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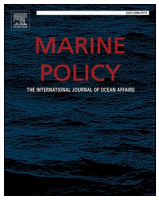

To criminalise or not to criminalise IUU fishing: The EU's choice☆

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ABSTRACT

The fight against the global phenomenon of illegal, unreported and unregulated (IUU) fishing is carried out through a wide variety of international, regional and national instruments, although its effectiveness is not sufficient in view of the results obtained. The search for the most effective solution is currently under way. Among the possible models to adopt, some countries, such as Norway and Indonesia, have advocated for the criminalisation of IUU fishing. The EU has also opted for a management-based model to combat IUU fishing that relies on administrative sanctions, also leaving its Member States the option of adopting criminal sanctions. Subsequently, in the proposed recast Directive on environmental crime, the EU has not recognised IUU fishing as an either an environmental or autonomous crime, unless it converges with transnational organised crime and other associated crimes in the fisheries sector. The EU has promoted its model in non-member countries, and has contributed towards paving the way to a level playing field which comprises the most authoritative set of international legal instruments on IUU fishing, both soft and hard, established by the UN and FAO. Nevertheless, discussions are ongoing on the need to reform EU legal instruments to better contribute to the sustainable use of marine resources in the 21st century in line with the UN Sustainable Development Goals as foreseen in the EU Green Deal.

1. Introduction

The fight against illegal, unreported and unregulated (IUU) fishing is carried out through a wide variety of international, regional and national instruments and procedures, but its effectiveness is not sufficient in view of the results obtained.[1] The global phenomenon of IUU fishing has constantly grown in recent years and seems unstoppable in face of ineffective measures adopted by states and international organisations.[2] Despite its impact on natural resources and livelihoods and its connections with fisheries crimes and other crimes, such as forced labour, human trafficking, fraud, money laundering and corruption, ([1] [2]), IUU fishing is still far from being recognised unanimously as a crime (be

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[1] An OECD report, which also incorporates data from the FAO, considers that "despite the efforts invested in the fight against IUU fishing, the problem persists and it is believed that each year more than 15% of global capture fisheries production is still taken illegally, or not accounted for in any statistics" (2018:17).

[2] As reported by Milieu, "[a]ccording to information material of the European Commission, based on 2009 estimations, IUU fishing practices represent approximatively 11–19% of the reported value of catches worldwide. There are a number of estimates of the annual loss of resources from such IUU fishing practices and an assessment of the methodologies to calculate these. UNEP and Interpol reported in 2016 an economic loss of around USD 11–23.5 billion a year worldwide based on data from 2003 to 2009. Other estimates of IUU fishing includes an annual 10–26 million metric tonnes of fish, with a value of up to USD 10 billion to USD 23 billion, and 12–28 million metric tonnes of fish at a value of USD 16–37 billion. While the mentioned limitations apply, this shows that the impact of IUU fishing is an issue of global scale" (Milieu 2021:65)[9,10].

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it an autonomous crime, or as part of environmental crime). The quest for the most effective international legal solution is at stake.[3] Among the possible models to adopt, some countries, such as Norway and Indonesia, have advocated for the criminalisation of IUU fishing.[4] Some authors have also favoured this solution ([3], De Conning 2016, [4], Schatz 2016 [5]) and have gone ever further, proposing the most serious cases be classified as ecocide[5] [6] or universalising jurisdiction over marine living resources crimes [7], in an attempt to generate a more forceful and effective response from states. The EU has also opted for a management-based model to combat IUU fishing that punishes infringements with administrative sanctions, also leaving its Member States the option of adopting criminal sanctions. The EU has promoted this model in non-member countriesº and has contributed to pave the way to a global level playing field made of the most authoritative set of international legal instruments, both soft and hard, on IUU fishing, established by the United Nations (UN) and the Food and Agriculture Organization (FAO). Nonetheless, discussions are ongoing on the need to reform EU legal instruments to better contribute to the sustainable use of marine resources in the 21st century in line with the UN Sustainable Development Goals, as endorsed in the EU Green Deal [8]. In the institutional debate and public consultation leading to the adoption of the proposal for a Directive on the protection of the environment through criminal law amending Directive 99/2008/EC, the possibility of making fishing offences a manifestation of environmental crime has also been considered. However, the long-awaited proposal presented by the European Commission on 15 December 2021 did not incorporated IUU fishing in its new list of environmental crimes. This choice reflects the fact that the European Union favours a management-based approach rather than the criminalisation of IUU fishing, which is an option it offers to its Member States in Regulation (EC) No 1005/2008 of 29 September 2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (hereafter Regulation on IUU fishing). This Regulation and the others that supplemented it[6] will be reviewed in the second half of 2022. Some of the proposed changes are in line with those of the Environmental Crime Directive since they seek to improve their enforcement and compliance by Member States.[7]

These reforms and the ways in which the EU is combating IUU fishing will be the subject of analysis in this article, once a definition of IUU fishing and fishing crime has been proposed as a starting point for reflection.

2. Defining IUU fishing and fishing crime

Defining IUU fishing (making it a criminal offence or just an administrative infringement and proposing appropriate sanctions to eliminate it) is not an easy task. Indeed, this definitional exercise is driven by the need to understand why IUU fishing has not yet been classified as an environmental or autonomous crime in the various international instruments adopted by the United Nations and FAO and, more recently, in the EU's proposal amending the Environmental Crime Directive. Certainly, there has been an evolution in the way states and international organisations have dealt with overfishing and illegal fishing. As Oral has pointed out, "[w]hile the concept of IUU fishing did not exist at the time of the 1982 Convention's adoption and does not expressly appear in the 1995 Straddling Fish Stocks Agreement (…), the latter does include important provisions on strengthening the role of regional fisheries management bodies and enforcement in particular" (2020:370). It was not until the adoption by FAO in 2001 [18] of the 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (IPOA-IUU) that a definition on the nature and scope of IUU fishing was provided in Section 3, distinguishing between illegal fishing, unregulated fishing and unreported fishing. Pons Rafols summarises the concept of illegal fishing as "any fishing which is carried out –whether by national or foreign vessels, whether in waters under state jurisdiction or not- in violation of state regulations or of the international rules established by RFMOs to regulate this fishing for these vessels or in these spaces" (2020:75). However, this complete definition that has been incorporated in the subsequent FAO legal instruments[8] does not characterise IUU fishing as a crime and

[3] The OECD therefore is of the view that "monitoring progress and identifying gaps in the adoption and implementation of recognised best policies and practices against IUU fishing will be key to maintaining momentum towards greater compliance with fisheries regulations and identifying priorities for action" (2018:17).

[4] As Ardhani [11] exposes "At the bilateral level, Norway has been the strategic partner of Indonesia to criminalize IUU Fishing. Letter of Intent on Marine Affairs and Fisheries Cooperation of the Indonesia Ministry of Marine Affairs and the Ministry of Trade, Industry, and Fisheries of the Kingdom of Norway signed in 2015 laid the foundation for such cooperation. In this Letter of Intent, Indonesia and Norway declared their commitment to work hand in hand by supporting each other in their effort to combat the transnational organized fisheries crime (TOFC) in international forums. The Letter of Intent was followed up by conducting several join events to raise awareness and understanding about the seriousness of TOFC, the High-Level Side Event of Transnational Organized Fisheries Crime (TOFC) in the 25th session of the CCPCJ in 2016 (Asydhad, 2016a). In addition, both countries have shown continuing support to the International Symposium on Fisheries Crimes" (2021: 172). At the regional level, Norway has partnered with the Caribbean countries to fight fishing crime (CRFM, CARICOM IMPACS 2022). See also the commitment made by the Norwegian government [12] in the context of the Oceans Action 18406 to fight transnational fisheries crime.

[5] Oral considers "It may thus be time to redefine IUU fishing as one of the most serious inter- national crimes affecting the international community as a whole, on par with crimes against humanity. The framing of environmental crimes in this context dates back to at least 1973, when the concept of ecocide (inspired by the 1948 Genocide Convention) was reflected in a draft convention proposed to the UNGA. The same premise was recently invoked in Pope Francis's call for ecocide to be codified as a fifth crime against peace in the Rome Statute. Indeed, the International Law Commission (ILC) had considered including environ- mental crimes in its Draft Code of Crimes against the Peace and Security of Mankind, the precursor to the Rome Statute. The ILC proposed a provision concerning individuals who "willfully" cause or order the cause of widespread long-term and severe damage to the natural environment" (2020: 375).

[6] Council Regulation (EC) No. 1006/2008 [13] on fishing activities in non-Community waters; Commission Regulation (EC) No. 1010/2009 [14,15], laying down rules for the implementation of Council Regulation (EC) No. 1005/2008 [16]; and Council Regulation (EC) No. 1224/2009 [17] establishing a new system of control, inspection and enforcement in the field of fisheries.

[7] The Council has accepted the revision of the sanctioning system (Articles 90–93 and Annexes III and IV), "Based on a large number of comments and intensive discussions in the Working Party and informal videoconferences of the members of the Working Party, the Presidency compromise proposes various changes to the Commission proposal. The compromise: provides for the possibility to use administrative and/or criminal sanctions, rather than administrative sanctions only (Article 89a(1) and 91a(5)) (…)", (Council of the European Union 2021:7–8).

[8] See FAO's 2010 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the 2007 FAO [20] Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.

does not impose criminal sanctions.[9] As Palma Robles points out, IUU fishing and fisheries crime "have a conceptual correlation and interconnection by default", but "they are distinct by scope and nature: IUU the former mainly entails fisheries management issues such as the extraction of marine living resources and falls with the focus of the FAO". On the other hand, "fisheries crime covers a whole range of criminal offences, such as document fraud, trafficking and smuggling related crimes, money laundering, etc., mainly perpetrated by organised crime groups, hence falls under the mandate of the United Nations Office on Drugs and Crime (UNODC)" [19]. The convergence of IUU fishing with organised crime,[10] human trafficking and forced labour is described as a "transnational criminal venture" (IOM 2016:3) that will require the application of the United Nations Convention against Transnational Organised Crime and the intervention of international institutions such as INTERPOL and the UNODC. These international institutions developed cooperation networks even before international legal instruments had been adopted specifically to combat illegal fishing.

In the absence of a definition of fishing crime in international instruments, it is necessary to refer to the domestic legal systems that may define fisheries crimes in a narrow way or, on the contrary, "covering all criminal offences committed within the fisheries sector" with the 'fisheries sector' referring to the entire value chain from vessel registration to sale [4]. However, despite the varying national criminal conceptions of fisheries crime,[11] most domestic legal systems define it as a crime that takes place in their territory and under their jurisdiction. As the Vidal Armadores case illustrates, states do not consider IUU fishing as a fishing crime due to the lack of criminal jurisdiction on the high seas and the impossibility of applying the principle of dual criminality inherent in state criminal law in a space beyond the jurisdiction of states. Therefore, the most serious cases of IUU fishing escape these requirements of national criminal systems. Furthermore, attempts to characterise IUU fishing as a situational crime that would take place once a vessel is in position to carry out fishing activities in an area managed by a Regional Fisheries Management Organisation (RFMO) without the required licence, lack the *mens rea* required by criminal codes, as well as the fact that it is costly and extremely difficult to prove. For this reason, administrative sanctions are considered most adequate to deal with this situational dimension of IUU fishing.

Thus, in order to qualify IUU fishing as a fishing crime, specific conditions relating to its transnational nature and its connection with other traditional crimes must be met in order to present this "criminal venture" as defined by INTERPOL before national courts. For this reason, when the conditions are not met and given the lack of characterisation of IUU fishing as an autonomous crime, the most appropriate mechanism for its sanction can only be a punitive administrative system. Paragraph 21 of the IPOA-IUU calls on states to "ensure that sanctions imposed on IUU fishing vessels and, to the greatest extent possible, on nationals under their jurisdiction, are sufficiently severe to effectively prevent, deter and eliminate IUU fishing and deprive offenders of the benefits derived from such fishing". This voluntary instrument does not recommend the adoption of criminal sanctions, but "the adoption of a system of civil sanctions based on a system of administrative sanctions". This is also the case for the set of instruments for the prevention, deterrence and elimination of IUU fishing, comprising FAO instruments and the management and conservation regimes of different regional fisheries organisations. Unfortunately, because of the poor commitment of most states involved, none of these international instruments have been effectively implemented and enforced, nor have the national plans that were designed to put the IPOA-IUU into action.[12]

However, as States have finally acknowledged, IUU fishing goes far beyond fishing crime and requires, that the circumstances that motivate and make it possible be taken into account in global and national strategies to combat it. In 2000, the report on IUU fishing presented by the FAO to the UN General Assembly leading to the adoption of the IPOA-IUU concluded that "the circumstances leading to IUU fishing are complex, but in one way or another they are often interrelated and economic in nature". It also noted that "a key consideration in addressing IUU fishing is the need for more effective flag state control", adding as "other considerations that can contribute to IUU fishing include the existence of fleet overcapacity, payment of government subsidies (when maintaining or increasing capacity), strong market demand for certain products, and ineffective monitoring, control and surveillance" [22]. More than two decades later, these are still the prevailing circumstances and drivers of IUU fishing, coupled with the high profitability of these activities and the low risk of detection and prosecution, characteristics that IUU fishing shares with wildlife crime [2]. The IPOA's definition of IUU fishing has served to develop a constellation of different measures in order to address the many faces of this multifaceted phenomenon. For instance, the World Trade Organisation refers to the IPOA-IUU definition in its draft for negotiations to end fisheries subsidies (WTO 2021, [23]) that is supported by the EU in its attempt to achieve Sustainable Development Goal 14.[13]

Taking environmental crime seriously was a proposal put forward by the United Nations General Secretary that had an echo in several General Assembly Resolutions in 2015 and 2016, encouraging states to

[9] The Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas gives freedom to its parties when it states in its Article III.8 on Flag State Responsibility that "Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas", https://www.fao.org/documents/card/en/c/8cb30770–3145–55ed-a0db-315cbbb722a6 [21].

[10] The modus operandi was already described in an organised crime threat assessment conducted by UNODC in 2010, which traced the human smuggling routes used by fishing boats transporting migrants from Egypt to Italy and embarking and disembarking on the open sea, using small boats.

[11] Indonesia considers as "serious criminal offences [when] illegal fishers violate numerous laws, from deactivating the transmitter, using prohibited and destructive fishing gear, illegal transhipment, forging vessel documents and the logbook" (OIM 2016: xii).

[12] With respect to OECD countries, it has been shown that "[l]ack of universally implemented dissuasive sanctioning schemes continues to create loopholes that IUU fishing operators can exploit. For instance, while all the OECD countries surveyed have regulations on the prevention of money laundering that in principle cover the proceeds from IUU fishing, only 26% reported that their regulations specifically considered IUU fishing as a predicate offence for money laundering. Co-ordination between fisheries agencies and tax authorities is only occurring in 26% of the OECD countries surveyed. And only 70% of participating OECD member countries reported they had a specialised task force or inter-agency group convened specifically for the purpose of fighting IUU fishing. This diminishes the effectiveness of existing legislation and does not facilitate the pursuit of related crimes such as money laundering. Further, prosecution of IUU fishing violations could be easier if vessel registration systems required information about the beneficial owners of vessels. In 2016, this was the case in only about half of the OECD countries surveyed for vessels fishing on the high seas, and even less (39%) for vessels fishing in domestic waters (…). In addition, in 20% of the OECD countries surveyed, fishers who do not abide by the law still have access to public support (…)" (2018:11).

[13] The EU Biodiversity Strategy expressly establishes "zero tolerance towards illegal, unreported and unregulated fishing and will combat overfishing, including through WTO negotiations on a global agreement to ban harmful fisheries subsidies. [24]0)".

criminalise the most serious attacks on nature. The UN Security Council also considered some of these manifestations as a threat to international security [25]. However, the possibilities of intervention have been limited by the available means. Thus, the mandate of EU Operation Atalanta to control piracy on the coast of Somalia, based on the Security Council Resolutions, "was reformed to introduce as a new task to control illegal fishing". Apart from its deterrent effect on vessels dedicated to IUU fishing, "the EU forces have no tools to face those activities" [26].

So far, no progress has been made towards a globally accepted definition of environmental crime or fisheries crime. The EU has tried to promote the fight against environmental crime before the UN, but its position has not been shared by third countries that "consider this to be unclear and that believe it could interfere with their policy of exploitation of their natural resources" (Fajardo 2016). On the other hand, the EU and several of its Member States, including Spain, adopted the position of not considering IUU fishing as a crime (as an autonomous crime, as part of ''environmental crime'' or ''wildlife crime'') in the framework of the 13th United Nations Congress on Crime Prevention and Criminal Justice, held in April 2015 in Doha, organised by UNODC (EFFACE 2016). The EU has adopted the same position in subsequent meetings and conferences organised by UNODC and INTERPOL (EFFACE 2016) and in the latest resolutions adopted by the United Nations General Assembly and by the FAO, all of which reinforce the idea that improved management through cooperation is the best available solution (UNGA 2020, 2021a[14]). In Resolution 76/181 of 16 December 2021 on the 14th United Nations Congress on Crime Prevention and Criminal Justice, the General Assembly endorsed the *Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development* which, rather than including a definition of environmental crime, continues to refer to crimes that affect the environment, as in previous resolutions (UNGA 2021b) [27].[15] From different positions, Norway and Indonesia have supported the continuation of these meetings where they have advocated for the criminalisation of IUU fishing, especially when it is linked to transnational organised crime.[16] The United States combines both models of sanctioning, with over 130 cooperation agreements with third countries that facilitate cooperation in enforcement and criminal prosecution (NOAA 2015).

3. The proposal for a Directive on the protection of the environment through criminal law amending Directive 99/2008/EC

The original Directive 99/2008/EC on the protection of the environment through criminal law does not incorporate IUU fishing among the crimes listed in Article 3. During the process of recasting this directive, the Commission "has identified a need for criminal sanctions to ensure the effective implementation of EU policies on protection of the environment, in relation to [new] offence categories currently not covered by the Directive" (European Commission 2021,[29]). Thus, "[t]he Commission has acknowledged that crimes like illegal deforestation, water, air and soil pollution, traffic in ozone-depleting substances, poaching, overfishing and other offences heavily damage biodiversity, harm human health and destroy whole ecosystems". This situation led the Commission to discuss the possibility of adding new types of environmental crime in Article 3 such as overfishing or illegal deforestation.[17] Finally, new types have been incorporated in the proposal which includes illegal water abstraction, but not IUU fishing. However, some of these new categories of offences are not just a response to the "unclear definitions used for the descriptions of environmental criminal offences, which may hinder effective investigations, prosecutions and cross-border cooperation" [30]. Some of these actions could have been criminally prosecuted in national legal systems under the umbrella types

[14] The most recent resolutions of the General Assembly have reiterated: 83. *Urges* States to effectively exercise jurisdiction and control over their nationals, including beneficial owners, and vessels flying their flag, in order to prevent and deter them from engaging in illegal, unreported and unregulated fishing activities or supporting vessels engaging in illegal, unreported and unregulated fishing activities, including those vessels listed by regional fisheries management organizations or arrangements as engaged in those activities, and to facilitate mutual assistance to ensure that such actions can be investigated and proper sanctions imposed;84. *Encourages* States that have not yet done so to establish penalties for non-compliance by vessels involved in fishing or fishing-related activities and their nationals, as appropriate, in accordance with applicable national law and consistent with international law, that are adequate in severity for effectively securing compliance, deterring further violations and depriving offenders of the benefits from their illegal, unreported and unregulated fishing activities; [28]0).178. *Encourages* the development of regional guidelines for States to use in establishing sanctions for non-compliance by vessels flying their flag and by their nationals, to be applied in accordance with national law, that are adequate in severity for effectively securing compliance, deterring further violations and depriving offenders of the benefits deriving from their illegal activities, as well as in evaluating their systems of sanctions to ensure that they are effective in securing compliance and deterring violations, [28]3).

[15] In the section dedicated to Promoting international cooperation and technical assistance to prevent and address all forms of crime, the States assembled at the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice in Kyoto, Japan, from 7 to 12 March 2021, adopted the Kioto Declaration that say: *We therefore endeavour* to take the following actions: 87. Adopt effective measures to prevent and combat crimes that affect the environment, such as illicit trafficking in wildlife, including, inter alia, flora and fauna as protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, in timber and timber products, in hazardous wastes and other wastes and in precious metals, stones and other minerals, as well as, inter alia, poaching, by making the best possible use of relevant international instruments and by strengthening legislation, international cooperation, capacity-building, criminal justice responses and law enforcement efforts aimed at, inter alia, dealing with transnational organized crime, corruption and money-laundering linked to such crimes, and illicit financial flows derived from such crimes, while acknowledging the need to deprive criminals of proceeds of crime. (UNODC 2021)

[16] See footnote 4. Norway has supported INTERPOL programs on fisheries crimes, stating "(…) that Norwegian support through Norad to INTERPOL has encouraged cooperation between industrialised countries and developing countries. The support has produced concrete results in the fight against fisheries crime and crimes related and/or connected to the fisheries sector" (INTERPOL2021:19).

[17] The following DGs and services participated in the Inter-Service Steering Group that discussed the reform of the Environmental Crime Directive: Environment (ENV), Migration and Home Affairs (HOME), European anti-fraud office(OLAF), Mobility and Transport (MOVE), Maritime Affairs and Fisheries (MARE), Climate Action (CLIMA), Energy (ENER), Health and Food Safety (SANTE), Internal Market, Industry, Entrepreneurship and SMEs (GROW) International Cooperation and Development (DEVCO), the Legal Service (SJ) and the Secretariat-General (SG).

that encompass serious violations of administrative provisions. The need to criminalise these serious violations is not justified by the shortcomings of the definition of environmental crime[18] or the wording of the current offences, but rather by the need to highlight the lack of implementation and compliance with existing administrative rules adopted to transpose EU environmental legislation ([31-33], Milieu 2021a, 2021b). The stigmatisation of serious violations of environmental regulations through criminalisation is not an end in itself but a means to raise awareness of the serious problem of environmental crime, which is used both for punishment and prevention, making the phenomenon of environmental crime visible to an as yet unaware society. This is clearly the case with the new offences of water abstraction or illegal forestry. These are problems shared by EU environmental legislation and the Common Fisheries Policy. However, the latter case is dealt with by means other than criminal law.

The proposal for an Environmental Crime Recast Directive has been presented following a parallel process of scrupulous evaluation of the achieved results by the European Commission and the Member States. In both cases, the final assessment points to a lack of "effect on the ground" in bringing about a better protection of the environment through criminal law ([34], Council of Ministers 2019). Although the measures adopted by the EU Member States should have led to an improvement in the state of environmental protection, the evaluation carried out by the European Commission shows that the number of cases and convictions has not grown in proportion to the number of offences ([24], European Commission 2021).

During the long period of elaboration of this proposal, different reasons have been considered for adopting the final option reflected in paragraph 6 of the preamble of the proposal that states:

"6. Member States should provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Union law concerning protection of the environment. In the framework of the common fisheries policy, Union law provides for comprehensive set of rules for control and enforcement under Regulation (EC) No 1224/2009 and Regulation (EC) No 1005/2008 in case of serious infringements, including those that cause damage to the marine environment. Under this system the Member States have the choice between administrative and/or criminal sanctioning systems. In line with the Communication from the Commission on the European Green Deal and the EU Biodiversity Strategy for 2030, certain intentional unlawful conduct covered under Regulation (EC) No 1224/2009 and Regulation (EC) 1005/2008 should be established as criminal offences."

The reasons for the differentiation made between responses to "serious infringements of provisions of EU law relating to the protection of the environment" and those committed "in the framework of the Common Fisheries Policy" relate both to the nature of the competence conferred upon the EU in relation to these policies - environment and fisheries - and to the context in which the infringements occur. However, the fight against IUU fishing has reached the category of horizontal political priority as recognised by the Green Deal proposed by the European Commission and endorsed by the European Parliament and Council of Ministers [8] that promises that "work will continue under the common fisheries policy to reduce the adverse impacts that fishing can have on ecosystems, especially in sensitive areas (p. 13)" and that "[t]he Commission will also take a zero-tolerance approach to illegal, unreported and unregulated fishing. (p. 14)". The Biodiversity Strategy for 2030 has determined that "[i]n all of its international cooperation, the EU should promote sustainable agricultural and fisheries practices and actions to protect and restore the world's forests" ([24]b:22). [19]

3.1. *The nature of the competence conferred upon the EU in the framework of the Common Fisheries Policy and the Environmental Policy*

The competences conferred upon the EU in its foundational treaties to protect the environment and marine resources vary in nature, which conditions their exercise and the scope of the measures that can be adopted.

In the case of the shared competence in environmental matters, the choice of criminal law to combat non-compliance makes it necessary for the response to be articulated in the form of a directive that advances towards the harmonisation of the national criminal laws of the Member States. The need to resort to criminal sanctions to protect the environment was first justified and accepted by the jurisprudence of the European Court of Justice that allowed the adoption of the Environmental Crime Directive. The European Court of Justice settled the conflict between the Member States and the Commission on the legal basis to be used for its adoption and the scope of the foreseen sanctions. In its case on *Environmental Crime* the Court resolved the conflict between Denmark's Framework Decision 2003/80 adopted under the Third Pillar of the EU Treaty and the Commission's proposal on the same topic under the First Pillar, acknowledging that "Criminal law and procedures are in principle (.) not within the sphere of competence of the Community. However, the latter finding cannot prevent the Community legislator, when the application of effective, proportionate and deterrent penalties by the competent national authorities is an essential measure for combating serious environmental offences, to take related measures considering the criminal law of the Member States and which it considers necessary to ensure the full effectiveness of the rules" [35,36]. After the Lisbon Treaty, it can be considered that the *acquis communautaire* has configured the environmental competence as including criminal actions for the enforcement of the instruments adopted in the framework of its legislative development.

The Environmental Crime Directive and the national measures that Member States have adopted to transpose it have not addressed the problem of overfishing in "distant waters"; however, they have been applied to illegal fishing affecting endangered species such as the European glass eel or sport fishing during the seasonal closure period that would jeopardise the viability of a species in a given ecosystem [37]. The proposed changes to improve the effectiveness of the Environmental Crime Directive - while respecting the principles of subsidiarity and proportionality - would not provide the coverage required for IUU fishing, as it does not extend jurisdiction to offences with no personal

[18] The European Commission has considered that "Regarding the definition of crime, it would not be possible to define vague terms more precisely in the Directive or in soft-law. There would always be room for different interpretations. There are examples of negative consequences of different interpretations for cross-border cooperation. (…). After all, cross-border cooperation does not depend so much on the text of legislation but on proper law-enforcement and people. One participant draw the attention to poor implementation of sectoral rules in some Member States. (…) The Commission should assume more responsibilities to use its possibilities to make Member States not only to transpose EU sectoral legislation but also to implement it in practice", [34]88).

[19] *EU Biodiversity Strategy for 2030. Bringing nature back into our lives* has as one of its goals the presentation of the European Commission of "a new action plan to conserve fisheries resources and protect marine ecosystems by 2021. Where necessary, measures will be introduced to limit the use of fishing gear most harmful to biodiversity, including on the seabed. It will also look at how to reconcile the use of bottom-contacting fishing gear with biodiversity goals, given it is now the most damaging activity to the seabed. This must be done in a fair and just way for all. The European Maritime and Fisheries Fund should also support the transition to more selective and less damaging fishing techniques". [24], p. 11.)

connection to the EU (Art. 12 of the proposal).[20] The added provisions on confiscation are also available in the punitive administrative system.

Despite the agreement of EU institutions and Member States on the protection of the environment through criminal law, the implementation of the Environmental Crime Directive in the Member States has exposed a wide spectrum of problems related with the environmental rule of law: the quality of the design of the laws, policies and governance at the service of compliance of environmental law, the lack of resources, the lack of intelligence data to design prevention strategies for detection and prosecution, the lack of specialised law enforcement agencies, etc. Moreover, protecting the environment is a shared task of administrative and criminal laws and administration and law enforcement agencies that require a multilevel system of norms and multi-layered governance [33]. This has been recognised in the proposal to recast Directive on Environmental Crime, which states:

> "To ensure an effective, integrated and coherent enforcement system that includes administrative, civil and criminal law measures, Member States should organise internal cooperation and communication between all actors along the administrative and criminal enforcement chains and between punitive and remedial sanctioning actors. Following the applicable rules, Member States should also cooperate through EU agencies, in particular Eurojust and Europol, as well as with EU bodies, including the European Public Prosecutor's Office (EPPO) and the European Anti-Fraud Office (OLAF), in their respective areas of competence (para. 30.)"

In the case of the EU's exclusive competence for the protection of fisheries resources as it is the case of the Common Commercial Policy [39], the Common Fisheries Policy has not incorporated in its acquis a mirrored competence in the area of criminal law. Politically, a proposal asserting the EU's exclusive competence in the criminal field to impose common sanctions in an area of exclusive competence, such as the one which includes IUU fishing, would have been unacceptable to Member States; particularly as EU fisheries ministers have repeatedly refused to support strong proposals for the EU fishing fleet in non-EU waters (EU Reporter 2016). The various studies that have been carried out on sanctions in the fisheries sector have shown that Member States prefer to maintain different types of measures in addition to those provided for by European legislation (Blomeyer & Sanz 2014, Milieu 2021a, 2021b). Thus, "almost all Member States (all except Ireland, Lithuania and Poland) provide for both administrative and criminal sanctions in their national laws. The others have only criminal sanctions (Ireland) or administrative sanctions (Lithuania, Poland, Slovenia). However, in practice, administrative sanctions are much more commonly used in almost all Member States (all except Belgium, Ireland, Malta and the Netherlands where criminal sanctions are more common)" (Milieu 2021a:66). Despite these different national approaches, the exclusive competence has allowed to develop a common system based on control and management by the European institutions and the Member States, which provides for administrative sanctions that can be complemented by criminal sanctions by the Member States if they so decide, as provided for in Article 44[21] of the Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, which lists certain behaviours as serious infringements. Thus, it has highlighted that "for this category of infringements, Article 44(2) of the Regulation provides for an approximation of the maximum levels of administrative fines foreseen in relation to serious infringements, requiring Member States to impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement" [34].

As shown in the FAO report presented in 2013 on the administrative sanction systems adopted by states in response to the IPOA-IUU, the advantages of using administrative sanctions outweigh those of using criminal sanctions. Along the same lines, the European Commission has considered that "unlike criminal sanctions, administrative sanctions can be imposed and enforced more rapidly (without any risk of prescription due to the length of proceedings), and require a lower standard of proof for sanctioning fisheries offences". Moreover, an administrative sanctioning system does not necessarily imply the application of lower monetary sanctions as proved by the examples of Spain and Cyprus ([34], Milieu 2021a, 2021B).

3.1.1. *The different contexts of environmental crimes and IUU fishing*

Environmental crime and IUU fishing have very different territorial, legal and economic contexts, but what both have in common is the lack of a globally accepted definition in a binding legal instrument, as discussed in Section 2. The environmental crime addressed by the Environmental Crime Directive takes place on European territory. In the case of the Common Fisheries Policy, the external dimension of most cases of IUU fishing has conditioned the context of the proposed framework to combat it. Existing soft law instruments adopted by the UN, FAO, IOM, ILO and international institutions such as INTERPOL or UNODC[22] only attempt to make the gravity of both problems visible from a transnational perspective, contributing to a rule of law for ocean governance. The European Commission has favoured the EU's involvement in the global fight, raising the bar of these instruments, converting them into common obligations for the Member States and promoting compliance through the different instruments of its external policies [40].

Regarding the economic context of IUU fishing, the EU has used its leverage as the biggest importer of seafood in the world to apply its IUU Regulation beyond its borders and promote a worldwide coalition to fight IUU fishing. The common control and management system of the Regulation on IUU fishing is applied in this context, in which different manifestations of fisheries-related crimes, such as forced labour human

[20] A different issue is the EU position on flag, coastal, port or market state liability, which cannot be dealt with in this paper but which was reflected in the written statement presented to the International Tribunal for the Law of the Sea by the European Commission on behalf of the European Union in 2013 and that was summarized in its paragraph 79 "The IUU Regulation thus provides, in the Union legal order, a complete and detailed framework for assessing whether the "liability" - in the broad meaning which is adopted in the practice of the fight against IUU fishing as discussed in point 60 and 61 above - of the State in question is engaged. The system established by the IUU regulation is designed to ensure that such a liability is engaged only by systemic failures of the States in fighting against IUU fishing as flag, coastal, port or market State", See reference [38], p. 435.

[21] Article 44 of the IUU Regulation stablishes the "Sanctions for serious infringements:1. Member States shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions.2. The Member States shall impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement.In case of a repeated serious infringement within a five-year period, the Member States shall impose a maximum sanction of at least eight times the value of the fishery products obtained by committing the serious infringement.In applying these sanctions the Member States shall also take into account the value of the prejudice to the fishing resources and the marine environment concerned.3. Member States may also, or alternatively, use effective, proportionate and dissuasive criminal sanctions.

[22] Thus, for example, UNODC [41,42] has contributed to international cooperation against organised crime by developing legislative guides for States on fisheries crime [43].

trafficking, laundering of both species and money[23], corruption and organised crime may occur. This context may also involve different jurisdictions along the fisheries production chain and requires close cooperation with third states and international fisheries organisations, as well as national and international law enforcement agencies such as INTERPOL.[24] As former Commissioner Karmenu Vella stated, it is this transnational context of the global phenomenon of IUU fishing that requires "an active multilateral approach and a flexible system of cumulative sanctions" that would allow that when "fisheries offences are linked to crimes, such as trafficking of people or weapons, the relevant United Nations Conventions [are applied] on top of the fisheries sanctions "([44]:2). Thus, the specific treatment reserved for IUU fishing in the preamble of the proposal for a recast Environmental Crime Directive only reflects EU practice in the global context, since in 2010 it declared war on IUU fishing.

The EU has negotiated fisheries agreements with third countries all over the world to meet the fishing needs of its Member States, in particular those of Spain and France. The Sustainable Fisheries Partnership Agreements result from the evolution of the EU's fisheries treaty practice (Sobrino & Oanta 2015, [40]). These agreements offer a common response to IUU fishing based on the respect of the sovereign right of third states to decide[25] on the convenience or not of imposing administrative and/or criminal sanctions on IUU fishing activities committed in their waters -as in the case of Article 44 of the IUU Regulation. For this purpose, a clause was included as in the case of the agreement with Liberia, now under the status of dormant agreement. This has been the fate of many of these agreements that have not had the foreseen success and have been criticised for not sufficiently considering the interests and problems of developing countries (Van den Bossche and Van der Burgt 2009). Some of these problems are not due to the deficient resources and weak governance of developing countries but to the practices of Member State corporations, such as the reflagging of vessels, which allowed to increase the number of fishing vessels when it should be reduced in order to achieve sustainability. Development cooperation was also conditional on adherence to and improvement of national legal and institutional systems in line with the rule of law of the oceans inspired by UN and FAO soft and hard law instruments, but there has been an endemic compliance deficit.

Despite the fact that environmental crime and IUU fishing are both growing global phenomena driven by the same factors of high profits and low risk of detection and prosecution, the management and control system of the Common Fisheries Policy has achieved an autonomy that will be undermined if the improvement of the punitive system has to depend on the adoption of a common definition of IUU fishing crime in the EU, given that there is no common understanding among Member States. In this case, Article 83.1 of the Lisbon Treaty prescribes unanimity regarding the establishment of "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". Moreover, according to the preamble of the proposal of the recast Environmental Crime Directive, the EU will have to ensure that "certain intentional unlawful conduct [is] made a criminal offence"; this means that *mens rea* will have to be proven, which is particularly difficult when many cases of illegal fishing could be situational rather than intentional.

4. Vidal Armadores as an example of the difficulties in sanctioning IUU fishing criminally or administratively

In March 2016, a joint operation led by the Spanish Police for the Protection of Nature (SEPRONA) and INTERPOL resulted in the arrest of six people linked to the fishing company Vidal Armadores. The company had long been connected to illegal fishing cases, and international cooperation finally led to high-profile captures of the group of toothfish poaching vessels: Kunlun, Songhua and Yong Ding [47]. Despite the criminal charges against the owners of Vidal Armadores being dropped, the administrative fines and suspensions placed on associated companies and individuals reportedly remain unaffected, as will be analysed in other articles of this monographic volume.

The ruling of the Spanish Supreme Court that closed the case against Vidal Armadores for crimes related to the fishing sector such as counterfeiting, money laundering, organised crime and the environmental crime of illegal fishing in high seas (Spanish Supreme Court 28.12.2016) showed the difficulties in sanctioning IUU fishing. This ruling also generated reactions insofar as it undermined the development of the rule of law for the oceans and served for the European Commission to reaffirm its model of administrative sanctions.

The judgment declared that the Convention for the Conservation of Antarctic Marine Living Resources was not a sufficient legal basis to criminally proceed against Vidal Armadores. It also refused to apply the principle of personality of criminal law, since the principle of double criminality was not applicable to vessels with a flag of convenience owned by Spanish nationals [48]. Unlike drug trafficking, which can be prosecuted in international waters as it is considered in the interest of the international community, IUU fishing would not be subject to criminal proceedings in this area as it is not classified as a crime in the relevant international conventions.[26] This is one of the reasons why the EU and also UNDOC and Interpol have prioritised the traditional crimes associated with IUU fishing in order to facilitate conviction [25].

Over the past decades, Vidal Armadores, its owners and associated companies have received a number of criminal and administrative sanctions in Spain, as well as in the United States of America and other countries over three continents. However, none of those measures were as significant as the 17.8 million € administrative fine imposed by the Spanish Ministry of Agriculture, Environment and Food in 2015 and ratified in March 2016 to control illegal fishing of Patagonian toothfish. The complexity of Vidal Armadores scheme shows how organised crime flourishes in a legal market, in competition with legal operators for resources as well as subsidies received from the EU, the Spanish Government as well as from the Autonomous Community of Galicia. These subsidies would have been profitable in laundering illegal fish of illegal origin to turn it into omega 3. Species laundering is –as in the case of

[24] The Commission cooperates with INTERPOL to combat IUU fishing since in 2013, when it became an observer in the Fisheries Crime Working Group set up under INTERPOL's Environmental Crime Programme [46]. Together with Member States, the Commission supports the INTERPOL's Project SCALE, a global initiative to detect, suppress and combat fisheries crime, which was initially funded by the Bank of Norway Trust Fund, supporters of criminalisation.

[23] See Telesetsky 2014 [45].

[25] As the UNODC recalls "It is important to note that, however egregious the aggravating circumstances in IUU fishing may be, offences occurring specifically in an Exclusive Economic Zone (EEZ) as opposed to territorial waters are highly unlikely to be dealt with as "serious crime" (as defined by UNTOC). This is due to UNCLOS Art. 73.3, which emphasizes that "coastal state penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment". In territorial waters, however, disputes related to IUU fishing practices are regulated by the domestic legal framework of the coastal state, which may include the use of both administrative and criminal justice measures" (2020:4).

[26] In contrast to the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides a specific rule on criminal jurisdiction in the case of interception of suspected vessels on the high seas, the Palermo Convention and the Protocol against the smuggling of migrants, while they include a very similar rule for intervention in international waters, they do not include any special norm on the establishment of criminal jurisdiction in relation to offences committed outside the national territory (Digest p. 31).

crimes against nature– one of the main problems in order to provide evidence [25]. In the years leading up to its fall, Vidal Armadores had been convicted in the United States, in 2004, where Antonio Vidal Pego was condemned for obstruction of justice in a National Oceanographic Atmospheric Administration case (NOAA), after pleading guilty under Chapter 18 of the USA Criminal Code. The 4 year prison sentence was suspended on condition that he paid a fine of $400,000 in instalments over 4 years and he was also prohibited from carrying out fishing activities in the future. Furthermore, his shell company was ordered to pay an identical fine and was dissolved. The fines and the dissolution of the company, which is one of the most feared consequences of a criminal sanction, had no deterrent effect and only led Vidal Shipowners to move to waters where legal systems and law enforcement are weaker and offer more opportunities for crimes.

5. Conclusions

The disappointing results obtained with the implementation and enforcement of the Environmental Crime Directive have made it inadvisable to choose it as the next step in the fight against IUU fishing. Against this background, the solution eventually adopted was to leave IUU fishing out of the new list of environmental offences and to strengthen the instruments of the Regulation on IUU fishing through a reform that will take place in the first half of 2022 and that may also provide for criminal sanctions in addition to existing administrative sanctions in particularly serious cases (Council 2021).

From an international law point of view, IUU fishing and crimes in the fisheries sector are still being defined by soft law instruments that are raising normative expectations about the way States may address them, rather than prescribing obligations to incorporate criminal offences in their legal systems. In response to calling the UN and FAO to eradicate IUU fishing, the EU fights against it with administrative sanctions that will "deprive offenders of the benefits derived from their illegal activities" ([49], para. 7). The EU, as a normative power of the ocean's governance, plays an important role in the foundations of institutional and inter-state cooperation. The EU has paved the way for a multi-regulatory approach to the fight against IUU fishing based on a regime of management and control of fishing activities whose infringements are punishable by administrative sanctions. Criminal sanctions should only be proposed as a last resort when other fisheries-related crimes are involved, such as forced labour and human trafficking under the umbrella of transnational organised crime. The proposal for the revision of the Environmental Crime Directive also establishes the requirement of intent in IUU crimes, which would prevent what in practice would only be situational infringements from being considered as criminal offences.

The EU has promoted responsible fishing thanks to its market-based system that makes trade in fishing products conditional on the adherence of non-member states to UN and FAO main instruments. With this "blue conditionality", which contrasts with the green conditionality that promotes sustainability and environmental protection, the EU has led more than 30 countries to improve their fisheries management systems. Although this system is not free from criticism regarding its lack of transparency (Marques-Banqué 2020), its limited control of the EU fleet in developing countries and the EU's excessive fishing capacity is at the heart of the overexploitation of resources.

As the former commissioner Carmenu Vella stated regarding the role of the EU to combat IUU fishing, "[this] is not a fight the EU can win alone, which is why multilateral cooperation is part and parcel of our work. Promoting regional solutions is equally essential. Within the EU we have learnt that sharing resources for control and harmonising legal responses to IUU offences is the only way to effectively fight this scourge" [44,50].

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Conflict of interest

none.

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