of criminal and administrative sanctions in respect of high seas fishing

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ABSTRACT

Doctrinal arguments and two examples illustrating the practice of the Spanish courts highlight two risk factors that can undermine the effectiveness of enforcement actions by States in matters involving high seas fishing. Firstly, the absence from treaty law of clearly defined conduct standards and unequivocal criminal enforcement routes to provide a positive basis for the exercise of extraterritorial criminal jurisdiction. Secondly, the transcendence of individual rights and constitutional principles enshrined in domestic constitutional and European Union law and safeguarded by national courts, and their potential for tension with international fisheries conservation objectives. Through a brief analysis of those tensions, the article leads to a reflection on the relevance of legal security considerations to inform the development of international and regional legal frameworks and decision-making mechanisms for addressing high seas illegal and unregulated fishing.

1. Introduction

Recent legislative proposals by the European Union (EU or Union) will,[1] if adopted, strengthen the role of criminal law and its prominence in the protection of the environment and of natural resources. In matters of high seas fishing, this emergence is taking place in an international legal context characterised by an abundance of open-framed obligations surrounded by policy narratives imbued with pragmatism that can generate uncertainty in the determination of illegality. The enquiry conducted here highlights the need for legal specificity to support the effective exercise of enforcement jurisdiction in cases of high seas illegal and unregulated fishing. This need is explored in criminal and non-criminal contexts through the two case studies presented, and is shown to be particularly important in contexts where criminalisation is sought. This is due to the stringent and exceptional nature of criminal law and its intrinsic tension with individual rights and principles as are present in domestic and constitutional law.

The two case studies before domestic Spanish courts showcase the extent to which such domestic rights and principles are juridically robust and able to resist attempts at the domestic implementation of existing international measures where these have been conceived without sufficient specificity. This results in the reduced effectiveness of the international measure in specific scenarios, once it and/or its implementation are placed under the scrutiny of the domestic courts, *de facto* undermining costly enforcement efforts by flag State or State of nationality authorities. There are therefore latent risks linked to elasticity in the definition of international obligations and processes, indicating that texts developed for pragmatism can lose effectiveness in some domestic enforcement scenarios. In addition, doctrinal considerations mean that this undermining effect is likely to be more pronounced in domestic criminal enforcement contexts.

The article is divided into four parts, commencing with a brief outline of the international legal framework concerning high seas fishing operations. The second section sets out two Spanish case studies for contextual and illustrative purposes, as both involved breaches of regional measures in the high seas, followed by responses by Spanish authorities and court interventions respectively in criminal and administrative law contexts.[2] The third section sets out an analysis of the two cases from a doctrinal as well as a practical perspective, seeking to shed light into some of the legal limits and difficulties that followed attempts by Spanish authorities to exercise extraterritorial jurisdiction. The theme of legal security as a constitutionally protected principle, and

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[1] Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC [accessed on 23 June via https://ec.europa.eu/info/sites/default/files/1_1_179760_prop_dir_env_en.pdf].

[2] For more comprehensive information on Spain's action to combat IUU fishing to date, see G.A. Oanta, 'Spain's Action to Control and Suppress Illegal, Unreported and Unregulated Fishing: Current Status and Future Prospects' (2019), 34(4) *The International Journal of Marine and Coastal Law,* 642–667.

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its relationship to legal certainty and correspondingly to the clarity of international legal obligations and the precision of processes is also explored as part of this enquiry, briefly extending to the effects of rule interaction across different regimes. The fourth and final section contains the concluding remarks, which highlight the risks posed to the effective exercise of extraterritorial jurisdiction by a lack of clarity in treaty wordings and/or the approach taken to ensure implementation. Reflecting on the potential of individual rights enshrined in domestic and constitutional law to limit the effects of the exercise of State enforcement powers and condition the interpretation of international obligations, the conclusion highlights the importance of legal security and the need to strengthen legal certainty in global and regional legal duties and process to expedite enforcement, especially in criminalisation scenarios.

2. Bringing home the exercise of enforcement jurisdiction in the high seas

Currently in the EU infractions of fisheries law and regulation are typically addressed through a blend of criminal and administrative law measures, yet there is increasing interest in protecting ecosystems and natural resources through criminalisation. This is showcased in a recent proposal by the European Commission to the Parliament of the Union. The Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC seeks to reinforce and harmonise across EU member States criminal law responses to environmental harms, while safeguarding fundamental principles and rights such as the principle of legality and the right to conduct a business. Fishing activities are not specifically mentioned amongst the proposed offences, but the preamble of the directive calls on member States to consider the criminalisation of intentional fishing activities that breach specific EU law obligations established as part of the regulation of fisheries in EU waters, and to combat illegal fishing. The following paragraphs consider some of the difficulties that emanate from certain international legal features and doctrine when enforcement jurisdiction is exercised in transnational contexts involving high seas fishing activity. Such difficulties might be encountered when States, including member States of the Union, wish to apply criminal sanctions as a response to serious infringements, but are also relevant when administrative sanctions applied by the domestic authorities are subjected to domestic judicial review.

A significant number of regional fishery bodies have been created over time to rationalise the utilisation of transboundary marine living resources occurring in the high seas. Many of those bodies have an advisory function, but others have competences to adopt conservation and management measures capable of binding States [McDorman 2005].[3] These later group of organisations is usually referred to as RFMOs [FAO 2020].[4] RFMOs have an important role to play in the implementation of the international cooperation and conservation and management obligations established by the United Nations (UN) 1982 Convention on the Law of the Sea (UNCLOS) in respect of marine fish stocks.[5] For high seas fishing, UNCLOS requires State parties to cooperate through international organisations such as RFMOs . The role of RFMOs as key international fora for cooperative decision-making has been crystallised in respect of straddling and highly migratory fish stocks through the UNCLOS-implementing treaty known as the UN Fish Stocks Agreement (UNFSA).[6] UNFSA contains comparatively more detailed obligations than UNCLOS, requiring State parties to ensure the conservation and management of straddling and highly migratory fish stocks, as well as associated and dependent species, to precautionary standards in their regulation of fishing activities.[7]

The jurisdictional bases upon which States regulate fishing and other activities in the high seas are established in UNCLOS Part VII. UNCLOS Article 117 requires States to adopt measures in respect of their nationals for the conservation of the living resources of the high seas, while article 92 indicates States extend their exclusive jurisdiction over vessels flying their flag. States regulate the activities of their nationals (vessels or persons) via the application of their national law. Member States of RFMOs participate in the decision-making processes of these organisations, contributing to the adoption of crucial regulatory measures with a direct impact on the conservation and management of high seas stocks.

The role of UNFSA and of the RFMO treaties is not limited to ensuring the harmonisation of prescriptive measures, extending also to enforcement and sanctioning.[8] Prescriptive measures are established by States over fishing vessel operations and the individuals responsible for them, and enforced in their capacity as flag States or States of nationality of the relevant individuals. Acting as interface between prescription and enforcement, UNFSA Article 21.11 requires State parties to recognise a series of activities as 'serious violations'.[9] Further, Article 19 of the UNFSA requires flag States to enforce the conservation and management measures adopted by RFMOs.[10] It also requires that 'all investigations and judicial proceedings (…) be carried out expeditiously', that applicable sanctions are 'adequate in severity to be effective in securing compliance and to discourage violations wherever they occur', and that they 'deprive offenders of the benefits accruing from their illegal activities'.[11] The agreement additionally offers detailed and practical enforcement solutions as to how this is to be achieved: for example, Article 19(2) indicates that sanctions shall include 'provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers' on fishing vessels. These provisions are binding on State parties of the UNFSA, and must therefore be implemented domestically by them if they are to become applicable to persons under their jurisdiction.

Specific RFMO decision-making processes can result in the adoption of measures that bind their contracting parties, as well as non-contracting cooperating States as appropriate, in accordance with their respective constitutive treaties [McDorman 2005].[12] Such binding measures also require implementation by those States in their domestic legal systems. Not all RFMO contracting parties are parties to the UNCLOS and the UNFSA [FAO 2020].[13] Often, the convergence of requirements from different international legal sources can give rise to complex situations in respect of decision-making as well as in

[3] For information on the types of measures and binding mechanisms, see Ted L. McDorman, 'Implementing Existing Tools: Turing Woods into Actions - Decision-Making Process of Regional Fisheries Management Organisations (RFMOs)' (2005) 20 *Int'l J Marine & Coastal L* 423.

[4] FAO, 'Regional Fisheries Management Organizations and Advisory Bodies: Activities and Developments 200–2017′ (2020) *FAO Technical Paper* 651 1.

[5] 1982 United Nations Convention on the Law of the Sea, *1833 UNTS 33*.

[6] 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *2167 UNTS 3*.

[7] UNFSA Articles 5 *et seq*.

[8] For a comprehensive overview of the evolution of international fisheries law and the impact of the UNFSA and RFMO practice on prescription and enforcement, see F Orrego Vicuna, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, 1999).

[9] UNFSA Article 21.11.

[10] UNFSA Article 19.1(e).

[11] UNFSA Article 19.2.

[12] See McDorman 2005, footnote 3, pp. 427 & 428.

[13] FAO (2020), footnote 2, p. 14.

implementation.[14] For member States of the EU, there are added layers of complexity: although fisheries competences are shared between the EU and its member States, the conservation of marine living resources is an exclusive Union competence. Consequently, member States are represented by the EU in RFMO decision-making processes, but they exercise their enforcement power as States.[15] As individual States, they are both enabled and constrained in their actions by their domestic and constitutional systems. The intricacies that result from the interaction of the various global, regional and national legal frameworks can pose challenges for EU member State enforcement bodies in the determination of breaches and liabilities as part of domestic infringement procedures. Yet, the transnational nature of high seas fishing activity means that considering the interactions of the domestic and the international legal frameworks is of the essence, especially when enforcement results in the application of stringent sanctions on persons. The difficulties that can ensue are illustrated by two cases that took place in Spain in criminal law as well as administrative law contexts. Both examples serve as reminders of the importance that clarity, objectivity, and specificity in international obligations and measures can have for effective enforcement in the domestic domain, and also of the transcendence of national law, and in particular of constitutionally protected rights and principles.

3. Case studies

Two highly publicised studies occurred in Spain in the recent past that illustrate the discussion that follows on the difficulties of ensuring successful exercise of enforcement jurisdiction in high seas fisheries matters, in contexts where sanctions are likely to be evaluated by domestic courts. The first concerns a highly publicised case involving criminal law procedures, occurring in December 2016. Events saw the 'Tribunal Supremo' (Spain's uppermost court of law in non-constitutional matters),[16] delivering a decision in a case concerning fishing without authorisation carried out from three vessels, the Songhua, Yongding and Kunlun, for which individuals within the Spanish corporate group Vidal Armadores had been deemed responsible. Charges were raised in respect of conducts codified as criminal activities in the Spanish 'Código Penal' (criminal code). The principal charge involved offences against the protection of fauna, with secondary charges relating to infringements of prohibitions to participate in a criminal organisation, to falsify documents, and to engage in money laundering [García-Revillo 2017].[17]

The vessels had been intercepted in the marine area regulated by the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). At least one person of Spanish nationality was apprehended and imprisoned, and subsequently underwent lengthy criminal proceedings twice appealed until the matter reached its final stage at the Tribunal Supremo.[18] Although not the only issue raised by the Tribunal Supremo in the final appeal, the key argument upon which the case for the prosecution was finally dismissed concerned the criminal jurisdiction of the Spanish courts in respect of activities carried out in the high seas. As this issue in the case is linked with international obligations derived from a State's status as a contracting party to an RFMO, it is the focus of analysis in the discussion set out in Section 4.

The second case is linked to the high profile 'Operation Sparrow', which was conducted in two parts (Sparrow I and Sparrow II) by the Spanish government. These operations involved a number of dawn raids carried out at the premises of Spanish companies that were responsible for suspected illegal fishing activities in the regulated area of the CCAMLR [Rosello 2015] [Rosello 2016].[19] Sparrow I and II ended with administrative proceedings in which sanctions of unprecedented severity exceeding €17 Million were imposed on the companies based on a number of findings that were considered by the Secretaría General de Pesca (Fisheries Secretariat, from now on 'Secretaría') to amount to serious infractions. Two vessels identified during operation Sparrow II, the Antony and Norther Warrior, were apprehended in the port of Vigo during a subsequent operation, named 'Banderas', suspected of having relied on forged documentation to obtain fishing authorisations, and to access the port. Prior to its fateful entry in the port of Vigo, the Northern Warrior had lost its Curaçao flag, following a request for the vessel to be removed from the ship register due to cost considerations. From that moment on, the vessel had engaged in at least one fishing venture in waters under the jurisdiction of a West African state. The other vessel had lost its right to fly the Indonesian flag a few days before its arrival to Vigo. The vessels were subjected to bonds of over € 1 Million as condition for their release. The companies responsible for their operation were subsequently fined [Rosello 2019].[20]

The decisions taken by the Secretaría at the time were, as a punitive decision by a public authority typically in States observing separation of powers, susceptible to being challenged via judicial review. Indeed, fines imposed in respect of the operation of the two vessels were appealed before the Spanish 'Audiencia Nacional', a composite court with competence to hear appeals against public administrative decisions. Two of the appeals, of € 450,000 Euros, concerned fishing operations conducted whilst the vessels were stateless, were partially upheld [Rosello 2019].[21] This decision by the Audiencia Nacional is a cautionary tale in risks to the effectiveness of RFMO decision-making rules, and their importance to domestic implementing measures.

4. Discussion

Extraterritorial jurisdiction in respect of the criminal conduct of nationals outside of the State's frontiers is addressed first. Criminal jurisdiction is, according to Marshall, 'an emanation of sovereign power and thus closely tied to State territory' [Marshall 2003].[22] Doctrinally,

[14] By way of illustration, see M Rosello, V Schatz, and E van der Marel, 'Opinion on the Conformity of the European Union's Position with the UNFSA concerning the Conservation and Management of North Atlantic Shortfin Mako Shark at ICCAT' (2021) [accessed on 14 December 2021 via https://sfact.org/wp-content/uploads/2021/11/Mako-legal-opinion.pdf].

[15] Treaty on the Functioning of the European Union, Articles 3 and 4. Regulation 1380/2013 on the Common Fisheries Policy, Amending Council Regulations 1954/2003 and 1224/2009 and Repealing Council Regulations 2371/2002 and 639/2004 and Council Decision 2004/585/EC, 2013 OJEU L (354) 22.

[16] Tribunal Supremo, Sala de lo Penal, Sentencia No. 974/2016 (STS 5654/2016) [accessed on 7 December 2021 via https://www.poderjudicial.es/search/AN/openDocument/96a68f6ad7a24d99/20170109] (Tribunal Supremo).

[17] For a summary of the case and the various appeals culminating in the Tribunal Supremo decision, see M García García-Revillo, 'Falta de Jurisdicción de los Tribunales Españoles para conocer de Delitos contra el Medio Ambiente (Pesca IUU) cometido por españoles mediante Buques de Pabellón Extranjero en Alta Mar' (2017) 69(2) *Revista Española de Derecho Internacional* 345–352.

[18] *Ibid*.

[19] M Rosello, 'Operation Sparrow Brings an Important Message to the Fight against IUU Fishing' (2016) [accessed on 3 December 2021 via https://houseofocean.org/2016/03/21/operation-sparrow-brings-an-important-message-to-the-fight-against-iuu-fishing/], and M Rosello, 'Operation Sparrow: A Landmark in the Fight against IUU Fishing' (2015) [accessed on 3 December 2021 via http://www.iuuwatch.eu/2015/12/operation-sparrow-a-landmark-in-the-fight-against-iuu-fishing/].

[20] M Rosello, 'The need to reinforce RFMO regulation for effective domestic enforcement: the case of Operation Sparrow II' (2019) [accessed on 3 December 2021 via https://houseofocean.org/2019/07/01/the-need-to-reinforce-rfmo-regulation-for-effective-domestic-enforcement-the-case-of-operation-sparrow-ii/].

[21] Ibid.

[22] P Marshall, 'Part 7 of the Proceeds of Crime Act 2002: Double Criminality, Legal Certainty, Proportionality and Trouble Ahead' (2003) 11(2) *Journal of Financial Crime* 111–126, 113.

the jurisdiction of the criminal courts in the State of the subject's nationality is often established if the principle of double criminality is met: this means that the subject's conduct must be criminally punishable not only in the State of nationality, but also in the State where the act is committed (*lex loci delictii*) [van der Wyngaert 2000].[23] However, this principle does not apply to all cases. Typically, the exceptions will be cases involving the 'protection principle', namely the protection of key elements of the security of the State in question [van der Wyngaert 2000].[24] Further, certain cases can also escape the reach of the double criminality principle if they are characterised by particular gravity, or if the nature of the crime or category of person perpetrating it enables such exemption [van der Wyngaert 2000].[25] There are also exceptional cases where the conducts in question are sufficiently grave as to constitute international crimes, to which the double criminality principle does not generally apply in matters of extraterritorial jurisdiction [van der Wyngaert 2000] [Boister 2003].[26]

The conducts under judicial scrutiny in this case involved principally fishing without authorisation in an RFMO regulated area in the high seas, which by definition raises questions as to how the principle of double criminality is to be applied. The most obvious scenario is the vessel where the persons under the jurisdiction of the State of nationality are based. As previously mentioned, flag States have exclusive jurisdiction over vessels operating in the high seas and are obliged under Article 94.1 of UNCLOS to exercise it in administrative, technical and social matters occurring on board. In this case, the fishing operations had been conducted by individuals on board of the three vessels named above, which were at the time when the events took place flagged to Equatorial Guinea. Highlighting the important role of the flag States in jurisdictional matters in the high seas, the sole dissenting opinion in the Tribunal Supremo's ruling reasonably questioned why the criminal laws of that State had not been enquired into, so as to determine whether the principle of double criminality had been met.[27]

Logically, considerations of double criminality in respect of activities carried out on board of a fishing vessel by nationals of a State that is not the vessel flag State whilst it navigates or operates in the high seas should in principle involve the domestic laws of those two States first. It is nevertheless unclear whether such enquiry of the criminal laws of Equatorial Guinea might have resulted in the case for the prosecution being upheld, given the effect of another element in the doctrine: the States' criminal jurisdiction is rooted in and demarcated by sovereignty, and it therefore follows that its extraterritorial expression is exceptional [Boister 2003].[28] Hence, it appears that the double criminality principle may not necessarily be always met by seeking the *lex loci delictii* by reference to the domestic laws of the flag State. It seems likely that the activation of extraterritorial jurisdiction over criminal conducts by nationals through the principle of double criminality may often depend on the existence of international agreements specifying a positive legal basis for the exercise of criminal jurisdiction beyond the territorial limits of the State [van der Wyngaert 2000].[29]

With respect to the exceptions from the requirement of double criminality, in this author's opinion fishing activities are unlikely to fall into any of the previously mentioned excepted categories. Firstly, when it comes to the protection principle, fishing operations rarely threaten the security of the flag State or the State of nationality when they are illegal or unregulated. If anything, they can in some contexts externalise impacts to other States, posing a threat to their domestic security interests instead [Okafor-Yarwood 2020].[30] Secondly, unauthorised fishing in the high seas does not typically threaten human life and is therefore clearly distinguishable for purposes of legal typology from the egregious human rights abuses that have been documented to occur at times on board of fishing vessels [Environmental Justice Foundation 2010].[31] Such abuses may arguably be captured in the exceptions mentioned by van der Wyngaert (the particular gravity of the crime, its nature, or category of person involved, as previously highlighted).[32] In addition, unauthorised fishing activities of the type illustrated in this case cannot be considered international crimes as conceived in the Rome Statute of the International Criminal Court.[33] By contrast, activities of this type occurring at least in part in the high seas are typically transnational events. As such, they place international interests at risk, including interests protected by treaty, particularly the conservation and management of marine living resources in the high seas. As Boister indicates, 'purely national crimes can (…) be distinguished from transnational crimes because they are criminalized solely at the election of the state and are not initiated through international treaty' [Boister 2003].[34]

The protective effects of State jurisdiction can be suspended by international custom or agreement, and of particular interest are the extraterritorial jurisdiction considerations for drug trafficking set out in the UNCLOS. These considerations are relevant because unauthorised high seas fishing operations are often complemented by transportation activities during which the traceability, origin and/or value of the product are disguised or blurred,[35] and a such they have significant similarities with typical transnational crimes such as drug trafficking [Boister 2003] [Bueger and Edmunds 2020] [Rose and Tsamenyi 2013].[36] UNCLOS Article 108 addresses drug trafficking by stating that 'States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas *contrary to international conventions*' (emphasis added). Drug trafficking is identified as a transnational crime in the UN Convention Against Transnational Organized Crime (UNTOC).[37] This is not the case in respect of other activities such as unauthorised fishing or unauthorised transhipment, which form part of the typical fishing conducts associated to illegal or unregulated fishing events. Neither the UNCLOS, nor any of its global implementing treaties dealing with fisheries management and Illegal, Unreported, and Unregulated (IUU) fishing control, nor the principal RFMO treaties, contain provisions establishing the criminalisation of these activities.

If treaty is the logical basis for the criminalisation of damaging conducts occurring in the high seas that place legally protected

[23] C van der Wyngaert, 'Double Criminality as a Requirement for Jurisdiction' (2000) 76(5) *Nordisk Tidsskrift for Kriminalvidenskab* 43–57, 46 & 47.

[24] Ibid, p. 43 and 47.

[25] Ibid, p. 46.

[26] Ibid, p. 48. N Boister, 'Transnational Criminal Law?' (2003) 14(5) *European Journal of International Law* 953–976, 961.

[27] Tribunal Supremo, footnote 14, p. 12.

[28] See Boister, footnote 26, p. 964.

[29] See in respect of jurisdiction emanating from international solidarity, van der Wyngaert, footnote 23, p. 53.

[30] See I Okafor-Yarwood, 'The Cyclical Nature of Maritime Security Threats: Illegal, Unreported, and Unregulated Fishing as a Threat to Human and National security in the Gulf of Guinea' (2020) 13(2) *African Security* 116–146.

[31] See Environmental Justice Foundation, 'All at Sea – The Abuse of Human Rights aboard Illegal Fishing Vessels' (2010) [accessed on 10 December 2021 via https://ejfoundation.org/resources/downloads/report-all-at-sea_0_1.pdf].

[32] See van der Wyngaert, footnote 23, p. 46.

[33] Rome Statute of the International Criminal Court, UN document A/CONF.183/9, 2187 UNTS 90.

[34] Boister, footnote 26, p. 963.

[35] For a categorisation showcasing the common denominators, see 'crimes against mobility' in C Bueger, and T Edmunds, 'Blue Crime: Conceptualising Transnational Crime at Sea' (2020) 119 *Marine Policy* 1–8, 3.

[36] See Boister, footnote 26, p. 956; Bueger and Edmunds, Ibid;G Rose, and M Tsamenyi, *Universalizing Jurisdiction over Marine Living Resources Crimes, A Report for WWF International* (2013) pp. 42 & 47 (accessed on 23 June 2022 via ihttps://ro.uow.edu.au/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2261&context=lhapapers).

[37] 2000 United Nations Convention Against Transnational Organized Crime, 2225 UNTS 209.

international interests at risk [Boister 2003],[38] then typification of particularly damaging or repeated instances of unauthorised fishing and/or unauthorised transhipment would enable mutual recognition of offences amongst participating States. This would ensure that the principle of double criminality is observed and would also establish common procedures in order to address criminal conduct cooperatively and coherently. Nevertheless, the criminalisation of conducts associated to illegal fishing through treaty faces additional challenges, not only in the political context of aligning sensitivities and igniting multilateral efforts towards this end: it is also the case that any legal text intended to equate fishing activities associated to illegal fishing to a crime is likely to face obstacles related to legal certainty and by extension to legal security protection.[39] Firstly, it is a well-established principle that crimes must be clearly defined in the applicable law [Tulkens 2011].[40] The need for specificity in the definition of criminal offences means that it is not sufficient for an international treaty to state that a conduct must be treated as a serious infraction or violation to ensure that State parties address that conduct as a criminal offence. Criminal law is the most coercive of legal manifestations and carries the latent threat of suspending or permanently removing some of the most fundamental rights of individuals, including the right to liberty.[41] Accordingly, the deployment of criminal law by public authorities is by nature exceptional, and its role is deemed to be subsidiary to other types of law if they are also capable of protecting the juridical goods at stake [Tulkens 2011].[42]

It is self-evident that the legality principle implies minimum requirements of legal certainty and expressions such as 'IUU' fishing or fisheries crime are inadequate tools when what is required is a clear understanding of the specific conducts whereby a person or persons have breached applicable legal rules [Rosello 2021].[43] It is also self-evident that breaches capable of resulting in criminal sanctions are offences, which are committed by human beings and not by fishing vessels. Fishing vessels are just tools that human beings use to fish, transport and unload fishing products, and other related activities. Yet, paragraph 3 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU) refers to illegal and unregulated fishing as being *conducted by vessels*. This might be useful in certain functional contexts involving trade or surveillance, but less so when analysed from a criminal law perspective. Further, it detracts from the necessary attention that should be paid to the persons responsible for the specific conducts that must be legally described and categorised. Indeed, human conducts must be defined and categorised as criminal offences to ensure that policy makers and enforcement actors can identify those offences with confidence, and that once ascertained they can be acted upon as crimes through prosecution and criminal punishment.

Article 21(11) of the UN Fish Stocks Agreement (UNFSA), whilst not comprehensive, is a useful reference for the specification of conducts that State parties must address as serious infractions, including inter alia activities like fishing in the high seas without an authorisation, licence, or permit.[44] State parties are not, however, directed by this provision to treat serious infractions as criminal offences under their domestic law. Neither the UNCLOS nor the UNFSA contain a mandate for the criminal proscription of such activities in the high seas or for the extraterritorial exercise of criminal jurisdiction. In the case study previously presented, such mandate would need to have been made explicit in the CCAMLR convention, which did not provide it.

The legal certainty limitations associated to the lack of specificity in the text of international agreements are not exclusive to the application of criminal sanctions. The second case study, involving the judicial review of the administrative sanctions that followed the seizure of two of the vessels, is also illustrative of the importance of specificity in international legal texts for ensuring legal certainty at the domestic level. In this case, the Secretaría General de Pesca had relied as a justification for the determination of the sanctions on inter alia certain provisions in Spanish Law 3/2001.[45] Specifically, Article 101(1) specifies certain scenarios where fishing activities can be considered serious violations of Law 3/2001. Amongst these, activities concerning the operation, management and ownership of vessels without nationality, or vessels flagged to third countries identified by RFMOs or other international organisations as having participated in IUU fishing operations are classified as such. The Secretaría had relied on this provision, and further supported it with a presumption established in Council Regulation 1005/2008: Article 3.1(l) of the Regulation establishes that a 'fishing vessel shall be presumed to be engaged in IUU fishing if it is shown that, contrary to the conservation and management measures applicable in the fishing area concerned, it has: (…) (l) no nationality and is therefore a stateless vessel, in accordance with international law'.

Despite this, the above-mentioned fines were invalidated by the Audiencia Nacional. The procedural framework of CCAMLR as it was at that time framed this outcome. The wording of Article 3.1 of the IUU Regulation establishing a presumption of IUU fishing requires that it be shown that the presence of the stateless vessel in the regulated area 'is contrary to a conservation and management measure' of the RFMO in question. Article 101.1 of Law 3/2001 was by contrast silent on this point, and therefore interpretation required recourse to the directly applicable text of the EU IUU Regulation. Therefore, for the presumption to have effect, a relevant RFMO conservation and management measure would have had to be breached. However, this reference to a breach of RFMO measures results in an additional evidence requirement: the proof that the breach has taken place, for which a decision or statement adopted by the RFMO in accordance with its decision-making procedures is required.

Hence, on the one hand the operation, management, or ownership of a stateless vessel must have been formally identified by the relevant RFMO or similar organisation as an unauthorised fishing event for the certainty and specificity required for the imposition of sanctions at the national level. On the other hand, the wording of Article 3.1 of the IUU Regulation is *de facto* establishing an additional procedural layer to which the national administrative authority must resort if it is to operate with objectivity and within legal certainty parameters. Such layer also involves waiting for RFMO decisions to be taken, and some RFMOs can take months or even years to formally adopt measures. In this case, the lack of activation of the presumption occurred because the 'IUU' designation process established by the RFMO had not been fully completed at the time when the administrative sanction was imposed. In summary, the judicial decision invalidated the penalties imposed by the

[38] See Boister, footnote 26, p. 967.

[39] Legal security is a principle protected by Article 9(3) of the Spanish Constitution, alongside the principle of legality.

[40] F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577–596, 579.

[41] For a study on the difficulties of balancing the protection of human rights and enforcement at sea, see B Wilson, 'Human Rights and Maritime Law enforcement' (2016) 52(2) *Stanford Journal of International Law* 243–319.

[42] Tulkens, footnote 40, p. 582.

[43] M Rosello, *IUU Fishing as a Flag State Accountability Paradigm: Between Effectiveness and Legitimacy* (Brill Nijhoff, 2021) 9.

[44] 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3.

[45] Ley 3/2001, de 26 de marzo, de Pesca Marítima del Estado [accessed 3 December 2021 via https://www.boe.es/buscar/pdf/2001/BOE-A-2001–6008-consolidado.pdf].

administrative authority because it did not wait for such completion. The exhaustion of the RFMO procedure neutralises a possible conflict between a decision taken at the domestic level on the basis that a breach of an RFMO measure is demonstrable. A future decision is not fully predictable, particularly as an 'IUU' designation and ensuing listing can be prevented if there is a lack of support from contracting parties.[46]

Although regional treaty and related RFMO measures have been highlighted as strategically important options to promote the development of criminal measures to combat fisheries illegality,[47] the need for legal predictability for the imposition of sanctions at the domestic level can potentially be at odds with the *de facto* political nature of much of the activity that takes place in and through RFMOs. Although RFMOs have a formal role *de jure* under the UNCLOS and the UNFSA as fora in which international obligations to cooperate in the conservation and management of straddling and highly migratory resources are to be defined and implemented, they often function in practice as bargaining sites. RFMOs typically see States engage in negotiations to share marine stocks, but contracting party priorities and concerns feature prominently in such negotiations and this may not always be conducive to the legal certainty and objectivity that is required for the application of personal sanctions in domestic contexts, particularly where criminalisation is sought. However, the relationship between the international and the domestic domains is not one-directional. As Stølsvik indicates, the emergence of a drive to develop conceptualisations of fisheries crime also responds to the domestic initiatives of some States, such as Indonesia, Norway, and South Africa.[48] A comprehensive survey of national law responses to serious fisheries infractions in the high seas would serve inter alia to guide efforts to develop such conceptualisations in treaty law.

5. Conclusion

RFMOs have an important role to play in the implementation of international legal obligations established in the UNCLOS and its global implementing treaties in matters of fisheries conservation and management, particularly in respect of high seas highly migratory and straddling fishing activity. This role is not confined to the harmonisation of duties via the collective exercise of prescriptive jurisdiction , but also affects the exercise of extraterritorial enforcement. Of necessity, sanctions on persons must be imposed by States through the application of domestic law, irrespective of whether those sanctions are the result of criminal or administrative processes. In both contexts, the international legal framework can be instrumental in reinforcing as well as weakening the effectiveness of the domestic sanctioning mechanisms. The role of treaty law is likely to be important in the drive towards criminalisation of high seas fishing activities, as those activities may not otherwise attract extraterritorial criminal enforcement by some States. Even when a legal breach can be established, in some States the principle of double criminality must also be met. If the principle cannot be met by reference to both the law of the State of nationality and the law of the flag State in cases where the activities take place in the high seas, meeting the double criminality requirement may depend on appropriate reference to treaty law. Currently, the global UN treaty framework for the control of transnational crime does not include illegal fishing. Should RFMO treaty law be developed in the future towards the criminalisation of specific fishing activities, member States seeking criminalisation will need to address and overcome terminological uncertainties that can derive from broadly embraced managerial terms such as 'IUU' fishing.

The first case study presented here illustrates the desirability for the formulation of offences punishable through criminal law to be unambiguously made in global or regional treaty law, if the criminalisation of high seas fishing activities is sought. To ensure this outcome, international agreements will need to define clearly understandable actions with attributable human authorship with a high level of clarity and specificity. The second case study illustrates the need for specificity and objectivity in respect of the rules and measures adopted by RFMOs, in the context of the application of administrative sanctions. The illustrations also highlight the need to carefully consider the interactions between international, regional, and domestic legal rules to secure effective enforcement outcomes. The intricacies of rule interaction can be even more challenging for member States of the EU, for whom EU law must also be considered.

Although the scope of the case studies presented here is very limited, the doctrinal material used for analysis suggests that the legal features discussed here in the Spanish context are likely to be present in other legal systems. If so, efforts to minimise legal ambiguity and procedural elasticity guided by considerations of legal security are desirable. Further, enhancing international legal certainty would also in principle support the existing drive towards criminalisation in the protection of the marine environment and enhance the effectiveness of extraterritorial enforcement in matters concerning high seas fisheries. For this purpose in particular, developing appropriate global and/or regional treaty frameworks and explicitly defining criminalisation objectives and mechanisms is also desirable.

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[46] Z Scanlon, 'Safeguarding the Legitimacy of Illegal, Unreported and Unregulated Fishing Vessel Listings' (2019) 61 *International and Comparative Law Quarterly*, 369–389, 379.

[47] Rose and Tsamenyi (2013), footnote 36, pp. 9, 11 & 13.

[48] G Stølsvik, 'The Development of the Fisheries Crime Concept and Processes to Address it in the International Arena' (2019) 105 *Marine Policy* 123–128, 123.