

FISHING FOR SOLUTIONS:

Criminalisation of IUU Fishing through Suppression
Conventions at Global and Regional Levels

FISHING FOR SOLUTIONS:

Criminalisation of IUU Fishing through Suppression
Conventions at Global and Regional Levels

ANDREA ALBERT STEFANUS

© 2021 Andrea Albert Stefanus

All rights reserved. No part of this book may be reproduced in any form, by any means, without prior written permission from the author.

This research was funded by the *Lembaga Pengelola Dana Pendidikan* (Indonesia Endowment Fund for Education/LPDP).

Fishing For Solutions: Criminalisation of IUU Fishing through Suppression Conventions at Global and Regional Levels

**Vissen naar oplossingen: Criminalisering van IOO-visserij
door middel van bestrijdingsverdragen op mondiaal en
regionaal niveau**

(met een samenvatting in het Nederlands)

Proefschrift

ter verkrijging van de graad van doctor aan de
Universiteit Utrecht
op gezag van de
rector magnificus, prof.dr. H.R.B.M. Kummeling,
ingevolge het besluit van het college voor promoties
in het openbaar te verdedigen op

maandag 29 maart 2021 des ochtendste 10.30 uur

door

Andrea Albert Stefanus

geboren op 11 augustus 1984
te Kudus, Indonesië

Promotoren:

Prof. dr. J.A.E. Vervaele

Prof. dr. S. Trevisanut

This thesis was accomplished with financial support from *Lembaga Pengelola Dana Pendidikan* (Indonesia Endowment Fund for Education/ LPDP).

ACKNOWLEDGEMENTS

First and foremost, I would like to thank God for all the countless blessings that He has given me and my family.

The past four years (2017-2021) have been a journey of a lifetime. I have gained new and exciting knowledge and life experiences during this time which makes me realize that this PhD is not the end goal. It is just the beginning of my intellectual and personal journey to be a better person which I look forward to.

I am forever grateful to my supervisors, Professor John A.E. Vervaele and Professor Seline Trevisanut for giving me the chance to pursue this life-changing odyssey. Thank you John and Seline for your clear guidance, patience, encouragement and support during these four years. Thank you for the much-needed laughs and talks outside the dissertation. I really enjoyed them. Without your support, I wouldn't have finished the dissertation. If I had to do it again, there are no other persons I would rather be my supervisors than both of you. A million thanks for both of you. You two are the best!!!

I want to thank the members of the reading committee, Professor Michiel Luchtman, Professor Cedric Ryngaert, Professor Xiumei Wang, Dr. Richard Caddell, and Dr. Arie Afriansyah for their valuable comments and suggestions on the manuscript. I also want to thank Professor Dina Siegel who introduced me to Professor John A.E. Vervaele which led to my wonderful time in the Netherlands. A sincere gratitude to Dr. Daan van Uhm who provided his support and valuable criminological perspectives on the dissertation.

To the most fun and kind-hearted paranymphs, Koen Bovend'Eerd and Catherine Blanchard, thank you so much for your help, support and friendship. A sincere thanks for my colleagues and friends in the Willem Pompe Institute, especially Koen Bovend'Eerd, Argyro Karagianni, Stanislaw Tosza, András Csúri, Aart de Vries, Elmin Omičević and Esther Nauta. My gratitude also goes to friends and colleagues in Utrecht Centre for Water, Oceans and Sustainability Law (UCWOSL) and the Netherlands Institute on the Law of the Sea (NILOS), particularly Professor Alex G. Oude Elferink, Dr. Erik J. Molenaar, Catherine Blanchard, Minh Tran, Nikolaos Giannopoulos, Chuxiao Yu and Wen Duan.

My special thanks are dedicated to my colleagues and friends in the Indonesian Embassy in Den Haag and the Directorate of International Security and Disarmament, MoFA for being so supportive and becoming a significant part of my life. I am genuinely grateful to have my colleagues and friends in PPI Utrecht, PPI Belanda, and PPLN, particularly Pak Moel, Kak Uli, Bang Hadi, Mas Yance, Arti, and Mas Luluk. Thank you everyone for the friendship, support, discussions, laughs, and gossips for all these years. I couldn't have done the PhD alive and well without you guys. Thank you also for Pak Han Harlan for being my partner in drinking coffee every morning in the last year.

My utmost gratitude to my parents, Mama Siska, Papa Tri, Dad Ken, my sister Maya and my in-law Andrew as well as my father in-law Pak Putu, mother in-law Mama Terulin, brother and sisters in-laws Made, Asti and Aime who always provide their unconditional love and support. I know words would not be enough to repay all of your kindness, but once again, thank you. My love also goes to my cute nephews and niece, Matthew, Isaac and Nara. I love you all.

Finally, I would like to express my endless love and gratitude to my wife, Wili for her endless love, compassion, and support. Thank you for always being there for me in the ups and downs and of course for being a perfect mother for our sunshine, Mikael who was born during this PhD period. This book is dedicated to both of you.

March 2021

TABLE OF CONTENTS

Acknowledgments	vii
Table of Contents	ix
Abbreviations	xvi

Chapter 1

Introduction

1.1 The Harms of IUU Fishing	1
1.2 The Transnational and Organised Crime Dimensions of IUU Fishing.....	5
1.3 Assessment of the Regulatory and Enforcement Deficits at International Level	8
1.4 Assessment of the Regulatory and Enforcement Deficits at National Levels	12
1.5 Criminalisation of IUU Fishing through Suppression Conventions	14
1.6 Research Questions	18
1.7 Terminology and Limitation	20
1.8 Methodology and Structure of the Research	23

Chapter 2

Understanding IUU Fishing

2.1 Introduction	27
2.2 IUU Fishing Global Conditions and Its Harms	27
2.2.1 IUU Fishing Harms	32
2.2.1.1 Economic Harms	32
2.2.1.2 Environmental Harms	33
2.2.1.3 Social Harms	35
2.2.1.4 Legal Order Harms	36
2.3 Understanding IUU Fishing Terminology and Concept	37
2.3.1 Early Development	37
2.3.2 Concept of IUU Fishing under IPOA-IUU	39
2.3.2.1 Illegal Fishing	40
2.3.2.2 Unreported Fishing	41
2.3.2.3 Unregulated Fishing	42
2.3.2.4 The Need for a Clearer Terminological and Conceptual Definition	44
2.4. Actors and Drivers of IUU Fishing	47
2.4.1 Actors of IUU Fishing	47
2.4.2 Drivers of IUU Fishing	49
2.4.2.1 Benefits of Conducting IUU Fishing	49
2.4.2.2 Expected Penalty Drivers	51
2.4.2.3 Moral and Social Drivers	54

2.5 Transnational and Organised Crime Dimensions of IUU Fishing	54
2.5.1 Transnational Dimensions of IUU Fishing	54
2.5.2 Organised Crime Dimensions of IUU Fishing	58
2.6. Interim Conclusion	62

Chapter 3

International Instruments for Addressing IUU Fishing

3.1. Introduction	64
3.2. The UNCLOS	66
3.2.1 Background	66
3.2.2 Rights, Obligations and Enforcement Powers of Coastal States	67
3.2.2.1 Rights of Coastal States	67
3.2.2.2 Obligations of Coastal States	69
3.2.2.3 Enforcement Powers of Coastal States	71
3.2.2.3.1 Limitation of Article 73	78
3.2.3 Rights, Obligations and Enforcement Powers of Flag States	80
3.2.3.1 Rights of Flag States	80
3.2.3.2 Obligations of Flag States	81
3.2.3.3 Enforcement Powers of Flag States	86
3.2.4 Port States Measures	88
3.2.5 Roles of RFMOs	90
3.2.6 Deficits of the UNCLOS	94
3.3 The Compliance Agreement	97
3.3.1 Background	97
3.3.2 Flag States' Obligations	98
3.3.3 Exchange of Information	99
3.3.4 Port State Measures	100
3.3.5 Enforcement Powers	101
3.3.6 Roles of RFMOs	102
3.3.7 Deficits of the Compliance Agreement	102
3.4 The UNFSA	104
3.4.1 Background	104
3.4.2 Duties of Flag States	105
3.4.3 Compliance and Enforcement Powers of Flag States	106
3.4.4 Port States Measures	109
3.4.5 Roles of RFMOs	110
3.4.5.1 Enforcement Powers of RFMOs	111
3.4.6. Deficits of the UNFSA	113
3.5 The IPOA-IUU	114
3.5.1 Background	114
3.5.2 Flag States Responsibilities	116
3.5.2.1 Fishing Vessel Registration	116
3.5.2.2 Record of Fishing Vessels	117
3.5.2.3 Authorisation to Fish	117
3.5.3 Coastal States Measures	119
3.5.4 Port States Measures	120
3.5.5 Enforcement Powers	122
3.5.6 Roles of RFMOs	123
3.5.7 Deficits of the IPOA-IUU	126
3.6 Port State Measures Agreement	127

3.6.1 Background	127
3.6.2 Entry into Ports	129
3.6.3 Use of Ports	130
3.6.4 Inspections and Follow-up Actions	131
3.6.5 Roles of Flag States	133
3.6.6 Roles of RFMOs	134
3.6.7 Enforcement Powers of Port States	136
3.6.8 Deficits of the PSMA	137
3.7 Interim Conclusion	139

Chapter 4

National Regulatory and Enforcement Policies Against IUU Fishing Conducted By OCGS: Case Studies of Indonesia and Vietnam

4.1 Introduction	142
4.2 Indonesia Case Study	143
4.2.1 IUU Fishing in Indonesia	143
4.2.2 Indonesia's National Regulatory and Enforcement Policy Framework	147
4.2.2.1 Indonesia's Fisheries Resources	147
4.2.2.2 Indonesia's Policies against IUU Fishing	149
4.2.2.3 Indonesia's IUU Fishing Regulations and Enforcement	154
4.2.2.3.1 Administrative Regulations and Enforcement	156
4.2.2.3.2 Criminal Regulations and Enforcement	159
4.2.3 Indonesia and International Fisheries Instruments	168
4.2.3.1 Indonesia and Coastal State Obligations	170
4.2.3.1.1 Monitoring, Control and Surveillance	170
4.2.3.1.2 To Ensure No Fishing Without Authorisation	172
4.2.3.1.3 Avoidance of Issuing Licences to Vessels with IUU Fishing History	173
4.2.3.1.4 Indonesia's Challenges in Implementing Coastal State Obligations	174
4.2.3.2 Indonesia and Flag State Obligations	174
4.2.3.2.1 Fishing Vessel Registration	174
4.2.3.2.2 Record of Fishing Vessel	175
4.2.3.2.3 Authorisation to Fish	176
4.2.3.2.4 Indonesia's Challenges in Implementing Flag State Obligations	176
4.2.3.3 Indonesia and Port State Measures	178
4.2.3.3.1 Entry into Port	178
4.2.3.3.2 Inspections and Follow-up Actions	178
4.2.3.3.3 Indonesia's Challenges in Implementing Port State Obligations	179
4.3 Vietnam Case Study	180
4.3.1 IUU Fishing in Vietnam	180
4.3.1.1 Vietnam and the Idea of the Criminalisation of IUU Fishing as TOC	186
4.3.2 Vietnam National Regulatory and Enforcement Policy Framework	187
4.3.2.1 Vietnam's Fisheries Resources	187

4.3.2.2 Vietnam's Policies against IUU Fishing	191
4.3.2.3 Vietnam's IUU Fishing Regulations	196
4.3.2.3.1 Administrative Regulations and Enforcement	198
4.3.2.3.2 Criminal Regulations and Enforcement	202
4.3.3 Vietnam and International Fisheries Instruments	205
4.3.3.1 Vietnam and Flag State Obligations	206
4.3.3.1.1 Fishing Vessel Registration	206
4.3.3.1.2 Record of Fishing Vessels	206
4.3.3.1.3 Authorisation to Fish	207
4.3.3.1.4 Vietnam's Challenges in Implementing Flag State Obligations	208
4.3.3.2 Vietnam and Coastal State Obligations	208
4.3.3.2.1 Monitoring, Control, and Surveillance	208
4.3.3.2.2 Ensure No Fishing without Authorisation	210
4.3.2.2.3 Avoid Licensing Vessels with IUU Fishing History	210
4.3.2.2.4 Vietnam's Challenges in Implementing Coastal State Obligations	211
4.3.3.3 Vietnam and Port State Measures	212
4.3.3.3.1 Entry into Port	212
4.3.3.3.2 Inspections and Follow-up Actions	213
4.3.3.3.3 Vietnam's Challenges in Implementing Port State Obligations	213
4.4 Comparative Analysis	214
4.4.1 National Fisheries Framework	214
4.4.1.1 Policies	214
4.4.1.2 Regulatory and Enforcement Framework	215
4.4.2 Obligations under International Instruments	217
4.4.3 IUU fishing and the Involvement of OCGs	218
4.5 Interim Conclusion	219

Chapter 5

The Criminalisation of IUU Fishing at Global Level

5.1 Introduction	220
5.2 Criminalisation of IUU Fishing at Global Level	221
5.3 Suppression Conventions to Combat Transnational Crimes	224
5.3.1 What are Suppression Conventions?	224
5.3.2 Objectives	226
5.3.3 Elements of Suppression Conventions	227
5.3.3.1 Substantive Law	227
5.3.3.2 Jurisdiction	229
5.3.3.3 Investigative Tools	231
5.3.3.4 International Cooperation	233
5.4 Criminalisation of IUU Fishing under Suppression Conventions	235
5.4.1 The Need for Criminalisation of TOC Dimensions of IUU Fishing	235
5.4.2 Criminalisation of IUU Fishing under Suppression Conventions: the Three Alternatives	239
5.4.2.1 IUU Fishing Criminalisation under the UNTOC	240
5.4.2.1.1 An Overview of the UNTOC	240
5.4.2.1.2 Substantive Law	241
5.4.2.1.2.1 Offences under Articles 5, 6, 8, and 23	

of the UNTOC	242
5.4.2.1.2.2 Serious Crime	244
5.4.2.1.2.3 Offences of the UNTOC's Protocols	245
5.4.2.1.2.4 Criminalisation of IUU Fishing under the UNTOC	245
5.4.2.1.2.4.1 Establishing IUU Fishing as a Serious Crime	245
5.4.2.1.2.4.2 Establishing an Additional UNTOC Protocol against IUU Fishing	247
5.4.2.1.3 Jurisdiction	251
5.4.2.1.4 Investigative Tools	252
5.4.2.1.5 International Cooperation	255
5.4.2.2 Establishment of a Stand-alone Suppression Convention against IUU Fishing	257
5.4.2.2.1 Substantive Law	258
5.4.2.2.2 Jurisdiction	260
5.4.2.2.3 Investigative Tools	264
5.4.2.2.4 International Cooperation	265
5.4.2.2.4.1 Exchange of Information	265
5.4.2.2.4.2 Mutual Legal Assistance	265
5.4.2.2.4.3 Extradition	266
5.4.2.3 Integration of Suppression Provisions into International Fisheries Instruments	267
5.4.2.3.1 Substantive Law	269
5.4.2.3.2 Jurisdiction	270
5.4.2.3.3 Investigative Tools	270
5.4.2.3.4 International Cooperation	271
5.4.3 Comparative Analysis of the Three Alternatives	271
5.4.3.1 Pros and Cons of IUU fishing Criminalisation under the UNTOC	272
5.4.3.2 Pros and Cons of a Stand-alone Suppression Convention	273
5.4.3.3 Pros and Cons of Integration of Suppression Provisions	274
5.4.3.4 Comparison of the Three Alternatives	275
5.4.3.4.1 Scope of Application	275
5.4.3.4.2 Feasibility	276
5.4.3.4.3 Operability	276
5.5 Interim Conclusion	277

Chapter 6

The Criminalisation of IUU Fishing at Regional Level

6.1 Introduction	279
6.2 The Rationale of Criminalisation of IUU Fishing at Regional Level	280
6.3 IUU Fishing in Southeast Asia	285
6.3.1 Southeast Asia's Fight against IUU Fishing	287
6.4 IUU Fishing as a Transnational Crime under ASEAN	292
6.5 Criminalisation of IUU Fishing through a Suppression Convention: The Two Alternatives	296
6.5.1 Establishment of a Stand-alone Regional Suppression Convention	296
6.5.1.1 Substantive Law	298

6.5.1.2 Jurisdiction	300
6.5.1.3 Investigative Tools	301
6.5.1.4 Regional Cooperation	302
6.5.2 Integration of Suppression Provisions into Southeast Asia's Fisheries Instruments	303
6.5.2.1 The Preference for a Non-binding Instrument	304
6.5.2.2 The Selection of a Regional Instrument	305
6.5.2.3 The Process of Integration	308
6.6 Comparative Analysis between the Two Alternatives	310
6.6.1 Pros and Cons of a Stand-alone Regional Suppression Convention	310
6.6.2 Pros and Cons of Integration of Suppression Provisions	312
6.6.3 Comparison between the Two Alternatives	313
6.6.3.1 Scope of Application	313
6.6.3.2 Feasibility	313
6.6.3.3 Operability	313
6.7 The Nexus between Regional and Global Criminalisation of IUU fishing	314
6.8 Interim Conclusion	316

Chapter 7

The Criminalisation of IUU Fishing through Suppression Conventions at Global and Regional Levels

7.1 The Extent of Harms caused by IUU Fishing and related Transnational Organised Crimes	319
7.2 The Deficits of International Fisheries Instruments at Global and National Levels	323
7.2.1 The Deficits of International Fisheries Instruments at a Global Level	323
7.2.2 The Deficits of International Fisheries Instruments at a National Level	326
7.3 The Criminalisation of IUU Fishing through Suppression Conventions	328
7.3.1 The Rationale for Criminalisation	328
7.3.2 The Need for Suppression Conventions	329
7.3.3 Advantages and Challenges of IUU Fishing Criminalisation through Suppression Conventions	332
7.3.3.1 Advantages	332
7.3.3.2 Challenges	336
7.3.4 The Criminalisation of IUU Fishing through Suppression Conventions at Global Level	340
7.3.4.1 Criminalisation under the UNTOC	341
7.3.4.2 Establishment of a Stand-alone Convention	342
7.3.4.3 Integration of Suppression Provisions into International Fisheries Instruments	342
7.3.4.4 Comparison of the Three Options	344
7.3.4.4.1 Scope of application	344
7.3.4.4.2 Feasibility	345
7.3.4.4.3 Operability	345
7.3.4.5 Recommendations	346
7.3.5 The Criminalisation of IUU Fishing under Suppression Conventions at Regional Level	348

7.3.5.1 Establishment of a Stand-alone Regional Suppression Convention	348
7.3.5.2 Integration of Suppression Provisions into Regional Fisheries Instruments	350
7.3.5.3 Comparison of the Two Options	351
7.3.5.3.1 Scope of Application and Substantive Law	351
7.3.5.3.2 Feasibility	351
7.3.5.3.3 Operationality	352
7.3.5.4 Recommendations	353
7.4 Final Remarks	353
Samevatting	356
Bibliography	363
Table of Cases	403
Table of Legislation	404
Curriculum Vitae	412

ABBREVIATIONS

1998 Drugs Convention	: 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
ACTIP	: ASEAN Convention against Trafficking in Persons, especially Women and Children
AMAF	: ASEAN Ministers on Agriculture and Forestry
AMMTC	: ASEAN Ministerial Meeting on Transnational Crime
AMS	: ASEAN Member States
ASSP	: ASEAN-SEAFDEC Strategic Partnership
ASWGF	: ASEAN Sectoral Working Group on Fisheries
BBNJ	: Biodiversity in Areas Beyond National Jurisdiction
CCAMLR	: Commission for the Conservation of Antarctic Marine Living Resources
CCPCJ	: Commission on Crime Prevention and Criminal Justice
CCSBT	: Commission for the Conservation of Southern Bluefin Tuna
CoFI	: Committee on Fisheries (of the Food and Agriculture Organization of the United Nations)
Compliance Agreement	: Agreement to Promote Compliance with International Conservation and Management Measures by Vessel Fishing on the High Seas
CoP	: Conference of the Parties
CTI-CFF	: Coral Triangle Initiative on Coral Reefs, Fisheries, and Food Security
EC	: European Commission

EEZ	: Exclusive Economic Zone
EU	: European Union
FAO	: Food and Agriculture Organization of the United Nations
FFA	: Pacific Islands Forum Fisheries Agency's
Firearms Protocol	: Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime
FMA	: Fish Management Areas
FoC	: Flags of Convenience
FRSF	: Vietnamese Fisheries Resources Surveillance Force
GAOR	: General Assembly Official Records
GT	: Gross Tonnage
HP	: Horsepower
ICCAT	: International Commission for the Conservation of Atlantic Tunas
IMO	: International Maritime Organization
INTERPOL	: International Criminal Police Organization
IOTC	: Indian Ocean Tuna Commission
IPOA-IUU	: International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing
ITLOS	: International Tribunal for the Law of the Sea
IUU Fishing	: Illegal, Unreported and Unregulated Fishing
LMEs	: Large Marine Ecosystems
MACC	: Malaysian Anti-Corruption Commission
MARD	: Vietnamese Ministry of Agriculture and Rural Development
MLA	: Mutual Legal Assistance

MMAF	: Indonesian Ministry of Maritime Affairs and Fisheries
MMEA	: Malaysian Maritime Enforcement Agency
MoU	: Memorandum of Understanding
MRAG	: Marine Resources Assessment Group
NEAFC	: North-East Atlantic Fisheries Commission
Nm	: Nautical mile
NPFC	: North Pacific Fisheries Commission
NPOA-IUU	: National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing
OCGs	: Organised Criminal Groups
OECD	: Organization for Economic Co-operation and Development
PPKP	: <i>Pusat Pemantauan Kapal Perikanan</i> (Indonesian Fishing Vessel Monitoring Control)
PPNS	: <i>Penyidik Pegawai Negeri Sipil</i> (Indonesian Civil Servant Investigator)
PSMA	: Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
RFBs	: Regional Fisheries Bodies
RFMO/A	: Regional Fisheries Management Organisation/ Arrangement
Rp	: Indonesian Rupiah
RPOA-IUU	: Regional Plan of Action to Promote Responsible Fishing Practices including Combating IUU fishing in the Region
SDGs	: Sustainable Development Goals
SEAFDEC	: Southeast Asian Fisheries Development Center
SFRC	: Sub-Regional Fisheries Commission
SIKPI	: <i>Surat Izin Kapal Pengangkut Ikan</i> (Indonesian Fish Carrier Vessel License)

SIPI	: <i>Surat Izin Penangkapan Ikan</i> (Indonesian Catch License)
SKAT	: <i>Surat Keterangan Aktivasi Transmitter</i> (Indonesian Certificate of Transmitter Activation)
Smuggling of Migrants Protocol	: Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
SOM-AMAF	: Senior Officials Meeting of the ASEAN Ministers on Agriculture and Forestry
SOMTC	: Senior Officials' Meeting on Transnational Crime
SOP	: Standard Operating Procedure
SPKP	: <i>Sistem Pemantauan Kapal Perikanan</i> (Indonesian Fishing Vessel Monitoring System)
TOC	: Transnational Organised Crime
Trafficking in Persons Protocol	: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
UN	: United Nations
UNCAC	: United Nations Convention against Corruption
UNCED	: United Nations Conference on Environment & Development
UNCLOS	: United Nations Convention on the Law of the Sea
UNEP	: United Nations Environment Programme
UNFSA	: 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
UNGA	: United Nations General Assembly

- UNICPOLOS : United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
- UNODC : United Nations Office on Drugs and Crime
- UNTOC : United Nations Convention against Transnational Organized Crime
- UNTS : United Nations Treaty Series
- VMS : Vessel Monitoring System
- VND : Vietnamese Dong
- WCPFC : Western and Central Pacific Fisheries Commission
- WPI : Whole Person Impairment
- WWF : World Wildlife Fund

CHAPTER 1

Introduction

1.1 The Harms of IUU Fishing

Illegal, Unreported and Unregulated (IUU) fishing can be understood generally as fishing activities that violate or undermine national, regional, and international fisheries regulations and also the measures of Regional Fisheries Management Organisations (RFMOs) (see Section 1.7. for a brief explanation of IUU fishing terminology and Chapter 2 for a more detailed discussion). IUU fishing is acknowledged as one of the factors that led to the decline of fish stocks or seriously affected efforts to rebuild already depleted fish stocks.¹ At its most extreme, IUU fishing can lead to the collapse of a fishery.² In addition, IUU fishing is also recognised as a major threat to the livelihoods of people in the fisheries sector and to the

¹ United Nations General Assembly (UNGA), 'Discussion Panel A Responsible Fisheries and Illegal, Unregulated and Unreported Fisheries' (United Nations Open-ended Informal Consultative Process on Ocean Affairs, First Meeting, 30 May-2 June 2000) (15 May 2000) UN Doc A/AC.259/1 para 1.

² David J. Douman, 'Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666. In the report, "Fishery" is described as "the sum of all fishing activities on a given resource, for example a hake fishery or shrimp fishery. It may also refer to the activities of a single type or style of fishing on a particular resource, for example a beach seine fishery or trawl fishery."

marine ecosystem in general.³

IUU fishing is a global phenomenon that disregards fisheries' conservation and management measures and exploits gaps in regulations and law enforcement, both at the level of the law and also of its practice in different states. In a 2009 study by Agnew and others, it was estimated that IUU fishing produces between 11-26 million tonnes of fish each year (which represents 12-28% of the total global capture of fisheries production)⁴ and it has been escalating for the past 20 years.⁵ The Pew Charitable Trusts, in its 2013 report, states that IUU fishing accounts for more than 1,800 pounds of wild-caught fish stolen from the world's seas every second.⁶ The United States Coast Guard, in its 2020 IUU Fishing Strategic Outlook, estimates that one in five fish caught around the world could have originated from IUU fishing.⁷

A closer look at the practice of IUU fishing can also be seen from a regional setting. In Southeast Asia, for example, the problem of IUU fishing has become one of the major maritime challenges in the region. Meryl J. Williams argues that although there are no accurate estimates as to the extent of IUU fishing, the general levels may be drawn from Agnew and others' study in 2009 of three regions,⁸ namely, the Eastern Indian Ocean, the Northwest Pacific and the Western Central Pacific which covers the Southeast Asian waters. The study argues that the

³ Food and Agriculture Organization (FAO), 'The State of World Fisheries and Aquaculture 2018. Meeting the Sustainable Development Goals' (FAO 2018) 98.

⁴ FAO, 'The State of World Fisheries and Aquaculture 2014. Opportunities and Challenges' (FAO, 2014) cited in World Wildlife Fund for Nature (WWF), 'Living Blue Planet Report. Species, Habitats and Human Well-Being' (WWF, 2015) 28 < <https://www.worldwildlife.org/publications/living-blue-planet-report-2015> > accessed 24 December 2019.

⁵ David J. Agnew and others, 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4(2) PLoS ONE 1, 4. The article explains that the figures are lower and upper estimates of the total value of illegal and unreported losses globally.

⁶ The Pew Charitable Trusts, 'How to End Illegal Fishing' (The Pew Charitable Trusts, December 2013) 1 <<https://www.pewtrusts.org/-/media/legacy/uploadedfiles/peg/publications/report/howtoendillegalfishingpdf.pdf>> accessed 15 June 2019.

⁷ The United States Coast Guard, 'Illegal, Unreported, and Unregulated Fishing Strategic Outlook' (The United States Coast Guard, September 2020) 3.

⁸ Meryl J. Williams, 'Will Multilateral Arrangements Help Southeast Asian States Solve Illegal Fishing?' (2013) 35(2) Contemporary Southeast Asia 259.

three regions had among the highest estimated percentages of IUU fishing globally, namely 32%, 33% and 34% respectively between 2000 and 2003.⁹ The numbers indirectly support anecdotal evidence that IUU fishing has become a major problem for the region. The issue of IUU fishing is also acknowledged by Southeast Asian countries, where they underlined that “IUU fishing is a serious concern and threatens the sustainability of the region’s fisheries management and conservation measures, fishery resources and aquatic ecosystems, as well as economic viability and food security”.¹⁰ The high incidence of IUU fishing in Southeast Asia can also be seen from numerous cases as discussed in Chapters 4 and 6. Against the problem of IUU fishing, Southeast Asian countries have collectively committed to addressing the issue through the establishment of regional arrangements, sectoral bodies, bilateral treaties and also cooperation with dialogue partners. Nonetheless, the problem persists (see Chapter 6 for further discussion on IUU fishing in Southeast Asia).

IUU fishing activities have resulted in harms to the economic, social, environmental and legal order aspects.¹¹ The economic harms of IUU fishing are estimated globally at US\$10-US\$23.5 billion per year (approximately €9-21.1 billion).¹² In five Large Marine Ecosystems (LMEs) around Europe, it has been estimated that IUU fishing cost over €10 billion of lost catches and over 27,000 lost jobs between 2008-2020 in fishing and processing industries.¹³ Meanwhile, in Asia, the region’s loss, because of IUU fishing, has been estimated at between US\$6 billion (approximately €5.4 billion) and US\$20.75 billion (approximately €18.63 billion) per year, representing between

⁹ *ibid.*

¹⁰ Joint Association of Southeast Asian Nations (ASEAN)-Southeast Asian Fisheries Development Center (SEAFDEC) Declaration on Regional Cooperation for Combating Illegal, Unreported and Unregulated (IUU) Fishing and Enhancing the Competitiveness of ASEAN Fish and Fishery Products (Bangkok, 3 August 2016) para 4.

¹¹ See Chapter 2 for further discussion.

¹² Agnew and others (n 5) 4. In this study US\$1 is equal to €0.9.

¹³ The Pew Charitable Trusts, ‘The Costs of IUU Fishing to the EU’ (The Pew Charitable Trusts, 2008) 4 <<https://www.pewtrusts.org/~media/legacy/uploadedfiles/peg/publications/report/iuu20briefing20englishpdf.pdf>> accessed 10 June 2017.

4.5 and 14.4 million tonnes.¹⁴ States suffer losses of revenue at the national level (from the fish that is illegally removed from the country) to the loss of licensing fees and income from taxes.¹⁵

The environmental harms of IUU fishing are obviously detrimental since conservation and management measures are being disregarded. IUU fishing activities cause tremendous damage to fish stocks and the marine environment. For instance, IUU fishing actors often employ destructive fishing methods such as the use of poisons and blast fishing.¹⁶ These methods have the potential to damage sensitive marine habitats such as coral reefs which can take up to 25 years to recover.¹⁷ Thus, IUU fishing is not only destroying the target fish species; it is also damaging the broader marine ecosystem.

In terms of social harms, IUU fishing can disrupt the social aspects of fishermen's communities through disregarding labour standards, creating unemployment, threatening food security and provoking a culture of crime and incompliance. Furthermore, IUU fishing undermines the legal order by violating fisheries laws and regulations at national, regional and global levels and disrupting a state's authority in managing its fisheries conservation and management efforts. The increasing trend of IUU fishing has made the United Nations General Assembly (UNGA) recognise it as "one of the greatest threats to marine ecosystems since it undermines national and regional efforts for sustainable fisheries and marine

¹⁴ Bay of Bengal Large Marine Ecosystem (BOBLME), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries in Asia' (FAO/BOBLME Secretariat, 2015) 395 <<https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-fishing-developing-countries-asia>> accessed 12 June 2017.

¹⁵ Frank Meere and Claire Delpuch, 'The Challenge of Combating Illegal, Unreported and Unregulated (IUU) Fishing' in FAO/OECD, 'Fishing for Development' (2015) FAO Fisheries and Aquaculture Proceedings No. 36, 36.

¹⁶ Asia-Pacific Economic Cooperation (APEC), 'Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific', (APEC, November 2008) APEC#208-FS-01.5, 40.

¹⁷ Alan T. White, Helge P. Vogt, and Tijen Arin, 'The Philippine Coral Reefs Under Threat: The Economic Losses Caused by Reef Destruction,' 40 Marine Pollution Bulletin (2000) 600 cited in Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers 2010).

biodiversity conservation, particularly in some developing countries where their fisheries regulations and management capacities are insufficient, and enforcement mechanisms are weak”.¹⁸

1.2 The Transnational and Organised Crime Dimensions of IUU Fishing

Tackling IUU fishing cannot be limited to conservation, management and enforcement measures in relation to the local fisheries actors. In many cases, the transnational and organised crime (TOC) dimensions of IUU fishing are evident. The transnational dimensions cover not only the physical movement of the vessels, but also other aspects in the supply chain including deliberate strategies by IUU fishing actors to identify attractive opportunities, preparation, execution, control, until the sale of the illicit catch and laundering of the proceeds. The physical movement of IUU fishing vessels is carried out for various reasons, including avoiding detection, disguising the illegal origin of catches, transshipments, finding new fish stocks, exploiting weak regulations and enforcement, collaborating with corrupt officials to support the illegal operations, and even by flag/forum shopping. Cross-border movements can be found in large-scale IUU fishing operations such as the case of the “Bandit 6” (see Chapter 2) and the Vietnamese blue boats (see Chapter 4).

The organised crime dimensions can be seen through the involvement of Organised Criminal Groups (OCGs) in large-scale IUU fishing operations. Both transnational and organised crime dimensions are, in the majority of cases, inter-related. IUU fishing with transnational dimensions usually requires the significant involvement of some kind of organised structure of human resources, working together to obtain financial benefits from the activity, which fits the description of OCGs (see Section 1.7. for a discussion on terminology). On the other hand, involvement of OCGs is often found to be transnational as it maximises their profits and helps to avoid detection. The transnational dimensions of OCGs can be seen

¹⁸ UNGA ‘Sustainable fisheries, including through the 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, and related instruments’ (19 December 2019) UN Doc A/RES/74/18, para 80.

from the participation different individuals from different countries which create cross-border business networks from catch to table.¹⁹ The dimensions can also be seen from their operations in different jurisdictions to find opportunities to catch fish illegally, sell them, and launder the illicit proceeds. Combined, the two dimensions (i.e. transnational crime and organised crime) magnify the already significant harms of IUU fishing and thus pose major challenges for states, regional communities and the international community in securing fisheries resources.

The TOC dimensions of IUU fishing are particularly apparent in the case of high-value fish products such as abalone, shark fins, sturgeon and caviar as shown in Chapters 2 and 4. In Chapter 2, it is explained that a high profit margin is one of the main pull factors for these OCGs. For example, one kilogram of raw abalone costs about US\$40 (approximately €36) in South Africa and sells for as much as US\$3,900 (approximately €3,510) for retail customers in Asia.²⁰ A study by the United Nations Office on Drugs and Crime (the UNODC) in 2011, showed the involvement of OCGs in abalone poaching in South Africa, Australia and New Zealand, with Asia as the main market.²¹ In South Africa, Chinese OCGs exploited local fisherman to obtain abalone and then smuggled the majority of the abalone to Asia through Mozambique or Zimbabwe, while the rest was supplied to the South African market.²² The widespread existence of OCGs' involvement in IUU fishing is also highlighted in a study by the Global Initiative against Transnational Organised Crime where it is suggested that the OCGs' involvement can be found in many parts of the world, from New York's Fulton Fish Market to groups from the former Soviet Union, China, South America and South Africa.²³

¹⁹ See also section 2.4.1. (actors of IUU fishing).

²⁰ Greg Warchol and Michael Harrington, 'Exploring the Dynamics of South Africa's Illegal Abalone Trade via Routine Activities Theory' (2016) 19 Trends in Organized Crime 21, 33.

²¹ United Nations Office on Drugs and Crime (UNODC) 'Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking' (2011) 98-103.

²² Warchol and Harrington (n 20) 32.

²³ Teale N. Phelps Bondaroff, Tuesday Reitano and Wietse van der Werf, 'The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime' (The Global Initiative Against Transnational Organized Crime and

In Southeast Asia, the involvement of OCGs in IUU fishing is also evident from numerous cases in the region. The case of the fishing vessel “Viking” among others, showed how the vessel had the characteristics of OCGs.²⁴ The “Viking” crew consisted of a Chilean national as the captain and ten crew members coming from Argentina, Chile, Indonesia and Peru. Their main purpose was to obtain financial benefits from their operations.²⁵ “Viking” was put under the purple notice²⁶ of Interpol and listed as an IUU fishing vessel by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The vessel had been engaging in IUU fishing activities in different countries for ten years under twelve different names and eight different flags before it was sunk by the Indonesian government on 14 March 2016.²⁷ In addition to “Viking”, there are similar cases, such as “Sino”,²⁸ “Pusaka Benjina”,²⁹ “Kunlun”³⁰ and others, where the involvement of OCGs can be linked to IUU fishing operations across Southeast Asian waters. The linkage between IUU fishing and TOC can also be seen from the fact that IUU fishing (and the fishing industry in general) is linked to several related TOCs such as trafficking in persons, migrant smuggling, drug trafficking

The Black Fish, 2015) < <https://globalinitiative.net/wp-content/uploads/2015/04/the-illegal-fishing-and-organised-crime-nexus-1.pdf> > accessed 10 April 2017.

²⁴ *Putusan Pengadilan Negeri Tanjung Pinang* (Tanjung Pinang District Court Decision) No. 17/Pid.Sus-PRK/2016/PN Tpg.

²⁵ The Maritime Executive, ‘Viking Fishing Vessel Sunk by Indonesian Authorities’ *The Maritime Executive* (14 March 2016) <<http://www.maritime-executive.com/article/viking-fishing-vessel-sunk-by-indonesian-authorities>> accessed 17 May 2017.

²⁶ The purple notice is an international request for cooperation or an alert issued by Interpol with the aim to ‘seek or provide information on modus operandi, objects, devices and concealment methods used by criminals.’ See INTERPOL, ‘Notices’ <<https://www.interpol.int/INTERPOL-expertise/Notices>> accessed 11 September 2017.

²⁷ Cabinet Secretariat of the Republic of Indonesia, ‘Indonesia Sinks FV Viking’ (*Setkab*, 14 March 2016) <<http://setkab.go.id/en/indonesia-sinks-fv-viking/>> accessed 18 May 2017.

²⁸ *Putusan Pengadilan Tinggi Ambon* (Ambon High Court Decision) No. 33/PID,SUS-PRK/2015/PT.AMB.

²⁹ *Putusan Mahkamah Agung* (Supreme Court Decision) No. 40 K/Pid. Sus/2015.

³⁰ INTERPOL, ‘New Zealand requests INTERPOL Purple Notices to Identify Networks Behind Illegal Fishing’ (*INTERPOL*, 15 January 2015) <<https://www.interpol.int/News-and-media/News/2015/N2015-003>> accessed 16 May 2017.

and corruption, which will be explained further in Chapter 2 and Chapter 4.

The involvement of OCGs in IUU fishing, as shown above, covers different species and geographical locations and shows that their operations are not exclusively local. Rather the opposite, their operations are mainly transnational in nature. As the problem of OCGs' involvement in IUU fishing has a significant transnational dimension, the solution cannot be only a local one. One state acting alone would face significant difficulties due to limited jurisdiction and capacities in trying to combat the operations of OCGs. Thus, states have to cooperate with one another to ensure that illegal activities are tackled and states will need to work towards implementing common regulatory and enforcement standards aiming at common policy goals. The following Section 1.3. will examine briefly whether such standards are already prevalent in the existing international fisheries instruments and whether they have been sufficiently transposed at the national level.

1.3 Assessment of the Regulatory and Enforcement Deficits at International Level

The issue of fisheries conservation and management, including IUU fishing, at the international level, has been regulated under several international fisheries instruments, while the implementation (both in terms of regulations and enforcement) is conducted by individual states and collectively through Regional Fisheries Management Organisations.³¹ In this research five main international fisheries

³¹ Regional Fisheries Management Organisations (RFMOs) are defined by para 6(1)(b) of the IPOA-IUU as 'intergovernmental fisheries organisations or arrangements, as appropriate, that have the competence to establish fishery conservation and management measures.' Their operation covers the EEZ, high seas or both, depending on the scope of the agreement establishing the particular RFMO. For more detailed examination of RFMOs, see Erik J. Molenaar, 'Regional Fisheries Management Organizations' in Marta Chantal Riberior, Fernando Loureiro Bastos and Tore Henriksen (eds), *Global Challenges and the Law of the Sea* (Springer 2020); Erik J. Molenaar, 'Participation in RFMOs' in Richard Caddel and Erik J. Molenaar, *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019); Bob Applebaum and Amos Donohue, 'The Role of Regional Fisheries Management Organisations' in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999); Kuan-Hsiung Wang, 'In Combating and Deterring IUU

instruments will be examined: i.e. i) the United Nations Convention on the Law of the Sea (the UNCLOS);³² ii) the Agreement to Promote Compliance with International Conservation and Management Measures by Vessel Fishing on the High Seas (the Compliance Agreement);³³ iii) the 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 (the UNFSA);³⁴ iv) the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the IPOA-IUU);³⁵ and v) the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the PSMA).³⁶ The five international fisheries instruments, in general,

Fishing: Do RFMOs Work?' in Clive H Schofield, Sog-u Yi, and Moon-Sang Kwon, *The Limits of Maritime Jurisdiction* (Koninklijke Brill NV 2014); Frank Meer, 'The Role of Regional Fisheries Management Organisations' in FAO/OECD, 'Fishing for Development' (2015) FAO Fisheries and Aquaculture Proceedings No. 36; and Stefán Ásmundsson, 'Regional Fisheries Management Organizations (RFMOs): Who Are They, What Is Their Geographic Coverage on the High Seas and Which Ones Should Be Considered as General RFMOs, Tuna RFMOs, and Specialized RFMOs?' (Sustainable Ocean Initiative Global Dialogue with Regional Seas Organizations and Regional Fisheries Bodies on Accelerating Progress Towards the Aichi Biodiversity Targets, Seoul, 26-29 September 2016) <https://www.cbd.int/meetings/SOIAM-2016-01> accessed 20 October 2018.

³² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 71 (UNCLOS).

³³ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered in force 24 April 2003) 2221 UNTS (Compliance Agreement).

³⁴ 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 (adopted 4 August 1995, entered in force 11 December 2001) 2167 UNTS 3 (UNFSA).

³⁵ FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2001) (adopted 2 March 2001, endorsed 23 June 2001) (IPOA-IUU).

³⁶ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (opened for signature 22 November 2009, entered into force 5 June 2016) (PSMA).

provide provisions for coastal states,³⁷ flag states³⁸ and port states³⁹ in regulating and enforcing fishery conservation and management measures, including tackling IUU fishing. Such measures include registration of fishing vessels, authorisation to fish, maintenance of a record of fishing vessels, boarding and inspection, and denial of permission to enter into port.

At a quick glance, there are two hypotheses that will be further examined in Chapter 3. The first hypothesis concerns the general regulatory design of the enforcement regimes. The international fisheries instruments give states wide discretion in formulating and applying their regulatory and enforcement designs and practices. A wide range of regulatory and enforcement systems and measures can be found in different states, from a mere administrative fine with limited or non-existent deterrent effects, civil sanctions to imprisonment.⁴⁰ The international fisheries instruments do not

³⁷ Coastal states, according to Molenaar, can be understood as ‘States with a sea-coastline’ where ‘the jurisdiction of a coastal State relates to its maritime zones which covers the resources and activities therein as well as the external impacts towards them.’ See Erik Molenaar, ‘Port and Coastal States’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 2.

³⁸ Flag states, according to Natalie Klein, refers to ‘States with powers over vessels bearing its nationality or registered to them.’ See Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 64.

³⁹ Port states, according to Molenaar, is best understood when it is used ‘in connection with foreign vessels in its ports in the context of compliance with conservation and management measures whose spatial scope is not exclusively limited to the maritime zones of the port State.’ See Erik J. Molenaar, ‘Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement’ in Dawn A. Russel and David. L. Van der Zwaag (eds), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives* (Martinus Nijhoff Publishers 2010) 370.

⁴⁰ Michiel Luchtman, ‘Procedural Safeguards and the Interaction between Administrative and Penal Enforcement’ in Jose Luis de la Cuesta and others (eds), *Protection of the Environment through Criminal Law (AIDP World Conference Bucharest, Romania, 18th-20th May 2016)* (Maklu 2016). Luchtman explains that different enforcement systems applied by different states against similar violations (some states might apply administrative law, criminal law or a dual tract of both criminal and administrative or private enforcement) can hamper effective cooperation and also cause problems for the protection of fundamental rights of individuals and economic operators. Thus, in this contribution Luchtman argues that there is a need for “rules on the choice of forum and applicable national laws, on the guidance of consecutive or parallel administrative and criminal investigations, and on the effective judicial supervision of transnational investigations.” See also

have a preference for which types of regulations and enforcement systems and measures states need to implement. Nevertheless, on sanctions some of these instruments provide general guideline where such sanctions should be of sufficient severity to secure compliance, discourage violations, and to deprive offenders from enjoying the benefits from the illegal activities.⁴¹ These instruments also mention examples of sanctions that can be applied by states. For example, the Compliance Agreement and the UNFSA provide for sanctions against violations such as refusal, withdrawal or suspension of authorisations to fish.⁴² This neutral position of international fisheries instruments is considered to be a deficit in this dissertation since these instruments do not prevent the wide discrepancies in the national applications. The wide state discretion on national regulations and enforcement systems and enforcement could be exploited by IUU fishing actors, either by avoiding sanctions or by finding the least punitive sanctions so that their operations can continue without significant barriers.

The second hypothesis is the regulatory and enforcement deficits of international fisheries instruments in relation to the phenomenon of TOC dimensions in IUU fishing operations, which is the main focus of this study. The existing regulations and enforcement concerning IUU fishing in the international instruments are arguably do not provide appropriate solution against the TOC dimensions, which in this study is proposed to be criminal regulations and enforcement system. The criminal regulations and enforcement system is needed considering the criminal nature and significant harms caused by the involvement of OCGs. The regulations and enforcement measures provided by the international fisheries instruments are mainly directed at the “regular” actors of IUU fishing rather than at the involvement of OCGs and thus do not provide any solution for tackling the latter. The lack of criminal regulations and enforcement system in

Michiel Luchtman, 'Inter-state Cooperation at the Interface of Administrative and Criminal Law' in Francesca Galli and Anne Weyembergh (eds), *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* (Editions de l'Université de Bruxelles 2014); Michiel Luchtman and John Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?' (2014) 5(2) *New Journal of European Criminal Law* 192.

⁴¹ Compliance Agreement, art 3(8); UNFSA, art 19(2); IPOA-IUU, para 21.

⁴² *ibid.*

the international fisheries instruments against the involvement of OCGs in IUU fishing is argued to be a deficit in this dissertation.

Since international instruments are transposed and applied by states, the deficits found in international fisheries instruments are also likely to be found at the national level. The following Section 1.4. will examine briefly whether the two hypotheses in international instruments are isolated at the global level or if they can also be found at the national level.

1.4 Assessment of the Regulatory and Enforcement Deficits at National Levels

At a quick glance, the two hypotheses formulated in the existing international fisheries instruments can also be found at the national level. These hypotheses will be examined further through the national case study of Indonesia and Vietnam in Chapter 4.

On the first hypothesis, the wide variation in fisheries regulations and its enforcement among states can be seen from different studies. One study, commissioned by the European Parliament, focuses on the infringement procedures and imposed sanctions throughout the European Union (EU), and found that countries in the EU have two main predominant sanctioning systems, i.e. criminal and administrative.⁴³ Countries with predominantly criminal sanctioning systems include Belgium, Finland, Ireland, Italy, Sweden and Netherlands. Countries with predominantly administrative sanctioning systems include Bulgaria, Croatia, Cyprus, Denmark, Estonia, Portugal and Spain.⁴⁴ Nonetheless, most EU countries apply administrative sanctioning and sometimes complemented with criminal enforcement measures.⁴⁵ The study identifies that the “diversity in national control systems could be perceived as discriminatory. This could have a negative impact on the culture

⁴³ Mike Beke, Roderick Ackermann and Roland Blomeyer, ‘The Common Fisheries Policy-Infringement Procedures and Imposed Sanctions Throughout the European Union’ (Director-General for Internal Policies, European Parliament 2014) IP/B/PECH/I/2013-135, 37.

⁴⁴ *ibid.*

⁴⁵ *ibid* 63.

of legality and generate more non-compliance.”⁴⁶ The study further found the application of the monetary sanctions vary across member states where some countries have less severe sanctions than the others⁴⁷. This variation could cause discrimination and lead to the migration of offenders operating in countries which have less severe sanctions.⁴⁸ Another study by the FAO also confirmed the wide variation of regulations and enforcement systems and measures among selected countries in Europe, Africa, Latin America, North America, and South Pacific. The study found that some states apply predominantly administrative enforcement systems, while others apply predominantly criminal enforcement systems.⁴⁹ Nonetheless, countries with predominantly criminal enforcement systems often provide administrative sanctions against certain types of fisheries violations and vice versa.⁵⁰ The two studies confirmed that countries, at national level, apply a variety of enforcement systems and measures against fishing violations. A further examination on national application of enforcement systems and measures will be provided in Chapter 4, in order to confirm the discrepancies at national level through the case studies of Indonesia and Vietnam.

On the second hypothesis, the lack of provisions on the involvement of OCGs can be seen from a study by Anastasia Telesetsky on Russia, Japan, China, Taiwan and the United States. The study shows that the five countries provide some possibilities for criminal enforcement against fisheries violations. Nonetheless, the study highlighted the fact that there is a lack of clarity on the relationship between IUU fishing and organised crime in the five countries’ fisheries provisions.⁵¹ The lack of provisions on the involvement of IUU fishing can also be seen in the national case study of Indonesia and Vietnam in Chapter 4.

⁴⁶ *ibid* 17.

⁴⁷ *ibid* 10.

⁴⁸ *ibid*.

⁴⁹ P. Cacaud, M. Kuruc, and M. Spreij, ‘Administrative Sanctions in Fisheries Law’ (FAO, 2003) FAO Legislative Study 82.

⁵⁰ *ibid*.

⁵¹ Anastasia Telesetsky ‘Laundering Fish in the Global Undercurrents: Illegal Unreported, and Unregulated Fishing and Transnational Organized Crime’ (2015) 41(4) *Ecology Law Quarterly* 939, 978.

This dissertation will examine and confirm the two hypotheses at international and national levels. The confirmed hypotheses will be considered as deficits against the involvement of OGCs in IUU fishing and thus there is a need to find the solutions. Since the deficits involve different jurisdictions, the solutions should aim at common regulatory and enforcement standards to reduce legal gaps in addressing TOC dimension in IUU fishing. The solutions can be pursued at global and regional level where common regulatory and enforcement standards are needed. In this study it is argued that such standards can be pursued through suppression conventions. The following section 1.5. will explain the rationale of such argument.

1.5. Criminalisation of IUU Fishing through Suppression Conventions

Various regional and global discussions, including in several international forums, have been held on the link between IUU fishing and TOC dimensions, including discussions on the need for its criminalisation. The discussion was first highlighted in 2008 at the 9th meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS).⁵² The meeting recognised the threat of IUU fishing to the economic, social and environmental pillars of sustainable development and the involvement of OGCs in IUU fishing in some states. The Conference of Parties (CoP) to the UN Convention against Transnational Organized Crime (UNTOC) in 2008 also had deliberations on IUU fishing, where it was suggested by some speakers that “the existing approaches to tackle IUU fishing had to be supplemented by using the criminalisation provisions of the UNTOC”.⁵³ At the meeting, several speakers also acknowledged

⁵² UNGA ‘Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting’ (25 July 2008) UN Doc A/63/174, part A, para 10 (e). For further reference see Palma, Tsamenyi and Edson (n 17) 261; Cathy Haenlein, ‘Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens Our Security’ (Royal United Service Institute for Defense and Security Studies, 2017) 13 <<https://rusi.org/publication/occasional-papers/below-surface-how-illegal-unreported-and-unregulated-fishing-threatens>> accessed 2 January 2018.

⁵³ United Nations (UN) ‘Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session,

IUU fishing as an emerging form of crime, along with trafficking in cultural property, and trafficking in timber, wildlife and other forest biological resources.⁵⁴ The UNGA has also recognised the link between illegal fishing and TOC through the adoption in 2009 of Resolution 63/112 on sustainable fisheries where it noted “the concerns about possible connections between international organised crime and illegal fishing in certain regions of the world”.⁵⁵ Subsequent UNGA resolutions on Sustainable Fisheries also continue to recognise the possible link between illegal fishing and TOC.⁵⁶ At the regional level, the African Union decided to suppress IUU fishing and other transnational crimes under the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter).⁵⁷ Along the same lines, the UNODC has stated that “Efforts should also be made to criminalise marine living resource crimes to ensure that transnational fishing actors are prosecuted and that the economic, environmental and societal impact of marine living resource crimes committed by amongst others transnational criminal groups are duly recognized by the criminal justice systems.”⁵⁸ Research institutes such as RUSI⁵⁹ and the Stimson Center⁶⁰ also have underlined the

held in Vienna from 8 to 17 October 2008’ (1 December 2008) UN Doc CTOC/COP/2008/19 para 210.

⁵⁴ *ibid.*

⁵⁵ UNGA ‘Sustainable fisheries, including through the 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, and related instruments’ (24 February 2009) UN Doc A/RES/63/112, para 59.

⁵⁶ The subsequent UNGA Resolutions on ‘Sustainable fisheries, including through the 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, and related instruments,’ are UN Doc A/RES/64/72, UN Doc A/RES/65/38, UN Doc A/RES/66/68, UN Doc A/RES/67/79, UN Doc A/RES/68/71, UN Doc A/RES/69/109, UN Doc A/RES/70/75, UN Doc A/RES/71/123, UN Doc A/RES/72/72, UN Doc A/RES/73/125, and UN Doc A/RES/74/18. All documents are available on < https://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm > accessed 21 January 2020.

⁵⁷ African Charter on Maritime Security and Safety and Development in Africa (adopted 15 October 2016) (Lomé Charter).

⁵⁸ UNODC (n 21) 139.

⁵⁹ Haenlein (n 52).

⁶⁰ Amanda Shaver and Sally Yozell, ‘Casting a Wider Net. The Security

need to complement the traditional fisheries management approach with criminal law enforcement.

Criminal law has been considered to be important in protecting the environment.⁶¹ John Vervaele states that the criminal law protection of the environment should be used when the essential interests related to the preservation of the commons are at stake.⁶² Thus, all serious harms to these common interests, committed by gross negligence, recklessness or intent, deserve the protection and enforcement of the criminal law.⁶³ The harms of environmental crimes and their TOC dimensions have sparked new interest in protecting the environment through criminal law,⁶⁴ including in the case of IUU fishing.

The involvement of OCGs in transnational IUU fishing brings different levels of concern for the international community. OCGs are deliberately obtaining financial benefits through illegal conduct, supported by pre-established networks and resources that involve violent and destructive criminal practices. The scale of the operation of OCGs in terms of coverage, resources and catches is greater than that conducted by regular actors of IUU fishing such as small-scale fishermen. With such a greater scale, the harms inflicted by OCGs are also definitely more significant.

Implications of Illegal, Unreported and Unregulated Fishing' (Stimson Center, 2018) <[https://www.stimson.org/sites/default/files/file-attachments/Casting a Wider Net Report.pdf](https://www.stimson.org/sites/default/files/file-attachments/Casting_a_Wider_Net_Report.pdf)> accessed 31 May 2018.

⁶¹ Jose Luis de la Cuesta and others (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18-20th May 2016) (Maklu 2016); Ricardo M Pereira, *Environmental Criminal Liability and Enforcement in European and International Law* (Queen Mary Studies in International Law Volume 21, Brill Nijhoff 2015); Stephen C. McCaffrey, 'Criminalization of Environmental Protection' in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).

⁶² John A.E. Vervaele, 'International Cooperation in the Investigation and Prosecution of Environmental Crime. Problems and Challenges for the Legislative and Judicial Authorities' in Jose Luis de la Cuesta and others (eds), *Protection of the Environment through Criminal Law (AIDP World Conference Bucharest, Romania, 18th-20th May 2016)* (Maklu 2016).

⁶³ *ibid* 243.

⁶⁴ *ibid* 251; John A.E. Vervaele and Daan P. Van Uhm, 'Criminal Justice and Environmental Crime: How to Tackle Organized Crime and Ecocide' (RENFORCE Blog, 16 February 2017) <<http://blog.renforce.eu/index.php/en/2017/02/16/criminal-justice-and-environmental-crime-how-to-tackle-organized-crime-and-ecocide/>> accessed 24 January 2018.

The “harm principle” states that harms to others provide a sufficient (or even necessary) condition for states’ intervention through criminal law.⁶⁵ The enactment of criminal law against certain conduct aims to protect the interests of society against the harm caused and also aims to deter or prevent the same conduct from happening in the future.⁶⁶ Based on the harm principle, the greater harms caused by OCGs can be argued to be threats against the interests of society and thus sufficient condition for states to intervene, using criminal law to deter and punish the intentional actions of OCGs in IUU fishing.

The criminalisation of transnational crime, which can include IUU fishing, can be done through suppression conventions. These conventions are aimed at suppressing certain crimes and coordinating suppression efforts among member states.⁶⁷ In doing so, suppression conventions provide four main provisions, i.e. substantive law, jurisdiction, investigative tools and international cooperation.⁶⁸ Historically, little efforts were made to coordinate cross-border prohibition, jurisdiction, and enforcement, mainly due to national sovereignty in criminal justice matters. States cooperated on a partial and reactive basis which responded to the perceived problems of the time.⁶⁹ However, national responses alone are insufficient to tackle transnational crimes due to several factors such as limited jurisdiction, lack of resources and the transnational nature of the crime itself.⁷⁰ Robert Currie observes that there has been increasing

⁶⁵ Nina Peršak, ‘Norms, Harms and Disorder at the Border; The Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory in Nina Peršak, *Legitimacy and Trust in Criminal Law, Policy, and Justice: Norms, Procedures, Outcomes* (Routledge 2014).

⁶⁶ McCaffrey (n 61) 1015.

⁶⁷ Roger S. Clark, ‘Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus’ (2011) 22 *Criminal Law Forum* 519, 520; Robert J. Currie and Joseph Rikhof, *International and Transnational Criminal Law* (2nd edn, Irwin Law 2013) 328; Neil Boister, ‘Human Rights Protections in the Suppression Conventions’ (2002) 2(2) *Human Rights Law Review* 199, 199.

⁶⁸ See Chapter 5 for further discussion on these elements of suppression conventions.

⁶⁹ Currie and Rikhof (n 67) 328.

⁷⁰ Sara Wharton, ‘Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute’ (2015) 52 *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 129, 177.

willingness among states to increase and expand cooperation that has resulted in the growing sophistication and complexity of suppression conventions.⁷¹ Until now, different suppression conventions have been concluded to suppress particular transnational crimes including drugs trafficking,⁷² corruption,⁷³ trafficking in persons,⁷⁴ smuggling of migrants⁷⁵ and illicit manufacturing and trafficking of firearms.⁷⁶ The ability to harmonise substantive and procedural criminal law and to strengthen international cooperation among states has made suppression conventions a preferred solution in tackling common threats. Suppression conventions are negotiated by states, mostly in the framework of existing international and regional fora. Once signed and ratified, states have to implement their treaty obligations at the domestic level.

1.6. Research Questions

This dissertation aims to provide an analysis of the harms of IUU fishing and its TOC dimensions and the deficits of international and national fisheries instruments in addressing the TOC dimensions in IUU fishing. It will then suggest solutions to the deficits through suppression conventions at global and regional levels. Thus, this research aims to answer the central question:

⁷¹ Currie and Rikhof (n 67) 328.

⁷² United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (1998 Drugs Convention).

⁷³ United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UNCAC).

⁷⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking in Persons Protocol).

⁷⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling of Migrants Protocol).

⁷⁶ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005) 2326 UNTS 208 (Firearms Protocol).

How can the criminalisation of IUU fishing under suppression conventions tackle the deficits of regulations and enforcement at the international and national levels?

In answering the central question, this study will also examine the following sub-questions.

1. What is the extent of IUU fishing, in particular by transnational organised crime groups, and what types of harms does it cause?
2. What is the extent of regulatory and enforcement deficits in the international and national fisheries instruments?
3. Can suppression conventions tackle the deficits in the existing international and national fisheries instruments?
4. How can criminalisation of IUU fishing under suppression conventions be regulated at a global level?
5. How can criminalisation of IUU fishing under suppression conventions be regulated at a regional level?

The objective of this study is to provide policy recommendations toward more comprehensive solutions in tackling IUU fishing, particularly against its TOC dimensions. These recommendations will propose the criminalisation of IUU fishing through suppression conventions at global and regional levels. In doing so, it offers solutions to tackle the deficits found in the existing international fisheries instruments through suppression conventions. This study does not aim to draft the complete text of the suppression conventions against IUU fishing and its TOC dimensions. Rather it provides a more concrete picture on how the suppression conventions could be implemented against IUU fishing at global and regional levels through setting out details of the four main elements of suppression conventions, i.e. substantive law, jurisdiction, investigative tools and international cooperation, that will be present in different alternatives at global and regional levels.

In this dissertation, it is argued that suppression conventions can be employed to address the common threats of IUU fishing and its TOC dimensions. Suppression conventions will serve as complementary solutions to the deficits found in international and national fisheries instruments by providing harmonisation of

substantive law, establishment of jurisdiction, investigative tools, and international cooperation against OCGs' involvement in IUU fishing. In this context, this dissertation will elaborate on the two settings where suppression conventions can be regulated, i.e. at the global and regional levels. At the global level this dissertation will elaborate three different alternatives types of suppression conventions that could be pursued, namely the criminalisation of IUU fishing through UNTOC, the establishment of a stand-alone convention, and the integration of suppression provisions into the international fisheries instruments. At the regional level, there are two alternatives that could be implemented, i.e. the establishment of a regional suppression convention and the integration of suppression provisions into regional fisheries instruments. These alternatives will be discussed in Chapters 5 and 6.

1.7. Terminology and Limitation

In this dissertation several terms will be used throughout the chapters. To understand better the orientation and scope of this dissertation, it is necessary to clarify the meaning and limitation of such terms.

First is the term “IUU fishing.” The term is described under paragraph 3.1. of the IPOA-IUU as activities that are:

- 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law;
or
- 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

IUU fishing in general can include different aspects that covers the supply chain, from the preparation state which include identification of opportunities, procurement of vessels and fraudulent documents, and recruitment of crew; execution stage which include fishing without a license, fishing with prohibited gear, fishing in a closed area, and not reporting or misreporting catch; and the follow-up stage which include the sales or distribution of the illegal catch to the market.

The broad description enables the term “IUU fishing” to encapsulate different activities and offer flexibility in application. However, the broad definition also creates obscurity and overlap among its elements (“illegal”, “unreported” and “unregulated”). Despite the shortcomings, “IUU fishing” has become a well-known term in the international community. This dissertation will use the term “IUU fishing” to mean fishing activities on a large-scale that can violate or undermine national, regional or international regulations and also RFMO measures. The fishing activities in this dissertation focus on the activities related to the extraction of fish from the sea including fishing without a license, fishing with prohibited gear, and not reporting or seriously misreporting catch. The activities related to the extraction of fish from the sea are selected since these activities are commonly found in the IUU fishing activities as displayed in different cases of this dissertation. That said, other conduct such as distribution, sales, transportation, export or import are excluded as well as the usage of fishing vessels to smuggle contraband items or people, and other conduct not related to fishing activities. The fishing activities in this dissertation also exclude small-scale IUU fishing activities or subsistence fishing.

Second, are the terms “regulations” and “enforcement”. In this dissertation, “regulations” is to be understood in the context regulatory fisheries enforcement as regulations that contain all the legal obligations in relation to enforcement of fisheries policies, such as the definition of illicit behaviour, investigative powers and sanctioning powers. It should be distinguished from “fisheries regulations” that contain the substantive rules on fisheries conservation and management, such as licensing of vessels, determining quotas of catch, regulating seasons and areas of fishing, or fixing the age, size and species of fish that may be caught. “Enforcement ” in this

dissertation is to be understood as actions that can be taken to implement the “regulations” which include monitoring, surveillance, boarding, inspecting, arresting, obligations to report, denial of entry, and decisions on sanctions. Both “regulations” (in the context of regulatory fisheries enforcement) and “fisheries regulation” are parts of rulemaking at the global, regional and domestic levels. “Enforcement” is mainly done at the domestic level. However, “enforcement” practices in fisheries matters can also be found at global and regional levels.

Third are the terms “transnational dimension” and organised crime dimension.” The terms are understood through two different elements, “transnational” and “organised crime”. In this dissertation, the element of “transnational” refers to Article 3(2) of the UNTOC which covers four circumstances for an offence i.e. “i) It is committed in more than one State, ii) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State, iii) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State or iv) It is committed in one State but has substantial effects in another State”. The element of “organised crime” in this study is understood through the involvement of OCGs. The meaning of an “OCG” in this study refers to Article 2(a) of UNTOC which defines it as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes of offences ... in order to obtain, directly or indirectly, a financial or other material benefit”. “A structured group” is defined under Article 2(c) as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”. In the context of OCGs, this study will only cover OCGs that involve natural persons and not legal persons. An OCG involving legal persons is a sophisticated matter that involves a different range of legal issues and many jurisdictions have not yet regulated such a matter in the area of enforcement. Thus, the involvement of legal persons in OCGs and its consequences needs a separate, in-depth study which will not be covered by this study.

1.8. Methodology and Structure of the Research

The research is a legal study aimed to find the answer to how IUU fishing can be criminalised under suppression conventions. The methodology of this research is doctrinal legal research.⁷⁷ The doctrinal legal research is carried out through the interpretation and examination of existing regulations and a literature review which are used to answer the main question and the sub-questions of this research. The sub-questions in this study are used as building blocks towards answering the main question.

Desktop research is the main method which is used to collect data throughout the research process. It is conducted through the identification, collection, review, and assessment of primary and secondary literature. Primary sources of international, regional, and national instruments are examined along with relevant secondary sources of books and articles related to fisheries, IUU fishing, suppression conventions and transnational organised crime in general, both in print and electronic forms. In addition, reports from regular as well as specialised media sources are used to gather data. Both primary and secondary sources are obtained through internet and library research as well as by using the websites of relevant governments, regional and international organisations, and news agencies.

In answering sub-question 1, the study examines in Chapter 2 the conditions of IUU fishing, its actors (including OCGs) and harms through the study of different reports published by relevant institutions and experts, including the FAO. Different reports on IUU fishing, including those from criminological perspectives, are presented to support the premise that IUU fishing causes significant harms in the context of the legal order, environment, social condition and the economy. Reports on the involvement of OCGs in IUU fishing are also discussed to establish the disquieting realities of such an involvement through cases found around the world. It is argued that the involvement of OCGs in IUU fishing magnifies the already significant harms caused by IUU fishing, which establishes the urgent need to address such involvement.

⁷⁷ For further reading see Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

International and national instruments on fisheries and IUU fishing are examined in answering sub-question 2. An analysis of international fisheries instruments, i.e. the UNCLOS; the Compliance Agreement, the UNFSA, the IPOA-IUU, and the PSMA is conducted to establish the regulations and enforcement deficits of international fisheries instruments in addressing the TOC dimensions of IUU fishing (explained in Chapter 3). These instruments have been selected because they represent the global regime of fisheries conservation and management measures covering coastal, flag and port states. They also represent the historical development of international interests in fisheries, starting from more general fisheries conservation and management measures by the UNCLOS in 1982, the Compliance Agreement in 1993 and the UNFSA in 1995, and then developing into more detailed measures against IUU fishing in the case of the IPOA-IUU in 2001 and the PSMA in 2009. The selection of these instruments is by no means a full representation of the international fisheries instruments. Nonetheless, for the purpose of this study, these five instruments are sufficient.

In answering sub-question 2, the study also examines Indonesia and Vietnam as national case studies. The case studies (explained in Chapter 4) are to confirm that the regulations and enforcement deficits found in international fisheries instruments against TOC dimensions in IUU fishing are also found at national level. To that end, the national legislation of both countries related to fisheries and IUU fishing are examined. Criteria for the selection of the countries as case studies are: i) those that have a significant position in the global marine capture production, and thus have substantial interests in complying with international fisheries instruments, and ii) those that suffer from IUU fishing and its TOC dimensions. Under these criteria, Indonesia and Vietnam have been selected. First, both countries have been consistently ranked in the top ten global marine capture producers; Indonesia ranked 3rd and Vietnam ranked 7th.⁷⁸ Second, both countries suffer from rampant IUU fishing, but under two different sets of circumstances. On the one side, Indonesia represents the “victim” of the involvement of OCGs in IUU fishing,

⁷⁸ FAO, ‘The State of World Fisheries and Aquaculture 2020. Sustainability in Action (FAO 2020) 13.

where many of its fish stocks are plundered causing significant harm to the country, although it is also acknowledged that some Indonesian vessels engage in transnational IUU fishing. On the other side, although Vietnam is a victim of IUU fishing, the country also represents the “perpetrator” of IUU fishing where many of its vessels are engaged in transnational IUU fishing, causing harm and concerns in the affected countries. The selection of Indonesia and Vietnam also support the explanation of regional criminalisation of IUU fishing in Southeast Asia in Chapter 6.

The concept of suppression conventions and its four elements is used as the basis to answer sub-questions 3, 4 and 5. In answering sub-question 3, the concept of suppression conventions is explained in detail (see Chapter 5) through the elaboration of four of their elements i.e. substantive law, jurisdiction, investigative tools and international cooperation. These elements have been selected since they are the core elements in suppression conventions that exist in the majority of the conventions. These elements are then used to explain how criminalisation of IUU fishing can be regulated at global and regional levels. At each level, this study elaborates on how criminalisation can be regulated using the four elements in more detail. The options of the two levels are important bearing in mind the transnational nature of IUU fishing. Both levels can be pursued in different time frames and in different circumstances yet still can be mutually reinforcing. The absence of one level would not lessen the value of the other level.

The dissertation analyses how IUU fishing criminalisation can be implemented at global and regional levels when answering sub-questions 4 and 5. For sub-question 4, this study analyses and proposes three alternatives for global criminalisation of IUU fishing, i.e. criminalisation under the UNTOC, the establishment of a stand-alone suppression convention and the integration of suppression provisions into existing international fisheries instruments (explained in Chapter 5). Chapter 5 also provides a comparative analysis of the three alternatives for global criminalisation of IUU fishing covering the pros and cons of each alternative and a comparison of the three alternatives under three main categories i.e. scope of application and substantive law, feasibility and operationality to explain the important aspects of the establishment of a suppression convention

or the integration of suppression provisions. The first category analyses the comparison of scope of application and substantive law among the three alternatives, particularly on the aspect of coverage and flexibility. The second category compares the feasibility of the three alternatives considering their different characteristics. The last category compares the operational aspect of the three alternatives, including institutional support and funding.

For sub-question 5, this study analyses and proposes two alternatives for regional criminalisation of IUU fishing i.e. the establishment of a stand-alone regional suppression convention and the integration of suppression provisions into existing regional fisheries instruments (explained in Chapter 6). In this regional solution, Southeast Asia is used in an attempt to better explain how the criminalisation can be regulated. Southeast Asia has been selected for three main reasons. First, the region is an important player in global marine capture production. Six out of ten countries in the region are in the top 20 major producer countries with Indonesia ranked 3rd, Vietnam ranked 7th, the Philippines ranked 11th, Malaysia ranked 14th, Thailand ranked 12th and Myanmar ranked 18th.⁷⁹ Second, the Southeast Asia region is struggling to fight IUU fishing and its TOC dimensions, as can be demonstrated by numerous cases found in the region. The third reason is that the region has not yet criminalised the TOC dimensions of IUU fishing, but at the same time the region is still open to the possibility of the criminalisation of new transnational crimes, including IUU fishing. Chapter 6 also provides a comparative analysis of the two alternatives for regional criminalisation of IUU fishing. The analysis covers the pros and cons of each alternative and a comparison of the two alternatives under three main categories i.e. scope of application and substantive law, feasibility and operationality.

This dissertation synthesises and analyses the findings of the chapters in Chapter 7. Policy recommendations on the most suitable alternatives to criminalise IUU fishing at global and regional levels are offered in this chapter.

⁷⁹ *ibid.*

CHAPTER 2

Understanding IUU Fishing

2.1 Introduction

The purpose of this chapter is to provide an understanding of the phenomenon of IUU fishing through examining its global conditions and the harms caused by it, concept, different drivers that motivate IUU fishing, and its TOC dimensions. The elaboration of different aspects of the IUU fishing phenomenon will affirm the TOC dimensions of IUU fishing and the magnified harms caused by such dimensions that are threatening the common interests of the international community in conserving and managing fish stocks. In doing so, this chapter will first explain the IUU fishing global conditions and harms caused (economic, environmental, social, and legal order). It will then explain the concept of IUU fishing with main reference to the IPOA-IUU. The discussion will then move to different drivers of IUU fishing to understand the pull and push factors of IUU fishing. Lastly, the chapter will discuss the TOC dimensions of IUU fishing which are explained through different cases occurring in different parts of the world.

2.2 IUU Fishing Global Conditions and Its Harms

Fisheries sector has a significant role for the world's population. Fish and fish products are important sources of protein and play an integral role in the world populations' consumption of animal protein. The Food and Agriculture Organisation's (FAO) publication, entitled "The State of World Fisheries and Agriculture" of 2018, stated that

from 1961 to 2015, fish consumption per capita grew at an average rate of around 1.5% per year.¹ In 2015, fish accounted for around 17% of animal protein consumed by the global population.² In developing countries, fish holds a more significant role since people in those countries have a higher proportion of fish as protein in their diets than people in developed countries.³

Fish and fish products have become some of the most traded food items in the world. In 2018, the global trade of fish and fish products represented more than 9% of total agricultural exports (excluding forest products) and 1% of world merchandise trade in value terms.⁴ From 1976 to 2016, the global export of fish and fish products grew by 245% which represents an increase from US\$8 billion (approximately €7.2 billion) in 1976 to US\$143 billion (approximately €128.7 billion) in 2016.⁵ Based on the 2006 and 2016 data, China was the largest exporter of fish and fish products, having a 10.4% and a 14.1% share of the total global exports in 2006 and 2016 respectively.⁶ Over the same period, the United States of America (USA) held the role as the biggest importer with 15.5% (2006) and 15.1% (2016) of total global imports of fish and fish products.⁷ Fish trade, for many countries, represents a significant source of foreign currency earnings, in addition to its significant role in income generation and employment for the community. In some countries, such as Cabo Verde, Faroe Islands, Greenland, Seychelles and Vanuatu, exports of fish and fish products exceed 40% of the total value of traded commodities.⁸ The growth of exports in developing countries, partly due to regional trade agreements,

¹ Food and Agriculture Organization (FAO), 'The State of World Fisheries and Aquaculture 2018. Meeting the Sustainable Development Goals' (FAO 2018) 69.

² *ibid.*

³ *ibid.*

⁴ *ibid* 52.

⁵ *ibid* 7. For this report of 2018, the dataset used in this timeframe is from 1976 to 2016.

⁶ *ibid* 55. See also Hongzou Zhang and Fengshi Wu, 'China's Marine Fishery and Global Ocean Governance' (2017) 8(2) *Global Policy* 216.

⁷ *ibid* 7.

⁸ *ibid* 52.

has been significantly higher than that in developed countries.⁹ In addition to the economic importance of fisheries, the sector has also provided work for an estimated 59.6 million people who are employed in various parts of the sector.¹⁰ Among those who are employed in the sector, 85% are located in Asia, followed by Africa (10%) and Latin America and the Caribbean (4%) while Europe, North America and Oceania had less than 1% each.¹¹

Global marine fisheries catches have been steadily decreasing since the mid-1990s. At the same time, fishing efforts have continued to increase, leading to intense competition, declining catch-per-unit-of-effort and the over-exploitation of many fish stocks.¹² The growing world demand, overcapacity and the lack of new or alternative opportunities in capture fisheries are causing fisheries actors to look further and deeper than ever before.¹³ It is suggested that only the deepest and most inaccessible areas of the ocean have yet to feel pressure from fisheries.¹⁴ The FAO estimated that, in 2015, 33.1% of fish stocks were overfished, while 59.9% were fully fished (maximally sustainably fished) and 7% were underfished.¹⁵ Generally, up to 2015, an increasing proportion of fish stocks have been overfished or fully fished, resulting in a lower proportion of fish stocks being underfished.¹⁶ IUU fishing is acknowledged as one of the factors that led to the decline of fish stocks or seriously affected efforts to rebuild already depleted fish stocks.¹⁷

⁹ *ibid* 7.

¹⁰ *ibid* 30.

¹¹ *ibid*.

¹² David Tickler and others, 'Modern Slavery and the Race to Fish' (2018) 9 *Natural Communication* 1, 1.

¹³ WWF, 'Living Blue Planet Report. Species, Habitats and Human Well-Being' (WWF, 2015) 26 <<https://www.worldwildlife.org/publications/living-blue-planet-report-2015> > accessed 24 December 2019.

¹⁴ *ibid*.

¹⁵ FAO, 'The State of World Fisheries and Aquaculture 2018. Meeting the Sustainable Development Goals' (n 1) 39-40. In the report, overfished refers to having abundance lower than the level that can produce Maximum Sustainable Yield (MSY), fully fished refers to having abundance at or close to the level of MSY and underfished refers to abundance above the level corresponding to MSY.

¹⁶ *ibid*.

¹⁷ United Nations General Assembly (UNGA), 'Discussion Panel A Responsible Fisheries and Illegal, Unregulated and Unreported Fisheries' (United Nations

The decline of global fish stocks has pushed the need for more sustainable fishing practices. The importance of conserving and sustainably using marine resources is underlined by Goal 14 of the Sustainable Development Goals (SDGs): “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”.¹⁸ To this end, the SDGs set a target number 14.4. for marine fisheries: “By 2020, effectively regulate harvesting and end overfishing, illegal unreported, and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield”.¹⁹ Unfortunately, based on the FAO assessment, it seems very unlikely that the world’s fish stocks can be rebuilt in the very near future.²⁰

A 2009 study by Agnew and others estimated that IUU fishing produces between 11-26 million tonnes of fish each year for US\$10-23 billion (approximately €9-20.7 billion) and it has been escalating for the past 20 years.²¹ It was estimated that the Eastern Central Atlantic experienced the highest level of IUU fishing while the Southwest Pacific experienced the lowest level.²² The study also underlined the significant relationship between weak governance and scale of IUU fishing where countries with weak governance are more vulnerable to IUU fishing activities. The study showed that weak governance also correlates to poor performance in enforcing IUU fishing where 30 out of 53 top fishing countries were assigned fail grades under the FAO Code for Responsible Fisheries.²³

In the areas of RFMOs IUU fishing practices are also evident. CCAMLR, for example, through its Scientific Committee, reported

Open-ended Informal Consultative Process on Ocean Affairs, First Meeting, 30 May-2 June 2000) (15 May 2000) UN Doc A/AC.259/1 para 1.

¹⁸ UNGA ‘Transforming our world: the 2030 Agenda for Sustainable Development’ (21 October 2015) UN Doc A/RES/70/1.

¹⁹ *ibid.*

²⁰ FAO, ‘The State of World Fisheries and Aquaculture 2018. Meeting the Sustainable Development Goals’ (n 1) 46.

²¹ David J Agnew and others, ‘Estimating the worldwide extent of illegal fishing’ (2009) 4(2) PLoS ONE 1, 4.

²² *ibid.* 2.

²³ *ibid.* 4.

that in 2016 there had been an increase in the detection of IUU activities in the last three years in its area.²⁴ This fact is a continuation of IUU fishing trends in the area where it was also found in 2003-2004 that around 16.5 percent of the total catch of toothfish resulted from IUU fishing.²⁵ Similarly, the Indian Ocean Tuna Commission reported that nearly 10 percent of its reported landings are from IUU fishing²⁶ while the Northeast Atlantic Fisheries Commission (NEAFC) estimated that IUU fishing vessels caught up to 27 percent of redfish in 2002.²⁷

The continuing trend of IUU fishing has made it one of the greatest threats to marine ecosystems, particularly in some developing countries where fisheries regulations and management capacities are insufficient, and enforcement mechanisms are weak. In 2015, the UN General Assembly noted that IUU fishing is “one of the greatest threats to fish stocks and marine ecosystems and continues to have serious and major implications for the conservation and management of ocean resources, as well as the food security and economies of many States, particularly the developing States”.²⁸ The concerns by the General Assembly reflect the general acknowledgement that IUU fishing problems and its threats are real, particularly for the developing countries and, therefore, the international community needs to find a more comprehensive solution in tackling the problem.

²⁴ Scientific Committee for the Conservation of Antarctic Marine Living Resources (SC-CCAMLR), ‘Report of the Thirty-Fifth Meeting of the Scientific Committee’ (Hobart, Australia, 17-21 October 2016) SC-CCAMLR-XXXV.

²⁵ Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), ‘Report of the Twenty-third Meeting of the Commission’ (Hobart, Australia, 25 October–05 November 2004) CCAMLR-XXIII, 31.

²⁶ Kevin Bray, ‘A Global Review of Illegal, Unreported, and Unregulated Fishing’ in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.

²⁷ Kjartan Hoydal, ‘IUU Fishing in NEAFC: How Big is the Problem and What Have We Done?’ in OECD, *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004).

²⁸ UNGA ‘Sustainable fisheries, including through the 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, and related instruments’ (19 December 2019) UN Doc A/RES/74/18, para 80.

2.2.1. IUU Fishing Harms

In understanding the seriousness of the problem of IUU fishing, it is necessary to look into the harms caused by IUU fishing. The impacts of IUU fishing can be examined under several categories such as economic, environmental, social and legal order. The coverage of those harms can range from state level to an individual level where jobs and security of the citizens are at stake.

2.2.1.1. Economic Harms

The economic loss from IUU fishing is estimated at between US\$10-23 billion per year (approximately €9-21.1 billion)²⁹ which can range from the losses of revenue at the national level (from the fish that is illegally removed from the country) to the loss of licensing fees, value added tax and other tax incomes.³⁰ The economic impacts of IUU fishing are not only seen at the national level, but also trickle down to the microeconomic level such as the villages, communities and households where IUU fishing activities may cause economic harm to the legal fishers due to increased competition and costs of harvesting the decreasing fish stocks.³¹

Developing countries are the ones which are the most affected by the economic harms of IUU fishing.³² In a study by MRAG on the impacts of IUU fishing on developing countries, for example, it was

²⁹ Agnew and others (n 21) 2.

³⁰ Frank Meere and Claire Delpuech, 'The Challenge of Combating Illegal, Unreported and Unregulated (IUU) Fishing' in FAO/OECD, 'Fishing for Development' (2015) FAO Fisheries and Aquaculture Proceedings No. 36, 36.

³¹ David J. Agnew and Colin T. Barnes, 'Economic Aspects and Drivers of IUU Fishing: Building a Framework' in in OECD, *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004).

³² Transform Aqorau, 'Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666. For further discussion on the resource exploitation in resource-rich countries see also publications related to 'resource curse' by Frederick van der Ploeg, 'Natural Resources: Curse or Blessing?' (2011) 49 (2) *Journal of Economic Literature* 366-420; Jeremy D. Sachs and Andrew M. Warner, 'The Curse of Natural Resources' (2001) 45 (4-6) *European Economic Review* 827-38; Christa N. Brunnschweiler, 'The Curse Revisited and Revised: A Tale of Paradoxes and Red Herrings,' (2008) 55 (3) *Journal of Environmental Economics and Management* 248-64.

estimated that the IUU fishing loss coming from Angola, Guinea, Liberia, Kenya, Mozambique, Namibia, Sierra Leone, Somalia, and Papua New Guinea accounts for US\$372 million (approximately €334.8 million) where Guinea had the highest loss of US\$105.3 million (approximately €94.7 million).³³ In the Eastern Central Atlantic, IUU fishing is estimated to cause losses of between US\$828 million (745.2 million) and US\$1.6 billion annually (approximately €1.44 billion).³⁴ In Asia, the region's losses caused by IUU fishing are estimated at between US\$6 billion (approximately €5.4 billion) and US\$20.75 billion (approximately €18.6 billion) per year, representing between 4.5 and 14.4 million tonnes.³⁵ In developing countries, these economic losses can have significant consequences for their development agenda, especially when those countries are heavily dependent on the fisheries sector. Countries with weak conservation and management capabilities, particularly in developing countries, will continue to suffer economic loss from IUU fishing if it is not addressed.

2.2.1.2. Environmental Harms

The environmental harms of IUU fishing are detrimental since conservation and management measures are being disregarded. IUU fishing activities cause tremendous damage to fish stocks and the marine environment. With regard to harm to fish stocks, Agnew and others found a direct correlation between IUU fishing and the depletion of fish stocks, where areas with the highest levels of IUU fishing had the lowest levels of the proportion of fish stocks, whilst areas with the lowest levels of IUU fishing had the highest levels

³³ Marine Resources Assessment Group Ltd (MRAG), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries: Final Report' (MRAG, 2005) 37 <<https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-iuu-fishing-developing-countries>> accessed 15 June 2017.

³⁴ Eva de Coning and Emma Witbooi, 'Towards a New 'Fisheries Crime' Paradigm: South Africa as an Illustrative Example' (2015) 60 *Marine Policy* 208, 208.

³⁵ Bay of Bengal Large Marine Ecosystem (BOBLME), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries in Asia' (BOBLME, 2015) 395 < <https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-fishing-developing-countries-asia>> accessed 12 June 2017.

of the proportion of fish stocks.³⁶ In addition, IUU fishing is also inflicting damage on seabirds, marine mammals and sea turtles. For example, in the Southern Ocean, illegal long-line vessels are estimated to kill 100,000 seabirds, including tens of thousands of endangered albatrosses annually.³⁷ IUU fishing practices result in the high level of by-catch of both juvenile fish and non-target species, and they also contribute to the extinction of several species, especially the ones with a high value which are the main focus of IUU fishing actors.³⁸ The irresponsible practices of fishing may also eliminate keystone species (those whose impact on their community ecosystem is large, and disproportionately large relative to their abundance)³⁹ which can have huge negative impacts on the ecosystem. The elimination of particular keystone species, from an ecocentric perspective (where there is a dialectical relationship between humans and nature under the ecological principle of ‘everything is related to everything else’),⁴⁰ could have calamitous impacts on the perennial species and their ecosystem due to the complex symbiotic interaction between plants and animals.⁴¹ Further, the disappearance of both predator and prey keystone species can also disturb the ecosystem’s balance; for example, the reduction in the sea star population resulting in the upsurge of growth in the mussel population that, in turn, pushed away other species.⁴²

The violation of conservation and management measures by IUU fishing actors also has detrimental impacts on the marine

³⁶ Agnew and others (n 21) 5.

³⁷ Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers 2010) 11.

³⁸ FAO ‘Report of the FAO/UNEP Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats’ (Rome, 23-25 September 2009) FAO Fisheries and Aquaculture Report No. 932, FIRF/R932, 12.

³⁹ Mary E. Power and others, ‘Challenges in the Quest for Keystones: Identifying Keystone Species is Difficult but Essential to Understanding How Loss of Species Will Affect Ecosystems’ (1996) 46(8) *Bioscience* 609.

⁴⁰ Daan P. van Uhm, *The Illegal Wildlife Trade: Inside the World of Poachers, Smugglers and Traders* (Springer 2016) 66.

⁴¹ *ibid* 267

⁴² *ibid* 21.

environment. For instance, those who carry out IUU fishing often employ destructive fishing methods such as the use of poisons and blast fishing.⁴³ These methods have the potential to damage sensitive marine habitats such as coral reefs which can take up to 25 years to recover and, where 50 percent of the live coral is destroyed, recovery to the initial state is estimated to take around 60 years.⁴⁴ These irresponsible practices towards conservation and management measures will contribute to the acceleration of the pressures under which the marine environment is already struggling.

2.2.1.3. Social Harms

The fisheries sector is a significant source of employment in many countries. The sector provides work for an estimated 59.6 million people who are employed in various parts of the sector.⁴⁵ It also supports more than 500 million people who are making their living indirectly from the fishing industry.⁴⁶ The existence of IUU fishing activities can displace legitimate fishers since IUU fishing operates at lower costs which leads to unfair competition. This could also induce legitimate fishers to participate in IUU fishing itself to keep up with the competition. The declining fish stocks, caused by IUU fishing, also disrupt the livelihood of legitimate fishermen. The lower fish catch could lead to lower employment and lower household incomes which contribute to the increasing level of poverty, particularly among coastal and artisanal fishers.⁴⁷ Thus, IUU fishing is disrupting the social status in fishing communities where livelihoods depend on marine

⁴³ APEC, 'Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific', (APEC, November 2008) APEC#208-FS-01.5, 40.

⁴⁴ Raquel Goñi, 'Fisheries Effects on Ecosystems' in Charles R.C. Sheppard (ed.), *Seas at the Millennium: An Environmental Evaluation* (Vol III: Global Issues and Processes, Pergamon Elsevier Science, 2000) 123 cited in Palma, Tsamenyi and Edeson (n 37) 10.

⁴⁵ FAO, 'The State of World Fisheries and Aquaculture 2018. Meeting the Sustainable Development Goals' (n 1) 30.

⁴⁶ WWF, 'Fishing for Proteins. How Marine Fisheries Impact on Global Food Security up to 2050. A Global Prognosis', (WWF, 2016) 4 <<https://www.worldwildlife.org/publications/fishing-for-proteins-how-marine-fisheries-impact-global-food-security-up-to-2050>> accessed 30 August 2018.

⁴⁷ Agnew and Barnes (n 31) 199

resources, threatening food security and provoking a culture of crime and non-compliance.⁴⁸

2.2.1.4 Legal Order Harms

IUU fishing undermines the legal order by violating fisheries laws and regulations at national, regional and global levels. IUU fishing is in contravention of established management and conservation measures, through fishing without licences, using forbidden fishing gear, and not reporting or misreporting fishing activities to the authority. The actors of IUU fishing conduct their activities in an organised manner with advanced technology and extensive networks. In doing so, they often engage in illicit collaboration with corrupt law enforcement officials to avoid the reach of applicable laws and regulations and to exploit the weak regulations and enforcement in numerous countries.

The activities of IUU fishing further undermine the legal order through links with the involvement of OCG which complicates the problem even more. The involvement of OCG is more apparent when it involves high-value products such as abalone, shark fins, sturgeon and caviar. Furthermore, IUU fishing activities can also be linked to other TOCs such as trafficking in persons, drug trafficking, people smuggling, bribery and money laundering. The involvement of OCG in IUU fishing and its links with related TOCs exacerbate the adverse impacts of IUU fishing on the legal order.

IUU fishing violates fisheries laws and regulations and, at the same time, having connections with OCGs and other related TOC have resulted in IUU fishing not only undermining the legal order but also, in a broader context, being connected with the threat to

⁴⁸ Anastasia Telesetsky, 'Laundering Fish in the Global Undercurrents: Illegal Unreported, and Unregulated Fishing and Transnational Organized Crime' (2015) 41 (4) *Ecology Law Quarterly* 939, 969. The example of provocation of the culture of crime and non-compliance can be seen, for example from the study by Daan van Uhm and Dina Siegel on the illegal trade of black caviar in the Caspian Sea where many unemployed workers and fishers often resort to poaching. It was also found that senior government officials, fishery inspectors, police services and other agencies are involved in the illicit activities. See Daan van Uhm and Dina Siegel, 'The Illegal Trade in Black Caviar' (2016) 19 *Trends in Organized Crime* 67.

states' security. In a database launched by Stimson Center on IUU fishing incidents reported around the world in 2016, it was found that 130 incidents converged with regional and national security interests, 48 incidents converged with TOC, 16 incidents converged with drug smuggling and 10 incidents converged with human security issues such as slavery.⁴⁹ It was also argued by the Royal United Services Institute, in its 2017 paper, that IUU fishing, along with other forms of organised crime, poses a security threat to the stability of national governments and their economies as it undermines national institutions and their governance, and it also converges with corruption, tax fraud and money laundering that all contribute to the threat to economic security.⁵⁰

The above elaboration of the harms of IUU fishing to the economy, environment, social, and legal order shows that IUU fishing is a real problem that needs comprehensive solutions. In understanding more about the problem of IUU fishing, we first need to discuss the terminology and concept of IUU fishing which will be elaborated in Section 2.3. below.

2.3. Understanding IUU Fishing Terminology and Concept

2.3.1 Early Development

The origin of IUU fishing terminology can be deduced from several events before its culminating inclusion in the IPOA-IUU in 2011.⁵¹ Earlier discussions⁵⁰ on different elements of IUU fishing

⁴⁹ Stimson Center, 'New Illegal Fishing Database Details Environmental Security Threats' (*Stimson Center*, 2017) < <https://www.stimson.org/content/new-illegal-fishing-database-details-environmental-security-threats> > accessed 30 September 2017.

⁵⁰ Cathy Haenlein, 'Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens Our Security' (Royal United Service Institute for Defense and Security Studies, 2017) 35-36.

⁵¹ For further discussion on the development of IUU fishing terminology see Palma, Tsamenyi and Edeson (n 37) 25-34; Andrew Serdy, 'A Wrong Turning in International Fisheries Law: The Flawed Concept(s) of Illegal, Unreported and Unregulated Fishing' in *The New Entrants Problem in International Law* (Cambridge University Press 2016); Martin Tsamenyi, Blaise Kuemlangan and Matthew Camilleri, 'Defining Illegal, Unreported and Unregulated (IUU) Fishing' in FAO 'Expert Workshop to Estimate The Magnitude of Illegal, Unported and Unregulated Fishing Globally' (Rome, 2-4 February 2015) FAO Fisheries and Aquaculture Report FIRO/R1106.

can be found in the work of the United Nations Conference on Environment & Development (UNCED) in 1992.⁵² The conference, under Chapter 17 of Agenda 21, acknowledged unregulated fishing as one of the problems in the management of high seas fisheries along with overcapitalisation, excessive fleet size and others. Furthermore, the conference encouraged states to cooperate at the bilateral, sub-regional and global level to address these issues of fisheries management.⁵³

Discussions on illegal and unreported fishing emerged at the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) when, during the Fifteenth Meeting of the CCAMLR in 1996, it acknowledged illegal and unreported fishing activities as a serious problem for the Commission.⁵⁴ Since then, the CCAMLR has been using the term “IUU fishing” regularly to describe a combination of unsustainable fishing activities by members and non-members.⁵⁵

The term “IUU fishing” then became formally recognised by the FAO at the Twenty-third Session of the Committee on Fisheries (COFI) in February 1999, based on a paper submitted by Australia to develop an international plan of action to combat IUU fishing.⁵⁶ Following the Twenty-third Session, the Rome Declaration on the Implementation of the Code of Conduct of Responsible Fisheries was established in 1999.⁵⁷ The declaration underscores its concerns on the escalating IUU fishing incidents, including vessels flying flags of

⁵² United Nations Conference on Environment and Development (UNCED), Agenda 21: Programme of Action for Sustainable Development’ (1992) A/CONF.151/26/Rev.I/Vol.I, ch 17 para 17.45.

⁵³ *ibid.*

⁵⁴ CCAMLR, ‘Report of the Fifteenth Meeting of the Commission’ (Hobart, Australia, 21 October-1 November 1996) CCAMLR-XV, para 12.13 and 13.24.

⁵⁵ Tsamenyi, Blaise, and Camilleri, (n 51) 24.

⁵⁶ FAO, ‘Illegal, Unreported and Unregulated Fishing: Proposal for a Draft International Plan of Action’ (Committee on Fisheries, Twenty-fourth Session, Rome, Italy, 26 February-2 March 2001) (FAO 2001) COFI 2001/7.

⁵⁷ FAO, Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries (adopted by the FAO Ministerial Meeting on Fisheries, Rome, 10-11 March 1999).

convenience,⁵⁸ and urged the development of a global plan of action to deal effectively with all forms of IUU fishing through coordinated actions by all stakeholders.⁵⁹

The development of IUU fishing terminology then passed several significant milestones such as the 116th Session of the FAO Council in June 1999 which agreed on the development of an international plan of action to address the problem of IUU fishing within the framework of the FAO Code of Conduct for Responsible Fisheries,⁶⁰ and the FAO Expert Consultation on IUU Fishing in May 2000⁶¹ which produced a draft plan entitled “the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing”. This was then followed by two sessions of the FAO Technical Consultation on IUU fishing, one in Rome from 2-6 October 2000 and another from 22-23 February 2001, before the 120th FAO Council Session in June 2001 adopted the text of the IPOA-IUU.⁶²

2.3.2 Concept of IUU Fishing under IPOA-IUU

The terminology of IUU fishing can be better understood within the context of the IPOA-IUU. The IPOA-IUU does not offer a definition of IUU fishing; rather it describes what may constitute elements of IUU fishing which can be found in Paragraph 3 of the IPOA-IUU. Paragraph 3 shows that the IPOA-IUU differentiates the three elements of IUU fishing: illegal, unreported and unregulated. However, it does not offer additional details on the activities covered by each of the elements, thereby leaving the Paragraph with a broad description. By having a broad description of each element, the

⁵⁸ *ibid* para 2.

⁵⁹ *ibid* para 12 (j).

⁶⁰ FAO, ‘Current World Food Situation’ in FAO Council Report of the Hundred and Sixteenth Session in Rome, 14-19 June 1999 (1999) C; 116/REP, para 30.

⁶¹ FAO, ‘Report of the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15-19 May 2000’ in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.

⁶² FAO, ‘International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO 2001) (adopted 2 March 2001, endorsed 23 June 2001) (IPOA-IUU) para 2.

IPOA-IUU provides enough space for the stakeholders to determine, as they deem appropriate, which activities may be considered as IUU fishing. However, unfortunately, the broad description also creates obscurity and overlap among the elements.

In order to have a more thorough understanding of the terminology of IUU fishing, it is necessary to take a closer look at the three elements of IUU fishing under the context of the IPOA-IUU.

2.3.2.1 Illegal Fishing

Under Paragraph 3.1. of the IPOA-IUU, illegal fishing is described as activities that are:

- 3.1.1 “conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;”
- 3.1.2 “conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law;”
or
- 3.1.3 “in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.”

Based on this description, illegal fishing can be understood as fishing activities by vessels (national or foreign) in a state’s jurisdictional waters in contravention of its laws and regulations, or of international obligations, or in contravention of the conservation and management measures of an RFMO of which body a state is a member, or a cooperating state.

Paragraph 3.1. does not provide detailed information on which fishing activities are actually considered as illegal, rather it refers to

the violations of national laws, international obligations and RFMOs' conservation and management measures. National laws are laws that are established based on the states' jurisdictions whether as coastal states or flag states.⁶³ Therefore, the violations of laws and regulations established by states (as coastal states or flag states) can then be seen as illegal fishing. International obligations can be understood as the existing instruments related to fishing, such as the UNCLOS, the Compliance Agreements, and the UNFSA.⁶⁴ The RFMOs' conservation and management measures in this context refer to the existing measures established by each RFMO that binds its members or cooperating states. The description "illegal fishing", therefore, encompasses a vast array of activities which, to some extent, can overlap with the description of unreported fishing and unregulated fishing.

2.3.2.2 Unreported Fishing

Unreported fishing, based on Paragraph 3.2. of the IPOA-IUU, refers to fishing activities:

- 3.2.1 "which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations;" or
- 3.2.2 "undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization."

Based on that description, unreported fishing can be understood as fishing activities that are not reported or misreported to the relevant national authority, in contravention of national laws and regulations. It also refers to the unreported or misreported fishing activities that are in contravention with the reporting procedures of a RFMO.

⁶³ Jens T. Theilen, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28(3) *The International Journal of Marine and Coastal Law* 533, 536-538.

⁶⁴ *ibid* 538.

The description of unreported fishing under Paragraph 3.2 does not directly relate to the actual fishing, in contrast to illegal fishing and unregulated fishing that involve the actual activities of harvesting fish from the sea. Rather, unreported fishing refers specifically to the unreported or misreported fishing activities or its outcomes, such as catch, discards, landings, transshipments, fishing locations, date and time⁶⁵ that are not directly related to the actual fish harvesting activities. The specific reference to “unreported” or “misreported” may overlap with the description of illegal fishing when both activities are violating national laws and regulations or international obligations on reporting obligations as stipulated in Paragraph 3.3.1. of the IPOA-IUU. Similarly, unreported fishing may also overlap with the description of unregulated fishing where it is conducted on the high seas with no RFMO measures.⁶⁶

2.3.2.3 Unregulated Fishing

Unregulated fishing according to Paragraph 3.3. refers to fishing activities:

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

3.3.2 “in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.”

Unregulated fishing can be understood as fishing activities in an RFMO area by vessels without nationality or flying the flag of a non-party that are in contravention of the RFMO’s conservation

⁶⁵ De Coning and Witbooi (n 34) 209.

⁶⁶ Tsamenyi, Kuemlangan and Camilleri (n 51) 31.

and management measures. It also covers fishing activities in areas, or for fish stocks, where there are no applicable conservation or management measures, and where those activities are incompatible with the states' responsibilities established by international law regarding the conservation of living marine resources. The implication of this broad description is that unregulated fishing also covers a wide spectrum of circumstances such as, for example, the species managed by RFMOs or on high seas that have not been regulated. The so-called discrete fish stocks, such as orange roughy and alfonsio in the high seas of the Indian Ocean,⁶⁷ and small-scale or artisanal fishing in waters with no applicable fishing measures are also included under this broad description.⁶⁸

The description of unregulated fishing under Paragraph 3.3. may also overlap with the description of illegal fishing. Paragraph 3.3.1 refers to those fishing activities that are inconsistent with or contravene the measures provided by an RFMO. Paragraph 3.3.2 specifically refers to those fishing activities that are “inconsistent with State responsibilities for the conservation of living marine resources under international law”. Both conditions, in part, also relate to illegal fishing under Paragraph 3.1.3 where illegal fishing is described as being “activities in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organisation”. The description of unregulated fishing may also overlap with the description of unreported fishing if it is conducted by vessels without nationality or flying the flag of a non-State that fails to report or misreports those fishing activities in the area of RFMOs as stated by Paragraph 3.2.2.

It should be noted that under Paragraph 3.4 of the IPOA-IUU, not all unregulated fishing on the high seas is illegal. The Article recognised that “certain unregulated fishing may take place in a manner which is not in violation of the applicable international law and may not require the application of measures envisaged under the International Plan of Action”. This provision takes into account the fact that there are still several high seas waters and/or fisheries that are unregulated including the orange roughy/alfonsio fishery in the

⁶⁷ Palma, Tsamenyi and Edeson (n 37) 52.

⁶⁸ De Coning and Witbooi (n 34) 209.

Southern Indian Ocean and the toothfish fishery on the northern Patagonian shelf edge.⁶⁹ Against this provision, however, it has been argued by Agnew and Barnes that there are no areas of high seas fishing that may be considered legitimately unregulated in terms of states' obligations under the Straddling Stocks Agreement and under Part VII of the UNCLOS where states have the obligation to manage and conserve fish stocks.⁷⁰

2.3.2.4 The Need for a Clearer Terminological and Conceptual Definition

The terminology of IUU fishing, as previously discussed, is not clear-cut. The three elements in the terminology sometimes overlap and can create confusion in their interpretation and implementation. Several aspects of unreported and unregulated fishing, as explained above, can also be covered by illegal fishing due to its overarching description. These overlapping descriptions are also the reason why, in several publications, IUU fishing is referred to simply as “illegal fishing” to avoid confusion and obscurity with the other two elements.⁷¹ The equating of IUU fishing with illegal fishing, however, is described as a danger to the development of a comprehensive approach to tackle fisheries problems and contributes to the failure of States and RFMOs to develop governance measures to address unregulated fishing⁷² and therefore should be treated carefully.

Employing IUU fishing or illegal fishing terminology, within its existing description, will undoubtedly raise questions and spark debate since both terms are similarly unclear and have excessively broad coverage. Illegal fishing terminology has an overstretched coverage on almost every fisheries violation of different national laws, international obligations and RMFO conservation and

⁶⁹ Agnew and Barnes (n 31) 172.

⁷⁰ *ibid.*

⁷¹ Gabriela A. Oanta, 'Illegal Fishing as Criminal Act at Sea' in Efthymios D. Papastavridis and Kimberly N. Trapp, *Crimes at Sea La criminalité en mer* (Martinus Nijhoff Publishers 2014); Jens T. Theilen (n 63); Eva R. van der Marel, 'Combating IUU Fishing' in Richard Caddel and Erik J. Molenaar (eds) *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019).

⁷² Palma, Tsamenyi and Edeson (n 37) 53.

management measures which may make it unclear and confusing. IUU fishing terminology, in addition to the similar problems attached to illegal fishing, also has to deal with the concept of unregulated fishing which is still considered to be largely an issue of governance,⁷³ instead of issues of contravention with existing laws or regulations as found in illegal fishing and unreported fishing. Unregulated fishing technically does not directly violate existing laws and regulations since they may be considered to be non-existent or unregulated. However, unregulated fishing does involve indirect violation when it is conducted in a manner inconsistent with the conservation and management measures of the RFMOs and with state responsibilities for the conservation of living marine resources under international law as provided by Article 3.3.1 and 3.3.2. of the IPOA-IUU.

It is also acknowledged that the existing concepts of IUU fishing, or equating it with illegal fishing, still need substantial refining. The existing descriptions are still excessively broad and may create confusion in their interpretation and implementation. Each of the IUU fishing elements, namely “Illegal”, “Unreported” and “Unregulated”, need to be clearly described to provide an indisputable meaning of which activities should be deemed illegal since it has also been previously noted that not every activity which might deserve to be designated as illegal, particularly when related to unregulated fishing, is illegal. A possible starting point to clarify which activities are categorised as IUU fishing are the ones mentioned as serious violations in Article 21 (11) of the UNFSA. The Article mentioned nine activities as serious violations:

- “(a) fishing without a valid licence, authorisation or permit issued by the flag State;
- (b) failing to maintain accurate records of catch and catch-related data, as required by the relevant sub-regional or regional fisheries management organisation or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organisation or arrangement;
- (c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by

⁷³ Tsamenyi, Kuemlanguan and Camilleri (n 51) 34.

- the relevant sub-regional or regional fisheries management organisation or arrangement;
- (d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited; (e) using prohibited fishing gear;
 - (f) falsifying or concealing the markings, identity or registration of a fishing vessel;
 - (g) concealing, tampering with or disposing of evidence relating to an investigation;
 - (h) multiple violations which together constitute a serious disregard of conservation and management measures; or
 - (i) such other violations as may be specified in procedures established by the relevant sub-regional or regional fisheries management organisation or arrangement”.

States could also use these nine activities as a starting point for IUU fishing criminalisation, with modifications, to clarify the activities of IUU fishing and also to consider its criminalisation if deemed necessary. Among them, at least two activities related to the execution of IUU fishing can be considered to be worthy of criminalisation by states, i.e. fishing without a valid licence and fishing using prohibited gear. It was found in IUU cases in Chapter 4 that OCGs do not have proper licences for their fishing activities and that they also employ destructive gear to gain maximum catch. Both types of conduct are arguably commonly found in IUU fishing cases involving OCGs. This is not to say the other IUU fishing activities should not be criminalised. In the end, of course, it is up to states to agree on which activities are to be considered to be offences.

IUU fishing is also related to other serious offences throughout the entire fisheries supply and value chains and is better known as fisheries crime.⁷⁴ The UNODC/WWF Fisheries Crime Expert Group Meeting provides examples of fisheries crime that include illegal fishing, document forgeries, mislabelling and violations of hygiene and food safety standards among the 24 examples of fisheries crime.⁷⁵

⁷⁴ For discussions on fisheries crime, see CCPCJ ‘Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting, 24-26 February 2016, Vienna’ (11 May 2016) UN Doc E/CN.15/2016/CRP.2; De Coning and Witbooi (n 34).

⁷⁵ *ibid* CCPJ, ‘Outcome of the UNODC/WWF Fisheries Crime Expert Group

It appears that fisheries crime is a broad concept that encompasses related serious offences in one basket. The notion of fisheries crime can be useful to highlight the danger of various offences in the fisheries sector and to push policy makers and law enforcement to pursue those offences more seriously. However, the concept is currently still at an early stage and therefore more work is needed for the terminology to be clear.⁷⁶

2.4. Actors and Drivers of IUU Fishing

2.4.1. Actors of IUU Fishing

The murkiness of the global fishing industry, due to its lack of transparency, lack of uniform regulations and enforcement actions, makes it vulnerable to opportunistic actors looking to exploit this industry by engaging in IUU fishing.⁷⁷ Actors involved in IUU fishing can include a broad range of people, including OCGs at different stages where some may be directly involved in IUU fishing activities, while others may be not aware of their involvement.⁷⁸ At the preparation stage, IUU fishing can involve different actors such as beneficial owners, ship owners, recruiters, crew, and middlemen who produce fraudulent documents and facilitate some kind of assistance from the law enforcement agencies. These actors set up the necessary foundation for IUU vessels to sail. At the execution stage, IUU fishing actors shift more to the operational side which could involve the officers and crew of the vessel. The crew members, often coming from different countries, are in many cases deprived of lawful labour standards. Some members of the crew are often recruited from the targeted fishing

Meeting' Annex 2.

⁷⁶ De Coning and Witbooi (n 34) 214.

⁷⁷ Austin Brush, 'Strings Attached, Exploring the Onshore Networks Behind Illegal, Unreported and Unregulated Fishing' (C4ADS, 2018) 35 <<https://www.c4reports.org/strings-attached>> accessed 27 July 2020.

⁷⁸ In a broader context, actors of IUU fishing may also include producers, processors, retailers and consumers who may not be aware of their involvement. See Mike Beke, Roderick Ackermann and Roland Blomeyer, 'The Common Fisheries Policy-Infringement Procedures and Imposed Sanctions Throughout the European Union' (Director-General for Internal Policies, European Parliament 2014) IP/B/PECH/1/2013-135, 21. For discussions on the distinction of legal and illegal actors see Antonius Johannes Gehardus Tijhus, 'Transnational Crime and the Interface between Legal and Illegal Actors. The Case of the Illicit Art and Antiquities Trade' (PhD thesis, Leiden University 2006).

area as they understand the area better and have local networks that might be useful in smoothing out the IUU operation. Then there is a follow-up stage where IUU actors try to disguise their illicit catch and sell it in markets. In selling the illegal catch, different actors can be involved including the processing companies, seafood retailers, and law enforcement officers who look the other way due to some kind of bribery. At this stage, the actors are also involved in money laundering to hide the catch's illicit origin. Against this background, it can be seen that actors in IUU fishing come from different backgrounds and serve different roles along the supply chain.

In addition to the above-mentioned actors, the lucrative returns of IUU fishing also attract OCGs and their involvement is apparent in high-value fish species such as abalone, shark fins, sturgeon, and totoaba bladders.⁷⁹ OCGs often leverage its networks, trafficking routes and contacts in supporting their operations, thereby enabling OCGs to exploit larger quantities of fish and, in the end, magnify the harm caused by IUU fishing.⁸⁰ For example, the OCGs in South Africa depleted abalone stocks which led to the closure of the fishery in 2008.⁸¹ A typical example of OCGs can be seen from the case of “Bandit 6”, six vessels (Kunlun, Perlun, Songhua, Thunder, Viking and Yongding) that had been plundering Patagonian toothfish in the Southern Ocean for years and which are believed to be connected to the Vidal Armadores syndicate, the most powerful clan of “*la mafia gallega*” (the Galician Mafia). A detailed description in a book entitled “Catching Thunder”⁸² provides a good overview on how OCGs operate in IUU fishing and how they were forced to stop operating. It has been found that OCGs in their operations often use forged documents, employ destructive fishing gear, offer bribes to inspectors and port authorities, recruit crew on low or no pay, and launder the proceeds.

⁷⁹ See Chapters 2 and 4 for further discussion.

⁸⁰ Austin Brus (n 77) 40.

⁸¹ Don Liddick, ‘The Dimensions of a Transnational Crime Problem: The Case of IUU Fishing’ (2014) 17 Trends in Organized Crime 290, 295.

⁸² Eskil Engdal and Kjetil Sæter, *Catching Thunder. The True Story of the World's Longest Sea Chase* (Zed Books, 2018).

2.4.2. Drivers of IUU Fishing

In understanding IUU fishing, one also needs to comprehend the drivers of IUU fishing. Different actors have different drivers that motivate them to conduct crimes, including IUU fishing. Becker developed the first economic model on the reasons for people engaging in criminal activity.⁸³ In his model, Becker developed an analysis of the costs and benefits of crime with the purpose of developing optimal public and private policies to combat illegal behaviour through considering the expenditure on law enforcement, size of the punishment, and the form of the punishment where optimal policies can be interpreted as decisions to minimise the social loss in income derived from offences.⁸⁴ The subsequent research argued for economic factors as a strong influence in undertaking illegal activities.⁸⁵ Meanwhile, the more recent studies by Tyler (1990)⁸⁶ and Sutinen (1999)⁸⁷ argued that moral, institutional and social drivers are important factors in the motivation of people to engage in illegal activity. Building on these studies, Sumaila, Alder and Keith elaborated three main drivers of IUU fishing:⁸⁸ i) benefits of conducting IUU fishing; ii) expected penalty drivers; and iii) moral and social drivers. The following subsections 2.4.2.1. to 2.4.2.3.) will explain the three drivers and examine which drivers apply to the specific OCGs involved in IUU fishing.

2.4.2.1. Benefits of Conducting IUU Fishing

Sumaila, Alder and Keith consider that the benefits received from IUU fishing can motivate many people to engage in the illegal activity. It is argued that the higher the financial return in a “legal”

⁸³ Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76(2) *Journal of Political Economy* 169.

⁸⁴ *ibid.*

⁸⁵ K. Kuperan and Jon G. Sutinen ‘Blue water crime: Deterrence, Legitimacy and Compliance in Fisheries’ (1998) 32(2) *Law and Society Review* 309.

⁸⁶ Tom R. Tyler, *Why People Obey the Law* (Yale University Press 1990) cited in Kuperan and Sutinen (n 85).

⁸⁷ Jon G. Sutinen and K. Kuperan, ‘A Socioeconomic Theory of Regulatory Compliance in Fisheries’ (1999) 26 *International Journal of Social Economics* 174 cited in Kuperan and Sutinen (n 85).

⁸⁸ U. R. Sumaila, J. Alder and H. Keith, ‘Global Scope and Economics of Illegal Fishing’, (2006) 30(6) *Marine Policy* 696, 697.

fishery, the lower the tendency to engage in IUU fishing. This means that if potential actors of IUU fishing can make a sizable profit from “legal” fishing, then the probability of doing IUU fishing is low, but when the profit from “legal” fishing is low, then the probability of conducting IUU fishing is higher. However, at the same time, there is also a factor of greed that drives people who have enough profit and yet still engage in IUU fishing to increase their profits.⁸⁹ The decision on whether someone will engage in IUU fishing or not will also depend on the potential benefits. If the potential benefits exceed the costs significantly, then the probability of doing the illegal activity is higher. There are several factors that can be considered by someone who wants to engage in IUU fishing:⁹⁰ i) the number of catches (higher catch possibility will increase the likeliness of IUU fishing); ii) the efforts or time in catching the fish (more efforts or time in catching the fish will enhance the cost of getting caught); iii) price of fish (higher prices will provide a higher financial incentive for the IUU fishing actors); and iv) cost of fishing (higher operational costs will influence the possibility of doing IUU fishing). After weighing up these four factors, and if it turns out that the potential benefits exceed the costs, then it is likely that those actors will decide to engage in IUU fishing.

The financial benefits can be considered as one of the main drivers of IUU fishing, among other drivers. Actors of IUU fishing engage in the illegal activity because the expected benefits exceed the benefits coming from legal behaviour.⁹¹ Actors of IUU fishing exploit weak regulations or enforcement actions and, in some cases, they also combine IUU fishing activities with trafficking in persons, migrant smuggling, drug trafficking and other crimes to maximise their financial gain.

The enormous potential financial benefits that exceed the costs have attracted various actors of IUU fishing to engage in these illegal activities. The annual illicit profits of IUU fishing are estimated at around US\$15.5 billion (approximately €13.9 billion) to \$36.4 billion

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*

(approximately €32.7 billion)⁹² which makes it very appealing for OCGs. For example, the Russian syndicates, Chinese triads and other Asian gangs are believed to earn US\$80 million (approximately €72 million) per year from illegally harvested abalone.⁹³ Further, the Russian criminal syndicates were estimated to earn US\$4 billion (approximately €3.6 billion) annually through illegal exportation of seafood products to Japan, Europe and the United States.⁹⁴ The Italian OCG called “*La Cosa Nostra*” has also benefited from the fishing industry along with other sectors such as construction, waste disposal, and wine where it earns an estimated average annual income of US\$6 million (approximately €5.4 million).⁹⁵ Another example of huge financial benefits can be seen from the IUU fishing operations conducted by IUU vessel “Thunder” (an IUU fishing vessel flagged to Nigeria) that has earned more than \$60 million (approximately €54 million) from illegal fishing activities in the Southern Ocean since the CCAMLR blacklisted it in February 2016.⁹⁶ The enormous potential financial benefits are most likely to remain one of the main drivers for actors in conducting IUU fishing.

2.4.2.2. Expected Penalty Drivers

The expected penalty drivers can be mainly divided into three categories: detection likelihood; avoidance; and penalty.

Under the detection likelihood driver, people will tend to engage in IUU fishing when the probability of detection is lower than the incentive to cheat. The likelihood of detection correlates with several factors: i) the effectiveness and efficiency of the enforcement system; ii) social acceptance of cheating in society; iii) awareness

⁹² Channing May, ‘Transnational Crime and the Developing World’ (Global Financial Integrity, 2017) 66 < http://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf> accessed 20 June 2017.

⁹³ Donald R. Liddick, *Crimes Against Nature: Illegal Industries and the Global Environment* (ABC-CLIO 2011) 77.

⁹⁴ Liddick ‘The Dimensions of a Transnational Crime Problem: The Case of IUU Fishing’ (n 81) 295.

⁹⁵ UNODC, ‘Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries’ (UNODC 2002) 112.

⁹⁶ INTERPOL, ‘Countries Unite to Identify Illegal Fishing Vessel via Interpol’ (*INTERPOL*, 5 December 2013) <<https://www.interpol.int/News-and-media/News/2013/PR152>> accessed 26 June 2017.

of the regulations; and iv) the involvement of non-governmental or private organisations in detecting infringements.⁹⁷ The factor of effectiveness and efficiency of the enforcement system also plays a significant role in lowering the tendency of people to engage in IUU fishing. When enforcement is weak or close to non-existent, then IUU fishing thrives.

The choice of enforcement system is also important in fighting IUU fishing. Whether it is criminal, administrative or civil enforcement depends on the seriousness of environmental harm, culpability and recidivism.⁹⁸ In the case of IUU fishing, different enforcement systems may be used to complement each other to make a more comprehensive system in tackling the problem. Criminal enforcement, for example, may be, in some circumstances, more effective or dissuasive than civil or administrative enforcement, particularly for more serious violations.⁹⁹ The use of several enforcement systems can be promoted to complement the deficit in a particular system and therefore make it more effective and efficient.

On the avoidance driver, actors of IUU fishing are willing to engage in illegal activities because they want to avoid the enforcement of applicable conservation and management measures by the authorities. The avoidance activities can be carried out through various activities such as transshipment of catch¹⁰⁰ and reflagging.¹⁰¹ Charles, Mazani and Cross describe the relationship between avoidance and enforcement where, at low levels of enforcement, IUU actors will increase the avoidance activity, but at higher enforcement levels it becomes uneconomical to do so, and then the avoidance actually

⁹⁷ Sumaila, Alder and Keith (n 88) 697.

⁹⁸ Ricardo M Pereira, *Environmental Criminal Liability and Enforcement in European and International Law* (Koninklijke Brill 2015) 317; Michael Faure and Gouritin A, 'Blurring Boundaries between Administrative and Criminal Enforcement of Environmental Law' in in Francesca Galli and Anne Weyembergh (eds), *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* (Editions de l'Université de Bruxelles 2014).

⁹⁹ *ibid* 315.

¹⁰⁰ Sumaila, Alder and Keith (n 88) 698.

¹⁰¹ Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Illegal, Economic and Historical Factors Relevant to Its Development and Persistence' (2004) 5 (2) *Melbourne Journal of International Law* 299.

decreases. If the avoidance activity is very inexpensive and/or very efficient, then IUU actors will respond to the increased enforcement by increasing avoidance.¹⁰²

As far as the penalty driver is concerned, it is evident that the more severe the penalty imposed, the less would be the likelihood of conducting illegal activities.¹⁰³ Sumaila, Alder and Keith suggest that, in order to have a deterrent effect on IUU fishing, the current penalty levels of IUU fishing should be increased 24 times to make it uneconomic.¹⁰⁴ This driver also relates to the detection likelihood driver where if there is no enforcement the severity level of the penalty is meaningless.¹⁰⁵ Furthermore, the absence of severe penalties combined with limited enforcement will make people more willing to engage in IUU fishing.

OCGs, in their operations, will also consider the expected penalty drivers. When the detection likelihood is low, due to insufficient regulations and enforcement measures, OCGs are likely to take the chance of engaging in IUU fishing and increase their operations. The low likelihood of detection would induce OCGs to increase their avoidance activities in IUU fishing operations as they will have a higher rate of success in avoiding law enforcement. OCGs would also be likely to operate when the penalties imposed are more lenient as the benefits of IUU fishing would outweigh the penalties. Against this background, several steps could be implemented to deter the drivers of engagement by OCGs in IUU fishing. First, the global community needs to increase the likelihood of detection through strengthening regulations and enforcement actions directed more specifically at the involvement of OCGs. These strengthened regulations and enforcement would in turn reduce the avoidance activities by OCGs. Second, the global community needs to increase penalties against the involvement of OCGs so that the costs of the illegal activity would outweigh the benefits. In this context, criminal

¹⁰² Anthony T. Charles, R. Leigh Mazani and Melvin L. Cross, 'The economics of Illegal Fshing: A Behavioral Model' (1999) 14(2) *Marine Resource Economics* 95, 105.

¹⁰³ Sumaila, Alder and Keith (n 88) 698.

¹⁰⁴ *ibid* 700.

¹⁰⁵ *ibid* 698.

sanctions could be considered amongst the more severe penalties that can be imposed on OCGs.

2.4.2.3. Moral and Social Drivers

Both moral and social drivers have an important role in the decision whether or not to engage in IUU fishing. The two drivers can be used to explain different behaviours of perpetrators of IUU fishing which can be categorised into three: i) chronic violators; ii) moderate violators; and iii) non-violators.¹⁰⁶ The chronic violators will put aside moral and social aspects in undertaking IUU fishing. Meanwhile, moral and social aspects are important for the non-violators. Moderate violators, on the other hand, will only break the regulations if the potential economic gain is high enough to cover the potential penalties. If the moral and social drivers are absent, then whatever the regulations and enforcement systems, they will have no effect on the behaviour of the violators.¹⁰⁷ In this context, OCGs could be considered as moderate violators as they violate regulations when the potential gains from the IUU fishing are higher than the penalties imposed.

2.5. Transnational and Organised Crime Dimensions of IUU Fishing

IUU fishing is not only a national problem found exclusively within national borders. In many cases around the globe, TOC dimensions are evident in IUU fishing activities. States, limited by jurisdiction and resources, are facing difficulties in tackling IUU fishing and its TOC dimensions. The following Sections (2.5.1. and 2.5.2.) will explain both “transnational” and “organised crime” dimensions in IUU fishing.

2.5.1. Transnational Dimensions of IUU Fishing

Globalisation has offered tremendous opportunities both for society in general and also for transnational illicit conduct, including IUU fishing, due to increased mobility and the

¹⁰⁶ *ibid.*

¹⁰⁷ Charles, Mazani and Cross (n 102) 104.

revolution in information and communication technology, thus making it easier to conduct criminal activities and to carry them out transnationally.¹⁰⁸ The intensified global connectivity and networks have created new challenges for authorities that are trying to find ways to control them.¹⁰⁹ One of those challenges is the transnational dimension of the illicit activities that enable the perpetrators to expand their operations and, at the same time, to avoid the long arm of the law. The challenge arising from the transnational dimension can also be found in the case of IUU fishing.

Large-scale IUU fishing activities are often found to be transnational in their operations. IUU fishing vessels are moving all the time for various reasons, including avoiding detection, disguising the illegal origin of catches and transshipments, finding new fish stocks and exploiting weak regulations and corrupt officials to support their illegal operations. In the case of IUU vessel “Thunder” (see Section 2.4.1. above), the IUU fishing vessel was detected in several areas such as the North Indian Ocean in August 2012 under the name “Kuko”, then in a Singapore shipyard using the name “Wuhan N4” in October 2012 before it was spotted in Malaysia under the name “Wuhan 4” in April 2013 and using the name “Thunder” in Indonesia a few days later.¹¹⁰ The cross-border movements of “Thunder” are believed to have been made in order to avoid the possibility of being caught for violating international laws and conventions.¹¹¹ Similar transnational operations are also employed by other IUU fishing vessels, such as “Kunlun”, “Songhua” and “Yongding”, which, by moving to different locations and using different names and flags, avoid detection by the authorities.¹¹² The transnational dimension of IUU fishing operations is also apparent in the case of the Vietnamese

¹⁰⁸ Jan van Dijk and Toine Spapens, ‘Transnational Organized Crime Networks’ in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice*, (2nd edn, Sage Publications 2014).

¹⁰⁹ Katja Franko Aas, *Globalization and Crime* (Sage Publications 2007) 102.

¹¹⁰ INTERPOL, ‘Countries Unite to Identify Illegal Fishing Vessel via Interpol’ (n 96).

¹¹¹ *ibid.*

¹¹² INTERPOL, ‘Spanish Operation Nets Suspects Behind Illegal Fishing’ (*INTERPOL*, 18 March 2016) <<https://www.interpol.int/News-and-media/News/2016/N2016-030>> accessed 26 June 2017.

blue boats (see Chapter 4). The blue boats operate across borders in the waters of Southeast Asia and the Pacific. Their existence causes significant problems and tensions.

In different cases of IUU fishing, the transnational nature covers, in most cases, not only the physical movement of the vessels but also the related aspects of the supply chain from catch to table which can range from preparation, to execution and to its follow-up. At the preparation stage, IUU fishing actors identify opportunities for IUU fishing in waters with high-value fish products and relatively lax regulatory fisheries enforcement and enforcement applications. The actors recruit crew members from different nationalities where labour standards are often not met and, in addition, trafficking in persons can be found happening on many IUU fishing vessels.¹¹³ For example, “Oyang No. 77”, a South Korean-flagged IUU fishing vessel, recruited crew from Indonesia who reportedly were deceptively recruited into abusive and unsafe working conditions and received severely reduced compensation upon the completion of their contracts.¹¹⁴ The vessel was found to be illegally dumping catch and filing false catch returns in New Zealand and fishing without a licence in Argentina’s EEZ.¹¹⁵

At the execution stage, IUU fishing vessels sail towards their target waters, which can be in different jurisdictions, for many

¹¹³ For cases of trafficking in persons in IUU fishing activities, see also Arie Afriansyah, ‘Indonesia’s Practice in Combatting Illegal Fishing: 2015-2016’ in Seokwoo Lee and Hee Eun Lee (eds), *Asian Yearbook of International Law*, Volume 22 (Brill Nijhoff 2016) 283; International Organization for Migration (IOM), Indonesian Ministry of Marine Affairs and Fisheries (KKP), and Coventry University, ‘Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry’ (IOM, 2016); UNODC, ‘Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking’ (2011) 98-103; Teale N. Phelps Bondaroff, Tuesday Reitano and Wietse van der Werf, ‘The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime’ (The Global Initiative Against Transnational Organized Crime and The Black Fish, 2015) < <https://globalinitiative.net/wp-content/uploads/2015/04/the-illegal-fishing-and-organised-crime-nexus-1.pdf> > accessed 10 April 2017; Environmental Justice Foundation (EJF), ‘Thailand’s Seafood Slaves. Human Trafficking, Slavery and Murder in Kantang’s Fishing Industry’ (EJF, 2015) < <https://ejfoundation.org/resources/downloads/EJF-Thailand-Seafood-Slaves-low-res.pdf> > accessed 30 July 2020.

¹¹⁴ Austin Brush (n 77) 20-21.

¹¹⁵ *ibid.*

months, even years, as they are assisted by other vessels supplying their needs so that they can continue their operations. This can be seen from unauthorised transshipments that usually involve mother ships which receive illegal catch and also provide supplies to IUU fishing vessels so that they can remain longer at sea.¹¹⁶ At this stage, IUU fishing actors also cooperate with local actors who assist the IUU actors with labour, supplies and getting around the regulations and law enforcement.

At the follow-up stage, IUU fishing actors sell the illegally caught fish to the target market through different methods, including combining the illegal fish products with different sources or species and mislabelling the products so that they can enter the market.¹¹⁷ The illegal proceeds from IUU fishing sales are often laundered in different jurisdictions to disguise their illegal origin and to make the proceeds appear legitimate. The illicit proceeds can be integrated into different stages throughout the supply chain, from the acquisition of large capital assets such as fishing vessels by offshore companies, to investment in new gear and fish processing plants and to the payment in cash to crew members.¹¹⁸ In controlling their IUU fishing operations, the actors often originate from states that are different from the state of *locus delicti*. In the case of “Kunlun”, “Songhua” and “Yongding”, for example, the vessels were associated with the Vidal Armadores syndicate, based in Spain. The syndicate used shell companies such as “Eastern Holding Ltd” based in Belize and “Stanley Management Inc” to mask their operation.¹¹⁹ Those hidden

¹¹⁶ For discussions on transshipments see S. Wijajaja, T. Long, H. Wirajuda and others, ‘Illegal, Unreported and Unregulated Fishing and Associated Drivers’ (World Resources Institute, 2019) < <https://oceanpanel.org/sites/default/files/2020-02/HLP%20Blue%20Paper%20on%20IUU%20Fishing%20and%20Associated%20Drivers.pdf> > accessed 15 April 2020; EJF, ‘Transshipment at Sea. The Need for a Ban in West Africa’ (EJF, 2013) < https://ejfoundation.org/resources/downloads/ejf_transshipments_at_sea_web_0.pdf > accessed 30 July 2020; Kristina Boerder, Nathan A. Miller and Boris Worm, ‘Global Hot Spots of Transshipment of Fish Catch at Sea’ (2018) 4(7) *Science Advances* 1; Anastasia Telesetsky (n 48) 957.

¹¹⁷ Ganapathiraju Pramod and others, ‘Estimates of Illegal and Unreported Fish in Seafood Imports to the USA’ (2014) 48 *Marine Policy* 102, 107.

¹¹⁸ Bondaroff, Reitano, and van der Werf (n 113) 50.

¹¹⁹ INTERPOL, ‘New Zealand Requests Interpol Purple Notices to Identify Networks behind Illegal Fishing’ (*INTERPOL*, 15 January 2015) <<https://www.interpol.int/News-and-media/News/2015/N2015-003>> accessed 16 May 2017.

and seemingly disconnected relations between the operators or beneficial owners and the actual operations are often employed to protect the real actors of IUU fishing and in most cases are difficult to prove. Nevertheless, those related aspects are still important parts of the transnational dimension of IUU fishing.

The transnational nature of IUU fishing, which involves multiple jurisdictions, has made it imperative for the international community to establish international cooperation at the prevention, investigation and prosecution stages if it wants to tackle IUU fishing more effectively.¹²⁰

2.5.2 Organised Crime Dimensions of IUU Fishing

The organised crime dimensions found through the involvement of OCGs in large-scale IUU fishing operations are particularly apparent in the case of high-value fish products such as abalone, shark fins, sturgeon and caviar as shown in this chapter. The involvement of OCGs in IUU fishing has been acknowledged at international forums such as the United Nations General Assembly which, in its resolutions on sustainable fisheries, expressed its concerns about “possible connections between international organised crime and illegal fishing in certain regions of the world”.¹²¹ The linkages between international organised crime and illegal fishing are also recognised and discussed by the CoP UNTOC,¹²² the CCPCJ,¹²³ the European

¹²⁰ INTERPOL, *International Law Enforcement Cooperation in the Fisheries Sector. A Guide for Law Enforcement Practitioners* (2018) 16-19.

¹²¹ UNGA Resolutions on ‘Sustainable fisheries, including through the 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, and related instruments,’ in UN Doc A/Res 63/112, UN Doc A/RES/64/72, UN Doc A/RES/65/38, UN Doc A/RES/66/68, UN Doc A/RES/67/79, UN Doc A/RES/68/71, UN Doc A/RES/69/109, UN Doc A/RES/70/75, UN Doc A/RES/71/123, UN Doc A/RES/72/72, UN Doc A/RES/73/125, and UN Doc A/RES/74/18.

¹²² UN ‘Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session, held in Vienna from 8 to 17 October 2008’ (1 December 2008) UN Doc CTOC/COP/2008/19, para 210.

¹²³ CCPCJ, ‘Report on the 24th Session of the Commission on Crime Prevention and Criminal Justice (5 December 2014 and 18-22 May 2015)’ E/2015/30 and E/CN.15/2015/19, 94.

Parliament,¹²⁴ and the UNICPOLOS¹²⁵

The high profit margin is one of the main pull factors for these OCGs. For example, one kilo of raw abalone costs about US\$40 in South Africa (approximately €36) and sells for as much as US\$3,900 (approximately €3,510) per kilo for retail customers in Asia.¹²⁶ The UNODC study in 2011, for example, showed the involvement of OCGs in the abalone poaching in South Africa, Australia and New Zealand, with Asia as the main market.¹²⁷ In South Africa, Chinese OCGs exploited local fisherman to obtain abalone and then smuggled the majority of the abalone to Asia through Mozambique or Zimbabwe, while the rest was supplied to the South African market.¹²⁸ In Australia, local Asian OCGs have been identified as possible buyers and distributors of poached abalone.¹²⁹ In 2011, Australian police successfully uncovered a large-scale abalone poaching OCG and seized more than US\$62,313 (approximately 56,081) worth of abalone during the operations.¹³⁰ In New Zealand, a similar *modus operandi* to that seen in South Africa and Australia is also evident where divers are hired on an individual basis or as part of a criminal gang before being trafficked to the Asian market.¹³¹ In 2008, the New Zealand government launched “Operation Paid” which resulted in up to 100 people being charged with serious crimes

¹²⁴ European Parliament, European Parliament Resolution of 17 November 2011 on Combating Illegal Fishing at the Global Level—the Role of the EU (2010/2210 (INI)) (OJ C 153E, 31.5.2013, p148-157) para 62.

¹²⁵ UNGA ‘Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting’ (25 July 2008) UN Doc A/63/174, part A para 10 (e).

¹²⁶ Greg Warchol and Michael Harrington, ‘Exploring the Dynamics of South Africa’s Illegal Abalone Trade via Routine Activities Theory’ (2016) 19 Trends in Organized Crime 21, 33.

¹²⁷ UNODC, ‘Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking’ (n 113) 98-103.

¹²⁸ Warchol and Harrington (n 126) 32.

¹²⁹ UNODC, ‘Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking’ (n 113) 102.

¹³⁰ *ibid*; Gohar A Petrossian, *The Last Fish Swimming : The Global Crime of Illegal Fishing* (ABC-CLIO 2019) 34.

¹³¹ UNODC ‘Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking’ (n 113) 103.

with some receiving high penalties in the form of fines and prison sentences.¹³² The involvement of OCGs in IUU fishing can also be found in other species. For example, Russian OCGs are involved in the harvesting and sale of beluga sturgeon in the Caspian Sea.¹³³ They recruit local fishers to catch sturgeon and then export the fish to the United States, the EU and Japan, earning an estimated annual income of US\$4 billion (approximately €3.6 billion) in the 1990s.¹³⁴ OCGs have also been involved in the caviar black market where some used violence and intimidation. For example, in the 1990s, two dozen members of a Russian anti-poaching unit were murdered and, in 1996, 54 Russian border guards assigned to disrupt the illegal caviar trade were killed in a bombing.¹³⁵ The Global Initiative against Transnational Organised Crime asserts that the involvement of OCGs in IUU fishing can be found in many parts of the world, from New York's Fulton Fish Market to groups from the former Soviet Union, China, South America and South Africa.¹³⁶

In Southeast Asia, the involvement of OCGs in IUU fishing is also evident from numerous cases in the region. For example, the case of the fishing vessel “Viking” revealed how the vessel was linked with OCGs. It was known that the crew consisted of a captain having Chilean nationality and ten crew members who came from Argentina, Chile, Indonesia and Peru with the main purpose of obtaining a financial benefit from their operations.¹³⁷ “Viking” was put under the purple notice¹³⁸ of Interpol and listed as an IUU

¹³² *ibid.*

¹³³ Petrossian (n 130) 34.

¹³⁴ *ibid.*; See also Van Uhm and Siegel ‘The Illegal Trade in Black Caviar’ (n 48).

¹³⁵ Liddick, ‘The Dimensions of a Transnational Crime Problem: The Case of IUU Fishing’ (n 81) 296; Daan van Uhm, ‘Wildlife and Security’ in Philip Reichel and Ryan Randa (eds), *Transnational Crime and Global Security* (Praeger 2018) 83.

¹³⁶ Bondaroff, Reitano, and van der Werf (n 113) 50.

¹³⁷ The Maritime Executive, ‘Viking Fishing Vessel Sunk by Indonesian Authorities’ *The Maritime Executive* (14 March 2016) <<http://www.maritime-executive.com/article/viking-fishing-vessel-sunk-by-indonesian-authorities>> accessed 17 May 2017.

¹³⁸ The purple notice is an international request for cooperation or an alert issued by Interpol with the aim to ‘seek or provide information on modus operandi, objects, devices and concealment methods used by criminals.’ See INTERPOL,

fishing vessel by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The vessel had been engaging in IUU fishing activities in different countries for ten years under twelve different names and eight different flags before it was sunk by the Indonesian government on 14 March 2016.¹³⁹ In addition to “Viking” there are similar cases such as “Sino”,¹⁴⁰ “Pusaka Benjina”¹⁴¹ and “Kunlun”¹⁴² and others where the involvement of OCGs can be linked to IUU fishing operations across Southeast Asian waters. The involvement of OCGs in IUU fishing, as shown above, covers different species and geographical locations.

The different cases of involvement by OCGs mentioned above show that their operations are not exclusively local. Rather the opposite, their operations are mainly transnational in nature. For example, Chinese OCGs, as explained above, exploit South African local fishermen to obtain abalone and then smuggle the fish from the Western Cape through Mozambique or Zimbabwe to their market destination in Asia. Other examples, including sturgeon poaching by the Russian OCGs and the “Viking” case, also show an apparent transnational nature in their operations. Both transnational and organised crime dimensions in the majority of cases are inter-related. On the one hand, unless it is done unintentionally, IUU fishing with transnational dimensions usually requires the involvement of significant human resources with some kind of structure, working together to obtain financial benefits from the activity, which fits the description of OCGs. On the other hand, OCGs often operate transnationally to maximise their profits and avoid detection. When combined, the two dimensions (transnational organised crime/TOC) in IUU fishing pose significant challenges for states, regional

‘Notices’ <<https://www.interpol.int/INTERPOL-expertise/Notices>> accessed 11 September 2017.

¹³⁹ Cabinet Secretariat of the Republic of Indonesia, ‘Indonesia Sinks FV Viking’ (*Setkab*, 14 March 2016) <<http://setkab.go.id/en/indonesia-sinks-fv-viking/>> accessed 18 May 2017.

¹⁴⁰ *Putusan Pengadilan Tinggi Ambon* (Ambon High Court Decision) No. 33/PID,SUS-PRK/2015/PT.AMB.

¹⁴¹ *Putusan Mahkamah Agung* (Supreme Court Decision) No. 40 K/Pid.Sus/2015.

¹⁴² INTERPOL, ‘New Zealand requests INTERPOL Purple Notices to Identify Networks Behind Illegal Fishing’ (n 119).

communities and the international community when attempting to secure fisheries resources. As the problem of involvement by OCGs in IUU fishing has a significant transnational dimension, the solution of course cannot only be a local one. One state acting alone would face significant difficulties, due to limited jurisdiction and capacities, in trying to halt the operations of OCGs. States thus have to cooperate with one another to ensure that such illegal activities are successfully tackled and, for that, states will need common regulatory and enforcement standards aiming at common policy goals.

2.6. Interim Conclusion

The second chapter has provided further understanding of IUU fishing by considering several topics, i.e. the concept of IUU fishing, its global conditions and impacts, the drivers of IUU fishing and IUU fishing characteristics. IUU fishing terminology started from the work of UNCED in 1992 leading to its culmination in the IPOA-IUU as adopted by the 120th FAO Council Session in June 2001. The IPOA-IUU does not offer a definition of IUU fishing; rather it describes what may constitute the elements of IUU fishing. The broad description means that the term “IUU fishing” can encapsulate different activities and it offers flexibility in the implementation. However, the broad definition also creates obscurity and overlap among its elements. Despite the shortcomings, IUU fishing has become a well-known term in the international community as meaning fishing activities that can violate or undermine the national, regional or international regulations and also RFMO measures. The IUU fishing terminology as a whole needs to be substantially refined, to provide legal certainty and avoid confusion in the interpretation and implementation.

IUU fishing is a real and serious problem to fisheries conservation and management efforts and has resulted in significant harm to the economy, environment, society and legal order. The transnational and organised crime dimensions of IUU fishing are apparent through the involvement of OCGs in transnational IUU fishing activities. The involvement of OCGs, due to their better resources and networks, has magnified the harm caused by IUU fishing. It has also been shown in this chapter that there are possible linkages between IUU fishing with OCGs and other TOCs such as trafficking

in persons, migrant smuggling, drug trafficking and corruption. IUU fishing activities are conducted mainly because of the three specified drivers, i.e. benefits of conducting IUU fishing, expected penalties, and moral and social considerations. In addressing the drivers, it is suggested that there should be a strengthening of regulations and enforcement measures specifically targeted against OGCs, especially through criminal sanctions.

After establishing the meaning of IUU fishing, its harms, actors and drivers, and TOC dimensions, the following Chapter 3 will test the first hypothesis of this dissertation. The first hypothesis argues that the international fisheries instruments allow states exercising a broad discretion in designing and applying their regulations and enforcement systems and measures against IUU fishing actors, including OGCs nor do they consider the involvement of OGCs, both of which issues are arguably deficits. The following Chapter 3 will examine to what extent these deficits exist in these international fisheries instruments. In doing so, Chapter 3 will examine the regulations and enforcement measures related to IUU fishing provided in the international fisheries instruments.

CHAPTER 3

International Instruments for Addressing IUU Fishing

3.1. Introduction

The international efforts made to address IUU fishing have been evolving from general obligations on the conservation and management of marine living resources into more specific measures for port states. The evolution into more specific solutions towards IUU fishing can be seen as a trend that IUU fishing is acknowledged as a global problem that deserves serious action. This trend can be examined through the adoption of various international instruments related to fisheries which will be discussed in this chapter: i) the UNCLOS,¹ ii) the Compliance Agreement,² iii) the UNFSA,³ iv) the IPOA-IUU,⁴ and v) the PSMA.⁵ These international instruments aim

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 71 (UNCLOS).

² Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered in force 24 April 2003) 2221 UNTS (Compliance Agreement).

³ 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 (adopted 4 August 1995, entered in force 11 December 2001) 2167 UNTS 3 (UNFSA).

⁴ FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2001) (adopted 2 March 2001, endorsed 23 June 2001) (IPOA-IUU).

⁵ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal,

to provide the international community with different regulations and enforcement provisions that can be used by coastal states, flag states and port states in the conservation and management of living marine resources, including in tackling IUU fishing. In addition to the regular problems of IUU fishing, as discussed in Chapter 1 and 2, there is a more recent phenomenon which also needs to be tackled by the international community, namely the TOC dimensions through the involvement of OCGs in transnational IUU fishing activities. In Chapter 1, the preliminary assessment shows that the existing international instruments have two main deficits. First, they give states wide discrepancies in detailing their regulatory and enforcement designs which can be exploited by IUU fishing actors, including OCGs. Second these fisheries instruments also do not consider such involvement by OCGs in their provisions. This chapter will elaborate the two deficits through reviewing the five existing main international instruments related to IUU fishing and examine the different regulations and enforcement provisions found in the instruments. In addition, the role of RFMOs in each instrument will also be examined. The existence of RFMOs plays a substantial role in the global system of fisheries governance by providing a mechanism for cooperation to enable states to agree on fisheries conservation and management measures.⁶ In this context, it is acknowledged that the establishment of RFMOs is not to combat IUU fishing; instead it is to achieve the conservation, management and development of fishery resources.⁷ This can be seen from their various provisions although, in some cases, those provisions can also be applied to the fight against IUU fishing. The findings from the examination of the five international instruments will be used to determine the extent of regulatory and enforcement deficits in addressing the phenomenon of involvement by OCGs in IUU fishing that can be complemented

Unreported and Unregulated Fishing' (opened for signature 22 November 2009, entered into force 5 June 2016) (PSMA).

⁶ Michael W. Lodge and others, 'Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations' (*Chatham House*, 2007) 1 < <https://www.oecd.org/sd-roundtable/papersandpublications/39374297.pdf>> accessed 18 December 2017.

⁷ Kuan-Hsiung Wang, 'In Combating and Deterring IUU Fishing: Do RFMOs Work?' in Clive Schofield, Seok Woo Lee, and Moon-Sang Kwon, *The Limits of Maritime Jurisdiction* (Brill Nijhoff 2014) 431, 435.

with a different approach such as criminal law regulations and enforcement at global and regional levels which will be discussed in Chapters 5 and 6.

In developing the argument, this chapter will be structured in five main parts where each part elaborates each of the five existing international instrument and its provisions that address IUU fishing activities. In each part, there will be an analysis of the extent of the deficits in the particular international instrument in addressing IUU fishing conducted by OCGs. It is acknowledged that the five selected international instruments provide a plethora of provisions related to different aspects of fishing, but not every provision is suitable or related to the discussion of this chapter. Therefore, for the purpose of this research, this chapter will only highlight the most relevant provisions, or those that can be applied to IUU fishing, in each international instrument.

3.2. The UNCLOS

3.2.1. Background

The United Nations Convention on the Law of the Sea (UNCLOS)⁸ aims to establish a legal order for the seas and oceans which will facilitate international communication and promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment.⁹ In achieving its goals, the Convention provides a general framework for the management of ocean spaces and its resources, including fisheries.¹⁰ The Convention provides no specific provisions on the efforts to combat IUU fishing since the terminology was not then

⁸ The UNCLOS was adopted and opened for signature on 10 December 1982 in Montego Bay, Jamaica and came into force on 16 November 1994. See UN/DOALOS, 'United Nations Convention on the Law of the Sea of 10 December 1982: Overview and full text' (*UN*, last updated 11/02/2020) < http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm > accessed 16 October 2020.

⁹ UNCLOS (n 1) preamble para 4.

¹⁰ Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers 2010) 58.

known. Nonetheless, concern about the depletion of fish stocks caused by distant-water fishing fleets and the solutions to counter it were present as one of the considerations in the establishment of the UNCLOS.¹¹ As a result, the Convention managed to provide general fisheries provisions in relation to the conservation and management of the marine living resources which can also be applicable in addressing IUU fishing. In the context of conservation and management of the marine living resources, the Convention provides several provisions related to the rights, obligations and enforcement powers that are distributed among coastal states, flag states and port states which will be examined in the following Sections.

3.2.2. Rights, Obligations and Enforcement Powers of Coastal States

3.2.2.1. Rights of Coastal States

Coastal states have full sovereignty with regard to the conservation and management measures in maritime zones under their sovereignty, i.e. internal waters, archipelagic waters and territorial waters.¹² However, the UNCLOS does not provide specific provisions relating to the rights and obligations of the fisheries in these maritime zones. Tsamenyi and Hanich explain that this lack of specific provisions is due to at least two possible reasons: i) coastal states, under general international law, have absolute rights over living and non-living resources under their sovereignty¹³ which can only be limited by an express agreement;¹⁴ and ii) the general perception during the late 1970s until the early 1990s that more than ninety percent of fisheries resources are located in the Exclusive Economic Zone (EEZ).¹⁵ The absence of specific fisheries conservation and management means that coastal states state “have a wide margin of

¹¹ Parvizal Copes, ‘The Impact of UNCLOS III on Management of the World’s Fisheries’ (1981) 5(3) *Marine Policy* 217, 217.

¹² UNCLOS (n 1) art 2.

¹³ Martin Tsamenyi and Quentin Hanich, ‘Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States’ (2012) 27 *The International Journal of Marine and Coastal Law* 783, 785.

¹⁴ *ibid* 786.

¹⁵ *ibid*.

discretion in regulating the use of the resources in internal waters, archipelagic waters and the territorial sea and they are also entitled to the benefits that are obtained from the fisheries resources in these zones”.¹⁶ Against this background, coastal states generally have full rights to regulate the use and are entitled to the benefits of the fisheries resources in maritime zones under their sovereignty.

The UNCLOS, unlike in the case of maritime zones under national sovereignty, provides a number of provisions with regard to the conservation and management measures in the EEZ. The EEZ plays a significant part in the management of fishing resources as it covers about 90 percent of marine living resources although it only encompasses 35 percent of the total ocean area.¹⁷ Article 55 of the Convention describes the EEZ as “an area beyond and adjacent to the territorial sea, subject to the specific legal regime of Part V of the UNCLOS, under which the rights and jurisdictions of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of the UNCLOS”. The area of the EEZ is further elaborated by Article 57 of the UNCLOS where it is stated that it must not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. The establishment of the EEZ has made a large section of the sea, including exploration and exploitation of the natural resources and resource-related activities, fall under the sovereign rights of coastal states.¹⁸

Under their sovereign rights, coastal have a right to regulate fishing activities within their EEZ, which could include establishing laws and regulations, providing conditions of access and applying and enforcing regulations on the foreign vessels in the EEZ.¹⁹ The rights, jurisdictions and obligations of coastal states are set out in Part V of the UNCLOS, particularly under Article 56, and

¹⁶ Ellen Hey, ‘The Fisheries Provisions of the LOS Convention’ in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999) 20.

¹⁷ Tsamenyi and Hanich (n 13) 786.

¹⁸ UNCLOS (n 1) art 56 (1) (a).

¹⁹ R. Rajesh Babu, ‘State Responsibility for Illegal, Unreported and Unrelated Fishing and Sustainable Fisheries in the EEZ: Some Reflections on the ITLOS Advisory Opinion of 2015’ (2015) 55 *Indian Journal of International Law* 239, 250.

supplemented by related provisions in the Convention. Article 56 (1) (a) provides coastal states with sovereign rights to explore and exploit the natural resources (living or non-living of the seabed, subsoil and superjacent waters) in the EEZ, along with other activities for the economic exploitation and exploration of the zone such as production of energy from the water, currents and winds. In addition, under Article 56 (1) (b), coastal states also have jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; protection and preservation of the marine environment and other rights and duties. However, the sovereign rights and jurisdiction enjoyed by coastal states are not without limits. It is important to note that the term “sovereign rights” suggests that they are exclusive but not preferential,²⁰ which means that coastal states have all rights necessary for and connected with the exploration and exploitation of their natural resources, but they do not have sovereignty over the EEZ.²¹ In exercising their sovereign rights, coastal states should also consider the rights and duties of other states in the EEZ, such as the freedoms of navigation and of overflight, the laying of submarine cables and pipelines and other uses of the sea as provided by Article 58 (1) of the UNCLOS.

3.2.2.2. Obligations of Coastal States

The UNCLOS prescribes the obligations for coastal states on the management of the EEZ through Article 61 (conservation of living resources) and Article 62 (utilisation of living resources).²² Article 61 (1) obliges coastal states to determine the allowable catch of the living resources, which also include fisheries resources in their EEZ. In doing so, coastal states need to take into account the best scientific evidence available to ensure, through proper conservation and management measures, that the living resources are not endangered

²⁰ Robert Beckman and Tara Davenport, ‘The EEZ Regime: Reflections after 30 Years’, LOSC Conference Papers, Law of the Sea Institute, UC Berkeley-Korea Institute of Ocean Science and Technology, Seoul, Korea (2012) 7 < <https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf> > accessed 11 October 2017; Fact Sheets of the European Union (2015) http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_3.3.6.html accessed 14 February 2018.

²¹ *ibid.*

²² Babu (n 19) 251.

by over-exploitation.²³ Further, the Convention also requires coastal states to adopt necessary measures to support the maintenance or restoration of the fisheries resources at levels that can produce the maximum sustainable yield.²⁴ Those measures are required to enable consideration to be given to the effects on species associated with or dependent upon harvested species so as to maintain or restore their populations above levels at which their reproduction may become seriously threatened.²⁵ In the efforts of conservation of fish stocks, coastal states need to contribute and exchange, on a regular basis, any available scientific information, catch and fishing effort statistics, and relevant data, through competent international organisations.²⁶

The UNCLOS further imposes obligations on coastal states to promote the optimum utilisation of the living resources under Article 62 (1). Article 62 (2) obliges coastal states to determine their capacity to harvest the living resources. However, the Convention provides coastal states with discretion to give other states access to the surplus of the allowable catch if coastal states do not have the capacity to harvest the entire allowable catch. In providing access to other states, coastal states must consider all relevant factors according to Article 62 (3) including, *inter alia*, the significance of the living resources to the coastal state concerned and its other national interests, the provisions of Articles 69 and 70, the requirements of developing states in the subregion or region in harvesting part of the surplus and the need to minimise economic dislocation in states whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

Nationals of other states that are fishing in the EEZ must also comply with the laws and regulations of the coastal state according to Article 62 (4). This Article gives a coastal state the power to legislate and enforce different activities concerning foreign vessels in its EEZ such as providing licences to fisherman, fishing vessels and equipment (sub-paragraph a), determining the species that may be caught and fix the quota for the catch (sub-paragraph b),

²³ UNCLOS (n 1) art 61 (2).

²⁴ *ibid* art 61(3).

²⁵ *ibid* art 61(4).

²⁶ *ibid* art 61(5).

regulating seasons, areas of fishing and various details of fishing vessels (sub-paragraph c), fixing the age and size of fish and other species that may be caught (sub-paragraph d), specifying information required of fishing vessels (sub-paragraph e), regulating the conduct of specified fisheries research programmes (sub-paragraph f), placing of observers or trainees on board (sub-paragraph g), landing of all or any part of the catch in the ports of the coastal state (sub-paragraph h), terms and conditions that are related to cooperation arrangements (sub-paragraph i), requirements for the training of personnel and transfer of fisheries technology (sub-paragraph j), and enforcement procedures (sub-paragraph k). In managing their rights, Article 62 (5) also requires coastal states to provide due notice of conservation and management laws and regulations.

In reply to the request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC),²⁷ the International Tribunal for the Law of the Sea (ITLOS) concluded that the primary responsibility to prevent, deter and eliminate IUU fishing in the EEZ lay with coastal states²⁸ and, at the same time, the Tribunal emphasised that the primary responsibility of coastal states did not release other states from their obligations in this regard.²⁹ The Tribunal further declared that “the laws and regulations adopted by the coastal state in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other states Parties whose ships are engaged in fishing activities within that zone”.³⁰

3.2.2.3. Enforcement Powers of Coastal States

Coastal states have full sovereignty over their internal waters, territorial sea and archipelagic waters. Thus, in these maritime

²⁷ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (ITLOS Advisory Opinion) (Advisory Opinion, 2 April 2015) Case No. 21, ITLOS Reports 2015, 4.*

²⁸ *ibid* para 106.

²⁹ *ibid* para 108.

³⁰ *ibid* para 102.

zones, coastal states have the power to prescribe and enforce their laws and regulations while taking account of other provisions in the Convention. In the internal waters, coastal states have equivalent enforcement powers to those which they have on their land territory.³¹ In the territorial sea, coastal states also enjoy the full enforcement powers against foreign vessels³² with the main limitation being to permit innocent passage of vessels through their territorial sea.³³ In the archipelagic waters, coastal states have similar enforcement powers as those for the territorial sea, including the limitation relating to innocent passage.³⁴

The UNCLOS provides coastal states with enforcement powers for fisheries violations in the EEZ through Article 73. Article 73 (1) provides coastal states with the rights to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary for the compliance with laws and regulations established by the coastal state.³⁵ In addition, according to Article 111, coastal states can also enforce the fishing law violations against foreign vessels by means of hot pursuit from the EEZ (and other coastal states' maritime zones) into the high seas.³⁶ These two Articles

³¹ UNCLOS (n 1) arts 2, 8; Stuart Kaye, 'A Zonal Approach to Maritime Regulation and Enforcement' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016) 5-6; UNODC, 'Maritime Crime: a Manual for Criminal Justice Practitioners, Second Edition' (2019) 87.

³² UNCLOS (n 1) arts 2-4; Malcolm Barret, 'Illegal Fishing in Zones Subject to National Jurisdiction' (1998) 5 *James Cook University Law Review* 1, 7; UNODC, 'Maritime Crime: a Manual for Criminal Justice Practitioners, Second Edition' (n 31) 30; Kaye (n 31) 6.

³³ UNCLOS (n 1) arts 17, 18, 19, 21, 24, 25.

³⁴ *ibid* arts 2, 47, 49, 52, 53; UNODC, 'Maritime Crime: a Manual for Criminal Justice Practitioners, Second Edition' (n 31) 35, Kaye (n 31) 12.

³⁵ Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Martinus Nijhoff Publishers 1987) 84.

³⁶ See generally Craig H. Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20(4) *Ocean Development and International Law* 309; Robert C. Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33 *Virginia Journal of International Law* 557; Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn, Martinus Nijhoff Publishers 2002); Erik Jaap Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*' (2004) 19(1) *The International*

provide coastal states with enforcement jurisdiction over foreign vessels that are believed to have violated the laws and regulations of coastal states.

With regard to the right of hot pursuit, Article 111 of the UNCLOS has provided the rights to coastal states to pursue a foreign ship that has violated the laws and regulations of those states with certain conditions established under the Article.³⁷ The UNCLOS further provides that hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.³⁸ Generally, hot pursuit is conducted by the vessels of coastal states whose laws and regulations were violated. However, in some cases, driven by collective interests in addressing IUU fishing, nations have come together to undertake what Erik J. Molenaar describes as “multilateral hot pursuit” which refers to the “exercises of hot pursuit that involve pursuing vessels, aircraft or officials with different nationalities”.³⁹ Molenaar argues that the applicability of multilateral hot pursuit under Article 111 the UNCLOS is not inconsistent with

Journal of Marine and Coastal Law 19; Rachel Baird, 'Arrests in a Cold Climate (Part 2) – Shaping Hot Pursuit through State practice' (2009) 13 Antarctic and Southern Ocean Law and Policy Occasional Papers 1.

³⁷ UNCLOS Article 111 established several conditions for the exercise of the right of hot pursuit which include:

- a. Coastal States must have good reasons to believe that the vessel has violated the laws and regulations of that State. The pursuit must be commenced when the vessel is within the States' maritime zones and may only be continued outside the maritime zones in an interrupted manner (Art 111 (1)).
- b. The right of hot pursuit also applies to violations in the EEZ or the continental shelf (Art 111 (2)).
- c. The right of hot pursuit ceases once the ship enters the territorial sea of its own State or of a third State (Art 111 (3)).
- d. Hot pursuit may only be commenced after a visual or auditory signal to stop has been given (Art 111 (4)).
- e. Hot pursuit may only be exercised by warships or military aircraft, or other government ships or aircraft which are clearly marked and identifiable (Art 111 (5)).
- f. A ship that has been stopped or arrested outside the territorial sea in an unjustified manner must be compensated for any loss or damage that may be sustained (Art 111 (8)).

³⁸ UNCLOS (n 1) art 111(5).

³⁹ Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi'(n 36) 20.

the Article as long as its conditions are satisfied.⁴⁰ Thus, with efficient coordination and strong coordination among states, multilateral hot pursuit can be an option for a more effective enforcement against IUU fishing.

With regard to the right to board and inspection of vessels, Article 73 provides minimal explanation on the details of enforcement powers by coastal states. In this sense, it is helpful to look at Mary Ann Palma-Robles' explanation of three important issues relating to the application of Article 73: 1) which vessels can be boarded; 2) what offences are covered; and 3) who can board vessels.⁴¹ With regard to the first question on which vessels can be boarded, it should be noted that Article 73 does not limit the terminology "vessels" to fishing vessels. Thus, it can be interpreted that a coastal state, under Article 73, can also take measures against vessels other than fishing vessels, including boarding, inspection, arrest and judicial proceedings, to ensure compliance with its laws and regulations. However, Palma-Robles argues that, in the context of fisheries enforcement, the subject of Article 73 is not all vessels, but specifically refers to fishing vessels, which are described by Article 1 (a) of the Compliance Agreement as "any vessel used or intended for use for the purposes of the commercial exploitation of living marine resources, including mother ships and other vessels directly engaged in such fishing operation". The definition is general and may be applicable to different types of fishing vessels. Against this definition, there is a follow-up question on whether the fishing vessels need to be licensed or authorised to qualify for boarding and inspection. Although Article 73 does not provide more specific explanation on this question, it can be inferred that the Article grants a general right to enforce fisheries laws that can be interpreted as a blanket provision for all fishing vessels in the EEZ, meaning that it covers both licensed and unlicensed fishing vessels.⁴²

⁴⁰ *ibid* 40.

⁴¹ Mary Ann Palma-Robles, 'Fisheries Enforcement and the Concepts of Compliance and Monitoring, Control and Surveillance' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016) 143.

⁴² *ibid* 144.

With regard to the second question on the fisheries offences that are covered by Article 73, there is a question of whether the Article covers only the actual fishing activities or if it also encompasses activities related to fishing such as bunkering or refuelling.⁴³ In providing some light on the question, it is then useful to look at the meaning of the term “fishing” itself. As the UNCLOS does not offer a meaning of the term “fishing”, one can refer to the general rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties.⁴⁴ Article 31 provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In searching for an “ordinary meaning” of a treaty term, Chang-fa Lo argued there are four methods of searching for an “ordinary meaning” of a terminology⁴⁵: i) using an adjudicator’s personal knowledge; ii) relying on dictionaries; iii) instruction from the interpreted treaty; and iv) usage in another treaty. In the context of finding the “ordinary meaning” of the term “fishing”, the last method (usage in another treaty) is considered appropriate where one can rely on the definition or the usage of the same term in another treaty. In searching for the “ordinary meaning” of the term “fishing”, one can refer to the PSMA. Under Article 1 (c) of the PSMA “fishing” is described⁴⁶ as “searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish”. Further, Article 1 (d) of the PSMA also describes “fishing related activities” as “any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been

⁴³ *ibid.*

⁴⁴ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁴⁵ Chang-fa Lo, *Treaty Interpretation under the Vienna Convention on the Law of Treaties. A New Round of Codification* (Springer 2017) 161-175. See generally Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill (2009); Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers 2010); Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015); Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties. A Commentary* (2nd edn, Springer 2018).

previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea”. From these provisions, it can be inferred that the “ordinary meaning” of fishing covers different activities of obtaining fish from attracting to harvesting, while fishing related activities have an even broader meaning, which includes different activities along the supply chain. Since Article 73 does not provide any further explanation on the breadth of its coverage then, hypothetically, the Article is applicable to offences concerning both fishing and fishing related activities as long as it is necessary to ensure compliance with the laws and regulations of coastal states.

On the third question of who can board vessels, Article 73 does not limit or provide any precise information on which agency is to have the authority to enforce fisheries laws and regulations, including through boarding, inspection, arrest and judicial proceedings. Thus, coastal states have the discretion to authorise any of their agencies to board the violating vessels. The UNODC identifies that most states generally adopt one of two main approaches to the selection of enforcement agencies. The first option is to have a dedicated law enforcement agency such as coastguard or maritime police. The second option is to utilise the navy.⁴⁶ Some countries have also employed a multi-agency approach in addressing IUU fishing. For example, Indonesia involves officers and vessels from the Ministry of Maritime Affairs and Fisheries (MMAF), the Indonesian National Police and the National Armed Forces in dealing with IUU fishing vessels within their maritime zones. Each institution has active officers and vessels that are dedicated to addressing different violations in the maritime zones, including IUU fishing. The MMAF, for example, has 1,082 fisheries inspectors and 34 fisheries inspection vessels of different sizes, ranging from 28 metres to 60 metres.⁴⁷ The fisheries inspectors have the right to board and inspect vessels in enforcing

⁴⁶ UNODC, ‘Maritime Crime: a Manual for Criminal Justice Practitioners, Second Edition’ (n 31) 97; Palma-Robles (n 41) 145.

⁴⁷ Ministry of Marine and Fisheries Resources (MMAF), ‘FAQ Pengawasan Sumber Daya Kelautan dan Perikanan (PSDKP)’ [FAQ of Marine and Fisheries Resources Surveillance] (MMAF, 1 February 2018) <<http://kkp.go.id/artikel/1495-faq-pengawasan-sumber-daya-kelautan-dan-perikanan-psdkp>> accessed 9 March 2018.

the national fisheries laws and regulations.⁴⁸

Coastal states, in implementing measures under Article 62(4) and 73 (1) of the UNCLOS to combat IUU fishing in the EEZ requires MCS effective measures.⁴⁹ In simple terms, MCS can be understood as the mechanism for implementation of agreed policies, plans or strategies for oceans and fisheries management.⁵⁰ The MCS systems were developed to manage fishing activities in the EEZ by ensuring that control measures were adequately implemented and fishing took place in accordance to the legal framework.⁵¹ This is still a core function of MCS systems.⁵² Nevertheless, MCS strategies are now focus more on integration within fishery management plans, promotion of compliance by fisheries through users participation and provision of information for RMFOs and the monitoring of international obligations and agreements.⁵³ As IUU fishing often occurred in jurisdictions with weak MCS, the effective implementation of MCS measures is important. MCS measures can include the issuance of fishing licences, maintenance of a record fishing vessels, implementation of vessel monitoring system, observer programme and boarding and inspection measures.⁵⁴ MCS measures, if implemented effectively, can limit the operation of IUU fishing operators and thus can be a powerful tool in tackling IUU fishing.⁵⁵

⁴⁸ *Undang-Undang Republik Indonesia Nomor 45 Tahun 2009 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 2009 tentang Perikanan* [Unofficial: Law No. 45 of 2009 on the Amendment of Law No. 31 of 2004 on Fisheries] art 66.

⁴⁹ Palma, Tsamenyi and Edeson (n 10) 136.

⁵⁰ Peter Flewwelling and others, 'Recent Trends in Monitoring, Control and Surveillance Systems for Capture Fisheries' (FAO, 2003) FAO Fisheries Technical Paper No. 415, 7; The term MCS was defined by the FAO in 1981 as three inter-related activities:

- Monitoring - the continuous requirement for the measurement of fishing effort characteristics and resource yields.
- Control - the regulatory conditions under which the exploitation of the resource may be conducted.

⁵¹ Per Erik Bergth and Sandy Davies, 'Fishery Monitoring, Control and Surveillance' in Keven L. Cochrane and Serge M. Garcia A (eds) *Fishery Manager's Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009) 376.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ IPOA-IUU (n 4) para 24.

⁵⁵ Blaise Kuemlangan 'Chapter 5. Legal Aspects' in Keven L. Cochrane and

3.2.2.3.1. Limitation of Article 73

The enforcement powers given by Article 73 (1) to coastal states in the EEZ are limited by Article 73 (2) which provides that arrested vessels and crews should be promptly released upon posting a reasonable bond or other financial security. The prompt release procedure, as explained by Seline Trevisanut, is an autonomous procedure with the purpose to “balance the interest of, on the one hand, coastal states in protecting their sovereign rights and, on the other, flag states in the maritime activities of their fleet”.⁵⁶ It was introduced into the UNCLOS as a way of balancing the extension of coastal states’ rights in the EEZ.⁵⁷ This procedure is also a solution to ensure that vessels will not be detained indefinitely nor subjected to unreasonable requirements for their release.⁵⁸

In the case where the detaining state has not complied with the provisions for prompt release provided in Article 73(2) of the UNCLOS then, according to Article 292 (1), “the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree”. The application for release can be brought before the court or tribunal by the flag state or on behalf of the flag state.⁵⁹ The application will be dealt with without

Serge M. Garcia A (eds) *Fishery Manager’s Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009) 127; FAO, ‘Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO, Implementation of the IPOA-IUU) (FAO 2002) FAO Technical Guidelines for Responsible Fisheries No. 9, 17

⁵⁶ Seline Trevisanut, ‘Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends’ (2017) 48 (3-4) *Ocean Development & International Law* 300, 301.

⁵⁷ *ibid.*

⁵⁸ Andrew Serdy and Michael Bliss, ‘Prompt Release of Fishing Vessels: State Practice in the Light of the Cases Before the International Tribunal for the Law of the Sea’ in Alex G. Oude Elferink and Donald R. Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004) 276.

⁵⁹ UNCLOS art 292 (2); Trevisanut S, ‘The Exercise of Administrative Functions by ITLOS: A Comment on Prompt Release Cases’ in Boschiero N, Scovazzi T, Pitea C, and Ragni C (eds) *International Courts and the Development of International Law. Essay in Honour of Tullio Treves* (T.M.C. Asser Press 2013).

delay and can only cover the question of release and the posting of a reasonable bond or other financial security, without prejudice to the merits of any alleged violations of coastal states' laws and regulations against the vessel, its owner or its crews.⁶⁰ The bond or other security will be determined by the competent court or the tribunal, and the detaining state must comply promptly with the decision for the release of the vessel or its crews.⁶¹ The UNCLOS does not provide any guidance on the determination of the bond. Against this fact, however, the ITLOS has elaborated its own criteria for assessing the reasonableness of the amount, nature, and form of the bond or other financial security as can be found in the *Camouco* case, the *Volga* case, and the *Monte Confurco* case.⁶² In addition, the Tribunal also has been looking at the different practices of states and has attempted to obtain some useful criteria.⁶³

The limitations of Article 73 (1) are further established by Article 73 (3) where it states "Coastal state penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment, in the absence of agreements to the contrary by the states concerned, or any other form of corporal punishment".⁶⁴ The exclusion of imprisonment for violations of fisheries laws and regulations may create difficulties for coastal states in their enforcement efforts, particularly when they have to face the involvement of OCGs in IUU fishing activities. OCGs may potentially remain free and continue

⁶⁰ UNCLOS art 292 (3).

⁶¹ *ibid* art 292 (4).

⁶² "*Camouco*" (*Panama v France*) (*Prompt Release, Judgment, 7 February 2000*) Case No. 5, ITLOS Reports 2000 10, para 67, "*Monte Confurco*" (*Seychelles v France*) (*Prompt Release, Judgment, 18 December 2000*) Case No. 6, ITLOS Reports 2000 86, para 72, "*Volga*" (*Russian Federation v Australia*) (*Prompt Release, Judgment, 23 December 2002*) Case No. 11, ITLOS Reports 2002 10, para 69 cited in Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' (n 51) 6..

⁶³ *ibid*.

⁶⁴ Article 73 provides no definition of corporal punishment. Nonetheless, a general interpretation of corporal punishment can be understood from a description provided by *Black's Law Dictionary* which states corporal punishment to be "Physical punishment; punishment that is inflicted upon the body (including imprisonment)." The dictionary further states that "corporal punishment was either eliminated as a legal penalty or restricted to beating with a birch rod, cane, whip, or other scourge." See Brian A. Garner (editor in chief), *Black's Law Dictionary* (9th edn, Thomson Reuter 2009).

to plan and execute IUU fishing operations since the option of imprisonment is generally unavailable. However, the Article provides a solution for states that want to impose imprisonment, namely through the establishment of agreements among concerned states. The establishment of bilateral agreements may not be practical for some states since it may take a significant amount of time before agreement(s) can be concluded due to different legal backgrounds and interests. States may opt to have a multilateral agreement that can cover several concerned states with similar interests in imposing stricter sanctions on OCGs.

3.2.3. Rights, Obligations and Enforcement Powers of Flag States

3.2.3.1. Rights of Flag States

The basic rights of flag states, in the context of fishing, are established by the UNCLOS which covers the right of navigation and the right to fish on the high seas. With regard to the right of navigation, Article 90 of the UNCLOS describes that all states, whether coastal or land-locked, have the right to sail ships flying their flag on the high seas. In this regard, Article 91 of the UNCLOS further elaborates that every state has the right to “fix the conditions for the grant of its nationality to ships, for the registration of ships in their territory”. The only specific condition provided by international law on the grant of nationality is that there must be a genuine link between the state and the ship.⁶⁵ Further, the UNCLOS, under Article 92, also provides the right of flag states to have exclusive jurisdiction over vessels flying their flag on the high seas, except in specific cases found in international treaties or in the UNCLOS such as piracy, slavery, illegal broadcasting, stateless vessels, and disguised vessels as provided in Article 110 (1) and (2), and also in other specific treaty regimes which provide varying degrees of non-flag state enforcement such as drug trafficking, people smuggling, liquor smuggling and the protection of submarine cables.⁶⁶

⁶⁵ Camille Goodman, ‘The Regime for Flag State Responsibility in International Fisheries Law - Effective Fact, Creative Fiction or Further Work Required?’ (2009) 23 Australian and New Zealand Maritime Law Journal 157, 158.

⁶⁶ *ibid* 167

The UNCLOS also provides states with the freedom of fishing on the high seas under Article 87. The freedom of fishing is further elaborated in Article 116, on the right to fish on the high seas, where it confirms that all states have the right for their nationals to engage in fishing on the high seas. This right, however, is not without limitation. Article 116 sets out three conditions to be complied with by states: i) states' treaty obligations, which can include any treaty obligation, including obligations relating to membership of an RFMO; ii) the rights and duties as well as the interests of coastal states; and iii) different provisions which include the duty to adopt measures for their nationals for the conservation of the living resources of the high seas (Article 117), cooperation of states in the conservation and management of living resources (Article 118), and conservation of the living resources of the high seas (Article 119).⁶⁷

3.2.3.2. Obligations of Flag States

Flag states' basic obligations can be found in Article 94 of the UNCLOS which requires flag states to exercise jurisdiction and control over ships flying their flag effectively and to take necessary measures to ensure safety at sea. The responsibility to effectively exercise jurisdiction and control over ships flying their flag includes the maintenance of ships' registration and assuming effective jurisdiction under internal law for the ship, master, officers, and crews in respect of administrative, technical and social matters. In addition, flag states are also required to take necessary measures to ensure safety at sea with regard to construction, equipment and seaworthiness of ships; manning of ships, labour conditions and the training of crews; and the use of signals, maintenance of communications and the prevention of collisions.

⁶⁷ For further discussion on the right to fish see Shigeru Oda, Fisheries under the United Nations Convention on the Law of the Sea (1983) 77(4) *American Journal of International Law* 739; Cassandra M. Brooks and others, 'Challenging the Right to Fish in a Fast-Changing Ocean' (2014) 33(3) *Stanford Environmental Law Journal* 289; Stefán Ásmundsson, 'Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)' in Myron H. Nordquist, John Norton Moore and Ronán Long, *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (Centre for Oceans Law and Policy Volume 19, Brill Nijhoff 2016).

In the case of straddling fish stocks, the Convention, through Article 63, calls for cooperation between flag states and coastal states in the area adjacent to the EEZ, but not within the EEZ itself. Similarly, under Article 64 of the UNCLOS, flag states are also under a general responsibility to cooperate with coastal states, directly or through appropriate international organisations, to ensure that highly migratory species are preserved and used optimally throughout the region both within and beyond the EEZ.⁶⁸

The Convention also provides the general obligations on the high seas which can be applied to flag states. Under Article 117, all states are required to take necessary measures to ensure that their nationals fishing on the high seas conserve the living resources. Further, under Article 118 of the UNCLOS, all states are required to cooperate with each other in the conservation and management of living resources in the high seas where states must cooperate with each other to establish sub-regional or regional fisheries organisations. The conservation and management measures of the living resources of the high seas taken by states, according to Article 119 of the UNCLOS, must be based on the best scientific evidence available.

In examining the obligations of flag states, it is also deemed necessary to look at the ITLOS Advisory Opinion on the matter. ITLOS delivered its Advisory Opinion on 2 April 2015 based on a request submitted by the SRFC, an RFMO established in 1985 comprising Cape Verde, Gambia, Guinea, Guinea Bissau, Mauritania, Senegal and Sierra Leone.⁶⁹ From the Advisory Opinion, there are two important matters to note related to the obligations of flag states: i) obligations of

⁶⁸ Rüdiger Wolfrum, 'The potential of the International Tribunal for the Law of the Sea in the Management and Conservation of Marine Living Resources' (Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations in New York, 21 June 2007) 5 < https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/friends_tribunal_210607_eng.pdf > accessed 22 November 2017.

⁶⁹ For more detailed analysis of the Advisory Opinion, see Jianjun Gao, 'The ITLOS Advisory Opinion for the SRFC' (2015) 14(4) *Chinese Journal of International Law* 735; Michael A. Becker, 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC)' (2015) 109(4) *American Journal of International Law* 851; Maria Gavouneli, 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC) (ITLOS)' (2015) 54(5) *International Legal Materials* 890; Babu (n 19).

flag states in the case of IUU fishing and ii) liability of flag states for IUU fishing conducted by vessels sailing under their flag.

First, on the obligations of flag states in the case of IUU fishing, the Tribunal observed that flag states' obligations for IUU fishing activities are not directly addressed in the UNCLOS. Therefore, the Tribunal used the general and specific obligations of flag states under the UNCLOS for the conservation and management of marine living resources to shed some light on the issue. The Tribunal stated that the general obligations of flag states are set out in Articles 91 (Nationality of Ships), 92 (Status of Ships), 94 (Duties of the Flag State), 192 (General Obligations) and 193 (Sovereign Rights of States to Exploit Their Natural Resources) of the UNCLOS. Meanwhile, the specific obligations can be found in Article 58 (3) and Article 62 (4) of the UNCLOS.⁷⁰ The Tribunal further observed that those "general and specific obligations of flag states are further specified in fisheries access agreements concluded between coastal states and flag states concerned".⁷¹

Under the general obligations, ITLOS elaborated that, based on Article 92 of the UNCLOS, ships are subject to the exclusive jurisdiction of the flag state on the high seas and by Article 58 the UNCLOS; this also applies to the EEZ in so far as it is not incompatible with Part V of the UNCLOS.⁷² Further, the UNCLOS, based on Article 94 (1), "requires the flag state to effectively exercise its jurisdiction and control in administrative, technical and social matters" which are elaborated in the following paragraphs of Article 94 where the list of measures established in the Article were clarified by the Tribunal to be 'only indicative, not exhaustive'.⁷³ The general obligations of flag states can also be found in Article 192 of the UNCLOS which imposes on all states Parties an obligation to protect and preserve the marine environment, which also corresponds to Article 193 where "states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve

⁷⁰ ITLOS Advisory Opinion (n 27) para 111.

⁷¹ *ibid* para 112.

⁷² *ibid* para 115.

⁷³ *ibid* para 117.

the marine environment”⁷⁴ Both Articles highlight the underlying general obligations to protect and preserve the marine environment which apply to both flag states and coastal states.

Under the specific obligation, the Tribunal concluded that flag states have the obligation “to take necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities” based on Article 58 (3), Article 62 (4) as well as Article 192 of the UNCLOS.⁷⁵ Further, ITLOS also acknowledged that “the primary responsibility for the conservation and management of living resources in the exclusive economic zone, including the adoption of such measures as may be necessary to ensure compliance with the laws and regulations enacted by the coastal state in this regard, rests with the coastal state”. Nonetheless, “flag states also have the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the EEZ”. With regard to the “responsibility to ensure”, the Tribunal further elaborated its meaning through the clarifications provided by the Seabed Disputes Chamber in its Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to activities in the area, in which it is described as a “due diligence obligation”, and an “obligation of conduct” instead of an “obligation of result”.⁷⁶ It means that “the flag state is not obligated to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU Fishing in the EEZ”. However, “the flag state is under the due diligence obligation to take all necessary measures to ensure compliance and to prevent IUU Fishing by fishing vessels flying its flag”.⁷⁷

⁷⁴ *ibid* para 120. The Permanent Court of Arbitration Award on the South China Sea Arbitration, under its consideration, stated that the general obligation of States to protect and preserve the marine environment under Article 192 extends to both the protection of the marine environment from future damage and preservation in the sense of maintaining or improving its present condition. The Tribunal further stated that Article 192 “entails a positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.” See *The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China)* (Award, 12 July 2016) PCA Case No. 2013-19.

⁷⁵ ITLOS Advisory Opinion (n 27) para 124.

⁷⁶ *ibid* para 128.

⁷⁷ *ibid* para 129.

Second, with regard to the liability of flag states for IUU fishing activities conducted by vessels sailing under their flag, the Tribunal noted that “neither the Convention nor the MCA Convention⁷⁸ provides guidance on the issue of liability of the flag state for IUU fishing activities conducted by vessels under its flag”.⁷⁹ Thus, in examining the second question, the Tribunal used “the relevant rules of international law on responsibility of states for internationally wrongful acts”.⁸⁰ The Tribunal further concluded that the liability of the flag state does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the (coastal) states concerning IUU fishing activities in the EEZ.⁸¹ Rather, the liability arises from its failure to comply with its due diligence obligations concerning IUU fishing activities.⁸² Thus, a flag state will not be liable when it has taken all necessary and appropriate measures to meet its “due diligence obligation” to ensure that vessels flying its flag do not conduct IUU fishing activities in the EEZ.⁸³

The Advisory Opinion of the ITLOS has managed to shed some light on the obligations of flag states related to IUU fishing activities. The Opinion is indeed valuable, not only to SRFC member states but also to flag states and coastal states in general. In this case, it can be used as a compendium to analyse the obligations of flag states for vessels engaged in IUU fishing which is important to fill the gaps existing in the UNCLOS.⁸⁴ The overall contribution of the Advisory Opinion in addressing IUU fishing was also underlined by the President of ITLOS during the Twenty-Sixth Meeting of State Parties to the UNCLOS, who stated that “while the Advisory Opinion aimed at providing assistance to the Sub-Regional Fisheries Commission in the performance of its activities and contributing to

⁷⁸ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC) (adopted 8 June 2012, entered into force 16 September 2012).

⁷⁹ ITLOS Advisory Opinion (n 27) para 142.

⁸⁰ *ibid* para 143.

⁸¹ *ibid* para 146.

⁸² *ibid*.

⁸³ *ibid* para 148.

⁸⁴ Gavouneli (n 69) 891.

the implementation of the Convention, it might well be of value to all those engaged in preventing and deterring illegal, unreported and unregulated fishing activities in other areas”.⁸⁵ For some, an Advisory Opinion is considered to constitute a “subsidiary source of law” according to Article 38 para 1 (d) of the International Court of Justice (ICJ) Statute whereby an Advisory Opinion is considered as part of a judicial decision.⁸⁶ Judicial decisions are one of the four sources of international law provided by Article 38 of the ICJ Statute along with international conventions, international customs and general principles of law recognised by civilised nations. In this context, an Advisory Opinion can be considered as part of one of the sources of international law. An Advisory Opinion is also acknowledged as an authoritative statement of what the applicable law is and a significant contributor to the development of international law despite its subsidiary and non-binding character.⁸⁷

3.2.3.3. Enforcement Powers of Flag States

The Advisory Opinion has also provided some information about the enforcement powers of flag states. Under Article 94, the Tribunal stated that flag states have an obligation to exercise their jurisdiction and control in administrative matters over fishing vessels flying their flag.⁸⁸ The Tribunal further acknowledged that

⁸⁵ ‘Report of the Twenty-Sixth Meeting of States Parties’ (New York, 20-24 June 2016) (2 August 2016) Doc. SPLOS/303 para 18.

⁸⁶ Karin Oellers-Frahm, ‘Lawmaking through Advisory Opinion’ (2011) 12(5) German Law Journal 1033, 1046.

⁸⁷ Manfred Lachs, ‘Some Reflections on the Contribution of the International Court of Justice to the Development of International Law’ (1983) 10(2) Syracuse Journal of International Law and Commerce 239; Massimo Lando, ‘The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission’ (2016) 29(2) Leiden Journal of International Law 441; Alain Pellet, ‘Decisions of the ICJ as Sources of International Law?’ in Decisions of the ICJ as Sources of International Law? (Gaetano Morelli Lecture Series, Vol 2, International and European Papers Publishing 2018) 7.

⁸⁸ ITLOS Advisory Opinion (n 27) para 116. In the Advisory Opinion, it is stated in para 116 that Article 94 (2) (b) UNCLOS requires the flag state to “assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.” Para 116 further states “Article 94 specifies in paragraphs 2(a), 3 and 4 that the exercise of jurisdiction and control by the flag state must include in particular,

flag states have the freedom to adopt different laws, regulations and measures in exercising their jurisdiction and control in administrative matters. Nevertheless, flag states have “the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations”.⁸⁹ The Tribunal then stated that when flag states decide to apply sanctions against involvement in IUU fishing activities, then those sanctions “must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities”.⁹⁰ The Tribunal, unfortunately, did not provide more details on the types of sanctions that can be applied.

One of the main problems of flag states’ enforcement is the low level of willingness and capabilities among them which often results in the practice of flags of convenience (FOC). FOC allow vessel owners to register their vessels for a low fee or register substandard vessels that would not comply with a more stringent registry.⁹¹ FOC can also be used by vessels owners to maintain anonymity, avoid the employment, tax and environmental requirements and other restrictions that would be imposed by the vessels’ own national registry.⁹² A number of countries offer FOC registration, and Panama, Liberia, and Marshall Islands account for more than 60 per cent of shipping vessels registered in this way in 2016.⁹³ Vessels owners can also easily move the registration of their ships into a less stringent registry to avoid satisfying certain standards applied by their previous registration authority, a practice called “reflagging”.

maintaining a register of ships containing the names and particulars of the ships flying its flag, and taking necessary measures: to ensure safety of navigation and periodical surveying by a qualified surveyor of ships; to ensure that each ship flying its flag is in the charge of a master and officers who possess appropriate qualifications; and to ensure that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship:

⁸⁹ *ibid* para 138.

⁹⁰ *ibid*.

⁹¹ Tamo Zwinge, ‘Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So’ (2011) 10(2) *Journal of International Business and Law* 297, 299.

⁹² Senate Standing Committee on Rural and Regional Affairs and Transport, ‘Increasing Use of So-called Flag of Convenience Shipping in Australia’ (2017) para 1.9.

⁹³ *ibid* para 1.15.

Another related practice is known as “flag-hopping” which refers to the practice of repeated and rapid changes of a vessel’s flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level, or of facilitating non-compliance with such measures or provisions.⁹⁴ These practices have been used as alternatives to dodge regulatory oversight.⁹⁵ The substantial income from these practices has made some flag states tend to overlook their obligations provided in Article 94 of the UNCLOS and treat the ships flagged in their registry as clients rather than their subjects where it resulted in the misuse of the regime.⁹⁶

3.2.4. Port States Measures

Port states have important roles in tackling IUU fishing, particularly due to the failure of flag states in prescribing and enforcing their laws over their vessels.⁹⁷ The crucial roles of port states in tackling IUU fishing are also based on the facts that all vessels must come to port at some point to access services or to bring their illegal catch to the market. It is also generally accepted that a vessel which has voluntarily entered a port becomes subject to the laws, regulations and enforcement powers of port states.⁹⁸ These facts mean that port states have the opportunities (and obligations as stated in several international fisheries instruments) to exercise their jurisdiction through prescribing and enforcing different measures against IUU fishing, such as denial of entry to and inspection of foreign vessels.

⁹⁴ IPOA-IUU (n 4) para 39.

⁹⁵ For cases of reflagging and flag hopping see EJF, ‘Lowering the Flag. Ending the Use of Flags of Convenience by Pirate Fishing Vessels (EJF, 2009) 7 <https://ejffoundation.org/resources/downloads/Lowering-the-flag.pdf> Art 39 IPOA-IUU accessed 13 March 2018.

⁹⁶ Andrew Jillions, ‘Commanding the Commons: Constitutional Enforcement and the Law of the Sea,’ (2012) 1(3) *Global Constitutionalism* 429, 443.

⁹⁷ Cedric Ryngaert and Henrik Ringbom, ‘Port State Jurisdiction: Challenges and Potential’ (2016) 31 *The International Journal of Marine and Coastal Law* 379, 380; Sophia Kopela, ‘Port State Jurisdiction, Extraterritoriality and the Protection of Global Commons’ (2016) 47 (2) *Ocean Development and International Law* 89, 89.

⁹⁸ Palma, Tsamenyi and Edeson (n 10) 161.

In general, port state jurisdiction, as explained by Molenaar can be territorial, quasi-territorial or extra-territorial.⁹⁹ The territorial principle as a basis for jurisdiction can be presumed since ports are located in a state.¹⁰⁰ Port states can address illegal conduct occurring prior to entry (when such conduct took place within internal waters, archipelagic waters, or the territorial sea) or when the illegal conduct occurred in the port.¹⁰¹ The quasi-territorial principle can be applied when the illegal conduct occurs beyond the port state's territory such as in the EEZ or continental shelf.¹⁰² The extra-territorial principle can be exercised when the illegal conduct occurs on the high seas, in the Area (seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction), or in the maritime zones of other states.¹⁰³ Generally, port states have residual jurisdiction which gives them wide discretion in exercising jurisdiction in their ports, including taking more stringent measures than those provided in international agreement.¹⁰⁴ This discretion usually considers relevant factors such as socio-economic, political interests and international comity.¹⁰⁵

The UNCLOS does not cover port state measures concerning specific fisheries-related activities, but rather focuses on ports in the context of “protection and preservation of the marine environment”, particularly through Article 218 where the Convention provides

⁹⁹ Erik J. Molenaar, 'Port State Jurisdiction' in Rudiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010) para 16.

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² *ibid* para 17.

¹⁰³ *ibid* para 20. For discussions on the extraterritorial jurisdiction of port states, see also Arron N. Honniball, 'Extraterritorial Port State Measures. The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing' (PhD Thesis, Utrecht University 2019); Bevan Martin, 'Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation' in Henrik Ringbom (ed) *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015).

¹⁰⁴ Ryngaert and Ringbom (n 97) 382; Erik J. Molenaar, 'Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage' (2007) 38 (1-2) *Ocean Development & International Law* 225, 227.

¹⁰⁵ Erik J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 115-17.

enforcement powers for port states when a vessel is voluntarily within a port or at an off-shore terminal of a state.¹⁰⁶ Port states then, when the evidence so warrants, may institute proceedings in respect of any discharge from the vessel that took place outside its jurisdiction in violation of international rules and standards established through competent international organisations or general diplomatic conferences.¹⁰⁷ In this sense, the UNCLOS has given port states extra-territorial jurisdiction against foreign-flagged vessels which violate internationally agreed rules and standards outside a port state's territory.¹⁰⁸ With regard to a discharge, the Convention further provides that no proceedings could be instituted where it had occurred in waters of another state, except at the request of that state, the flag state or a state damaged or threatened by the discharge violation.¹⁰⁹ The port state, as far as practicable, must comply with requests from any state for investigation of a discharge violation that is believed to have occurred in, caused or threatened damage to the internal waters, territorial sea or EEZ of that state.¹¹⁰ The transmission of investigation information to relevant states is also required by the UNCLOS to the port state.¹¹¹ The extra-territorial jurisdiction of port states represents a significant shift where previously such enforcement jurisdiction was predominantly the sole domain of flag states or coastal states.¹¹²

3.2.5. Roles of RFMOs

The roles of RFMOs have evolved gradually since the twentieth

¹⁰⁶ Judith Swan, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (2016) 31(3) *The International Journal of Marine and Coastal Law* 395, 400; Martin (n 103) 110.

¹⁰⁷ *ibid* Swan, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (n 106) 400.

¹⁰⁸ Rosemary Rayfuse, 'The Role of Port States' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016).

¹⁰⁹ UNCLOS (n 1) art 218(2).

¹¹⁰ *ibid* art 218(3).

¹¹¹ *ibid* art 218(4).

¹¹² Brian F. Fitzgerald, 'Port State Jurisdiction and Marine Pollution under UNCLOS III' (1995) 11 *Journal of the Maritime Law Association of Australia and New Zealand* 29, 37.

century.¹¹³ At that time RFMOs' roles were mainly to allocate fish stock quotas and to gather and analyse data to the development of basic management systems.¹¹⁴ Currently, the roles of RFMOs have evolved to include a wide range of conservation, management and enforcement of fisheries management measures.¹¹⁵ RFMOs (along with Regional Fisheries Management Arrangements) are, at present, regarded as “the preeminent vehicles for fisheries regulation at the regional level and, arguably, the preeminent institutions of international fisheries overall”.¹¹⁶

The UNCLOS does not specifically mention RFMOs in its provisions.¹¹⁷ The UNCLOS uses different terms to refer to regional fisheries organisations such as “competent international organizations, whether subregional, regional or global”,¹¹⁸ “subregional or regional organizations”,¹¹⁹ “international organizations”,¹²⁰ regional organizations¹²¹ and “subregional or regional fisheries organizations”.¹²² These terms are not defined in the UNCLOS. However, for the purpose of this study, these terms will be used in the context of RFMOs.

The UNCLOS and its provisions do not assign particular duties to the RFMOs in combating IUU fishing. Instead, it provides RFMOs with different roles under the context of management and conservation of living resources both in the EEZ and in the high seas. In the EEZ, the UNCLOS provides coastal states with obligations to ensure that the maintenance of the living resources in their EEZs

¹¹³ Kerry Tetzlaff, ‘The Role of Regional Organisations’ in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016) 106.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ Erik J. Molenaar, ‘Regional Fisheries Management Organizations’ in Riberior MC, Bastos FL and Henriksen T (eds), *Global Challenges and the Law of the Sea* (Springer 2020) 84.

¹¹⁷ See Chapter 1, footnote 32 for further explanation on RFMOs.

¹¹⁸ UNCLOS (n 1) art 6(5), 119(2).

¹¹⁹ *ibid* art 63(1)-(2).

¹²⁰ *ibid* art 64(1), 65.

¹²¹ *ibid* art 66.

¹²² *ibid* art 118.

are not endangered by exploitation and, as appropriate, to cooperate with RFMOs.¹²³ The measures taken by the coastal states then have to consider “fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global”.¹²⁴ It then follows that RFMOs have the role in providing coastal states with all relevant information related to the high seas area adjacent to the EEZ and to supply information on any international minimum standards that may have been developed by the RFMOs.¹²⁵ The UNCLOS also gives an additional role for RFMOs as recipients of and exchange mechanisms for “available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks”.¹²⁶

Article 63 of the UNCLOS assigns RFMOs the role of an optional forum for the development of conservation and management measures for straddling fish stocks and highly migratory fish stocks.¹²⁷ It provides that where straddling fish stocks occur in the EEZ of two or more coastal states, an RFMO may be used as a forum for those states to seek to agree upon the necessary measures to coordinate and ensure the conservation and development of such stocks.¹²⁸ In the case where straddling fish stocks occur in the EEZ of a coastal state and the area beyond and adjacent to the EEZ, an RFMO may be used to negotiate necessary measures for the conservation of those stocks.¹²⁹ With regard to highly migratory species, an RFMO serves as an optional forum for cooperation for ensuring conservation and promoting optimum utilisation of such species both within and beyond the EEZ.¹³⁰ Further, the UNCLOS also provides RFMOs with roles related to marine mammals, cetaceans and anadromous stocks. Under Article 65, the UNCLOS provides RFMOs with the rights to

¹²³ *ibid* art 61(2).

¹²⁴ *ibid* art 61(3).

¹²⁵ Tetzlaff (n 113) 107.

¹²⁶ UNCLOS (n 1) art 61 (5).

¹²⁷ Tetzlaff (n 113) 107.

¹²⁸ UNCLOS art 63(1).

¹²⁹ *ibid* 63(2).

¹³⁰ Bob Applebaum and Amos Donohue, ‘The Role of Regional Fisheries Management Organizations’ in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999) 228.

prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in Part V (Exclusive Economic Zone).¹³¹ Regarding cetaceans, the Convention requires states to work, through the appropriate RFMOs, for their conservation, management and study.¹³² In relation to anadromous stocks, Article 66 (5) stipulates that the state of origin of anadromous stocks, and states fishing for such stocks, have to make arrangements, where appropriate, through RFMOs.

The UNCLOS also states that the roles of RFMOs with regard to the high seas are similar to RFMOs' role in the EEZ.¹³³ The Convention, under Article 118, requires states that exploit living resources to cooperate, as appropriate, to establish subregional or regional fisheries organisation, which can include RFMOs, the conservation and management of living resources of the high seas. Article 119 provides further roles for RFMOs concerning the conservation of the living resources. It requires states to consider any generally recommended minimum standards whether sub-regional, regional or global which can include standards developed by RFMOs.¹³⁴ Article 119 further provides RFMOs with the role as a clearinghouse for available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks.¹³⁵

Based on the elaboration above, it can be assumed that the roles of the RFMOs in the UNCLOS do not directly relate to the prevention, deterrence, and elimination of IUU fishing. Rather, they mainly serve as forums for international cooperation in the conservation of the various types of marine fish stocks, and as recipients of and exchange mechanisms for scientific information and data on relevant fish stocks.¹³⁶

¹³¹ UNCLOS art 65.

¹³² *ibid.*

¹³³ Applebaum and Donohue (n 130) 229.

¹³⁴ Tetzlaff (n 113) 107.

¹³⁵ *ibid.*

¹³⁶ Applebaum and Donohue (n 130) 230.

3.2.6. Deficits of the UNCLOS

The UNCLOS, as the constitution of the sea, contains no specific provisions on IUU fishing since the terminology was not then known and it was not the focus of the international community. Rather, the Convention focuses on the conservation and management of living resources which includes fisheries resources. In its implementation, the issue of conservation and management of living resources, including IUU fishing, has been a recurring concern of states Parties of the UNCLOS, particularly in more recent years.¹³⁷ States Parties of the UNCLOS identified IUU fishing as one of the main contributing factors of overfishing,¹³⁸ as an anthropogenic threat to the ocean¹³⁹ and as an activity that undermined the efforts of developing countries in managing sustainable fishing within their EEZ¹⁴⁰ which needs to be addressed by the States Parties. Different strategies were proposed by States Parties, including increased international cooperation to effectively address IUU fishing.¹⁴¹ One interesting strategy used by some States Parties to address IUU fishing in their maritime zones is the increase in sanctions for vessels found to be involved in IUU fishing.¹⁴² The increase in sanctions can also be seen as an indicator of the seriousness of States Parties

¹³⁷ Report of the Twenty-Ninth Meeting of States Parties (New York, 17-19 June 2019) (8 July 2019) Doc. SPLOS/29/9; Report of the Twenty-Eight Meeting of States Parties (New York, 11-14 June 2018) (9 July 2018) Doc. SPLOS/324; Report of the Twenty-Seventh Meeting of States Parties' (New York, 12-16 June 2017) (10 July 2017) Doc. SPLOS/316; Report of the Twenty-Sixth Meeting of States Parties (New York, 20-24 June 2016) (2 August 2016) Doc. SPLOS/303; Report of the Twenty-Fifth Meeting of States Parties (New York, 8-12 June 2015) (13 July 2015) Doc. SPLOS/287; Report of the Twenty-Fourth Meeting of States Parties (New York, 9-13 June 2014) (14 July 2014) Doc. SPLOS/277; Report of the Twenty-Third Meeting of States Parties (New York, 10-12 June 2013) (8 July 2013) Doc. SPLOS/263.

¹³⁸ Report of the Twenty-Seventh Meeting of the Meeting of States Parties (n 137) para 58.

¹³⁹ Report of the Twenty-Sixth Meeting of the Meeting of States Parties (n 137) para 96.

¹⁴⁰ Report of the Twenty-Seventh Meeting of the Meeting of States Parties (n 137) para 94.

¹⁴¹ Report of the Twenty-Fifth Meeting of the Meeting of States Parties (n 137) para 89.

¹⁴² Report of the Twenty-Sixth Meeting of the Meeting of States Parties (n 137) para 105. The report does not specify further what and how sanctions have been increased in this regard.

in addressing the threat posed by IUU fishing activities in their maritime zones. Although the UNCLOS has been implemented for more than 30 years, it seems that the obligations imposed by the Convention on coastal states, flag states and port states have not yet been fully implemented. The more recent phenomenon of OCGs' involvement in IUU fishing will arguably put a greater burden on the performance of the Convention.

With regard to IUU fishing and the involvement of OCGs, the UNCLOS has several deficits which will be explored below.

First, in the waters under coastal states' sovereignty, the UNCLOS makes provisions on the conservation and management of living resources, but it is silent regarding specific obligations for coastal states to establish particular regulations and enforcement system against IUU fishing, including that conducted by OCGs. This gives wide discretion in the formulation of IUU fishing regulations and enforcement to states. For example, some states such as Indonesia, Malaysia, Micronesia, Tanzania, Grenada, Barbados and Nigeria address IUU fishing in their territorial seas by relying more on criminal sanctions against offenders¹⁴³ while other states such as Spain and Portugal rely on administrative sanctions.¹⁴⁴ The lack of specific obligations and the different approaches taken by coastal states in addressing IUU fishing, particularly that conducted by OCGs, may, in the end, create inconsistency in different jurisdictions. OCGs can exploit this inconsistency by operating in jurisdictions with less stringent regulations and enforcement.

Related to the regulations and enforcement against IUU fishing, in the EEZ, the UNCLOS seems to limit the application of criminal regulations and enforcement systems particularly through Article 73 (2) and (3) by which coastal states have to comply with the prompt release mechanism and exclude imprisonment unless there is existing agreement by the states concerned. Article 73 (2) will arguably cause difficulties in implementing coastal states' primary responsibility to prevent, deter and eliminate IUU fishing

¹⁴³ Palma, Tsamenyi and Edeson (n 10) 150.

¹⁴⁴ P. Cacaud, M. Kuruc and M. Spreij, 'Administrative Sanctions in Fisheries Law' (FAO, 2003) FAO Legislative Study 82.

in the EEZ, particularly when they have to face transnational IUU fishing activities conducted by OCGs. The extensive resources and networks that OCGs have may enable them to get around the law by simply paying the required reasonable bond or other security and then continuing their illegal activities. This option may be more affordable compared with being arrested which will cause their operations to cease for a longer time. Thus, the benefits of IUU fishing would outweigh the costs and encourage OCGs to continue to operate (see Chapter 2 for further discussion on the benefits driver). Article 73 (3) provides a solution to the imposition of imprisonment through the establishment of an agreement by the states concerned. A multilateral agreement, in the form of a suppression convention for example, could be a solution if states want to impose imprisonment against IUU fishing activities in the EEZ.

Second, flag states have the exclusive jurisdiction on fishing vessels flying their flag on the high seas, and no other state can take enforcement action unless specific agreements have been made for such matters.¹⁴⁵ Unfortunately, the UNCLOS does not contain particular provisions concerning the regulations and enforcement systems that need to be taken by flag states, and thus leaves such matters fully to the discretion of flag states, including in the case of IUU fishing conducted by OCGs. Against this background and considering the widely acknowledged incapability and unwillingness of some flag states in taking action against their vessels, it may be argued that the prospect of enforcement against IUU fishing, including that conducted by OCGs will be bleak in the future, unless there is an additional instrument which will force flag states to employ a more stringent approach against them, including hypothetically through criminal regulations and enforcement.

Third, the UNCLOS does not provide specific guidance for port states in addressing IUU fishing, including those operations conducted by OCGs. Instead, port state provisions under the UNCLOS focus

¹⁴⁵ Robin Churchill, 'Fisheries and Their Impact on the Marine Environment: UNCLOS and Beyond' in Marta Chantal Ribeiro (ed), *30 Years After the Signature of the United Nations Convention on the Law of the Sea: the Protection of the Environment and the Future of the Law of the Sea* (Coimbra Editora 2014).

more on the protection and preservation of the marine environment, particularly in the case of marine pollution.

3.3. The Compliance Agreement

3.3.1. Background

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement) was adopted on 24 November 1993 and entered into force on 24 April 2003.¹⁴⁶ The Compliance Agreement began as an effort to solve the problem of reflagging where the negotiations started from a meeting of the group of experts in Rome at the FAO headquarters during early February 1993 and continued until the FAO Council approved the final text of the Compliance Agreement on 5 November 1993.¹⁴⁷ The whole negotiation process took approximately ten months which showed the seriousness of the high seas fisheries issues.¹⁴⁸ The establishment of the Compliance Agreement was referred as “a momentous achievement and a milestone in the international management of high seas fisheries”.¹⁴⁹

The Compliance Agreement became the first international legally binding instrument that focused on addressing reflagging and other flags of convenience issues. The main objectives of the Compliance Agreement are displayed by two main elements. First is the concept of flag state obligations regarding fishing vessels on the high seas and second is the promotion of the free flow of information regarding high seas fishing operations.¹⁵⁰ The Agreement covers all fishing

¹⁴⁶ FAO, ‘Status of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas’ <http://www.fao.org/fileadmin/user_upload/legal/docs/012s-e.pdf> accessed 1 December 2017.

¹⁴⁷ David A. Balton, ‘The Compliance Agreement’ in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).

¹⁴⁸ *ibid* 44.

¹⁴⁹ *ibid*.

¹⁵⁰ Gerald Moore, ‘The FAO Compliance Agreement’ in Myron H. Nordquist and John Norton Moore (eds), *Current Fisheries and the Food and Agriculture Organization of the United Nations* (Martinus Nijhoff Publishers 2000).

vessels that are used or intended for fishing on the high seas¹⁵¹ with an exemption for vessels less than 24 metres in length, unless it would undermine the purposes and objectives of the Agreement.¹⁵² It further allows bordering coastal states, in any fishing region, that have not yet declared EEZ, to agree, either directly or through appropriate RFMOs, to establish a minimum length of fishing vessels below which the Agreement will not apply.¹⁵³ In promoting its objectives regarding flag state obligations, overfishing vessels on the high seas and promotion of the free flow of information, the Compliance Agreement focuses on several aspects as elaborated below.

3.3.2. Flag States' Obligations

Article 3 of the Compliance Agreement enumerates various flag state obligations overfishing vessels operating on the high seas. Article III(1)(a) obliges each Party to take necessary measures to ensure that fishing vessels flying its flag do not engage in activities that undermine the effectiveness of international conservation and management measures.¹⁵⁴ In this context, the national authority then needs to establish a necessary framework and detailed requirements to authorise high seas fishing.¹⁵⁵ The Article then goes further by stating that no Party should allow any fishing vessel entitled to fly its flag to fish on the high seas unless the appropriate authorities have authorised it.¹⁵⁶ When authorising any fishing vessel on the high seas, the Party must be satisfied that it is able to exercise its obligations

¹⁵¹ Compliance Agreement (n 2) art II (1).

¹⁵² *ibid* art II(2).

¹⁵³ *ibid* art II(3).

¹⁵⁴ International conservation and management measures” according to Article I of the Compliance Agreement mean “measures to conserve or manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional or subregional fisheries organizations, subject to the rights and obligations of their members, or by treaties or other international agreements.”

¹⁵⁵ William Edeson, David Freestone and Elly Gudmundsdottir, ‘*Legislating for Sustainable Fisheries: A Guide to Implementing the 1993 FAO Compliance Agreement and 1995 Fish Stocks Agreement*’ (The World Bank 2001) The World Bank Law Justice, and Development Series 23239, 7.

¹⁵⁶ Compliance Agreement (n 2) art III(2).

under the Compliance Agreement, taking into account the links that exist between it and the fishing vessel concerned.¹⁵⁷ The authorisation to fish on the high seas will be cancelled if the fishing vessel ceases to be entitled to fly the flag of that Party.¹⁵⁸

The Compliance Agreement also addresses the issue of non-compliance through Article III(5) which seeks to limit the freedom of vessels that have a bad compliance record in high fisheries to look for new flags.¹⁵⁹ The provision forbids flag states to authorise a reflagged fishing vessel to fish on the high seas when it is known to have a prior record of having undermined the international conservation and management measures. When properly enforced, this provision is believed by the negotiators of the Compliance Agreement to be a way to deter illegal reflagging by decreasing the possibility of a reflagged vessel being able to fish on the high seas.¹⁶⁰

Flag states' obligations are further strengthened by the requirement to mark their fishing vessels according to the generally accepted standards¹⁶¹ and to provide necessary information on the vessels operations including, in particular, information regarding the area of their fishing operations and their catches and landings.¹⁶²

3.3.3. Exchange of Information

The second main objective of the Compliance Agreement is the exchange of information which is designed to ensure an adequate flow of information on high seas fishing. Article VI of the Compliance Agreement is the core of this objective where it requires each party to make information available on each fishing vessel entered in the record, to the FAO¹⁶³ and, to the extent practicable, additional

¹⁵⁷ *ibid* art III(3).

¹⁵⁸ *ibid* art III(4).

¹⁵⁹ Moore (n 150) 80.

¹⁶⁰ Balton (n 147) 50.

¹⁶¹ Compliance Agreement (n 2) art III(6)

¹⁶² *ibid* art III(7).

¹⁶³ *ibid* art VI(1). The information required is: (a) name of fishing vessel, registration number, previous names (if known), and port of registry; (b) previous flag (if any); (c) International Radio Call Sign (if any); (d) name and address of

information from the same record.¹⁶⁴ The FAO will then circulate this information periodically to all Parties, or on request individually to any Party, subject to any restriction imposed by the reporting Party.¹⁶⁵

When a fishing vessel engages in an activity that undermines the effectiveness of international conservation and management measures, which can include IUU fishing, each Party is required to report it promptly to the FAO.¹⁶⁶ If any Party has reasonable grounds to believe that those activities are engaged in by a fishing vessel not entitled to fly its flag, then each Party should draw this to the attention of the flag state concerned and also, as appropriate, to the FAO.¹⁶⁷ Concerning the information provided, the FAO must circulate it to all Parties, subject to any restriction imposed by the reporting Party regarding the distribution of information; the FAO can also provide information promptly to any global, regional or sub-regional fisheries organisation.¹⁶⁸ This obligation to cooperate in information exchange on fishing vessels' activities has been identified as a crucial element in tackling IUU fishing.¹⁶⁹

3.3.4. Port State Measures

The Compliance Agreement provides that a port state must promptly notify the flag state where it has reasonable grounds for believing that the activities of the fishing vessel entering its port have undermined the international conservation and management measures. In that regard, Parties may make arrangements regarding the undertaking by port states of necessary investigatory measures.¹⁷⁰

owner or owners; (e) where and when built; (f) type of vessel; and (g) length.

¹⁶⁴ *ibid* art VI(2) Compliance Agreement. The information required is: (a) name and address of operator (manager) or operators (managers) (if any); (b) type of fishing method or methods; (c) moulded depth; (d) beam; (e) gross register tonnage; and (f) power of main engine or engines..

¹⁶⁵ *ibid* art VI(4).

¹⁶⁶ *ibid* art VI(8)(a).

¹⁶⁷ *ibid* art VI(8)(a).

¹⁶⁸ *ibid* art VI(10).

¹⁶⁹ Rachel J. Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer 2006) 92.

¹⁷⁰ Compliance Agreement (n 2) art V(2).

The provision indicates that port states do not have the powers to investigate a foreign-flagged vessel that has undermined international conservation and management measures without permission from the flag state.¹⁷¹ There is also no indication that port states can take other measures such as the denial of permission to enter into port or the detaining or inspecting of such vessels.¹⁷² Other than this provision, the Compliance Agreement is silent on the port states' sovereignty, duties and obligations and thus gives port states limited powers in their role to combat IUU fishing. The peripheral focus on the port states' measures is not surprising taking into account the Compliance Agreement's focus on the flag states' obligations.¹⁷³

3.3.5. Enforcement Powers

The Compliance Agreement essentially gives the enforcement powers to the flag states.¹⁷⁴ It established additional pressures on flag states requiring them to take enforcement measures against their fishing vessels that act in contravention of the Compliance Agreement including, where appropriate, by making such contravention an offence under national legislation, pursuant to Article III(8). In addition, the Article requires that the sanctions applicable to that contravention "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 authorisation to fish on the high seas".¹⁷⁵

¹⁷¹ Swan, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (n 106) 401.

¹⁷² *ibid.*

¹⁷³ Emma Witbooi, 'Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context' (2014) 29(2) *The International Journal of Marine and Coastal Law* 290, 298.

¹⁷⁴ Francisco Orrego Vicuna, *The Changing International Law of High Seas Fisheries* (Cambridge University Press 1999) 229.

¹⁷⁵ *ibid.*

3.3.6. Roles of RFMOs

The Compliance Agreement does not assign a specific role to the RFMOs. However, some of the provisions of the Compliance Agreement can be interpreted as a suggestion about the role of regional fisheries organisations, which can include RFMOs, such as international cooperation and exchange of information.¹⁷⁶ Concerning the role of international cooperation, Article V(3) of the Compliance Agreement requires Parties, when and as appropriate, to enter into cooperative agreements of mutual assistance on a global, regional, sub-regional or bilateral level to promote the achievement of the Compliance Agreement's objectives. This provision implies a possible role of regional fisheries organisations to promote the objectives of the Compliance Agreement, but not the implementation.¹⁷⁷ The Compliance Agreement also provides a role for regional fisheries organisations in supporting parties to provide assistance, including technical assistance to the developing countries in fulfilling their obligations under the Compliance Agreement.¹⁷⁸ With regard to the exchange of information, the Compliance Agreement provides a role for regional fisheries organisations to request from FAO relevant information on fishing vessels, subject to any restrictions on dissemination that may be imposed by the relevant party.¹⁷⁹ In addition, the Compliance Agreement also provides regional fisheries organisations a role in the exchange of information relating to the implementation of the agreement.¹⁸⁰

3.3.7. Deficits of the Compliance Agreement

The Compliance Agreement has strengthened international efforts in the management of high seas fisheries by extending the flag states' obligations and promoting the free flow of information regarding high seas fishing operations. The Compliance Agreement, however, does not address IUU fishing directly in its provisions and, consequently, the Compliance Agreement offers no regulatory

¹⁷⁶ Applebaum and Donohue (n 130) 238.

¹⁷⁷ *ibid* 239.

¹⁷⁸ Compliance Agreement art VII.

¹⁷⁹ *ibid* art VI(4), VI(10).

¹⁸⁰ *ibid* art VI; Applebaum and Donohue (n 130) 240.

solution for the more recent phenomenon of IUU fishing conducted by OCGs. Nonetheless, many of its provisions are still very relevant and can be used by flag states in combating IUU fishing.

With regard to the enforcement system, the Compliance Agreement has put additional pressure on flag states to take enforcement measures against their fishing vessels that contravene the provisions in the Compliance Agreement including, where appropriate, by making it an offence under national legislation as stated in Article III(8). Against such contraventions, the sanctions shall be of sufficient gravity as to be effective in securing compliance and to deprive offenders of the benefits from the illegal activities. Article III(8) also mentioned the application of refusal, suspension or withdrawal of the authorisation to fish on the high seas for serious offences. This Article provides wide discretion for states in formulating and implementing its enforcement measures which could cause wide variation of measures employed by states ranging from the suspension of a license to criminal sanctions. The wide variation arguably can be used by actors, including OCGs to find and operate in jurisdictions that have less stringent measures and thus is considered as a deficit. The provisions in the Agreement are arguably directed towards regular actors on the high seas fishing rather than OCGs as the provisions do not address the groups' involvement. The disregard of OCGs involvement in the Compliance Agreement is considered as a deficit as the OCGs are very much present on the high seas as can be seen from cases of IUU fishing in the Southern Ocean.¹⁸¹ Based on these findings, it is fair to say that the Compliance Agreement has deficits both in the realm of regulatory and enforcement systems against IUU fishing activities conducted by OCGs as the Agreement does not provide guidance in enforcement (which can cause inconsistencies in the national applications) and the disregard of OCGs phenomena in its provisions.

¹⁸¹ High Seas Task Force, 'Closing the Net: Stopping Illegal Fishing on the High Seas (2006) < <https://www.wwf.eu/?62600/Closing-the-net-Stopping-illegal-fishing-on-the-high-seas> > accessed 28 November 2017; Eskil Engdal and Kjetil Sæter, *Catching Thunder. The True Story of the World's Longest Sea Chase* (Zed Books, 2018).

3.4. The UNFSA

3.4.1. Background

The development of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter the UNFSA) can be traced from several significant events that led to its adoption. In response to the alarming situation of the high seas fisheries at that time and the recommendation from Agenda 21 of the United Nations Conference on Environment and Development (UNCED),¹⁸² the UN General Assembly, through Resolution 47/192, decided to convene the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in 1993.¹⁸³ The Conference held six sessions between April 1993 and August 1995¹⁸⁴ where it completed its work with the adoption of the UNFSA on 4 August 1995 before the Agreement then entered into force on 11 December 2001.¹⁸⁵ The Agreement consists of 13 Parts with 50 Articles and two Annexes.

¹⁸² UNCED, Agenda 21: Programme of Action for Sustainable Development' (1992) A/CONF.151/26/Rev.I/Vol.I, ch 17 para 17.49 (e): 'States should convene, as soon as possible, an intergovernmental conference under United Nations auspices, taking into account relevant activities at the subregional, regional and global levels, with a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks. The conference, drawing, inter alia, on scientific and technical studies by FAO, should identify and assess existing problems related to the conservation and management of such fish stocks, and consider means of improving cooperation on fisheries among States, and formulate appropriate recommendations. The work and the results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea, in particular the rights and obligations of coastal States and States fishing on the high seas.'

¹⁸³ UNGA 'United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks' (29 January 1993) UN Doc A/RES/47/192.

¹⁸⁴ Moritaka Hayashi, 'The Straddling and Highly Migratory Fish Stocks Agreement' in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).

¹⁸⁵ UN, 'Overview of the United Nations 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 (in force as from 11 December 2001)' (UN last updated 1 November 2019 < http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm> accessed 18 October 2020.

The objective of the 1995 the UNFSA is “to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the UNCLOS”.¹⁸⁶ The UNFSA, at that time, was considered to be the most important legally-binding global instrument for the conservation and management of fishery resources since the adoption of the UNCLOS.¹⁸⁷ Hayashi Takamura explains that the UNFSA serves as a significant addition to the UNCLOS legal regime in three ways. First, it facilitates states in implementing the UNCLOS through indicating specific measures that need to be implemented by states and international organisations that are engaged in fishing activities. Second, it strengthens the relevant provisions in the UNCLOS through elaborating on general rules and expanding their application. Third, it further develops the basic rules and principles that were established by the UNCLOS.¹⁸⁸ In understanding more about the UNFSA, it is best to examine its keys features, such as duties of flag states, compliance and enforcement powers of flag states, enforcement powers of sub-regional and RFMOs, port states measures and the roles of RFMOs.

3.4.2. Duties of Flag States

The UNFSA underlines the duties of flag states which were also established in the UNCLOS and the Compliance Agreement.¹⁸⁹ The UNFSA fills the gap left by the UNCLOS through elaborating further in its provisions the duties of flag states concerning effective control and concrete measures in respect of high seas fishing activities.¹⁹⁰ Effective control by a flag state is translated through authorisation of vessels flying its flag to fish on the high seas only

¹⁸⁶ UNFSA (n 3) art 2.

¹⁸⁷ UN ‘United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks’ (n 183).

¹⁸⁸ Moritaka Hayashi, ‘The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention’ 29 (1-3) *Ocean & Coastal Management* 51.

¹⁸⁹ See Chapter 2, Section 3.2.3. (Rights, Responsibilities and Enforcement Powers of Flag States) and Section 2.3. (the 1993 FAO Compliance Agreement) of this dissertation for further discussion.

¹⁹⁰ Hayashi, ‘The Straddling and Highly Migratory Fish Stocks Agreement’ (n 184) 64.

when it can effectively exercise its responsibility as a flag state under the UNCLOS and the UNFSA.¹⁹¹ Meanwhile, concrete measures are translated into actions that need to be taken, in respect of high seas fishing activities, by a flag state which includes control of fishing vessels through fishing licences, authorisations or permits in accordance with agreed procedures; national records of authorised fishing vessels; requirements for marking of fishing vessels and fishing gear; regulations for recording and time reporting of vessels; positions and catch; requirements for verifying the catch of target and non-target species; monitoring, control and surveillance of vessels; and regulations to ensure compliance with subregional, regional and global measures.¹⁹² In the report of the Secretary-General to the 2016 Resumed Review Conference¹⁹³ it was underlined that enhancing flag states' control continues to be the most important aspect for achievement of the UNFSA's objectives and for addressing IUU fishing.¹⁹⁴ Some states have already reported that they have taken measures to ensure effective control of their fishing vessels and vessels of other states. For example, Australia has sought the cooperation of flag states in deregistering vessels involved in IUU fishing.¹⁹⁵ Other states are reported to have introduced different measures to improve effective control over vessels flying their flag, including through the establishment and implementation of national legislation and procedures to strengthen effective control and through monitoring, control and surveillance (MCS) adopted by RFMO/As.¹⁹⁶

3.4.3. Compliance and Enforcement Powers of Flag States

The UNFSA imposes compliance and enforcement on flag states through Article 19 by which flag states must ensure compliance by fishing vessels flying their flag with subregional and regional

¹⁹¹ UNFSA (n 3) art 18(2).

¹⁹² *ibid* art 18(3).

¹⁹³ UNGA, 'Report Submitted to the Resumed Review Conference in Accordance with Paragraph 41 of General Assembly Resolution 69/109 to Assist it in Discharging its Mandate under Article 36 (2) of the Agreement' (1 March 2016) UN Doc A/CONF.210/2016/1, para 44.

¹⁹⁴ *ibid* para 358.

¹⁹⁵ *ibid* para 208.

¹⁹⁶ *ibid* para 211.

conservation measures over their vessels.¹⁹⁷ Flag states must enforce such measures irrespective of where violations occur.¹⁹⁸ Moreover, flag states also have an obligation to require their vessels to provide information to the investigating authority¹⁹⁹ and, if sufficient evidence is available in respect of an alleged violation, refer the case to the authorities to institute proceedings without delay in accordance with their laws and, where appropriate, detain the vessels concerned.²⁰⁰ When it has been established that the vessels have been involved in the commission of a serious violation,²⁰¹ flag states must ensure that such vessels do not engage in fishing operations on the high seas until all outstanding sanctions have been complied with.²⁰²

The investigations and judicial proceedings of any violation need to be conducted expeditiously with sanctions that are adequate in severity to be effective in securing compliance, to discourage

¹⁹⁷ UNFSA art 19(1)(a).

¹⁹⁸ *ibid* art 19(1)(b).

¹⁹⁹ *ibid* art 19(1)(c).

²⁰⁰ *ibid* art 19(1)(d).

²⁰¹ Serious violations are described in UNFSA Article 21 (11) as:

- (a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with article 18, paragraph 3 (a);
- (b) failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement;
- (c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement;
- (d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- (e) using prohibited fishing gear;
- (f) falsifying or concealing the markings, identity or registration of a fishing vessel;
- (g) concealing, tampering with or disposing of evidence relating to an investigation;
- (h) multiple violations which together constitute a serious disregard of conservation and management measures; or
- (i) such other violations as may be specified in procedures established by the relevant subregional or regional fisheries management organization or arrangement.¹

²⁰² *ibid* art 19(1)(e).

future violations and to deprive offenders of enjoying the benefits from their illegal activities.²⁰³ Measures that can be imposed upon masters and other officers of the vessels must include provisions that may permit, *inter alia*, refusal, withdrawal or suspension of authorisations to serve as masters or officers on such vessels.²⁰⁴ The different measures that are provided may serve to improve the historical relatively poor performance of investigations, prosecution and sanctions by flag states to which the Compliance Agreement also aspired.²⁰⁵

The importance of ensuring compliance and enforcement with sub-regional and regional conservation measures over straddling fish stocks and highly migratory fish stocks is further strengthened through international cooperation which is elaborated by Article 20 of the UNFSA. States are required to cooperate in order to ensure compliance with and enforcement of such measures.²⁰⁶ In the investigation of an alleged violation, the flag state may request assistance from any other state, and such state must endeavour to meet reasonable requests.²⁰⁷ In undertaking the investigation, a flag state may do it directly, in cooperation with other interested states, or relevant sub-regional or regional fisheries management organisations or arrangements.²⁰⁸ Furthermore, states are under an obligation to extend assistance to one another in the identification of violating vessels and in establishing arrangements to provide evidence for prosecuting authorities where national laws and regulations permit it.²⁰⁹

With regard to unauthorised fishing under the jurisdiction of a coastal state, the UNFSA imposes an obligation on the flag state, upon reasonable grounds, to thoroughly investigate the matter. The flag state is also under obligation to cooperate with the coastal state in taking appropriate enforcement measures and may authorise the

²⁰³ *ibid* art 19(2).

²⁰⁴ *ibid*.

²⁰⁵ Vicuna (n 174) 240.

²⁰⁶ UNFSA (n 3) art 20(1).

²⁰⁷ *ibid* art 20(2).

²⁰⁸ *ibid* art 20(3).

²⁰⁹ *ibid* art 20(4)-(5).

coastal state's relevant authorities to board and inspect the vessel, without prejudice to Article 111 of the UNCLOS (Right of Hot Pursuit).²¹⁰

3.4.4. Port States Measures

The UNFSA approaches port state control more comprehensively than the UNCLOS.²¹¹ The UNFSA has given port states the rights and duties to take measures, in accordance with international law, to promote the effectiveness of sub-regional, regional and global conservation and management measures without discriminating against the vessels.²¹² When fishing vessels voluntarily enter its ports or its offshore terminals, a port state may, *inter alia*, inspect documents, fishing gear and catch on board the fishing vessels.²¹³ The words “*inter alia*” indicate that port states may take other measures as deemed necessary.²¹⁴ It further provides that states *may* adopt regulations to empower the relevant national authorities to prohibit landings and transshipments where the catch has been established to undermine the effectiveness of sub-regional, regional or global conservation and management measures on the high seas.²¹⁵ The word “may” implies that port states have no legally binding obligations to take specific measures to tackle IUU fishing.²¹⁶ The lack of legally binding obligations specific to IUU fishing in the UNFSA and other instruments is one of the reasons for the development of a global approach by the Port State Measures Agreement.²¹⁷

²¹⁰ *ibid* art 20(6).

²¹¹ Witbooi (n 173) 296.

²¹² UNFSA (n 3) art 23(1).

²¹³ *ibid* art 23(2).

²¹⁴ Vicuna (n 174) 261.

²¹⁵ UNFSA (n 3) art 23(3).

²¹⁶ Witbooi (n 173) 297.

²¹⁷ Erik J. Molenaar, 'Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement' in Dawn A. Russel and David L. Van der Zwaag (eds), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives* (Martinus Nijhoff Publishers 2010) 373.

3.4.5. Roles of RFMOs

The UNFSA established RFMOs as the platform for the adoption of fisheries conservation and management measures. It implements the call for cooperation on high seas conservation in the UNCLOS and therefore represents a progressive development of different concepts in the UNCLOS such as cooperation, compatibility and responsibility.²¹⁸ The UNFSA has placed RFMOs in a primary role of international cooperation and development of the conservation and management of straddling fish stocks and highly migratory fish stocks.²¹⁹

The role of RFMOs can mainly be explained from Part III of the UNFSA (Mechanisms for International Cooperation Concerning Straddling Fish Stocks and Highly Migratory Fish Stocks) where it covers several aspects such as the duty to cooperate, establishment of RFMOs, membership of RFMOs, transparency in RFMOs' activities, strengthening existing RFMOs, and the collection and provision of information and cooperation in scientific research.²²⁰ Under Part III, the UNFSA also outlines the duty for states to pursue cooperation either directly or indirectly through appropriate RFMOs to ensure effective conservation and management of straddling fish stocks and highly migratory fish stocks.²²¹ The relevant states must give effect to their duty to cooperate by becoming members or participants of relevant RFMOs, or by agreeing to apply the conservation and management measures established by such RFMOs.²²² Only these states will state then have access to fishery resources to which such measures apply.²²³ In the case where no RFMO exists, relevant states then have to cooperate in its establishment or enter into other appropriate arrangements and must participate in the work of any such organisation or arrangement.²²⁴

²¹⁸ Lodge and others (n 6) 4.

²¹⁹ Tetzlaff (n 113) 112.

²²⁰ *ibid* 109.

²²¹ UNFSA (n 3) art 8(1).

²²² *ibid* art 8(3).

²²³ *ibid* art 8(4).

²²⁴ *ibid* 8(5).

The UNFSA also establishes a comprehensive to-do list for the states to fulfil their obligations to cooperate through RFMOs in Article 10. In addition to the to-do list, the UNFSA also provides related provisions regarding the RFMOs, such as the provisions on new members or participants,²²⁵ transparency,²²⁶ strengthening the existing RFMOs,²²⁷ collection and provision of information and cooperation in scientific research,²²⁸ and non-members of organisations and non-participants in arrangements.²²⁹ Regarding the non-members and non-participants of the RFMOs which do not agree with the conservation and management measures established by the RFMOs,²³⁰ the UNFSA does not discharge them from the obligation to cooperate, and those states are not allowed to authorise vessels flying their flag to engage in fishing operations which are subject to such measures.²³¹ This provision will serve as a deterrent towards non-members and non-participants which undermine the agreed conservation and management measures. Further, RFMOs' member states must exchange information regarding any fishing vessels of such states located in the RFMOs' area and must take measures to deter such activities.²³²

3.4.5.1. Enforcement Powers of RFMOs

The UNFSA establishes a system of regional cooperation for the enforcement of regional measures against vessels that are suspected of violating those measures.²³³ Under Article 21 (1), a state party of the UNFSA which is also a member of an RFMO or a participant in any fisheries arrangement may board and inspect fishing vessels flying the flag of another state party to the Agreement regardless of whether the flag state is a member of the regional organisation

²²⁵ *ibid* art 11.

²²⁶ *ibid* art 12.

²²⁷ *ibid* art 13.

²²⁸ *ibid* art 14.

²²⁹ *ibid* art 17.

²³⁰ *ibid* art 17(1).

²³¹ *ibid* art 17(2).

²³² *ibid* art 17(4).

²³³ Hayashi, 'The Straddling and Highly Migratory Fish Stocks Agreement' (n 184) 68.

or participant in the arrangement.²³⁴ Under this Article, states by becoming members of the UNFSA are considered to have accepted the possibility of inspections of their vessels under the auspices of an RFMO.²³⁵ States also have an obligation to establish procedures for boarding and inspection through sub-regional or RFMO/As that must not discriminate against non-members of the organisation or non-participants in the arrangement.²³⁶ The measures of boarding and inspection seem to have been relatively successful in ensuring compliance although they are still dependent on the resources allocated to them.²³⁷

Where, following boarding and inspection, there are clear grounds for establishing a serious violation, and the flag state has either failed to respond or failed to take action, the UNFSA provides that inspectors may remain on board and secure evidence by requiring the master to bring the vessel to the nearest port.²³⁸ The inspecting state must immediately inform the flag state of the name of the port and, together with the flag state and the port state must take all necessary steps to ensure the well-being of the crews regardless of their nationality.²³⁹ The provisions in Article 21 can be considered as innovative features in international fisheries law where a state party to the UNFSA, which is also a member of, or participant in, the relevant RFMO, may board and inspect vessels flying the flag of another state party to the UNFSA in the area of that RFMO regardless of whether the second state party is also a member of the RFMO.²⁴⁰ In supporting the boarding and inspection provision, the UNFSA has provided basic procedures in Article 22 through the obligations of the inspecting state and the flag state.

²³⁴ UNFSA art 21(1).

²³⁵ *ibid.*

²³⁶ UNFSA art 21(2).

²³⁷ Rosemary Rayfuse, 'Regional Fisheries Management Organizations', in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 15.

²³⁸ UNFSA (n 3) art 21(8).

²³⁹ *ibid.*

²⁴⁰ Tetzlaff (n 113) 111.

3.4.6. Deficits of the UNFSA

The UNFSA aims to achieve long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through strengthening the duties of flag states which were previously established in the UNCLOS and the Compliance Agreement. It also imposes compliance and enforcement obligations on flag states, provides state enforcement powers to RFMOs and gives port states wide discretion on different measures to use against violating fishing vessels. The effectiveness of the UNFSA is assessed by the Review Conference which was mandated by the 1995 UN Fish Stocks Agreement and has been conducted three times, namely in 2006, 2010 and 2016.²⁴¹ In the 2016 Resumed Review Conference on the UNFSA it can be found that the UNFSA's effectiveness had not reached its full potential. Delegations to the Conference expressed regret that despite some progress, the status of fish stocks and the economic profitability of fleets had not improved.²⁴²

Although the UNFSA does not directly address the problem of IUU fishing, in its Preamble it acknowledges various problems associated with IUU fishing such as unregulated fishing, overutilisation of resources, over capitalisation, excessive fleet size, vessels re-flagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between states. Thus, the provisions of the UNFSA can also be applied to IUU fishing activities since the measures laid out in relation to the management of straddling and highly migratory fish stocks are transferable to IUU fishing.²⁴³

²⁴¹ UN/DOALOS, 'Review Conference on the 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 (New York, 22 to 26 May 2006, 24 to 28 May 2010 and 23 to 27 May 2016)' (UN, last updated 23 September 2016) < http://www.un.org/depts/los/convention_agreements/review_conf_fish_stocks.htm > accessed 16 March 2018.

²⁴² UNGA, 'Report Submitted to the Resumed Review Conference in Accordance with Paragraph 41 of General Assembly Resolution 69/109 to Assist it in Discharging its Mandate under Article 36 (2) of the Agreement' (n 193) para 26.

²⁴³ Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (n 169) 93.

The provisions of the UNFSA does not provide further guidance nor preference on how the regulations and enforcement against IUU fishing can be applied. As in the case of the UNCLOS and the Compliance Agreement, the UNFSA gives wide discretion to the states in formulating and applying its regulations and enforcement. In relations to sanctions, the UNFSA only provide general guidance where sanctions shall be adequate in severity to be effective in securing compliance, discourage violations, and deprive offenders of the benefits accruing from their illegal activities.²⁴⁴ The Article further mentions examples of sanctions that can be applied such as refusal, withdrawal or suspension of authorisations to serve as masters or officers on such vessels. In light of this Article, states can apply sanctions that vary widely where some states will apply more lenient sanctions while others will apply more stringent sanctions. This inconsistency can be exploited by IUU fishing actors, including OCGs and thus is considered as a deficit. The provisions of the UNFSA also do not consider the involvement of OCGs in its provisions. This is understandable as the UNFSA focuses more on the regular actors and the phenomenon of OCGs was not a determinant factor in the establishment of the UNFSA. It is then fair to say that the UNFSA has deficits both in the aspects of regulatory and enforcement systems when it comes to dealing with IUU fishing conducted by OCGs.

3.5. The IPOA-IUU

3.5.1. Background

The development of the International Plan of Action to Prevent, Deter, and Eliminate Illegal Unreported and Unregulated Fishing (commonly known as the IPOA-IUU) started at the Twenty-third Session of the FAO Committee on Fisheries (COFI) in 1999 where the Committee was concerned about the information of the increasing presence of IUU fishing on the basis of the paper submitted by Australia.²⁴⁵ As a follow-up, an FAO Ministerial Meeting on Fisheries in March 1999 declared the development of a global plan of action

²⁴⁴ UNFSA (n 3) art 19 (2).

²⁴⁵ David J. Doulman, 'Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.

to deal effectively with all forms of IUU fishing. The draft of the IPOA-IUU was then discussed by the Expert Consultation on IUU fishing in 2000 (organised by Australia in cooperation with the FAO) and the FAO Technical Consultation on IUU fishing which was held twice in 2000 and 2001.²⁴⁶ The draft text was approved by the COFI 24th session on 2 March 2001 and endorsed by the FAO Council at its 120th session in June 2001.²⁴⁷

The IPOA-IUU is a voluntary instrument which was developed within the framework of the Code of Conduct for Responsible Fisheries.²⁴⁸ Its primary objective is to “prevent, deter and eliminate IUU fishing by providing all states with comprehensive, effective and transparent measures by which to act, including through appropriate RFMOs established in accordance with international law”.²⁴⁹ It provides a more comprehensive framework to tackle IUU fishing through strengthening the basic provisions of the UNCLOS, the Compliance Agreement and the UNFSA. The IPOA-IUU is also considered as a comprehensive instrument or toolbox which allows states to use its provisions in dealing with IUU fishing in different manifestations.²⁵⁰ The IPOA-IUU is designed to be flexible to allow for dynamic changes of international law and relevant obligations since it attempts to embrace all existing measures that are useful in tackling IUU fishing.²⁵¹ The IPOA-IUU builds on the preceding international fisheries instruments but with a broader reach both in its substantive paragraphs and in the description of a number of key terms that are used in the plan, including the term IUU fishing.²⁵² The IPOA-IUU, in its attempt to prevent, deter and eliminate IUU fishing contains several main provisions such as flag states responsibilities, coastal states measures, port states measures,

²⁴⁶ IPOA-IUU (n 4) para 2.

²⁴⁷ FAO, ‘Implementation of the IPOA-IUU’ (n 55) 3.

²⁴⁸ William Edeson, ‘The International Plan of Action on Illegal, Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument’ (2001) 16(4) *The International Journal of Marine and Coastal Law* 603.

²⁴⁹ IPOA-IUU (n 4) para 8.

²⁵⁰ FAO, ‘Implementation of the IPOA-IUU’ (n 55) xiii, para 15.

²⁵¹ *ibid* para 16.

²⁵² The elaboration and discussion of the term “illegal, unreported and unregulated fishing” is discussed in Chapter 2, Section 2.3. of this dissertation.

cooperation with RFMOs and enforcement powers; these will be elaborated below.

3.5.2. Flag States Responsibilities

The IPOA-IUU recognises the essential role of flag states in combating IUU fishing by reconfirming their primary responsibilities in ensuring that their flagged vessels do not engage in or support IUU fishing.²⁵³ In strengthening the flag states responsibilities, the IPOA-IUU providing detailed provisions, found in Paragraphs 34-50, which relate to fishing vessel registration, records of fishing vessels and authorisations to fish, as will be elaborated below.

3.5.2.1. Fishing Vessel Registration

Fishing vessel registration holds an essential role since it is the first step in preventing the non-compliance of vessels.²⁵⁴ Thus, the IPOA-IUU requires states to ensure that they can exercise their responsibility in making sure that their vessels have not engaged in IUU fishing before registration.²⁵⁵ Where vessels are found to have a history of non-compliance (which can be found in the record of fishing vessels), flag states have to avoid flagging such vessels except where the ownership has changed, or where flag states determine that such flagging would not result in IUU fishing.²⁵⁶ The IPOA-IUU also acknowledges the problem of reflagging and flag-hopping related to IUU fishing where ship-owners shop around for flag states which are unable or unwilling to assume their responsibilities.²⁵⁷ In that case, the IPOA-IUU also emphasises the obligation of flag states to deter reflagging for the purpose of non-compliance through, where applicable, uniform actions that do not provide incentives for vessels owners to reflag.²⁵⁸ States also have to prevent the practice

²⁵³ IPOA-IUU (n 4) para 34.

²⁵⁴ Judith Swan, 'Fishing Vessels Operating under Open Registers and Exercise of Flag State Responsibilities: Information and Options' (FAO 2002) Fisheries Circular No. 980, 17.

²⁵⁵ IPOA-IUU (n 4) para 35.

²⁵⁶ *ibid* para 36.

²⁵⁷ Swan, 'Fishing Vessels Operating under Open Registers and Exercise of Flag State Responsibilities: Information and Options' (n 254) 18.

²⁵⁸ IPOA-IUU (n 4) para 38.

of “flag hopping”, which is used to circumvent conservation and management measures, by taking all practicable steps, including denial of authorisation to fish and entitlement to fly their flag.²⁵⁹

3.5.2.2. Record of Fishing Vessels

The lack of databases or records of fishing vessels may create opportunities for IUU vessels to escape detection.²⁶⁰ In relation to this, the IPOA-IUU obliges flag states to maintain a record of fishing vessels entitled to fly their flags in accordance with paragraphs 1 and 2 of Article VI of the Compliance Agreement. The record is required to include the name of the fishing vessel, registration number, previous names (if known) and ports of registry, name and address of owner (s), type of fishing method(s), gross registered tonnage and power of main engine(s). In addition, the IPOA-IUU also encourages the recording of information on, *inter alia*: name and ownership history of the vessel and, where it is known, the history of non-compliance by that vessel; vessel dimensions and, where appropriate, a picture showing a side profile view of the vessel.²⁶¹ This information is intended to assist flag states in monitoring vessels flying their flags and may make it more difficult for owners of vessels to carry out re-flagging.²⁶²

3.5.2.3. Authorisation to Fish

The provisions to issue authorisations to fish can be found in Paragraphs 44-50 of the IPOA-IUU. Flag states, in general, should prohibit their vessels from fishing in any ocean area unless the vessels receive authorisation from the flag state to engage in fishing²⁶³ in a manner consistent with international law for the high seas, particularly under Articles 116 and 117 of the UNCLOS, or in conformity with national legislation within areas

²⁵⁹ *ibid* para 39.

²⁶⁰ FAO, ‘Implementation of the IPOA-IUU’ (n 55) 26.

²⁶¹ IPOA-IUU (n 4) para 42(1)-(6).

²⁶² Swan, ‘Fishing Vessels Operating under Open Registers and Exercise of Flag State Responsibilities: Information and Options’ (n 254) 18.

²⁶³ FAO, ‘Stopping Illegal, Unreported and Unregulated Fishing’ (2002) 10 <<http://www.fao.org/tempref/docrep/fao/004/y3554E/y3554E00.pdf>> accessed 6 December 2017.

of national jurisdiction.²⁶⁴ Flag states are also under an obligation to ensure that flagged vessels which are fishing in waters outside their sovereignty or jurisdiction have valid authorisation issued by them. Where a coastal state is the issuer, it should ensure that no fishing takes place in its waters without authorisation to fish issued by the flag state of the vessel.²⁶⁵ These arrangements serve as a checks and balances system where both coastal and flag states are charged with the responsibility of making sure that vessels fishing in their jurisdictions have the valid authorisation to fish.²⁶⁶ The authorisation to fish needs to include at least the information set out in Paragraph 46.²⁶⁷

Flag states or coastal states may impose conditions on the issuance of fishing authorisations to fish, including the requirement for vessel monitoring systems, catch reporting conditions, observer coverage, and internationally recognised identification numbers.²⁶⁸ Although Paragraph 47 sets out a broad range of conditions, it should be noted that not all of them will be applicable in all situations.²⁶⁹ Further, flag states should ensure that their fishing, transport and support vessels do not support or engage in IUU fishing especially since many fishing vessels engaged in IUU fishing need assistance from transport and other support vessels.²⁷⁰ Thus, a flag state has to make sure that, to the greatest extent possible, all of its fishing, transport and support vessels, in transshipment at sea, have obtained a prior authorisation issued by that flag state and that

²⁶⁴ IPOA-IUU (n 4) para 44.

²⁶⁵ *ibid* para 45.

²⁶⁶ Swan, 'Fishing Vessels Operating under Open Registers and Exercise of Flag State Responsibilities: Information and Options' (n 254) 19.

²⁶⁷ The information, according to Article 46, should include, but is not limited to:

1. the name of the vessel, and, where appropriate, the natural or legal person authorized to fish;
2. the areas, scope and duration of the authorization to fish; and
3. the species, fishing gear authorized and, where appropriate, other applicable management measures.

²⁶⁸ IPOA-IUU (n 4) para 47.

²⁶⁹ FAO, 'Implementation of the IPOA-IUU' (n 55) 29.

²⁷⁰ Dikdik Mohamad Sodik, 'Non-Legally Binding International Fisheries and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australia International Law Journal* 129, 156.

the vessels report the details of their activities to the designated national institution.²⁷¹ The information available from catch and transhipments then should be made available, in a full, timely and regular manner and as appropriate, to relevant national, regional and international organisations, including to the FAO, subject to confidentiality requirements.²⁷²

3.5.3. Coastal States Measures

The coastal states, under the provisions of the UNCLOS, have the sovereign rights to explore, exploit, conserve and manage fisheries in waters under their jurisdiction. In the exercise of such rights, the IPOA-IUU obliges each coastal state to implement measures to prevent, deter and eliminate IUU fishing in its EEZ. The IPOA-IUU encourages the coastal state to consider several measures, consistent with national legislation and international law, such as:²⁷³

- a) effective monitoring, control and surveillance of fishing activities;
- b) cooperation and exchange of information with other states;
- c) ensuring that no vessels can fish under its jurisdiction without authorisation;
- d) ensuring that authorisation is only issued when the vessels are properly entered on a record of vessels;
- e) ensuring that at-sea transhipment and processing of fish in waters under its jurisdiction are authorised or in conformity with relevant regulations;
- f) avoiding the licensing of vessels with a history of IUU fishing.

The large majority of the fishing activities in the waters of coastal states are conducted by vessels registered in the coastal states themselves. In such situations, the coastal state is also the flag state and has to exercise its responsibilities as a flag state in relation to its vessels where they operate in waters under its jurisdiction.²⁷⁴ Therefore, many similarities can be found between the measures that are

²⁷¹ IPOA-IUU (n 4) para 49.

²⁷² *ibid* para 50.

²⁷³ *ibid* para 51.

²⁷⁴ FAO, 'Implementation of the IPOA-IUU' (n 55) 33.

encouraged to be taken by coastal states and those to be taken by flag states as set out in Paragraphs 34-50 of the IPOA-IUU.²⁷⁵

3.5.4. Port States Measures

The IPOA-IUU sets out particular provisions relating to the duties of port states where they are required to use measures, in accordance with international law, to control fishing vessels in order to prevent, deter and eliminate IUU fishing in a fair, transparent and non-discriminatory manner.²⁷⁶ The IPOA-IUU also sets out more detailed provisions for control by port states than both the Compliance Agreement and the UNFSA. Under Paragraph 55 of the IPOA-IUU, port states should require fishing vessels and vessels involved in fishing-related activities to provide reasonable advance notice of their entry into port, a copy of their authorisation to fish, details of their trips and quantities of fish on board, with due regard being paid to confidentiality requirements, to determine whether the vessels have engaged in or supported IUU fishing.²⁷⁷ Where there is clear evidence that a vessel has engaged in IUU fishing activities, the port state should not allow the vessel to land or tranship in its port and should report the matter to the flag state of the vessel.²⁷⁸ This measure of denial of use of the port rose to prominence in the Port state Measures Agreement.²⁷⁹

The port states, in the exercise of their rights to inspect, should collect and remit specified information to relevant flag states and RFMOs which includes the identification of the vessels, fishing gear, catch on board and, where appropriate, other information required by relevant RFMOs or international agreements.²⁸⁰ This provision indicates that port states have a general right and therefore should exercise it in accordance with a certain minimum standard.²⁸¹ The

²⁷⁵ *ibid* 34.

²⁷⁶ IPOA-IUU (n 4) para 52.

²⁷⁷ *ibid* para 55.

²⁷⁸ *ibid* para 56.

²⁷⁹ Witbooi (n 173) 298.

²⁸⁰ IPOA-IUU (n 4) para 58.

²⁸¹ Swan, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (n 106) 405.

general right refers to the port states' right to inspect the fishing vessels in their ports which does not have to depend on the flag states' permission as required by earlier international instruments. However, in exercising this general right, port states have to adhere to the minimum standards concerning the collection of certain information established under Paragraph 58 of the IPOA-IUU and remit it to the relevant flag states and RFMOs. The collected information will provide a stronger basis for the port state to determine whether such vessel has engaged in or supported IUU fishing.²⁸² When the port state has reasonable grounds to believe that the vessel has engaged in or supported IUU fishing in areas beyond the port state's jurisdiction, it must report the matter to the flag state of the vessel. The port state may also take other action with the consent of, or upon the request of, the flag state.²⁸³

The IPOA-IUU also encourages port states to develop national, bilateral, multilateral and regional measures for port state control.²⁸⁴ The IPOA-IUU further calls for the development of port state measures within relevant RFMOs. It is based on the presumption that fishing vessels flying the flag of non-state parties to a particular RFMO, which have not agreed to cooperate with the particular RFMO yet are identified as engaging in fishing within the RFMO area, may be engaging in IUU fishing.²⁸⁵ The implications of this presumption regarding port states' responsibilities under the IPOA-IUU is that the relevant port state may prohibit landings and the transshipment of catches unless the identified vessels can prove that the catch was taken in compliance with the relevant RFMO conservation and management measures.²⁸⁶ The IPOA-IUU goes further in requiring port states to enhance cooperation on port state controls, including sharing of relevant information among relevant RFMOs and states.²⁸⁷ The universality and empowering provisions of the IPOA-IUU, despite its voluntary nature, provided essential

²⁸² FAO, 'Implementation of the IPOA-IUU' (n 55) 40.

²⁸³ IPOA-IUU (n 4) para 59.

²⁸⁴ *ibid* paras 61-62.

²⁸⁵ *ibid* para 63.

²⁸⁶ Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (n 169) 102.

²⁸⁷ IPOA-IUU (n 4) para 64; Sodik (n 270) 161.

stepping stones for the conclusion of the Port State Measures Agreement in 2009.²⁸⁸

3.5.5. Enforcement Powers

The IPOA-IUU reiterates some of the enforcement-related measures that may be implemented by states under the terminology of monitoring, control and surveillance (MCS). Considering the importance of MCS in addressing IUU fishing, the IPOA-IUU provides specific provisions under Paragraph 24. The Paragraph provides that states should undertake comprehensive and effective MCS measures from the commencement of a voyage, through the point of landing, to the final destination; ten measures are mentioned in the Paragraph.²⁸⁹ The MCS measures provided in the IPOA-

²⁸⁸ Witbooi (n 173) 297.

²⁸⁹ IPOA-IUU para 24 provides that the MCS measures could include:

- a. developing and implementing schemes for access to waters and resources, including authorization schemes for vessels;
- b. maintaining records of all vessels and their current owners and operators authorized to undertake fishing subject to their jurisdiction;
- c. implementing, where appropriate, a vessel monitoring system (VMS), in accordance with the relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry VMS on board;
- d. implementing, where appropriate, observer programmes in accordance with relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry observers on board;
- e. providing training and education to all persons involved in MCS operations;
- f. planning, funding and undertaking MCS operations in a manner that will maximize their ability to prevent, deter and eliminate IUU fishing;
- g. promoting industry knowledge and understanding of the need for, and their cooperative participation in, MCS activities to prevent, deter and eliminate IUU fishing;
- h. promoting knowledge and understanding of MCS issues within national judicial systems;
- i. establishing and maintaining systems for the acquisition, storage and dissemination of MCS data, taking into account applicable confidentiality requirements;
- j. ensuring effective implementation of national and, where appropriate, internationally agreed boarding and inspection regimes consistent with international law, recognizing the rights and obligations of masters and of inspection officers, and noting that such regimes

IUU also cover compliance and enforcement actions found in the UNCLOS, the Compliance Agreement and the UNFSA, such as authorisation to fish, record of fishing vessels, observer programmes, vessel monitoring systems, and boarding and inspection.²⁹⁰

In relation to sanctions, Paragraph 21 of the IPOA-IUU provides that states must ensure that sanctions are brought to bear on the IUU fishing vessels and on their nationals. The sanctions should be of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to prevent the offenders from enjoying the benefits of IUU fishing. This may include the adoption of a civil sanction regime, based on an administrative penalty scheme, in a consistent and transparent manner. Although the Paragraph does not limit the types of sanctions that can be applied by each state (which can include criminal sanctions), it is worth noting that Paragraph 21 seems to prefer the civil sanction regime based on an administrative penalty scheme by particularly highlighting such a regime in the Paragraph.

3.5.6. Roles of RFMOs

The IPOA-IUU defines RFMO as an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish fishery conservation and management measures.²⁹¹ Paragraphs 78-84 of the IPOA-IUU, supports the strengthening of the RFMOs' breadth, capacities and roles in tackling IUU fishing.²⁹² The IPOA-IUU, under Paragraph 78, obliges states to ensure compliance with and enforcement of policies and measures on IUU fishing which are adopted by relevant RFMOs. Where no RFMO exists, states then must cooperate in its establishment.²⁹³ The cooperation of all states is considered essential for the success of measures taken by relevant RFMOs to combat IUU fishing. Therefore, non-member states are not discharged from their obligation to cooperate with such an RFMO. In that regard,

are provided for in certain international agreements, such as the The UNFSA, and only apply to the parties to those agreements.

²⁹⁰ Palma-Robles (n 41) 141.

²⁹¹ IPOA-IUU (n 4) para 6(c).

²⁹² FAO, 'Implementation of the IPOA-IUU' (n 55) 55.

²⁹³ IPOA-IUU (n 4) para 78.

states have to cooperate by agreeing to apply the conservation and management measures established by that RFMO or to adopt measures consistent with those measures and should ensure that vessels flying their flag do not undermine such measures.²⁹⁴

The emphasis on more proactive roles for RFMOs in combatting IUU fishing is displayed through Paragraph 80 where the IPOA-IUU provides 14 different measures that can be used by states, acting through RFMOs, in taking action to strengthen and develop innovative ways to prevent, deter and eliminate IUU fishing.²⁹⁵ Among these measures, the IPOA-IUU established

²⁹⁴ *ibid* para 79.

²⁹⁵ IPOA-IUU para 80 provides the following measures to prevent, deter and eliminate IUU fishing:

- i) institutional strengthening, as appropriate, of relevant regional fisheries management organizations with a view to enhancing their capacity to prevent, deter and eliminate IUU fishing;
- ii) development of compliance measures in conformity with international law;
- iii) development and implementation of comprehensive arrangements for mandatory reporting;
- iv) establishment of and cooperation in the exchange of information on vessels engaged in or supporting IUU fishing;
- v) development and maintenance of records of vessels fishing in the area of competence of a relevant regional fisheries management organization, including both those authorized to fish and those engaged in or supporting IUU fishing;
- vi) development of methods of compiling and using trade information to monitor IUU fishing;
- vii) development of MCS, including promoting for implementation by its members in their respective jurisdictions, unless otherwise provided for in an international agreement, real time catch and vessel monitoring systems, other new technologies, monitoring of landings, port control, and inspections and regulation of transshipment, as appropriate;
- viii) development within a regional fisheries management organization, where appropriate, of boarding and inspection regimes consistent with international law, recognizing the rights and obligations of masters and inspection officers;
- ix) development of observer programmes;
- x) where appropriate, market-related measures in accordance with the IPOA;
- xi) definition of circumstances in which vessels will be presumed to have engaged in or to have supported IUU fishing;
- xii) development of education and public awareness programmes;
- xiii) development of action plans; and
- xiv) where agreed by their members, examination of chartering arrangements, if there is concern that these may result in IUU fishing.⁷

several provisions relating to compliance and enforcement such as the development of compliance measures, and the development of the boarding and inspection regimes. In developing the compliance measures, the FAO Technical Guidelines for Responsible Fisheries provide several recommendations which include:²⁹⁶ i) limitation or denial of access to the fisheries resources to members' fishing vessels that do not comply with the relevant RMFOs' measures; ii) denial of a licence to fish and of port access to such vessels; and iii) the application of consistent penalties imposed on IUU fishers, taking into consideration Paragraph 21 of the IPOA-IUU.²⁹⁷ With regard to the development of the boarding and inspection regimes, the FAO Technical Guidelines for Responsible Fisheries recommend that it may be useful to establish arrangements where members can exchange inspectors to harmonise the different approaches to boarding and inspection, or in some cases to create joint inspection schemes where members of the RFMO provide personnel to serve as inspectors who act on behalf of the RFMO itself.²⁹⁸

The IPOA-IUU also underlines the importance of cooperation with non-contracting parties since their involvement is crucial to the success of combating IUU fishing. Paragraph 83 requires states, through RMFOs, to encourage non-contracting parties with a real interest in the fishery to join and to participate fully. Where this is not possible, RFMOs should encourage and facilitate the participation and cooperation of non-contracting parties. In the case where a state fails to ensure that vessels flying its flag or, to the greatest extent possible, its nationals, do not engage in IUU fishing activities, member states, through a relevant RFMO, should draw the problem to the attention of that state. If the problem is not solved, members of the RFMO may agree to adopt appropriate measures, through agreed procedures, in accordance with international law.²⁹⁹

²⁹⁶ FAO, 'Implementation of the IPOA-IUU' (n 55) 60.

²⁹⁷ IPOA-IUU para 21 provides: 'States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing. This may include the adoption of a civil sanction regime based on an administrative penalty scheme. States should ensure the consistent and transparent application of sanctions.'

²⁹⁸ FAO, 'Implementation of the IPOA-IUU' (n 55) 62.

²⁹⁹ IPOA-IUU (n 4) para 84.

3.5.7. Deficits of the IPOA-IUU

The IPOA-IUU was established to prevent, deter and eliminate IUU fishing by providing states with several main provisions such as flag states responsibilities, coastal states measures, port states measures, cooperation with RFMOs and enforcement powers. The IPOA-IUU has managed to provide more comprehensive provisions to tackle IUU fishing through strengthening the basic provisions of the UNCLOS, the Compliance Agreement, and the UNFSA. If implemented effectively by states, the IPOA-IUU will indeed be a valuable toolbox for addressing IUU fishing. However, the reality is not that simple. The IPOA-IUU is implemented in two main ways:³⁰⁰ the first way is the adoption of measures in national legislation (Paragraph 16) and the second way is the development and implementation of national plans of action (NPOA-IUU) (Paragraph 25). With regard to the adoption of measures in national legislation, some states have adopted numerous flag, coastal, port and market measures contained of the IPOA-IUU in their national legislation.³⁰¹ With regard to the development of NPOA-IUU, the number of countries that have finalised their NPOA-IUU is still low.³⁰² The low number of NPOA-IUU may be an indication of a lack of compliance or inadequate support from states in implementing the IPOA-IUU.³⁰³ This reality is an issue worth noting since the IPOA-IUU is a voluntary instrument which needs extra willingness on the part of countries in supporting its implementation, both in terms of adoption of NPOA-IUU in their national legislation and, of course, the application of those NPOA-IUU. Without them, the effectiveness of the IPOA-IUU will be in question.

Despite the various provisions set out by the IPOA-IUU, as can be seen from the discussion above, the IPOA-IUU does not offer particular solutions for IUU fishing conducted by OCGs. In relation to

³⁰⁰ Palma, Tsamenyi and Edeson (n 10) 95.

³⁰¹ *ibid.*

³⁰² Examples of countries that have finalized their NPOA-IUU and published them on the FAO website are Antigua and Barbuda, Australia, Belize, Canada, Chile, Fiji, Ghana, Japan, New Zealand, Republic of Korea, and Saint Kitts and Nevis. See FAO, 'National Plans of Actions,' < <http://www.fao.org/fishery/ipoa-iuu/npoa/en> > accessed 14 March 2018.

³⁰³ Palma, Tsamenyi and Edeson (n 10) 95.

enforcement, the IPOA-IUU provides enforcement-related measures under the concept of MCS whereby it focuses more on the aspects of management and conservation measures such as authorisation to fish, record of fishing vessels, observer programmes, vessel monitoring systems, and boarding and inspection. The boarding and inspection measures seem to be more intrusive measures compared with other measures in this matter. Nonetheless, these boarding and inspection measures should be implemented consistently with internationally agreed boarding and inspection regimes, including those provided by the UNCLOS, the Compliance Agreement, the UNFSA, the Port State Measures Agreement and RFMOs. The boarding and inspection measures provided in these international instruments have limitations in application, such as the dependence on the authorisation of flag states which can delay or obstruct boarding and inspection measures. In this sense, the IPOA-IUU has not provided a regulatory breakthrough in enforcement measures against IUU fishing, especially to that conducted by OCGs.

With regard to sanctions, the IPOA-IUU provides that states must ensure that the application of sanctions should be of sufficient severity which “may” include a civil sanctions regime based on an administrative penalty scheme. The word “may” can be understood as the freedom of states to choose such different sanction systems as they see fit, which may include the criminal system. However, the specific reference in Paragraph 21 to a civil sanctions regime based on an administrative penalty scheme may also be understood as a preference for a civil sanctions regime in the fight against IUU fishing. Having considered these different factors, it can be concluded that the IPOA-IUU still lacks clear regulations and enforcement systems in addressing IUU fishing conducted by OCGs, particularly regarding the option to have a criminal regulation and enforcement system.

3.6. Port State Measures Agreement

3.6.1. Background

The development of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter the PSMA) can be traced from the FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing and the IPOA-IUU. The PSMA’s development

began in March 2007 when the COFI endorsed a timetable to develop a legally binding agreement on port state measures. As a follow-up, an Expert Consultation meeting was conducted in Washington DC in September 2007 to prepare a draft text of the Agreement. The legally binding agreement was then approved by the Conference of the FAO on 22 November 2009 after four negotiation sessions between June 2008 and August 2009.³⁰⁴ The PSMA then entered into force on 5 January 2016.³⁰⁵

The PSMA seeks to prevent, deter and eliminate IUU fishing by focusing on the effective implementation of port state measures which will ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.³⁰⁶ It encourages port states to apply measures in the PSMA which will contribute to the harmonisation of port state measures, and to the enhancement of regional and international cooperation and which will block the flow of IUU-caught fish into national and international markets.³⁰⁷ The PSMA is binding in nature and stipulates minimum port states measures. However, the PSMA allows states to adopt more stringent measures than those provided in it.³⁰⁸

The PSMA comprises ten main parts with 37 Articles and five Annexes and it contains different provisions relating to the port state measures. For the purposes of this research, there are five parts which will be examined further in order to display the main regulatory and enforcement approaches that are provided by the PSMA in addressing IUU fishing, such as: the entry into ports; use of ports; inspections and follow-up actions; role of flag states; and monitoring, review and assessment.

³⁰⁴ David J. Doullman and Judith Swan, 'A guide to the background and implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2012) FAO Fisheries and Aquaculture Circular No 1074. FIPI/ C1074, 18.

³⁰⁵ FAO, 'Status of the Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (Status of the PSMA) <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf> accessed on 15 December 2017.

³⁰⁶ PSMA (n 5) art 2.

³⁰⁷ FAO, 'Port State Measures Agreement' (FAO) <<http://www.fao.org/fishery/psm/agreement/en/#Implementing>> accessed 14 December 2017.

³⁰⁸ *ibid.*

3.6.2. Entry into Ports

The PSMA obliges each Party to designate and publicise the ports to which vessels may request entry and to ensure that every port so designated and publicised has sufficient capacity to conduct an inspection.³⁰⁹ The control of the ports over foreign vessels is essential to prevent IUU vessels escaping detection by landing their fish or fish products at ports which are either expecting the arrival of foreign vessels or which may not be equipped to control such landings and other activities.³¹⁰ In granting entry to foreign vessels, each Party must require that, as a minimum standard, certain information in the PSMA, Annex A, is provided by the foreign vessels. Such information needs to be supplied sufficiently far in advance to provide enough time for examination by the port state.³¹¹

The information provided will provide the basis of authorisation by the port state.³¹² If an entry has been authorised by the port state, the master of the vessel or the vessel's representative is required to present the authorisation for entry to the competent authorities.³¹³ If entry has been denied, each Party must communicate its decision to the flag state, relevant coastal states, RFMOs and other international organisations.³¹⁴ If there is sufficient proof that the vessel seeking entry has engaged in IUU fishing or related supporting activities, the Party is obliged to deny that vessel entry to its ports.³¹⁵ However, the PSMA provides that a Party may allow the vessel into ports exclusively for the purposes of inspection and take other appropriate actions which are considered to be at least as effective as denial of entry, such as market-related measures or, as appropriate, the initiating of legal proceedings under national law.³¹⁶ In such circumstances, the use of port services should be denied to the vessel.³¹⁷ Another exception concerning entry into port is provided by Article 10 which states that

³⁰⁹ PSMA (n 5) arts 7(1)-(2).

³¹⁰ Doulman and Swan (n 304) 43.

³¹¹ PSMA (n 5) arts 8(1)-(2).

³¹² *ibid* art 9(1).

³¹³ *ibid* art 9(2).

³¹⁴ *ibid* art 9(3).

³¹⁵ *ibid* art 9(4).

³¹⁶ *ibid* art 9(3); Doulman and Swan (n 304) 45.

³¹⁷ PSMA (n 5) art 9(4).

nothing in the PSMA should affect the entry of vessels to port for reasons of *force majeure* or distress, or prevent a port state permitting entry into port exclusively for rendering assistance to persons, ships or aircraft in danger or distress.

3.6.3. Use of Ports

The PSMA sets out several conditions on the denial of the use of ports in Article 11. The PSMA obliges a Party to deny the use of ports to fishing vessels for landing, transshipping, packaging and processing of fish including, *inter alia*, refuelling and resupplying, maintenance and drydocking under five situations:³¹⁸ a) the vessel does not have an authorisation to engage in fishing or fishing related activities required by its flag state; b) the vessel does not have an authorisation to engage in fishing or fishing related activities required by its coastal state in respect of areas under its national jurisdiction; c) the Party has clear evidence regarding the fish on board that it was taken in contravention of a coastal state's requirements with respect to its waters; d) the lack of flag state confirmation within a reasonable time that the fish on board was taken in accordance with the requirements of a relevant RFMO; and e) the Party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or other related supporting activities. Against those situations, the PSMA also provides an exception where Parties shall not prevent a fishing vessel from using its port services under two conditions:³¹⁹ a) the port services are essential for the safety or health of the crew or safety of the vessel; and b) the port services, where appropriate, are needed for the scrapping of the vessel.

In the case where a Party has denied the use of its port, it is required to promptly notify the flag state, relevant coastal states, RFMOs and other relevant international organisations.³²⁰ After the denial, ideally, no other ports in the region will grant access to the vessel which hopefully will prevent its catch from finding its way to

³¹⁸ *ibid* art 11(1).

³¹⁹ *ibid* art 11(2).

³²⁰ *ibid* art 11(3).

market.³²¹ A Party may also withdraw its decision where its grounds for denial are found to be inadequate or erroneous or no longer apply.³²² With the withdrawal of denial, a Party must promptly notify those that were originally notified.³²³ Overall, Article 11 has provided port states with considerable power to deal with IUU fishing and, at the same time, it has strengthened the port state control beyond what was available under the previous international instruments, such as the UNCLOS and the UNFSA.³²⁴

3.6.4. Inspections and Follow-up Actions

The PSMA requires each Party to inspect the number of vessels in its ports to reach an annual level of inspections sufficient to achieve the objective of the PSMA.³²⁵ To do that, Parties have to assess their capacities to inspect vessels and adopt their annual levels as appropriate.³²⁶ It is then important that Parties harmonise their inspection levels at regional and international levels to discourage the practice of “ports of convenience” by which IUU fishing vessels may use ports with minimal risk of inspection.³²⁷ To this end, Parties are obliged to agree on minimum levels for inspection of vessels through RFMOs or the FAO or otherwise.³²⁸ In determining which vessels to inspect, Parties are required to prioritise the inspection of vessels that fall under the following conditions:³²⁹ a) vessels that have been denied entry or use of a port; b) requests from other Parties, states or RFMOs that particular vessels be inspected, particularly where they are supported by evidence of IUU fishing or related supporting activities; and c)

³²¹ Witbooi (n 173) 301.

³²² PSMA (n 5) art 11(4).

³²³ *ibid* art 11(5).

³²⁴ Audrey Sharp, ‘The Effectiveness or Not of the New Port State Measures in the Battle to Control Illegal, Unregulated and Unreported Fishing’ (2010) 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140528> accessed 21 December 2017.

³²⁵ PSMA (n 5) art 12(1).

³²⁶ Doulman and Swan (n 304) 50.

³²⁷ *ibid* 51.

³²⁸ PSMA (n 5) art 12(2).

³²⁹ *ibid* art 12(3).

other vessels for which there are clear grounds for suspecting IUU fishing or related activities. The prioritisation of the inspection of such vessels, along with taking appropriate action, will increase the success of port states in deterring IUU fishing and its supporting activities in the future.³³⁰ In a questionnaire of 16 states on the implementation of the PSMA,³³¹ it was found that the majority had a set of levels and priorities or other criteria for inspections and a standard format for inspection reports. In having effective port inspections, these countries rely on strong control procedures and harmonised inspections which reduce inter-agency conflict. Although the 16 states do not represent a significant number of port states, this can be seen as an indication of the importance of inspection for states in addressing IUU fishing.

In the case where, following the inspection, there are clear grounds for suspecting the vessel's engagement in IUU fishing or its related activities, the port state is obliged to notify the flag state and other relevant stakeholders and deny the vessel permission to use the port's services.³³² There are no standards as to what constitutes "clear grounds", but it is expected that it would be based on the standard of reasonableness under the circumstances.³³³ The denial of permission to use the services of ports following the inspection must not be applied when such services are essential for the safety or health of the crew or the safety of the vessel.³³⁴ A Party is also free to take additional measures relating to port states actions following inspection, as long any such additional measure is in accordance with international law, including measures which the flag state of the vessel has expressly requested or to which it has consented.³³⁵

³³⁰ Douman and Swan (n 304) 51.

³³¹ FAO, 'Report of the Workshop on Implementing the FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing in the Mediterranean and Black Sea in Albania, 29 February-4 March 2016' (FAO, 2016) FAO Fisheries and Aquaculture Report No. 1151, FIAP/R1151, para 24.

³³² PSMA (n 5) art 18(1).

³³³ Douman and Swan (n 304) 59.

³³⁴ PSMA (n 5) art 18(2).

³³⁵ *ibid* art 18(3).

3.6.5. Roles of Flag States

The PSMA recognises the vital roles of flag states in combating IUU fishing by elaborating the role of flag states in its provisions in Part V.³³⁶ The PSMA emphasises the responsibilities of states in their capacity as flag states by holding them responsible for their vessels that engage in IUU fishing and for carrying out follow-up actions when their vessels are being denied access to a port.³³⁷ The PSMA further obliges each flag state to require the vessels flying its flag to cooperate with the port state in the case of inspections.³³⁸ When a flag state has clear grounds for believing that a vessel flying its flag has engaged in IUU fishing or its related supporting activities and is seeking entry to or is in the port of another state, it must request that state to inspect the vessel or undertake other measures provided in the PSMA.³³⁹ This provision is particularly beneficial in promoting cooperation in enforcement and can immediately prevent the vessel from engaging in further IUU fishing activities.³⁴⁰ Following the port state inspection and where there are clear grounds that show engagement in IUU fishing or its related supporting activities by the vessel, the flag state must immediately and fully investigate the matter and take enforcement action without delay according to its laws and regulations.³⁴¹ The actions taken by the flag state then have to be reported to other Parties, relevant port states and, as appropriate, other relevant states, RFMOs and the FAO.³⁴² Concerning the application of measures, the PSMA also seeks to promote the equitable application of measures between foreign-flagged vessels and national-flagged vessels.³⁴³ Therefore, it requires Parties (including port states in their capacity as flag states) to ensure that measures applied to their national vessels are at least as effective

³³⁶ PSMA (n 5) Part V; Swan, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (n 106) 409

³³⁷ Blaise Kuemlangan and Michael Press, 'Preventing, Deterring and Eliminating IUU Fishing. Port State Measures' (2010) 40(6) Environmental Policy and Law 262, 266.

³³⁸ PSMA (n 5) art 20(1).

³³⁹ *ibid* art 20(2).

³⁴⁰ Doulman and Swan (n 304) 62.

³⁴¹ PSMA (n 5) art 20(4).

³⁴² *ibid*, art 20(5).

³⁴³ Doulman and Swan (n 304) 63.

as those applied to foreign-flagged vessels in combating IUU fishing and related activities.³⁴⁴

3.6.6. Roles of RFMOs

The PSMA acknowledges the roles of the RFMOs, particularly in the context of cooperation and exchange of information in the fight against IUU fishing. The PSMA provides that Parties must cooperate and exchange information with RFMOs, including on measures adopted by such RFMOs to promote the effective implementation of the PSMA.³⁴⁵ It also requires Parties to cooperate at the sub-regional, regional and global levels, including where appropriate, through the FAO or RFMO/As.³⁴⁶ In considering the role of RFMOs in the PSMA, it should be recalled that Parties do not become bound by measures or decisions of, or recognise, any RFMO of which they are not a member or from giving effect to measures or decisions that have not been adopted in conformity with international law.³⁴⁷

The PSMA further elaborates the roles of RFMOs in several provisions including denial of entry,³⁴⁸ use of ports,³⁴⁹ levels and priority

³⁴⁴ PSMA (n 5) art 20(6).

³⁴⁵ *ibid* art 6.

³⁴⁶ *ibid*.

³⁴⁷ *ibid* arts 4(2)-(3).

³⁴⁸ *ibid* art 9(4): 'Without prejudice to paragraph 1 of this Article, when a Party has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, in particular the inclusion of a vessel on a list of vessels having engaged in such fishing or fishing related activities adopted by a relevant regional fisheries management organization in accordance with the rules and procedures of such organization and in conformity with international law, the Party shall deny that vessel entry into its ports, taking into due account paragraphs 2 and 3 of Article 4.' On the discussion of the RFMOs' IUU fishing vessel list, see also Molenaar, 'Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement' (n 217) 383-385.

³⁴⁹ *ibid* art 11 (1) (d): 'Where a vessel has entered one of its ports, a Party shall deny, pursuant to its laws and regulations and consistent with international law, including this Agreement, that vessel the use of the port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, *inter alia*, refuelling and resupplying, maintenance and drydocking, if...the flag State does not confirm within a reasonable period of time, on the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management organization taking into due account paragraphs 2 and 3 of Article 4.'

of inspections,³⁵⁰ transmission of inspection results,³⁵¹ electronic exchange of information,³⁵² port state actions following inspection,³⁵³ role of flag states,³⁵⁴ communication and information exchange. All in all, these provisions confirm the increasing roles of RFMOs for states in different aspects of port states measures.

It is acknowledged that relatively few RFMOs have adopted the full extent of measures found in the PSMA.³⁵⁵ The reasons behind this reality are the different requirements and standards among RFMOs, which may be caused by the differences in species of fish, functions, mandates and governance arrangements while another

³⁵⁰ *ibid* art 12 (2): 'Parties shall seek to agree on the minimum levels for inspection of vessels through, as appropriate, regional fisheries management organizations, FAO or otherwise' and art 12 (3) (b): 'In determining which vessels to inspect, a Party shall give priority to...requests from other relevant Parties, States or regional fisheries management organizations that particular vessels be inspected, particularly where such requests are supported by evidence of IUU fishing or fishing related activities in support of such fishing by the vessel in question.'

³⁵¹ *ibid* art 15 (b): 'Each Party shall transmit the results of each inspection to the flag State of the inspected vessel and, as appropriate, to...relevant regional fisheries management organizations.'

³⁵² *ibid* art 16 (5): 'FAO shall request relevant regional fisheries management organizations to provide information concerning the measures or decisions they have adopted and implemented which relate to this Agreement for their integration, to the extent possible and taking due account of the appropriate confidentiality requirements, into the information-sharing mechanism referred to in paragraph 2 of this Article.'

³⁵³ *ibid* art 18 (1) (a): 'Where, following an inspection, there are clear grounds for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing, the inspecting Party shall: promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other international organizations, and the State of which the vessel's master is a national of its findings.'

³⁵⁴ *ibid* art 20 (3): '...Parties are encouraged to develop, including through regional fisheries management organizations and FAO, fair, transparent and non-discriminatory procedures for identifying any State that may not be acting in accordance with, or in a manner consistent with, this Agreement' and art 20 (5): 'Each Party shall, in its capacity as a flag State, report to other Parties, relevant port States and, as appropriate, other relevant States, regional fisheries management organizations and FAO on actions it has taken in respect of vessels entitled to fly its flag that, as a result of port State measures taken pursuant to this Agreement, have been determined to have engaged in IUU fishing or fishing related activities in support of such fishing.'

³⁵⁵ Swan, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (n 106) 413.

reason could be the weak political will of the members of some RFMOs.³⁵⁶

3.6.7. Enforcement Powers of Port States

The PSMA provides several enforcement actions that can be undertaken by port states, such as: i) denial of entry into ports where there is sufficient proof that the vessel seeking entry has engaged in IUU fishing or related supporting activities as established by Article 9;³⁵⁷ ii) denial of the use of ports, where there are clear grounds for suspecting the vessel's engagement in IUU fishing or its related activities and prompt notification of the flag state and other relevant stakeholders as provided by Article 18;³⁵⁸ and iii) inspections and follow-up actions on violating vessels.³⁵⁹ Following an inspection, a port state can take additional measures in conformity with international law, including measures that the flag state has expressly requested or to which it has consented.³⁶⁰ Such actions may include initiating legal proceedings against the vessel.³⁶¹ The flag state then has to investigate the matter and take enforcement actions without delay in accordance with its laws and regulations. In this context, the main enforcement powers against IUU fishing under the PSMA still rest with the flag state.³⁶²

The Guide to the Background and Implementation of the PSMA³⁶³ suggests another potential way for the use of criminal enforcement in the form of a legal checklist for the implementation of the PSMA by states. The Guide suggests enforcement powers for the authorised officers, in enforcing the provisions of the PSMA, to, *inter alia*, arrest, detain for a period up to 14 days, search and seize,

³⁵⁶ *ibid.*

³⁵⁷ For further discussion, see also Section 3.6.2. on the Entry into Ports.

³⁵⁸ For further discussion, see also Section 3.6.3. on the Use of Ports.

³⁵⁹ For further discussion, see also Section 3.6.4. on Inspections and Follow-up Actions.

³⁶⁰ PSMA (n 5) art 18(3).

³⁶¹ Doulman and Swan (n 304) 60.

³⁶² Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 73.

³⁶³ Doulman and Swan (n 304) 161.

and execute and serve any warrant or civil or criminal process issued by any officer or court of competent jurisdiction.³⁶⁴ The Guide also suggests the setting up of the level of fines for civil and criminal enforcement, which could include maximum civil administrative penalties, maximum criminal fines, forfeiture, and imprisonment.³⁶⁵ It is acknowledged that the application of the checklist cannot be forced on states and will depend largely on each country's law, institutional policy arrangements and human capacity.³⁶⁶ Nonetheless, it can be seen as an indication of the necessity of criminal enforcement by port states in addressing IUU fishing.

3.6.8. Deficits of the PSMA

The PSMA has established itself as an international instrument to prevent, deter and eliminate IUU fishing through the effective implementation of port state measures. The PSMA provisions have been able to strengthen the previously established port state measures, particularly through its provisions on entry into ports, use of ports, inspection and follow-up actions, role of flag states and enforcement powers of port states. Nonetheless, mainly due to its recent entry into force in 2016, the implementation results of the PSMA have yet to be seen. Parties to the PSMA have just started to discuss the mechanism by which to review the implementation of the PSMA during the First Meeting of the Parties to PSMA in Norway, 2017,³⁶⁷ which is likely to require some time until it can be fully established. With regard to the implementation of the PSMA several concerns over the potential challenges have also emerged. The President of the Republic of Palau, during the First Meeting of the Parties to the PSMA, underlined the limited resources and capacity of his country as one of the main challenges that needs to be addressed, which also relates to many developing countries and island states.³⁶⁸

³⁶⁴ *ibid.*

³⁶⁵ *ibid* 162.

³⁶⁶ *ibid* 148.

³⁶⁷ FAO, 'Report of the First Meeting of the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing in Oslo, Norway, 29-31 May 2017' (FAO, 2017) FAO Fisheries and Aquaculture Report No. 1211, FIAP/R1211.

³⁶⁸ *ibid* 24.

In addition, different challenges such as outdated legal frameworks, lack of training, lack of political will, financial constraints and the need for modern technology were also identified as possible reasons for countries not implementing the PSMA.³⁶⁹ The challenges in implementation were also acknowledged in Second Meeting of the Parties to the PSMA.³⁷⁰ The Parties to the PSMA need to resolve these challenges, preferably at this early stage, to ensure the future effective implementation of the PSMA. Without clear solutions to these challenges, the effectiveness of the PSMA in addressing IUU fishing will be in question.

Regardless of the challenges, the provisions of the PSMA, if implemented effectively, will serve as strong support for port states in addressing IUU fishing, particularly towards the “regular” actors such as fishermen who or fishing companies which do not have the characteristics of OCGs. However, the PSMA’s effectiveness is still in question when it comes to facing IUU fishing activities conducted by OCGs since the PSMA makes no provisions on the matter. The PSMA, as suggested by the Guide to the Background and Implementation of the PSMA, has the potential to apply the criminal enforcement system towards IUU fishing activities, depending on each state’s conditions. This potential is also in line with Article 4 of the PSMA where port states can adopt more stringent measures in the exercise of their sovereignty over ports. Taken together, these can be good starting points for exploring the broader possibilities of criminal enforcement that can be implemented by port states, which may also be extended to OCGs. The focus of possible criminal enforcement in this context seems to be directed towards the “regular” actors of IUU fishing with no regard to IUU fishing conducted by OCGs. The fact that the PSMA does not provide regulations and enforcement measures for IUU fishing conducted by OCGs is considered as a deficit. This may be supplemented by provisions that are directed against OCGs, including through criminal regulations and enforcement.

³⁶⁹ FAO, ‘Report of the Workshop on Implementing the FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing in the Mediterranean and Black Sea,’ (n 331) para 23.

³⁷⁰ FAO, ‘Report of the Second Meeting of the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing in Santiago, Chile, 3-6 June 2019’ (FAO, 2019) FAO Fisheries and Aquaculture Report No. 1211, FIAO/R1272.

3.7. Interim Conclusion

The review of the five existing international instruments on fisheries in this chapter has provided a further understanding of the different regulations and enforcement systems preferred by the existing international instruments. From the discussion above, it has been found that the existing international instruments are established mainly to achieve goals of conservation and management of marine living resources. The earlier international instruments, such as the UNCLOS, the Compliance Agreement and the UNFSA, mainly focus on the establishment of general regulations and enforcement of fishing-related matters without focusing particularly on IUU fishing, although it is acknowledged that the provisions can be applied to IUU fishing. In the more recent international instruments, such as the IPOA-IUU and the PSMA, the focus has shifted to more specific regulations concerning IUU fishing. However, they are still regulated under the perspectives of conservation and management of marine living resources, where violations of the regulations are considered as fisheries management issues and therefore are responded to with non-criminal regulations and enforcement systems.

The protection of the environment, as explained by John Vervaele, “is not only about a specific nature-related interest, but also the systemic preservation of the commons of nature, essential for the life conditions of human beings and flora and fauna”.³⁷¹ Therefore, “all serious and longstanding (potential) harm to these commons of nature committed by gross negligence, recklessness or intent do qualify for criminal law enforcement as they endanger sustainable development and people’s very existence”.³⁷² Nonetheless, John Vervaele further acknowledged that “although much of these (harmful) conducts might already be criminalised in national jurisdictions, it does not mean that international public law dealing with environmental norms contains obligation about the duty to criminalise, its constitutive elements, sanctions and its jurisdictional

³⁷¹ John A.E. Vervaele, ‘International Cooperation in the Investigation and Prosecution of Environmental Crime. Problems and Challenges for the Legislative and Judicial Authorities’ in Jose Luis de la Cuesta and others (eds), *Protection of the Environment through Criminal Law (AIDP World Conference Bucharest, Romania, 18th-20th May 2016)* (Maklu 2016) 243.

³⁷² *ibid.*

reach”.³⁷³ The lack of obligations about the duty to criminalise harmful conducts by international public law can also be found in the existing international instruments, particularly in the case of IUU fishing with TOC dimensions.

IUU fishing activities have resulted in different harms in terms of economic, environmental, social and the legal order, particularly for developing countries.³⁷⁴ The far-reaching harms of IUU fishing are further exacerbated by the involvement of OCGs due to its criminal nature and extensive capabilities and networks. The existing international instruments, as can be seen from the discussion above, do not have a preference for which type of enforcement measures need to be implemented by states. The instruments provide states with wide discretion in formulating and implementing its regulations and enforcement systems. On sanctions, the instruments only provide general guidance on how the sanctions shall be of sufficient gravity as to be effective in securing compliance, discourage violations and deprive offenders of the benefits accruing from their illegal activities with no further detail on how such sanctions can be achieved, including its coverage and limitation.³⁷⁵ This wide discretion given by these instruments create inconsistencies in the state’s legal systems and their degree of enforcement in addressing IUU fishing. These inconsistencies can be exploited by IUU fishing actors including OCGs by operating in jurisdictions which has lax regulations and enforcement which can aggravate the global problem of IUU fishing. It is also found that the international fisheries instruments do not recognise the involvement of OCGs in their provisions and thus do not provide any solution towards the problem, including the obligation to criminalise such conduct. Based on these findings, it can be argued that there are deficits in terms of regulations and enforcement systems in the existing international instruments. The deficits arguably can be addressed through alternative solutions, namely by employing punitive and criminal regulations and enforcement at global and regional levels considering the criminal and transnational nature of OCGs.

³⁷³ *ibid* 244.

³⁷⁴ For further discussion on the impacts of IUU fishing see Chapter 2 of this dissertation.

³⁷⁵ UNFSA (n 3) art 19(2), Compliance Agreement (n 2) art 3(8), IPOA-IUU (n 4) para 21.

The alternative solution of criminal regulations and enforcement at global and local levels in addressing IUU fishing conducted by OCGs arguably will not underestimate the importance of the existing fisheries instruments. Rather, criminal regulations and enforcement will complement them by providing various punitive and criminal justice tools which were not previously available for states to take advantage of. The alternative solution will also support states in deterring and punishing the involvement of OCGs in IUU fishing activities through the harmonisation of administrative and criminal regulations and enforcement among states against such activities which will arguably limit the OCGs' operations significantly.

The deficits found in the existing international instruments need to be further examined through the assessment of the regulatory and enforcement design and practices of states at national levels. States have the obligation to incorporate the previously mentioned international public law obligations at the domestic level but, under these instruments, they also have the discretion to provide for more stringent regulatory and enforcement mechanisms as part of their own policies on fisheries conservation and management and related IUU fishing, including the OCG dimension. It is necessary to examine how states approach the phenomenon of IUU fishing conducted by OCGs in terms of regulations and enforcement systems; it needs to be tested whether the deficits found in the international instruments will also be found at the national level. In this regard, Chapter 4 will examine the states' practices in Indonesia and Vietnam to explore their national regulations and enforcement systems (in theory and in practice) and to determine their adequacy or deficiency for dealing with IUU fishing activities conducted by OCGs.

CHAPTER 4

National Regulatory and Enforcement Policies Against IUU Fishing Conducted By OCGs: Case Studies of Indonesia and Vietnam

4.1 Introduction

This chapter examines the regulatory and enforcement designs and practices against IUU fishing at the national level to see how countries implement and transpose relevant international obligations contained in international fisheries instruments. To that end, this chapter is set out in three main parts. The first part will detail the national frameworks against IUU fishing that cover IUU fishing conditions, national fisheries resources, policies, regulatory and enforcement designs and practices against IUU fishing in each country. The second part focuses on how the countries implement international instruments and international obligations in their national regulations and enforcement systems to see whether international fisheries instruments enable solutions or impose limitations at the national level, particularly regarding the involvement of OCGs in IUU fishing. This chapter will also set out, in the third part, a comparative analysis based on the findings from the two previous parts, through analysing national fisheries frameworks, national implementation of the obligations of international instruments, and national policies against the involvement of OCGs in IUU fishing. The comparative analysis will provide readers with a comparison of two national practices related to the relevant provisions of international fisheries instruments. This chapter will use Indonesia and Vietnam as case studies to examine each country's regulations and enforcement systems towards IUU fishing, including the involvement of OCGs in IUU fishing.

4.2 Indonesia Case Study

4.2.1 IUU Fishing in Indonesia

Indonesia was ranked as the fifteenth and thirteenth most fished nation by foreign fleets in 2013 and 2014 respectively,¹ which translates into 6.12 million tons of capture fisheries in 2013 and 6.48 in 2014.² Both foreign and Indonesian vessels are involved in IUU fishing. Nonetheless, foreign-flagged vessels have the most significant impacts due to their more advanced technology and capital. In the EEZ, it is known that IUU fishing has mostly been conducted by foreign-flagged fishing vessels,³ although Indonesian vessels also undertake their share of IUU fishing activities. Countries such as China, Japan, the Philippines, South Korea, Taiwan, Thailand and Vietnam have been known to fish illegally in Indonesian waters since the 1960s.⁴ In fighting IUU fishing, Indonesia has established and implemented several strict measures which will be explained in Section 4.2.2.

IUU fishing operations in Indonesia have indications of the involvement of OCGs, particularly those related to foreign vessels. This involvement of OCGs is reflected in numerous court cases. For example, in case number 2563 K/Pid.us/2015 (FV Sino 26),⁵ the vessel was found guilty of operating without a licence in the Indonesian EEZ, with 17 crew members of different nationalities who operated for 50 days and obtained 130 tonnes of fish illegally. In a different case, case number 491 K/Pid.Sus/2015 (FV Bintang Laut IX)⁶, similar characteristics of OCGs were also present, as the

¹ Reniel B. Cabral and others, 'Rapid and Lasting Gains from Solving Illegal Fishing' (2018) 2 *Nature Ecology & Evolution* 650, 651.

² Direktorat Jenderal Pengawasan Sumber Daya Kelautan dan Perikanan (PSDKP), '*Produktivitas Perikanan Indonesia*' [Indonesian Fisheries Productivity] (Forum Merdeka Barat 9 Kementerian Komunikasi dan Informatika, Jakarta, 19 January 2018) 4 <<http://kkp.go.id/wp-content/uploads/2018/01/KKP-Dirjen-PDSPKP-FMB-Kominfo-19-Januari-2018.pdf>> accessed 20 April 2018.

³ Cabral and others (n 1) 650.

⁴ Budy P. Resosudarmo, Lydia Napitupulu and David Campbell, 'Illegal Fishing in the Arafura Sea' in Budi P. Resosudarmo and Frank Jotzo (eds), *Working with Nature against Poverty: Development, Resources and the Environment in Eastern Indonesia* (ISEAS-Yusof Ishak Institute) 2009) 185.

⁵ *Putusan Mahkamah Agung* [Supreme Court Decision] No. 2563 K/Pid. Sus/2015 (2015).

⁶ *Putusan Mahkamah Agung* [Supreme Court Decision] No. 491 K/Pid. Sus/2015.

vessel was operating in Indonesian waters with ten crew members of different nationalities for two months to obtain 2.5 tonnes of fish illegally. Many of these types of court cases can be found in Indonesian case databases, showing that IUU fishing operations with OCGs characteristics are present and need to be addressed.

Indonesia has also experienced the presence of internationally wanted IUU vessels in its waters, for example the vessel “Vikings” explained in Chapter 2 which had the characteristics of OCGs. Different cases concerning vessels such as “Silver Sea 2”⁷ in October 2017 and “STS-50”⁸ in August 2018 also displayed similar characteristics. The “STS-50”, for example, was a fishing vessel blacklisted by CCAMLR and subject to an INTERPOL Purple Notice for IUU fishing.⁹ The vessel was known to poach Patagonian and Antarctic toothfish and had been operating illegally for ten years, generating up to US\$50 million (approximately €45 million) worth of fish using a crew of different nationalities. The vessel had managed to escape authorities of different states by moving from one place to another and using forged documents and flag registrations. The vessel ended its illegal operation in 2018 when the Indonesian authorities caught the vessel. The Indonesian court confiscated the vessel and sanctioned the captain with a criminal fine of Rp.200 million (approximately €12,000). These vessels had been known to be operating illegally in different countries for many years, using shell companies to hide their operations, and trying to escape local laws by changing their names, operating locations and flags. Aside from the possible involvement of OCGs, fishing operations in Indonesia are also known to be linked with other TOCs such as trafficking in persons, drug smuggling and migrant smuggling. The link to trafficking in persons is apparent in several cases in Indonesia. The most notorious was the “Benjina case” in the Maluku island of Indonesia in 2015 where more than 1,000 fishermen from Cambodia, Laos, Myanmar and Thailand were

⁷ *Putusan Pengadilan Negeri Sabang* [Sabang Distric Court Decision] No. 21/Pid.Sus/2017/PN.Sab.

⁸ *Putusan Pengadilan Negeri Sabang* [Sabang Distric Court Decision] No. 17/Pid.Sus/2018/PN Sab; see also Sarah Tory, ‘Catch Me if You Can: The Global Pursuit of a Fugitive Ship’ (Hakai Magazine, 3 March 2020) <<https://www.hakaimagazine.com/features/catch-me-if-you-can/>> accessed 28 May 2020.

⁹ *ibid.*

trafficked in IUU fishing-related operations.¹⁰ The link to migrant smuggling can be seen from how fishers in Rote Island (Eastern Indonesia), were used in migrant smuggling operations to Australia¹¹ and, in a different case, how Captain Bram (Abraham Louhenapessy), a notorious smuggler, had organised the smuggling of more than 1,000 migrants from Sri Lanka via Indonesia to Australia and New Zealand by using fishing vessels.¹²

The involvement of OCGs in IUU fishing operations and their relationship with other TOCs have compelled Indonesia to advocate for the fight against IUU fishing abroad by promoting the categorisation of IUU fishing as a TOC on numerous occasions.¹³ For example, Indonesia initiated a Fogrum Group Discussion on “Illegal Fishing as TOC” on 29 October 2015 in Vienna which was attended like-minded countries such as Australia, Colombia, Costa Rica, Kenya, Mexico, Norway, Oman and the U.S.¹⁴ At the 2nd INTERPOL-UNEP International Environmental Compliance and Enforcement Conference, on 16-17 November 2015 in Singapore, the Indonesian Minister for Marine Affairs and Fisheries called for the international community to recognise IUU fishing as a form of TOC. The efforts also continued in the 25th Session of the Commission on Crime Prevention and Criminal Justice, where the Minister also pushed forward the idea of categorising IUU

¹⁰ International Organization for Migration (IOM), Indonesian Ministry of Marine Affairs and Fisheries (KKP), and Coventry University, ‘Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry’ (IOM, 2016) 35.

¹¹ Antje Missbach, ‘People Smuggling in Indonesia: Complexities, (Mis)conceptions and Their Consequences for Sentencing’ (2016) 17(2) Australian Journal of Asian Law, 1.

¹² Jewel Topsfield and Amilia Rosa, ‘Notorious People-Smuggler Captain Bram Jailed for Six Years in Indonesia’ (*The Sydney Morning Herald*, 16 March 2017) <<https://www.smh.com.au/world/notorious-peoplesmuggler-captain-bram-jailed-for-six-years-in-indonesia-20170316-guzywl.html>> accessed 11 December 2018;

¹³ Aryuni Yuliantiningsih and others, ‘From Illegal, Unreported and Unregulated Fishing to Transnational Organised Crime in Fishery from an Indonesian Perspective’ (2018) 11(2) Journal of East Asia and International Law 335, 350-354.

¹⁴ *ibid* 351.

fishing as a form of TOC.¹⁵ In supporting this idea and raising the awareness of other states, Indonesia has also been active in organising international events such as the Joint High-Level Side Event on Transnational Organised Fisheries Crime (co-hosted by Indonesia and Norway) on 23 May 2016 in Vienna, Austria; the 2nd International Symposium on Fisheries Crime on 10-11 October 2016 in Yogyakarta, Indonesia; the High-Level Side Event on Transnational Organised Crime in the Fisheries Industries on 6 June 2017 in New York, USA;¹⁶ and the 3rd Regional Conference on the Establishment of a Regional Cooperation Agreement against Crimes Related to Fisheries on 18-19 September 2017 in Jakarta, Indonesia.¹⁷

The problems of IUU fishing in Indonesian waters, including the involvement of OCGs, as explained above, are very apparent. The following section 4.2.2. will explain Indonesia's national and regulatory enforcement policy framework to understand how the country addresses the problems of IUU fishing. The following Section 4.2.2. will start with a brief explanation of Indonesia's fisheries resources, continue with a discussion of the country's regulations and enforcement practices against IUU fishing and the implementation of international fisheries obligations.

¹⁵ *ibid* 352; Dwi Atmanta, 'Minister Susi Ups Ante in Fight against Fisheries Crime at UN' (*The Jakarta Post*, 24 May 2016) <<http://www.thejakartapost.com/news/2016/05/24/minister-susi-ups-ante-in-fight-against-fisheries-crime-at-un.html>> accessed 19 May 2018; Tempo, 'Susi Warns Countries That Illegal Fishing Is Transnational Crime' (Tempo, 18 September 2016) <<https://en.tempo.co/read/news/2016/09/18/055805139/Susi-Warns-Countries-That-Illegal-Fishing-is-Transnational-Crime>> accessed 18 May 2018; Patsy Widakuswara, 'Indonesia Urges UN to Declare Fish Theft a Transnational Crime' (VOAnews, 10 June 2017) <<https://www.voanews.com/a/indonesia-urges-united-nations-declare-fish-theft-transnational-crime/3895243.html>> accessed 18 May 2018.

¹⁶ 'Concept Paper High-Level Side Event on Transnational Organized Crime in the Fisheries Industries ("Fisheries Crime")' (UN Ocean Conference, New York, 6 June 2017) <<http://ocean.kkp.go.id/files/concept.pdf>> accessed 20 May 2018.

¹⁷ Coordinating Ministry for Maritime Affairs of the Republic of Indonesia, 'Indonesia Leads the Establishment of a Regional Cooperation to Combat Crimes in Fisheries Sector' (2017) <<https://oceanconference.un.org/commitments/?id=15127>> accessed 12 May 2018.

4.2.2 Indonesia's National Regulatory and Enforcement Policy Framework

4.2.2.1 Indonesia's Fisheries Resources

Indonesia is the largest archipelagic state in the world with 17,504 islands and 5.8 million km² of marine area.¹⁸ The marine area consists of 0.3 million km² of territorial sea, 2.95 million km² of archipelagic water, and 2.55 million km² of EEZ.¹⁹ With a vast marine area, the country is estimated to have 8,500 species of fish²⁰ with estimated fisheries resources of 12.5 million tons dispersed over the country's territorial sea and ZEE.²¹ The country has abundant fisheries resources which have made it one of the major global players in fisheries. Indonesia is the world's third-largest producer of marine capture behind China and Peru, with 6.71 million tons in 2018.²² Indonesia is also home to some of the highest marine biodiversity on the planet where it is part of the Coral Triangle (the marine area consists of Indonesia, Malaysia, Papua New Guinea, the Philippines, Solomon Islands and Timor-Leste). The area covers only 2% of the global ocean, yet it consists of 76% of all known coral species.²³

In managing its fish resources, Indonesia divides them into eleven fish management areas (FMAs):²⁴ i) Malacca Strait and Andaman Sea

¹⁸ Ministry of Marine Affairs and Fisheries of the Republic of Indonesia (MMAF), 'Laporan Kinerja 2017' [Performance Report 2017] (MMAF 2017) 8 <[http://kkp.go.id/an-component/media/upload-gambar-pendukung/kkp/LAPORAN/Laporan_Kinerja_KKP_2017_\(REV_4-\(28Maret\).pdf](http://kkp.go.id/an-component/media/upload-gambar-pendukung/kkp/LAPORAN/Laporan_Kinerja_KKP_2017_(REV_4-(28Maret).pdf)> accessed 5 April 2018.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *Keputusan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 50/KEPMEN-KP/2017 tentang Estimasi Potensi, Jumlah Tangkapan yang Diperbolehkan, dan Tingkat Pemanfaatan Sumber Daya Ikan di Wilayah Pengelolaan Perikanan Negara Republik Indonesia* [Ministry of Marine Affairs and Fisheries Decree Number 50/KEPMEN-KP/2017 on Estimated Potential, Allowed Capture Amount, and Utilisation Level of Fisheries Resources in the Republic of Indonesia Fisheries Management Area] (MMAF Decree No. 50/KEPMEN-KP/2017).

²² FAO, 'The State of World Fisheries and Aquaculture 2020. Sustainability in Action' (FAO 2020) 13.

²³ ADB, 'State of the Coral Triangle: Indonesia' (ADB 2014) 36.

²⁴ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 18/PERMEN-KP/2014 tentang Wilayah Pengelolaan Perikanan Negara Republik Indonesia* [Ministry of Marine Affairs and Fisheries Regulation Number 18/PERMEN-KP/2014 on Fisheries Management Areas of the Republic of Indonesia]

(FMA 571); ii) Indian Ocean in the Western Sumatra and Sunda Strait (FMA 572); iii) Indian Ocean in the Southern Java to Southern Nusa Tenggara, Sawu Sea and Western Timor Sea (FMA 573); iv) Karimata Strait, Natuna Sea and South China Sea (FMA 711); v) Java Sea (FMA 712); vi) Makassar Strait, Bone Gulf, Flores Sea and Bali Sea (FMA 713); vii) Tolo Gulf and Banda Sea (FMA 714); viii) Tomini Gulf, Maluku Sea, Halmahera Sea, Seram Sea, and Berau Gulf (FMA 715); ix) Sulawesi Sea and Southern Halmahera Island (FMA 716); x) Cendrawasih Gulf and Pacific Ocean (FMA 717); and xi) Aru Sea, Arafura Sea, and Eastern Timor Sea (FMA 718). Amongst these FMAs, the most significant contributor of the nation's fisheries resources comes from the area of Aru Sea, Arafura Sea, and Eastern Timor Sea (FMA 718) with 2,637,565 tons, while Malacca Strait and Andaman Sea (FMA 571) holds the place as the lowest contributor with 425,444 tons.²⁵ Most of the fisheries resources in these FMAs in 2017, unfortunately, fall into the category of fully-exploited or over-exploited.²⁶

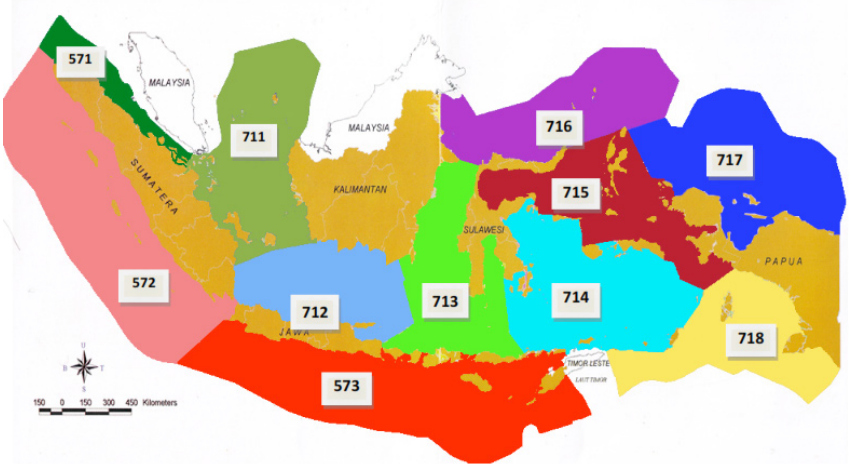


Figure 1.
Source: Indonesia National Plan of Action to Prevent and Combat IUU fishing (NPOA-IUU) for 2012-2016 <<http://extwprlegs1.fao.org/docs/pdf/ins165159.pdf>>

(MMAF Regulation No. 18/PERMEN-KP/2014).

²⁵ MMAF Decree No. 50/KEPMEN-KP/2017 (n 21).

²⁶ *ibid.*

4.2.2.2 Indonesia's Policies against IUU Fishing

The fight against IUU fishing in Indonesia is based on increasing awareness of the danger of the illicit activity, particularly its economic and environmental negative impacts. For example, several FMAs such as the Aru Sea, Arafura Sea, Java Sea and Eastern Timor Sea are identified as overexploited where species such as tuna, lobster, and crabs have become scarce in these areas. The adverse effects of overexploitation have also been experienced by the fishermen and the industry where it was found that, during 2003-2013, the number of fishermen households had dropped from 1.6 million to 800,000 households, and it was also found that 115 fish processing companies went out of business due to scarce fish supply in the country.²⁷

National policies toward the illegal activities have been accelerated under President Joko Widodo (Indonesian President from 2014 until the time of the writing this dissertation). Under his leadership, the government has pushed a new vision to establish Indonesia as a maritime axis by, inter alia, positioning the sea as the foundation of the country's future through maintaining the marine and fisheries resources sustainably.²⁸ This vision was then translated, inter alia, into stricter national policies against IUU fishing.²⁹

In doing so, the administration took three main actions: moratorium on foreign fishing vessels; banning fish transshipment at sea; and the establishment of an Illegal Fishing Task Force. Regarding the moratorium on foreign fishing vessels, the government established the Ministry of Marine Affairs and Fisheries (MMAF) Regulation Number 56/PERMEN-KP/2014 on Moratorium on Capture Fisheries Licence in the Republic of Indonesia FMAs, which ended on 31 October 2015. The moratorium was the first step for

²⁷ MMAF, *Laut Masa Depan Bangsa. Kedaulatan, Keberlanjutan, Kesejahteraan* [Sea, Future of the Nation, Sovereignty, Sustainability, Prosperity] (MMAF 2017) 19.

²⁸ *ibid* 16–18. For an overview of the Indonesian maritime axis policy see Indriati Kusumawardhani and Arie Afiansyah, 'Kebijakan Kelautan Indonesia dan Diplomasi Maritim' [Indonesia's Ocean Policy and Maritime Diplomacy] (2019) 41(3) *Jurnal Kertha Patrika* 251.

²⁹ For an overview of Indonesian policies against IUU fishing see Arie Afriansyah, 'Indonesia's Practice in Combatting Illegal Fishing: 2015-2016' in Seokwoo Lee and Hee Eun Lee (eds), *Asian Yearbook of International Law*, Volume 22 (Brill Nijhoff 2016).

the government to evaluate and analyse the existing licences given to 1,605 foreign fishing vessels. Most of those vessels come from China (374 vessels), Thailand (280 vessels), Taiwan (216 vessels), Japan (104 vessels) and the Philippines (98 vessels)³⁰ owned by 187 owners in 33 Indonesian ports.³¹ It was found that all of them conducted IUU fishing practices such as double flagging, inactive VMS, using illegal fuel, employing foreign nationals without a licence, and using destructive fishing gear.³²

Regarding the banning of fish transshipment at sea, in 2014, the MMAF established Regulation Number 57/PERMEN-KP/2014 which bans the transshipment activity at sea, as it was believed that it was one of the main supporting activities for IUU fishing.³³ This stricter regulation of illegal fishing was also further implemented by closing the capture fisheries business to foreign investment as stated in Presidential Regulation Number 44 of 2016 on the Lists of Business Fields that are Closed to and Business Fields that are Open with Conditions to Investment.³⁴

In parallel with stricter policies, the government also employed firm enforcement actions including through the establishment of an Illegal Fishing Task Force in 2015 through Presidential Regulation Number 115/2015 (Task Force 115). The task force, as stipulated

³⁰ MMAF, *Laut Masa Depan Bangsa. Kedaulatan, Keberlanjutan, Kesejahteraan* (n 27) 41.

³¹ *ibid* 34.

³² *ibid* 37.

³³ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 57/PERMEN-KP/2014 tentang Perubahan Kedua atas Peraturan Menteri Kelautan dan Perikanan Nomor PER.30/MEN/2012 tentang Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia* [Ministry of Marine Affairs and Fisheries Regulation Number 57/PERMEN-KP/2014 on the Second Amendment on the Regulation of the Minister of Marine Affairs and Fisheries Number PER.30/MEN/2012 on Capture Fisheries Business in the Republic of Indonesia Fisheries Management Areas 2014] (MMAF Regulation No. 57/PERMEN-KP/2014).

³⁴ *Peraturan Presiden Republik Indonesia Nomor 44 Tahun 2016 tentang Daftar Bidang Usaha yang Tertutup dan Bidang Usaha yang Terbuka dengan Persyaratan di Bidang Penanaman Modal* [Presidential Regulation of the Republic of Indonesia Number 44 Year 2016 Concerning Lists of Business Fields that are Closed to and Business Fields that are Open with Conditions to Investment] Appendix III C (Marine Affairs and Fisheries Sector).

in Article 1 of the Presidential Regulation, aims to support the enforcement of actions against violations and crimes in the fisheries sector, especially against illegal fishing, in a comprehensive manner. The task force consists of different agencies, i.e. the Navy, the Police, the Coast Guard and the Prosecutor's Office.³⁵ It was established to facilitate better coordination in fighting illegal fishing. The task force operates directly under the President with the Minister for Marine Affairs and Fisheries as the commander. Task Force 115 has four operation areas, i.e. Aceh, Natuna, Arafura, and Sulawesi with North Maluku.

From 2014 until December 2019, the Indonesian Government had sunk 556 illegal fishing vessels originating from different countries as can be seen from Figure 2. This action is known as the “burning and/or sinking policy”.³⁶ The legal basis for this policy for vessels that violate Indonesian regulations can be found in Article 69 (1) and (4) of the Law No. 45 of 2009 (which amended Law No. 31 of 2004 on Fisheries).³⁷ Article 69 (1) states that “fisheries surveillance vessels have the function to implement surveillance and law enforcement in the field of fisheries in the Republic of Indonesia Fisheries Management Areas”. Article 69 (4) states that “in implementing the function stated in Article 69 (1), investigators and/or fisheries inspectors can undertake special actions such as burning and/or sinking the foreign vessels based on prima facie evidence”. Prima facie evidence in this context relates to a criminal offence in the field of fisheries including by not owning either *Surat Izin Penangkapan Ikan* (SIPI)

³⁵ *Peraturan Presiden Republik Indonesia Nomor 115 Tahun 2015 tentang Satuan Tugas Pemberantasan Penangkapan Ikan Secara Illegal* [President of the Republic of Indonesia Regulation Number 115 of 2015 on Task Force against Illegal Fishing] (Presidential Regulation Number 115 of 2015), art 4.

³⁶ For further discussion on the procedures of the burning and/or sinking policy see Zaki Mubarak Busro, ‘Burning and/or Sinking Foreign Fishing Vessels Conducting Illegal Fishing in Indonesia. Some Obligations and Loopholes’ (2017) 2(1) *Asia-Pacific Journal of Ocean Law and Policy* 174.

³⁷ *Undang-Undang Republik Indonesia Nomor 45 Tahun 2009 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 2004 tentang Perikanan* [Law No. 45 of 2009 on the Amendment of Law No. 31 of 2004 on Fisheries] (Law No. 45 of 2009). Law No. 45 of 2009 amended parts of the previous law on fisheries which is *Undang-Undang Nomor 31 Tahun 2009 tentang Perikanan* [Law No. 31 of 2009].

[Catch Licence],³⁸ or *Surat Izin Kapal Pengangkut Ikan* (SIKPI) [Fish Carrier Vessel Licence],³⁹ when the foreign vessels catch or transport fish in the Indonesian FMAs. The special actions of burning and/or sinking, however, cannot be conducted arbitrarily. They can only be implemented when the investigators or fisheries inspectors are convinced that foreign-flagged vessels have committed a criminal offence in the field of fisheries.⁴⁰ In implementing the policy, Indonesia then established MMAF Regulation No. 37/PERMEN-KP/2017 on the Law Enforcement Standard Operating Procedure (SOP) of the Illegal Fishing Task Force which established in detail the subjective and objective requirements to conduct the burning and/or sinking of foreign vessels.

No	Year	Country									Total
		Malaysia	Philippines	Vietnam	Indonesia	Thailand	PNG	China	Nigeria	Belize	
1	2014	-	1	3	-	2	2	-	-	-	8
2	2015	12	35	36	10	19	-	1	-	-	113
3	2016	27	22	59	5	-	-	-	1	1	115
4	2017	12	18	90	6	1	-	-	-	-	127
5	2018	22	15	83	4	1	-	-	-	-	125
6	2019	16	1	49	1	1	-	-	-	-	68
Amount		89	92	320	26	24	2	1	1	1	556

Figure 2.
Source: Directorate General of PSDKP, Ministry of Maritime Affairs and Fisheries (2020)⁴¹

Some countries impacted by the burning and/or sinking

³⁸ *ibid* art 1(17). SIPI is a written licence which must be owned by every fishing vessel to conduct fishing and is also an inseparable part of the SIUP. SIUP, based on , is a written licence which must be held by a fisheries company to enable it to do fisheries business by using production facilities as listed in the licence.

³⁹ *ibid* art 1(18). SIKPI is a written licence which must be owned by every fishing vessel to conduct the carriage of fish.

⁴⁰ Law No. 31 of 2004 (n 37) elucidation of art 69(4); *Surat Edaran Nomor 1 Tahun 2015 tentang Barang Bukti Kapal dalam Perkara Pidana Perikanan* [Supreme Court Circular Note Number 1 of 2015 on Vessel Evidence in Fisheries Criminal Cases].

⁴¹ Direktorat Jenderal PSDKP, ‘*Laporan Kinerja Ditjen PSDKP 2019*’ [Director General PSDKP Performance Report 2019] III-46 <<https://kkp.go.id/an-component/media/upload-gambar-pendukung/Ditjen%20PSDKP/Humas%20PSDKP/LAPORAN%20KINERJA%20DJPSDKP%20TAHUN%202019.pdf>> accessed 28 May 2020.

policy, such as Vietnam, Thailand, the Philippines and China, have complained about Indonesia's policy.⁴² For example, the spokesperson of the Vietnamese Ministry of Foreign Affairs expressed the country's deep concern about the sinking of Vietnamese vessels by the Indonesian government.⁴³ The Indonesian government has taken a firm stance against these complaints by stating that the burning and/or sinking policy is the implementation of the law.⁴⁴ Indonesia tried to assure its ASEAN counterparts that its policy was not intended to disturb security or stability in the region.⁴⁵ The burning and/or sinking policy has been a point of discussion by different stakeholders. The ones that support it argue that the policy is based on domestic law and conforms to international law.⁴⁶ In contrast, the ones that disagree with it argue that the policy is excessive and not in line with international law.⁴⁷

The firm enforcement measures against IUU fishing taken by Indonesia, in general, have resulted in positive outcomes. Indonesia's

⁴² Poltak Partogi Nainggolan, '*Kebijakan Poros Maritim Dunia Joko Widodo dan Implikasi Internasionalnya*' [Joko Widodo's Maritime Axis Policy and its International Implications] (2015) 6 *Jurnal Politika* 180.

⁴³ Prashanth Parameswaran, 'Vietnam "Deeply Concerned" by Indonesia's War on Illegal Fishing. Hanoi Registers its Concerns to Jakarta again Following a Mass Public Sinking' (The Diplomat, 21 August 2015) <<https://thediplomat.com/2015/08/vietnam-deeply-concerned-by-indonesias-war-on-illegal-fishing/>> accessed 27 August 2018.

⁴⁴ Victor Maulana, 'Media Thailand Protes Penenggelaman Kapal, Ini Reaksi RI' [Thailand Media Protests Vessel Sinking. This is Indonesia's Reaction] *Sindonews* (7 January 2015) <<https://international.sindonews.com/read/947375/40/media-thailand-protos-penenggelaman-kapal-ini-reaksi-ri-1420625646>> accessed 20 June 2018.

⁴⁵ *ibid.*

⁴⁶ Arie Afriansyah (n 29) 284; Dita Liliansa, 'The Necessity of Indonesia's Measures to Sink Vessels for IUU fishing in the Exclusive Economic Zone' (2020) 10(1) *Asian Journal of International Law* 125.

⁴⁷ Arip Hidayatulloh, 'Third World Approach to International Law Analysis on Law Enforcement Against Illegal, Unreported and Unregulated Fishing in Indonesia' (Master Thesis, Flinders University 2019) 57; Carlyle A. Thayer, 'Indonesia's Policy of Sinking Illegal Unreported Unregulated Fishing Boats' (Chennai Centre for China Studies, 2019) <<https://www.c3sindia.org/defence-security/indonesias-policy-of-sinking-illegal-unreported-unregulated-fishing-boats-by-carlyle-a-thayer/>> accessed 19 July 2020; Siswanto Rusdi, 'Why Boat-Sinking Policy is Controversial' *Jakarta Post* (Jakarta, 8 January 2018) <<https://www.thejakartapost.com/academia/2018/02/08/why-boat-sinking-policy-is-controversial.html>> accessed 19 July 2020.

ranking in the list of nations that are most fished by foreign vessels changed from fifteenth in 2013 and thirteenth in 2014 to below eightieth in 2015 and 2016.⁴⁸ States such as Malaysia and Japan are also interested in cooperation and in the development of a similar firm enforcement measure such as a similar burning and/or sinking policy to that employed by Indonesia.⁴⁹ The firm enforcement policy, in general, has also succeeded in increasing the maximum sustainable yield of fisheries resources in Indonesian FMAs from 7.3 million tons in 2013 to 12.54 million tons in 2016.⁵⁰ This increase has resulted in direct benefits for the Indonesian fishermen's welfare, particularly for those in the remote islands, where now they can catch more fish closer to the shore. It can be seen from the national fishermen's exchange value (*nilai tukar nelayan*) – a comparison between fishermen's income and expenditure – which had increased from 102 in 2014 to 111 in June 2017 and thereby demonstrated a higher surplus of income for Indonesian fishers.⁵¹ The increased national fish stocks due to stricter IUU fishing policies have also resulted in the growth of the export of fisheries products. In 2016, Indonesia became the largest exporter of fisheries products in ASEAN, a rise from third place in 2013. Globally, Indonesia was the sixth largest exporter after China, Norway, India, Chile and Ecuador.⁵² In terms of national revenue, the revenue from the fisheries sector in 2016 has doubled compared with 2014, from Rp.214 billion (approximately €12,854,000) to Rp.462 billion (approximately €27,751,000).⁵³

4.2.2.3 Indonesia's IUU Fishing Regulations and Enforcement

The evolution of national fisheries regulations in Indonesia can be divided into two major timeframes: i) before the 1999 Local Government Law and ii) after the 1999 Local Government Law.⁵⁴

⁴⁸ Cabral and others (n 1) 654.

⁴⁹ MMAF, *Laut Masa Depan Bangsa. Kedaulatan, Keberlanjutan, Kesejahteraan* (n 27) 46.

⁵⁰ *ibid.*

⁵¹ *ibid* 89.

⁵² *ibid* 88.

⁵³ *ibid* 90.

⁵⁴ Laode M. Syarif, 'Promotion and Management of Marine Fisheries in

Before the enactment of *Undang-Undang Republik Indonesia Nomor 22 Tahun 1999* tentang Pemerintahan Daerah [Law Number 22 of 1999 on Local Government], the development of the marine and fisheries sectors received minimal attention from the central government. However, under former President Suharto's regime, the control over natural resources was centralised within the central government. The policy was Jakarta-driven where provincial and district governments had only a subsidiary role in the process. During this time, marine and fisheries sectors were regulated and managed by different government departments with the Directorate General of Fisheries and the Department of Agriculture as the leading agencies.⁵⁵

In 1999, Indonesia enacted Law Number 22 on Local Government which was then replaced by Law Number 32 of 2004 and Law Number 23 of 2014. In the new setting, provincial and district governments are given a more substantial role in managing their local resources, including fisheries. Provincial and district governments could also establish local regulations as long as they did not contradict national laws. With the new arrangement, local governments receive 80% of natural resources revenue, while the central government receives 20%, a complete reversal of the previous 80/20 split between central government and local government prior to the Local Government Law.⁵⁶ The principal government agency for marine and fisheries policies design and implementation under the new law is managed by the MMAF. At the provincial level, the policies and implementation are managed by the Provincial Office for Marine Affairs and Fisheries (POMAF), while at the district level they are managed by the District Office for Marine Affairs and Fisheries (DOMAF).⁵⁷

After 1999, Law Number 45 of 2009 which amended Law Number 31 of 2004 (hereinafter the Fisheries Law), became the main fisheries instrument in Indonesia. Fisheries Law aims to regulate fisheries management so as to increase welfare and justice for the interests of the nation while taking into account the principle of sustainability of

Indonesia' in Gerd Winter (ed), *Towards Sustainable Fisheries Law. A Comparative Analysis* (IUCN 2009).

⁵⁵ *ibid* 46.

⁵⁶ *ibid*.

⁵⁷ *ibid* 51.

fisheries resources and their environment as well as the development of national fisheries resources. In supporting the Fisheries Law, there are also different ministerial regulations that derive from the law to provide more detailed provisions regarding specific issues.

4.2.2.3.1 Administrative Regulations and Enforcement

The Fisheries Law obliges every vessel to meet the administrative requirements set out in the provisions, including to be licensed and registered accordingly.⁵⁸ The law provides three main types of licences that need to be obtained by vessels that are involved in fishing activities, i.e. SIPI, SIKPI and SIUP. These licences can be obtained through different authorities depending on specified conditions concerning the vessel and capital. The MMAF Regulation No. PER.30/MEN/2012 states that the authority to issue SIPI and SIKPI rests in the hands of the Director-General for Capture Fisheries of the MMAF, Governors and Regents as follows: i) the Director-General of MMAF has authority over fishing vessels exceeding 30 Gross Tonnage (GT) that use foreign capital and/or labour;⁵⁹ ii) the Governor, in his administration area, has authority over fishing vessels between 10 GT and 30 GT that do not use foreign capital and/or labour; and iii) the Regent (the head of a regency)/Mayor (the head of a city) has authority over fishing vessels between 5 to 10 GT that do not use foreign capital and/or labour. The issuance of SIUP, SIPI and SIKPI on the high seas rests solely in the hands of the Director-General for Capture Fisheries of the MMAF. Furthermore, the Fisheries Law and MMAF Regulation No. PER.30/MEN/2012 regulate different aspects of the conservation and management of fisheries resources such as the allocation of catch,⁶⁰ types of fish gear,⁶¹ transshipment,⁶² and conservation of bycatch and incidental

⁵⁸ For discussion on registration regulations see Section 4.2.3.2.1.

⁵⁹ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor PER.30/MEN/2012 tentang Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia* [Ministry of Marine Affairs and Fisheries Number PER.30/MEN/2012 on Capture Fisheries Business in Fisheries Management Area of the Republic of Indonesia] (MMAF Regulation No. PER.30/MEN/2012) art 14(2).

⁶⁰ Law No. 45 of 2009 (n 37) art 7(1)c.

⁶¹ *ibid* art 7 (1)f.

⁶² MMAF Regulation No. PER.30/MEN/2012 (n 59) art 69.

catch.⁶³ These regulations apply to every person who is licensed for fishing activities. These regulations are made in consideration of the international fisheries instruments.⁶⁴

In ensuring that every person is complying with the law, the Fisheries Law and MMAF Regulation No. PER.30/MEN/2012 set out administrative sanctions against illicit conduct. The Fisheries Law contains only one provision concerning administrative sanctions, namely Article 41 (4) which states that “every person who owns and/or operates a fishing vessel and/or a fish-carrier vessel and does not load or unload fish in the determined ports is charged with administrative sanctions in the form of warning, freezing of licence and revocation of licence”. More detailed provisions on administrative sanctions can be found in MMAF Regulation No. PER.30/MEN/2012 on Capture Fisheries Business in the Republic of Indonesia Fisheries Management Areas. The regulation provides administrative sanctions against several illicit forms of conduct as follows:

a) Transshipment

In the implementation of transshipment, Article 69 states that the catch must be landed in the designated port and must not be transported abroad. Violation of the provision will result in an administrative sanction in the form of the revocation of SIPI and SIKPI.

b) Conservation of bycatch and incidental catch

Every vessel that operates in the FMAs under Article 73 is obliged to carry out conservation actions towards bycatch (thresher shark) and accidental catch (seabirds, sea turtles, and sea mammals, including whales). Conservation actions include releasing the live fish, cleaning the dead fish, and recording and reporting the species of dead fish to the Harbourmaster. Failure to do so will result in an administrative sanction in the form of SIPI revocation.

⁶³ *ibid* art 73.

⁶⁴ Law No. 45 of 2009 (n 37), elucidation para 2.

- c) Fishing at a closed time and/or in a closed area
Article 75 states that every fishing vessel that operates in the EEZ is forbidden to fish at a closed time and/or in a closed area. Any violation will be liable to the imposition of an administrative sanction in the form of SIPI revocation.
- d) Fishing and transporting protected fish species
Article 76 states that every fishing vessel and/or fish carrier is forbidden to fish and/or transport protected fish species. Any violation will result in an administrative sanction in the form of the revocation of SIPI and/or SIKPI.
- e) Business activity report and capture activity report obligation
Article 81 states that everyone who conducts a capture fisheries business is obliged to make a business activity report every six months and a capture activity report every three months. Any violation could result in administrative sanctions such as a written warning, freezing of SIUP, SIPI and/or SIKPI and the revocation of SIUP, SIPI and/or SIKPI. A written warning is the first sanction which will be given. One month after the warning, if the licence holder still has not fulfilled their obligation, the licence will be frozen for a maximum period of one month. After the freezing period is over and if the licence holder has still not complied with their obligations, the licence will be revoked.

The administrative sanctions, as elaborated above, are enforced by the licence issuer. Thus, the administrative sanctions are enforced by the Director-General of MMAF, Governors and Regents as the issuers of the licence, depending on the size of the vessels and the involvement of foreign capital and/or labour.

The Director-General of Capture Fisheries implements administrative sanctions based on the Director-General of Capture Fisheries Decision No. 24/PER-DJPT/2017 on the Mechanism and Procedure of the Implementation of Capture Fisheries Administrative

Sanction in the Indonesian FMAs and/or High Seas.⁶⁵ Governors and regents are given the authority to establish local regulations regarding fishing licences, sanctions and enforcement. However, the local regulations must be based on the provisions of the previously mentioned MMAF regulation. The Nusa Tenggara Timur's Governor, for example, enacted Provincial Regulation No. 3/2011 on Management of Fisheries Business.⁶⁶ The regulation provides details on the licensing process, sanctions and enforcement. It further describes, under Article 71, the objection mechanism once a licence has been revoked; the licence holder has 14 working days after revocation to submit an objection to the governor. The governor then, within 14 working days, must provide a written response to the objection and state whether it is accepted or declined. If the objection is accepted, the governor will reissue the license. If it is declined and the affected person wants to appeal, that person can generally file a case in the administrative court.⁶⁷

4.2.2.3.2 Criminal Regulations and Enforcement

The Fisheries Law differentiates criminal offences into two categories: crime and violation.⁶⁸ Criminal offences that are categorised as crimes are sanctioned under Articles 84, 85, 86, 88, 91,

⁶⁵ *Peraturan Direktur Jenderal Perikanan Tangkap Nomor 24/PER-DJPT/2017 tentang Mekanisme dan Prosedur Penerapan Sanksi Administratif Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia dan/atau Laut Lepas* [Director General of Capture Fisheries Decision No. 24/PER-DJPT/2017 on the Mechanism and Procedure of the Implementation of Capture Fisheries Administrative Sanction in the Indonesian FMAs and/or High Seas].

⁶⁶ *Peraturan Daerah Provinsi Nusa Tenggara Timur Nomor 3 Tahun 2011 tentang Pengendalian Usaha Perikanan* [Regulation of the Province of Nusa Tenggara Barat No. 3 of 2011 on the Management of Fisheries Business].

⁶⁷ *Undang-Undang Republik Indonesia Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan* [Law No. 30 of 2014 on Government Administration] art 76(3).

⁶⁸ Law No. 31 of 2004 (n 37) art 103. There are several differences between violations and crimes; for example violation is generally less severely punished than crime and a person who commits a violation is not usually arrested during the investigation. For further discussion see Supriadi, 'Penetapan Tindak Pidana sebagai Kejahatan dan Pelanggaran dalam Undang-Undang Pidana Khusus' [Determination of Criminal Acts as Crime and Violation in Special Criminal Laws] (2015) 27(3) *Mimbar Hukum*.

92, 93, 94 and 94a of the Fisheries Law. Criminal offences that are categorised as violations are sanctioned under Articles 87, 89, 90, 95, 96, 97, 98, 99, 100a, 100b and 100d. The violation provisions in the Fisheries Law are generally not related to IUU fishing activities such as the destruction of the marine environment (Article 86), damage of germplasm in fisheries resources (Article 87), illegal circulation and ownership of fish that can endanger fisheries resources and environment (Article 88), unstandardised fish processing (Article 89), absence of health certificates for fisheries products produced in or outside Indonesian territory (Article 90), illegal usage of dangerous materials in fisheries processing (Article 91), and conduct fisheries research without a licence in Indonesian FMAs (Article 99). These violation provisions are related to other activities along the fisheries supply chain rather than to the IUU fishing activities themselves. On the other hand, the crime provisions in the Fisheries Law are more directly related to illegal activities that are commonly associated with IUU fishing activities, particularly illegal fishing activities. The following sub-sections will elaborate on these crime provisions to provide a clearer picture of how Indonesia imposes sanctions on IUU fishing activities in the Fisheries Law.

a) Fishing with destructive methods or gear

The Fisheries Law acknowledges the danger posed by fishing using destructive methods or gear and provides two main Articles for penalising such actions. The first is Article 84 which states that “every person who deliberately, in the Indonesian FMAs, conducts fishing by using chemical material, biological material, explosive material, gear and/or methods, and/or buildings that can damage and/or endanger the sustainability of fisheries resources and/or its environment is penalised with imprisonment of a maximum of six years and a maximum fine of Rp.1.5 billion [approximately €90,100]”.⁶⁹ The captain or leader of the vessel and its crew can be subject to imprisonment of a maximum of ten years and a maximum fine of Rp.1.2 billion (approximately €72,000).⁷⁰ Meanwhile, the owner/operator of the ship can be penalised with imprisonment of a maximum of ten years and a maximum fine of Rp.2 billion

⁶⁹ Law No. 31 of 2004 (n 37) art 84(1)

⁷⁰ *ibid* art 84 (2).

(approximately €120,000).⁷¹ The second article, Article 85, states that “every person who deliberately owns, carries, and/or uses fishing gear and/or supporting fishing gear in the fishing vessel which disturbs and damage the sustainability of fisheries resources in the Indonesian FMAs is penalised with imprisonment of a maximum of five years and a maximum fine of Rp.2 billion [approximately €120,000]”.

b) Fishing without a licence

Fishing without a licence, i.e. SIUP, SIPI and SIKPI, is considered as a criminal offence under the Fisheries Law. The penalty for not having SIUP is stipulated under Article 92 which states that “Every person who deliberately conducts fisheries business in the field of capture, breeding, transportation, processing and marketing and does not hold a SIUP as stated under Article 26 (1) is penalised by imprisonment of a maximum of eight years and a maximum fine of maximum Rp.1.5 billion [approximately €90,100]”. This criminal offence is aimed at maintaining order in the fisheries business where every company must hold a SIUP as its legal basis of operation.⁷²

The penalty for not having SIPI can be found in Article 93. Article 93 (1) and (3) focuses on Indonesian-flagged vessels and states that “every person who owns and/or operates Indonesian-flagged fishing vessels in Indonesian FMAs and/or on the high seas who does not hold or carry a SIPI as stated under Article 27 (1) is penalised with imprisonment of a maximum of six years and a maximum fine of Rp.2 billion [approximately €120,000]”. Meanwhile, Article 93 (2) and (4) focuses on foreign-flagged vessels where “every person who owns and/or operates a foreign-flagged fishing vessel in the Indonesian EEZ that does not hold or carry SIPI is penalised with imprisonment of a maximum of six years and a maximum fine of Rp.20 billion [approximately €1,200,000]”.

The penalty for not having SIKPI can be found in Article 94 which states that “every person who owns and/or operates a fishing carrier vessel that conducts carrier activities or other related

⁷¹ *ibid* art 84 (3).

⁷² Teddy Nurcahyawan and Leonardo Saputra, ‘Penegakan Hukum Dan Penanggulangan Kapal Asing (Study Kasus Tindak Pidana Pelaku Illegal Fishing)’ [Law Enforcement and the Sinking of Foreign Vessels (Case Study of Illegal Fishing Criminal Offence) (2017) 2 *Era Hukum* 344.

activities in Indonesian FMAs and/or on the high seas that does not hold a SIKPI is penalised with imprisonment of a maximum of five years and a maximum fine of Rp.1.5 billion [approximately €90,100].”

Fishing without a licence is one of the most common IUU fishing offences in Indonesia. In Section 4.2.1. there are cases related to fishing without SIUP, SIPI or SIKPI that are conducted by Indonesian and foreign nationals alike.

c) Fishing licence forgery

Fishing licence forgery is forbidden under the Fisheries Law. Article 94a states that “every person who forges and/or uses a forged SIUP, SIPI and SIKPI is penalised with imprisonment of a maximum of seven years and a maximum fine of Rp.3 billion [approximately €180,200]”. Fishing licence forgery is also one of the common criminal offences in Indonesia and is intended to deceive law enforcers. The long and inefficient process in obtaining licences is one of the main reasons for carrying out the forgery.⁷³

d) Fishing vessel modification

In principle, the modification of vessels either conducted in Indonesia or abroad needs to have prior approval by the MMAF.⁷⁴ The approval of MMAF in the modification of vessels is to ensure that vessels are in line with the determined standards. IUU fishing operations in Indonesia are often found to use illegally modified vessels as a way of deceiving officials.⁷⁵ The Fisheries Law forbids the illegal modification of vessels under Article 95 which states that “every person who builds, imports or modifies their fishing vessel without prior approval is penalised with imprisonment of a maximum of one year and a maximum fine of Rp.600 million [approximately €36,000]”.⁷⁶

⁷³ Gatot Supramono, *Hukum Acara Pidana & Hukum Pidana Di Bidang Perikanan* [Criminal Procedure Law and Criminal Law in the Field of Fisheries] (Rineka Cipta 2011) 168.

⁷⁴ Law No. 31 of 2004 (n 37) art 35.

⁷⁵ Coordinating Ministry for Maritime Affairs of the Republic of Indonesia, ‘Indonesia Leads the Establishment of a Regional Cooperation to Combat Crimes in Fisheries Sector’(n 17).

⁷⁶ Law No. 31 of 2004 (n 37) art 35.

e) Fishing vessel without registration

The Fisheries Law Article 96 states that “every person who operates a fishing vessel in Indonesian FMAs without registering it is penalised with imprisonment of a maximum of one year and a maximum fine of Rp.800 million [approximately €48,000]”. The registration of fishing vessels is required by Article 36 of the 2004 Fisheries Law. The registration of Indonesian-flagged vessels needs to be accompanied by supporting items, including i) proof of ownership, ii) identity of the owner and iii) certificate of measurement.⁷⁷ For vessels that are purchased or obtained abroad, which are already registered in the country of origin, the application for registration must also include a certificate of deletion of vessels.⁷⁸

f) Provisions on reasonable bonds and limitation of imprisonment

In addition to criminal offences, the Fisheries Law also sets out provisions on reasonable bonds and the limitation of imprisonment. Although the Fisheries Law does not mention UNCLOS⁷⁹ in its consideration, the law seems to incorporate the provisions of UNCLOS, particularly Article 73 (2) and (3) concerning reasonable bonds and limitation of imprisonment. With regard to reasonable bonds, Article 104 of the Fisheries Law states that an application to release vessels and/or persons captured for carrying out criminal offences in the Indonesian FMAs can be made any time before the verdict by the fisheries court is delivered, through submitting the sum of a reasonable bond that is determined by the fisheries court. In its explanation, the Fisheries Law further elaborates that a sum of a reasonable bond is determined based on the value of the vessel, its equipment and the proceeds of the activity conducted, on top of the amount of the maximum fine for the respective criminal offence. When the bond posted by the Indonesian fisheries court is not reasonable, in principle under Article 291 UNCLOS, the flag state or the private party acting on its behalf can contest its reasonableness before a court or a tribunal agreed by both parties.

⁷⁷ *ibid* art 36 (2).

⁷⁸ *ibid* art 36 (3).

⁷⁹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 71 (UNCLOS).

So far as the limitation of imprisonment is concerned, Article 102 of the Fisheries Law states that the criminal provisions in the Fisheries Law are not applicable to a criminal offence in the EEZ of Indonesia unless there is a prior agreement between Indonesia and the relevant states. This provision is in line with Article 73 (3) of UNCLOS where imprisonment and other corporal punishment is excluded for violations in the EEZ, in the absence of agreements by the states concerned.

Criminal enforcement is an important part of Indonesia’s efforts in addressing IUU fishing. From 2015 until 30 April 2018, there had been 684 cases of fisheries criminal offences where 247 cases (36% of total cases) occurred in the EEZ. Of those 247 cases, most of the illicit conduct was carried out by Vietnamese vessels (151 cases), and the rest by the Philippines (38 cases), Malaysia (25 cases), Indonesia (25 cases), Thailand (5 cases) and Timor-Leste (1 case) (See Figure 3).⁸⁰ Further, of the 247 cases, 223 cases (89% of total cases) had been brought before the fisheries court, and 141 cases (63% of total cases) had received final and binding decisions.

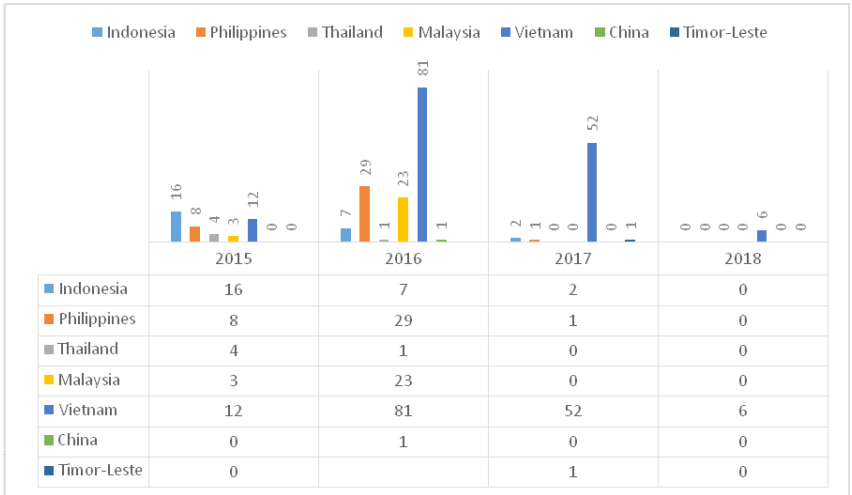


Figure 3. Source: Sherief Maronie⁶⁷⁷

⁸⁰ Sherief Maronie, ‘Telaah Penegakan Hukum Tindak Pidana Perikanan Di Wilayah Perairan Zona Ekonomi Eksklusif Indonesia’ [Analysis of Law Enforcement against Fisheries Criminal Offences in the Indonesian Exclusive Economic Zone] (2018) 5 <[http://kkp.go.id/an-component/media/upload-gambar-pendukung/djpdspkp/Penegakan Hukum TPP di Wilayah ZEEI \(11 Mei 18\).pdf](http://kkp.go.id/an-component/media/upload-gambar-pendukung/djpdspkp/Penegakan_Hukum_TPP_di_Wilayah_ZEEI_(11_Mei_18).pdf)> accessed 19 June 2018.

⁸¹ ibid 3-5.

The legal basis for enforcement action against fisheries criminal offences can be found under the Fisheries Law. Under the Fisheries Law, enforcement is acknowledged to hold a significant and strategic role in supporting sustainable fisheries development.⁸² In achieving that role, the Fisheries Law regulates different stages of law enforcement which covers investigation, prosecution and adjudication, which will be elaborated below.

a. Investigation of Fisheries Criminal Offences

Under the Fisheries Law, the enforcement powers lie in the hand of government institutions, i.e. the MMAF, the navy, the police, and also the provincial and district governments. The Fisheries Law introduced its own specific rules of procedure to deal with fisheries cases. In its rules of procedure, the Fisheries Law states that the powers to investigate fisheries-related cases are in the hand of civil servant investigators (*Penyidik Pegawai Negeri Sipil/PPNS*), navy investigators and police investigators.⁸³ In the past, criminal offences were only investigated by the police and the navy. However, the inclusion of the PPNS was then considered necessary to supplement the lack of knowledge of police and navy officers relating to fisheries-related offences. Although the PPNS is given investigatory powers under the Fisheries Law, in undertaking the investigation the PPNS is still under the coordination and supervision of a police investigator.⁸⁴ When a PPNS official conducts the investigation, that official should keep the police investigator informed of progress and of the result.⁸⁵ In addition, the PPNS also has to coordinate with the navy investigator when the offence is conducted in the EEZ.⁸⁶

The Fisheries Law states that the PPNS, the navy and the police investigators have the right to investigate criminal offences in fisheries in the Indonesian FMAs.⁸⁷ For offences in the EEZ, the Fisheries Law

⁸² Law No. 45 of 2009 (n 37) para 4.

⁸³ *ibid* art 73.

⁸⁴ Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 tentang Hukum Acara Pidana [Law No. 8 of 1981 on Criminal Procedure Law] art 7(2).

⁸⁵ Puteri Hikmawati, '*Permasalahan Hukum dalam Penyidikan Tindak Pidana di Bidang Perikanan*' [Legal Issues in the Investigation of Criminal Offenses in the Field of Fishery] (2016) 3(1) *Negara Hukum* 77, 83.

⁸⁶ Law No. 45 of 2009 (n 37) elucidation of art 73 (2).

⁸⁷ *ibid* art 73 (1).

gives investigation powers to the PPNS and the navy investigators.⁸⁸ Meanwhile, for offences occurring in Indonesian ports, the PPNS has the primary authority to conduct an investigation.⁸⁹ All investigators have the same authority as provided by Article 73A, namely to i) receive reports or information from the public regarding criminal offences in fisheries, ii) summon suspects and/or witnesses for their testimonies, iii) stop, check, arrest, impound and/or seize vessels and/or persons who are suspected of conducting criminal offences in fisheries, iv) check the validity of documents, v) seize the evidence used in the activity and/or the proceeds from the criminal offence, and vi) stop the investigation.⁹⁰

To support an investigation, the Fisheries Law provides investigators with the right to arrest a suspect for a maximum of 20 days, which can be extended by the prosecutor for up to an additional ten days.⁹¹ After 30 days, the investigator must release the suspect in the name of the law.⁹² The investigator has to inform the prosecutor within seven days of the commencement of the investigation.⁹³ The results of the investigation have to be submitted to the prosecutor within 30 days.⁹⁴ Once the investigation is complete, the investigator should provide a report to the prosecutor for formal prosecution.

b. Prosecution of Fisheries Criminal Offences

The prosecution of a fisheries criminal offence is conducted by a prosecutor with specific qualifications, namely i) has a minimum of two years of experience as a prosecutor, ii) has passed the education and technical training in the field of fisheries, and iii) has high competence and moral integrity.⁹⁵ The prosecutor has the authority to arrest a suspect for 120 days if he/she considers it is necessary, and the arrest can be extended for another ten days with the consent of

⁸⁸ *ibid* art 73 (2).

⁸⁹ *ibid* art 73 (3).

⁹⁰ *ibid* art 73A.

⁹¹ *ibid* art 73B (2).

⁹² *ibid* art 73B (3).

⁹³ *ibid* art 73B (1).

⁹⁴ *ibid* art 73B (6).

⁹⁵ *ibid* art 75.

the head of the district court.⁹⁶ When the prosecutor has declared that the results of the investigation are complete, the prosecutor must file criminal charges against the defendant with the court within ten days.⁹⁷

c. Adjudication of Fisheries Criminal Offences

The Fisheries Law makes provision for the establishment of a fisheries court to review, adjudicate and deliver a verdict on fisheries criminal offences committed by either Indonesian or foreign citizens.⁹⁸ The idea of the court's establishment was based on the motivation to overcome the inadequacy of the existing judicial system in dealing with fisheries offences.⁹⁹ The fisheries court is set up as one of the specialised courts (along with other courts such as the Human Rights Court, the Children Court, the Criminal Corruption Court and the Business Court)¹⁰⁰ under the framework of the general court.¹⁰¹ Indonesia currently has ten fisheries courts spread throughout the country. The first fisheries courts were established in 2004 in Jakarta Utara, Medan, Pontianak, Bitung and Tual.¹⁰² In 2010, two more fisheries courts were established in Tanjung Pinang and Ranai,¹⁰³ and in 2014 Indonesia established three additional fisheries courts in Ambon, Sorong and Merauke.¹⁰⁴ These fisheries courts were established mainly

⁹⁶ *ibid* art 76(6) and (7).

⁹⁷ *ibid* art 76(5).

⁹⁸ *ibid* art 71A.

⁹⁹ Ajarotni Nasution, Mugiyati and Sutriya, *Analisis Dan Evaluasi Hukum Tentang Pengadilan Perikanan* [Analysis and Evaluation of Law of Fisheries Court] (Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM 2007) 2.

¹⁰⁰ Jimly Asshiddiqie, 'Pengadilan Khusus' [Special Court] in Hermansyah, and others (eds), *Putih Hitam Pengadilan Khusus* [White and Black of Special Courts] (Sekretariat Jenderal Komisi Yudisial Republik Indonesia 2013).

¹⁰¹ Law No. 45 of 2009 (n 37) art 71(2).

¹⁰² *ibid* art 71(3).

¹⁰³ Keputusan Presiden Republik Indonesia Nomor 15 Tahun 2010 tentang Pembentukan Pengadilan Perikanan pada Pengadilan Negeri Tanjung Pinang dan Pengadilan Negeri Ranai [Presidential Decree No. 15 of 2010 on the Establishment of Fisheries Court in District Court of Tanjung Pinang and District Court of Ranai].

¹⁰⁴ Keputusan Presiden Republik Indonesia Nomor 6 Tahun 2014 tentang Pembentukan Pengadilan Perikanan pada Pengadilan Negeri Ambon, Pengadilan Negeri Sorong dan Pengadilan Negeri Merauke [Presidential Decree No. 6 of 2014 on the Establishment of Fisheries Court in District Court of Ambon, District Court of Sorong and District Court of Merauke].

in areas where high numbers of IUU fishing activities were to be found. Despite the vital role of fisheries courts as the main channel for settling fisheries criminal offences throughout the country, several factors hinder the full potential of the courts. A limited number of fisheries courts combined with the lack of capacity of the judges are identified as substantial impediments to the achievement of the court's objectives.¹⁰⁵

The examination of fisheries criminal offences in the court is conducted by two ad hoc judges and one career judge in a fisheries court.¹⁰⁶ The examination can be carried out in the absence of the defendant. In each instance (district, appeal and supreme courts), the judges also have the authority to arrest the defendants for 20 days¹⁰⁷ which can be extended by a further 10 days with the consent of the head of the court of each instance.¹⁰⁸ The judges are limited to 30 days in which to deliver a verdict in the court each instance.¹⁰⁹

4.2.3 Indonesia and International Fisheries Instruments

Indonesia is a party to several international fisheries instruments such as the UNCLOS,¹¹⁰ the UNFSA¹¹¹ and, the most recent, the

¹⁰⁵ Afrianto Sagita and Yosua Hamonangan Sihombing, 'Optimalisasi Pengadilan Perikanan Dalam Penegakan Hukum Tindak Pidana Perikanan Di Perairan Indonesia' [The Optimisation of Fishery Court as Fishery Crimes Law Enforcement in Indonesia Territorial Sea] (2017) 6(2) Hukum dan Peradilan 213.

¹⁰⁶ Law No. 31 of 2004 (n 37) art 78.

¹⁰⁷ *ibid* art 81(1), 82(2), 83(2).

¹⁰⁸ *ibid* art 81(2), 82(3), and 83(3).

¹⁰⁹ *ibid* art 80(1), 82(1), and 83(1).

¹¹⁰ *Undang-Undang Republik Indonesia Nomor 17 Tahun 1985 tentang Pengesahan United Nations Convention on the Law of the Sea (Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut)* [Law Number 17 of 1985 on the Ratification of the United Nations Convention on the Law of the Sea].

¹¹¹ *Undang-Undang Republik Indonesia Nomor 21 Tahun 2009 tentang Pengesahan 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 Stocks (Persetujuan Pelaksanaan Ketentuan-Ketentuan Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut tanggal 10 Desember 1982 yang Berkaitan dengan Konservasi dan Pengelolaan Sediaan Ikan yang Beruaya Terbatas dan Sediaan Ikan yang Beruaya Jauh)* [Law Number 21 of 2009 on the Ratification of the 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

PSMA.¹¹² Indonesia, however, is still in the process of ratifying the Compliance Agreement¹¹³ and has made the process of ratification one of its action plans, although there is no indication on the timeline.¹¹⁴ With regard to the IPOA-IUU,¹¹⁵ in 2012, Indonesia published and started the implementation of its National Plan of Action to Prevent and to Combat IUU fishing (NPOA-IUU) for 2012-2016. The NPOA-IUU is the reflection of Indonesia's determination in addressing the problem of IUU fishing. It was intended as a reference point for each organisational unit of the MMAF and as a reference point for the coordination of relevant ministries/institutions in preventing and combating IUU fishing.¹¹⁶ The NPOA-IUU 2012-2016 has surpassed its intended period and should have been replaced by a new NPOA-IUU. However, until now, the Indonesian government has not yet published a new NPOA-IUU.¹¹⁷ In implementing these international

Management of Straddling Fish Stocks and Highly Migratory Stocks]; 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 (adopted 4 August 1995, entered in force 11 December 2001) 2167 UNTS 3 (UNFSA).

¹¹² *Peraturan Presiden Nomor 43 Tahun 2016 tentang Pengesahan Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (Persetujuan tentang Ketentuan Negara Pelabuhan untuk Mencegah, Menghalangi dan Memberantas Penangkapan Ikan yang Illegal, Tidak Dilaporkan dan Tidak Diatur* [Presidential Regulation Number 43 of 2016 on the Ratification of the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing]; Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (opened for signature 22 November 2009, entered into force 5 June 2016) (PSMA).

¹¹³ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered in force 24 April 2003) 2221 UNTS (Compliance Agreement).

¹¹⁴ MMAF, 'Indonesia National Plan of Action to Prevent and to Combat Illegal, Unreported, and Unregulated Fishing' (adopted by Ministry of Marine Affairs and Fisheries Decree Number KEP.50/MEN/2012) (Indonesia NPOA-IUU) (2012) 21 <<http://extwprlegs1.fao.org/docs/pdf/ins165159.pdf>> accessed 20 April 2018.

¹¹⁵ FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2001) (adopted 2 March 2001, endorsed 23 June 2001) (IPOA-IUU).

¹¹⁶ *ibid* 3.

¹¹⁷ Based on informal communication with an official from the Directorate of Law of the MMAF, it appears that the new draft is still under preparation. However, there is no fixed indication when the draft will be finalised.

instruments and obligations, Indonesia does not enact a specific law for the implementation of each international instrument. Instead, the country transposed the obligations of the international instruments into the national laws as can be seen mainly from the Fisheries Law. The following sections 4.3.2.1. to 4.2.3.3. will explain how Indonesia implements international fisheries obligations related to coastal state, flag state, and port state.

4.2.3.1 Indonesia and Coastal State Obligations

4.2.3.1.1 Monitoring, Control and Surveillance

In terms of Monitoring, Control and Surveillance (MCS) of fishing activities, the Indonesian government has put in place several measures. Indonesia requires every vessel above 30GT, which operates in Indonesian FMAs and on the high seas, to install a *Sistem Pemantauan Kapal Perikanan/SPKP* [Fishing Vessel Monitoring System]¹¹⁸ through a transmitter before fisheries activities start.¹¹⁹ The transmitter must be activated and can be monitored by the *Pusat Pemantauan Kapal Perikanan/PPKP* [Fishing Vessel Monitoring Control].¹²⁰ A fishing vessel that has activated the SPKP transmitter and is monitored by the PPKP will be issued with a *Surat Keterangan Aktivasi Transmitter/SKAT* [Certificate of Transmitter Activation].¹²¹ The user of an SPKP is obliged to activate the transmitter continuously and hold the original SKAT when conducting fishing activities.¹²² Failure to do so will result in an administrative sanction in the form of a warning, a freezing of the SKAT and, finally, the revocation of the SKAT.¹²³ A

¹¹⁸ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 42/PERMEN-KP/2015 tentang Sistem Pemantauan Kapal Perikanan* [MMAF Regulation No. 41/PERMEN-KP/2015 on Fishing Vessel Monitoring System]. Art 1(1) defines SPKP as one of the fishing surveillance systems using pre-determined tools to identify the movement and activities of fishing vessels.

¹¹⁹ *ibid* art 12. Art 1(3) defines SPKP Transmitter as a tool installed and activated on a certain fishing vessel which purpose is to send data on vessel position and other data directly to the PPKP with the assistance of satellite network to implement SPKP.

¹²⁰ *ibid* art 15(1).

¹²¹ *ibid* art 15(2). Art 1(7) defines SKAT as a written document stating that a VMS transmitter in a fishing vessel has been installed, activated and can be monitored by the Fishing Vessel Monitoring Centre; art 15 (2).

¹²² *ibid* art 22 (2).

¹²³ *ibid* art 23 (1).

warning is valid for a maximum of two days.¹²⁴ If, after two days, the user of the SPKP does not implement his/her obligation, then the SKAT will be suspended for 14 days.¹²⁵ Following the suspension, the SKAT will be revoked if the user of the SPKP still has not implemented his/her obligation.¹²⁶

In supporting the MCS efforts, the Indonesian government also requires the vessel's owner or the company's officials who wants to apply for SIPI to sign a statement that they are able to receive, assist, and keep safe an observer/officer for fishing vessels above 30GT.¹²⁷ The same requirement also applies to an application for SIKPI,¹²⁸ to an extension for SIPI and SIKPI,¹²⁹ and to transshipment activity.¹³⁰ An observer is an officer with the role of conducting observation and measurements, and recording and reporting fishing activity and transshipment.¹³¹ In 2015, there were 403 observers throughout the Indonesian islands with the following distribution: 56 observers in Sumatra, 157 observers in Java, 2 observers in Kalimantan, 65 observers in Sulawesi, 93 observers in Ambon, 18 observers in Bali and Nusa Tenggara, and 12 observers in Papua.¹³² The problem of compliance by fishing companies with the obligation to have observers on their vessels is clear. In 2012-2014, only 82 observers were working, which reveals the low compliance with the requirement to have observers on board.¹³³

¹²⁴ *ibid* art 23 (2).

¹²⁵ *ibid* art 23 (3) and (4).

¹²⁶ *ibid* art 23 (5) and (6).

¹²⁷ MMAF Regulation No. PER.30/MEN/2012 (n 59) art 19 (h)(1) .

¹²⁸ *ibid* art 24 (f)(1).

¹²⁹ *ibid* art 50 (2)(h) (2) and art 59 (2)(i)(2).

¹³⁰ *ibid* art 69 (2)(b).

¹³¹ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 1/PERMEN-KP/2013 tentang Pemantau Kapal Penangkap Ikan dan Kapal Pengangkut Ikan* [MMAF Regulation No. 1/PERMEN-KP/2013 on the Observers of Fishing Vessel and Fishing Transport Vessel] art 6.

¹³² Satya Festiani, 'Ini Kendala Observer Transshipment' [This is the Obstacles of Transshipment Observers] *Republika* (Jakarta, 18 February 2015) <<https://www.republika.co.id/berita/ekonomi/makro/15/02/18/njymau-ini-kendala-observer-transshipment>> accessed 18 June 2018.

¹³³ *ibid*.

The Fisheries Law, in supporting the MCS efforts, also gives fisheries inspectors (consisting of PPNS and non-PPNS officials) with authority to monitor the implementation of fisheries regulations.¹³⁴ In the implementation of their duties, fisheries inspection vessels can be equipped with firearms and/or other protective gear, and supported by fisheries inspection vessels.¹³⁵ The inspection vessel can stop, inspect, and arrest a vessel that is suspected of being in violation of the law and transport it to the nearest port for further inspection.¹³⁶ When there is prima facie evidence, fisheries inspectors have to provide their findings to the investigator for further action.¹³⁷

4.2.3.1.2 To Ensure No Fishing Without Authorisation

In controlling fisheries resources, the Fisheries Law requires every fishing vessel and fish carrier vessel to obtain relevant licences such as SIUP, SIPI and SIKPI. SIUP applies to every person or legal entity whose activities in fisheries involve catching, cultivating, transporting, processing and marketing.¹³⁸ SIPI applies to every person or individual whose activity is limited to catching¹³⁹ while SIKPI applies to every person or individual who owns and/or operates fish carrier vessels in the Indonesian FMAs.¹⁴⁰ The three licences are not applicable to small fishers, who are defined as every person who fishes for his/her daily needs using a fishing vessel of a maximum 5 GT.¹⁴¹ Although small fishers are not required to obtain the three licences, they are still bound to comply with the standards and regulations of the Fisheries Law. Failure to do so will result in prosecution and imprisonment or a fine as regulated by

¹³⁴ Law No. 45 of 2009 (n 37) art 66.

¹³⁵ *ibid* art 69 (2).

¹³⁶ *ibid* art 69 (3).

¹³⁷ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 17/PERMEN-KP/2014 tentang Pelaksanaan Tugas Pengawas Perikanan* [Ministry of Marine Affairs and Fisheries Regulation No. 17/PERMEN-KP/2014 on the Implementation of Fisheries Inspectors Duties] art 17.

¹³⁸ Law No. 31 of 2004 (n 37) art 26.

¹³⁹ Law No. 45 of 2009 (n 37) art 27.

¹⁴⁰ *ibid* art 28.

¹⁴¹ Law No. 31 of 2004 (n 37) art 26(2); Law No. 45 of 2009 (n 37) arts 27(5), 28(4).

Article 100B and 100C of the Fisheries Law, although both terms of imprisonment and fines are substantially lower than those for the users of vessels above 5GT.¹⁴²

4.2.3.1.3 Avoidance of Issuing Licences to Vessels with IUU Fishing History

Indonesia's efforts to avoid the issue of licences to vessels with an IUU fishing history are reflected in several measures. In issuing SIPI or SIKPI, Indonesia requires the vessel's owner or the company's officials who wants to apply for SIPI or SIKPI to sign a statement that their vessels are not listed in the IUU vessel list.¹⁴³ The government also requires the holders of SIUP, SIPI and SIKPI to participate in preventing and eliminating IUU fishing through providing a report on IUU fishing activities to the fisheries surveillance officers.¹⁴⁴ The Indonesian government also extends the requirements of not using IUU fishing vessels, not only to the issue of a licence but also to the procurement of the fishing vessel itself. The procurement of a used fishing vessel can only be given if the application is accompanied by a statement that the vessel is not on the IUU vessel list.¹⁴⁵

¹⁴² Law No. 45 of 2009 (n 37) art 100B states that in the case of criminal offense referred in Article 8, 9, 14 (4), 16 (1), 20 (3), 21, 23 (1), 26 (1), 27 (1), 27 (3), 28 (1), 28 (3), 35 (1), 36 (1), 38, 42 (3), or 55 (1), which is conducted by a small fisherman and/or small cultivator, he/she is punished with imprisonment of a maximum of 1 year or a fine of a maximum 250 million rupiah (approximately €15,000). Meanwhile Art 100C states that in the case of a criminal offence referred to in Article 7 (2), which is conducted by a small fisherman and/or small cultivator, he/she is punished with a fine of a maximum of 100 million rupiah (approximately €6,000).

¹⁴³ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 26/PERMEN-KP/2013 tentang Perubahan atas Peraturan Menteri Kelautan dan Perikanan Nomor PER.30/MEN/2012 tentang Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia* [Ministry of Marine Affairs and Fisheries Regulation Number 26/PERMEN-KP/2013 on the Amendment on the Regulation of the Minister of Marine Affairs and Fisheries Number PER.30/MEN/2012 on Capture Fisheries Business in the Republic of Indonesia Fisheries Management Areas 2014] (MMAF Regulation No. 26/PERMEN-KP/2013) art 19(1)(g)(7); 24(1)(e)(7).

¹⁴⁴ MMAF Regulation No. PER.30/MEN/2012 (n 59) art 84.

¹⁴⁵ *ibid* art 32(1)(f).

4.2.3.1.4 Indonesia's Challenges in Implementing Coastal State Obligations

In implementing coastal state obligations, Indonesia has enacted different regulations to support the MCS activities and as regards fisheries licences. The problems of Indonesia arguably do not lie in the regulations, as there are different regulations for each obligation; instead, they lie in implementation. Regarding the MCS, for example, in 2019 Indonesia only had 292 fisheries inspectors with 369 crews and 133 fisheries inspection vessels.¹⁴⁶ It is acknowledged that limited number of personnel and vessels is insufficient to cover the broad area of the country's waters.¹⁴⁷ Another problem is the low compliance of the fishing companies with the requirement to have fisheries observers on board, as explained above. The inadequate MCS resources, as in the case of fisheries inspectors, arguably contribute to the low compliance by fishing companies. Thus, more investment in both personnel and equipment is needed to ensure that the fisheries inspectors' work is more effective. So far as fishing licences are concerned, Indonesia's regulations have required fishing vessels to obtain necessary licences and have aimed to avoid licensing vessels with IUU fishing history. Again, the problem is in implementation. The practices of forged licences and of collusion with corrupt officials often result in illegal licences being used in IUU fishing activities.

4.2.3.2 Indonesia and Flag State Obligations

4.2.3.2.1 Fishing Vessel Registration

With regard to a vessel's registration, Indonesia regulated the matter generally under the Fisheries Law and MMAF Regulation No. PER.23/MEN/2013 on Registration and Marking of Fishing Vessels.¹⁴⁸ The Fisheries Law under Article 36 requires Indonesian

¹⁴⁶ Direktorat Jenderal PSDKP, 'Refleksi 2019 & Outlook 2020' [Reflection 2019 & Outlook 2020] [MMAF 2020] 11-12 <<https://kkp.go.id/an-component/media/upload-gambar-pendukung/Ditjen%20PSDKP/Humas%20PSDKP/Refleksi%202019%20Outlook%202020%20Diten%20PSDKP.pdf>> accessed 12 November 2020.

¹⁴⁷ Singgih Prihadi Aji, Budi H. Iskandar and Fis Purwangka, '*Intensitas Kerja Pengawas Perikanan Pada Aktivitas Patroli Laut Pnegawasan Sumber Daya Kelautan Dan Perikanan Di Jakarta*' [Work Intensity of Fisheries Inspector on Marine and Fisheries Surveillance Patrols in Jakarta] (2017) 7(2) *Jurnal Teknologi Perikanan dan Kelautan* 163.

¹⁴⁸ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor*

fishing vessels that operate in Indonesian FMAs and on the high seas to be registered as an Indonesian fishing vessel.¹⁴⁹ The registration should be supplemented with proof of ownership, the identity of the owner and certificate of vessel measurement.¹⁵⁰ For vessels that are purchased or obtained (including rentals or grants) abroad, the application for registration must also include a certificate of deletion of vessels issued by the country of origin.¹⁵¹ The registration of vessels is carried out by different authorities as set out in MMAF Regulation No. PER.23/MEN/2013. For vessels above 30GT, registration is under the authority of the Director-General of Capture Fisheries of the MMAF. For vessels from 10GT to 30 GT, registration is under the authority of the Governor in each province. For vessels up to 10GT, registration is under the authority of a Regent/Mayor.¹⁵² The Fisheries Law further imposes criminal sanctions for an unregistered vessel with imprisonment of a maximum of 1 year and a maximum fine of Rp.800 million (approximately €48,000).¹⁵³

4.2.3.2 Record of Fishing Vessel

The record of fishing vessels is maintained in the Fishing Vessel Book (*Buku Kapal Perikanan*). The book contains information on fishing vessel registration, such as fishing vessel data and identity of ownership as well as changes to the fishing vessel's documents and the fishing vessel's body.¹⁵⁴ Changes to the fishing vessel's documents and body in the Fishing Vessel Book can be made through an application to the Director-General of Capture Fisheries of the MMAF.¹⁵⁵

23/PERMEN-KP/2013 tentang Pendaftaran dan Penandaan Kapal Perikanan [Ministry of Marine Affairs and Fisheries Regulation No. 23/PERMEN-KP/2013 on Registration and Marking of Fishing Vessels] (MMAF Regulation No. 23/PERMEN-KP/2013).

¹⁴⁹ Law No. 45 of 2009 (n 37) art 36(1).

¹⁵⁰ *ibid* art 36(2).

¹⁵¹ *ibid* art 36(3).

¹⁵² MMAF Regulation No.23/PERMEN-KP/2013 (n 148) art 3.

¹⁵³ Law No. 31 of 2004 (n 37) art 96.

¹⁵⁴ MMAF Regulation No.23/PERMEN-KP/2013 (n 148) art 1(9).

¹⁵⁵ *ibid* art 11.

4.2.3.2.3 Authorisation to Fish

Indonesia regulates the authorisation to fish through MMAF Regulation Number PER.12/MEN/2012 on High Seas Fishing Business. Every person who conducts a fisheries capture business on the high seas is required to own the relevant fisheries capture licences, such as SIUP, SIPI, and SIKPI. The licences are also required for fishing in the Indonesian FMAs. Every Indonesian vessel that operates on the high seas is required to comply with the requirements and/or international standards established by relevant RFMOs.¹⁵⁶ Any vessel that does not comply with those requirements and/or standards will be categorised as conducting IUU fishing and put into the IUU vessel list under one of three types of classifications:¹⁵⁷ i) Draft IUU Vessel List with administrative sanctions in the form of a warning;¹⁵⁸ ii) Provisional IUU Vessel List with administrative sanctions in the form of a suspension of the SIPI or SIKPI for two months; and¹⁵⁹ iii) IUU Vessel List with administrative in the form of suspension of the SIPI or SIKPI for three months.¹⁶⁰ When a vessel does not have any grounds for being removed from the IUU Vessel List, its SIPI or SIKPI will be revoked.¹⁶¹

4.2.3.2.4 Indonesia's Challenges in Implementing Flag State Obligations

Under the flag state obligations, Indonesia has adopted a vessel registration, record of vessels and licensing system for fishing vessels which ensure that only those vessels that comply with those regulations are allowed to fish on the high seas. Despite the established regulations, the implementation tells a different story. Fishing vessel registration has not been equally efficient throughout Indonesia.¹⁶²

¹⁵⁶ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor PER.12/MEN/2012 tentang Usaha Perikanan Tangkap di Laut Lepas* [MMAF Regulation No. PER.12/MEN/2012 on High Seas Fishing Business] art 32(1).

¹⁵⁷ *ibid* art 32(3).

¹⁵⁸ *ibid* art 33.

¹⁵⁹ *ibid* art 34.

¹⁶⁰ *ibid* art 35.

¹⁶¹ *ibid* art 35 (5).

¹⁶² MMAF, 'KKP Sederhanakan Proses Pendaftaran Kapal Perikanan' [KKP simplifies Fishing Vessel Registration Process] (KKP News ,5 September 2016) <<http://news.kkp.go.id/index.php/kkp-sederhanakan-proses-pendaftaran-kapal->

However, the government has tried to ease the process, for example, through the establishment of regional offices for fishing vessel registration.¹⁶³ The unavailability of the requisite documents for fishing vessel registration, such as certificate of measurement of the vessel¹⁶⁴ and certificate of ownership,¹⁶⁵ has been one of the main factors for the delay in fishing vessel registration along with a lack of awareness on the part of fishing vessel owners.¹⁶⁶ The delay in fishing vessel registration will also impact the issue of the Fishing Vessel Book since vessel registration is one of its requirements. In addition to the long process of obtaining vessel registration and the Fishing Vessel Book, forgery of a vessel's documents is still a common practice in Indonesia, and it can also be found in IUU fishing vessels in Indonesia.¹⁶⁷ IUU fishing vessels have been found to use forged documents in their operation to deceive law enforcement authorities. Forgery can also be found in fishing licences where it is often linked with corrupt officials who have authority to issue licences. In addressing these problems, Indonesia needs to focus more on: providing more vessel documents processing offices; raising awareness of the importance of having proper documents; enhancing the control of forged documents and licenses; and eliminating corrupt practices.

perikanan/> accessed 16 June 2018.

¹⁶³ Rahayu Subekti, '*KKP Komit Permudah Pengurusan Dokumen Kapal Ikan*' [KKP Commits to Ease Fishing Vessel Document] *Republika* (10 March 2018) <<https://www.republika.co.id/berita/nasional/daerah/18/03/10/p5c5cq313-kkp-komit-permudah-pengurusan-dokumen-kapal-ikan>> accessed 17 June 2018.

¹⁶⁴ MMAF '*KKP Sederhanakan Proses Pendaftaran Kapal Perikanan*' (n 162).

¹⁶⁵ Subekti '*KKP Komit Permudah Pengurusan Dokumen Kapal Ikan*' (n 163).

¹⁶⁶ Ministry of Transportation, '*Kemenhub Kirim Ahli Ukur Kapal Ikan Ke Pelabuhan Tegal*' [Ministry of Transportation sends Experts of Measuring Fishing Vessel to Tegal Port] Ministry of Transportation (Ministry of Transportation, 5 July 2017) <<http://www.dephub.go.id/post/read/kemenhub-kirim-ahli-ukur-kapal-ikan-ke-pelabuhan-tegal>> accessed 17 June 2018.

¹⁶⁷ Achmad Poernomo, Purwanto and Ahmadi, 'Combating Illegal, Unreported and Unregulated (IUU) Fishing to Attain Food Security and Alleviate Poverty: Initiative of Indonesia' (2011) 9(2) *Fish for People* <http://repository.seafdec.org/bitstream/handle/20.500.12066/860/sp9-2_combating_iuu.pdf?sequence=1> accessed 18 June 2018.

4.2.3.3 Indonesia and Port State Measures

4.2.3.3.1 Entry into Port

The commitment of Indonesia to implementing port state measures is reflected in the country's related regulations and its ratification of the PSMA in 2016.¹⁶⁸ In implementing its obligations on port state measures, Indonesia has designated five fishing ports where vessels may request entry, i.e., Nizam Zachman (Jakarta), Samudera Bungus (West Sumatra), Samudera Bitung (North Sulawesi), Pelabuhan Ratu (West Java) and Nusantara Ambon (Maluku).¹⁶⁹ These ports have been designated to receive and inspect foreign vessels that want to enter Indonesian ports, as required by Article 7 of the PSMA. MMAF Regulation No.3/PERMEN-KP/2013 on Harbourmaster in Fisheries Ports regulates general matters regarding the entry and inspection of vessels in Indonesian ports.¹⁷⁰ The entry (and departure) of vessels into ports are managed by the Harbourmaster; foreign vessels are obliged to notify the Harbourmaster 48 hours before their entry, whilst Indonesian vessels must give two hours notification prior to entry.¹⁷¹ The vessel's captain, after arriving in the port, is required to provide the vessel's documents to the Harbourmaster to be inspected, including SIPI or SIKPI, logbook, certificate of measurement, and the seamen's book.¹⁷² The MMAF regulation further specifies that foreign vessels which enter or depart the port area must follow the provisions of port state measures.¹⁷³

4.2.3.3.2 Inspections and Follow-up Actions

The Harbourmaster, in the inspection of foreign vessels, is

¹⁶⁸ For further analysis on laws and conditions of Indonesian ports see Melda Kamil Ariadno, Arie Afiansyah and Yetty Komalasari Dewi, 'Port Readiness in Facing Globalization' (2014) 2 Indonesia Law Review 297.

¹⁶⁹ Pandaya, 'Finally, a Game Changer Against Illegal Fishing' Jakarta Post (Rome, 11 August 2016) < <https://www.thejakartapost.com/academia/2016/08/11/finally-a-game-changer-against-illegal-fishing.html> > accessed 17 June 2018.

¹⁷⁰ *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 3/PERMEN-KP/2013 tentang Kesyahbandaran di Pelabuhan Perikanan* [Ministry of Marine Affairs and Fisheries No. 3/PERMEN-KP/2013 on Harbourmaster in Fisheries Ports.

¹⁷¹ *ibid* arts 6(2), 9(3).

¹⁷² *ibid* art 6(5).

¹⁷³ *ibid* art 36.

required to fill in a special form with specific information such as vessel and owner's identity, the status of the vessel in the IUU vessel list, and transshipment authorisations which are also required by the PSMA.¹⁷⁴ In order to be qualified to carry out the inspection, the Harbourmaster has to pass the education and training in the field of fishing vessel inspection and fishing gear.¹⁷⁵ After inspection of the vessel, if there are clear grounds for believing that a vessel has engaged in IUU fishing, the PSMA requires the port state to promptly notify relevant states, RFMOs and other international organisations on the details of the findings.¹⁷⁶ However, Indonesia, in its regulations, does not have specific provisions on the notifications to relevant parties.

4.2.3.3.3 Indonesia's Challenges in Implementing Port State Obligations

In the implementation of port state obligations, although Indonesia has ratified the PSMA, the country has not yet enacted specific regulations to implement it. The existing regulations are not sufficient to implement the specific port state obligations found in the PSMA. Requirements on the notification of inspection and the use of ports, for example, are lacking in the current regulations. Thus, Indonesia needs to enact specific regulations in line with the requirements found in the PSMA. A lack of both resources and competence can also be problematic for Indonesia in complying with its port state obligations. For example, there were only 139 Harbourmasters in 2016, distributed between 109 fishing ports throughout Indonesia (only 13.3% of the 816 total ports).¹⁷⁷ The low number of Harbourmasters contributes to the low level of inspections which may harm the country's efforts in implementing its port state obligations.

¹⁷⁴ *ibid* annex xiii.

¹⁷⁵ *ibid* art 4(1).

¹⁷⁶ PSMA (n 163) art 18.

¹⁷⁷ MMAF, 'Cegah IUU Fishing, KKP Butuh Banyak Syahbandar Perikanan' [Prevent IUU Fishing, KKP needs more Fisheries Harbourmaster] (MMAF, 17 March 2016) <https://kkp.go.id/djpt/artikel/2768-cegah-iuu-fishing-kkp-butuh-banyak-syahbandar-perikanan> accessed 22 June 2018.

4.3 Vietnam Case Study

4.3.1. IUU Fishing in Vietnam

IUU fishing causes significant economic and environmental harms to Vietnam.¹⁷⁸ It is estimated that IUU fishing in the Vietnamese EEZ costs the country between US\$ 669.61 million (approximately €602 million) and US\$1.8 billion (approximately €1.62 billion).¹⁷⁹ It is estimated that Vietnam's IUU catches represented on average between 501,103 and 1,377,792 tonnes per year where illegal catches contributes 23-71% and unreported catches contributes 10-20%.¹⁸⁰ IUU fishing also contributes to the destruction of the marine environment. Many IUU fishers in Vietnam still use illegal fishing methods, such as explosives and chemicals, which harm the environment and particularly damaging to the coral reef.¹⁸¹

In Vietnam, there are two main types of activities related to IUU fishing. The first is IUU fishing which is conducted by national vessels and foreign vessels in the country's waters. The second is IUU fishing which is carried out by its nationals in foreign waters. The risks of IUU fishing in Vietnam's waters, as reported by MRAG in 2015, are high and pervasive.¹⁸² The report highlighted that there is a high risk, and it is likely, that IUU fishing has been carried out by national and foreign vessels. IUU fishing by national vessels is estimated to be between 5-30% targeting shrimp, cuttlefish and mixed demersal fish.¹⁸³ IUU fishing by foreign vessels, mainly Chinese vessels, has been identified as almost certain to have a profound impact, taking into account the industrial vessels involved in the illegal operation.¹⁸⁴ Besides Chinese vessels, other foreign

¹⁷⁸ Bay of Bengal Large Marine Ecosystem (BOBLME), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries in Asia' (FAO/BOBLME Secretariat, 2015) 386 < <https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-fishing-developing-countries-asia> accessed 12 June 2017.

¹⁷⁹ *ibid* 390.

¹⁸⁰ *ibid*.

¹⁸¹ Robert Pomeroy, Kim Anh Thi Nguyen and Ha Xuan Thong, 'Small-Scale Marine Fisheries Policy in Vietnam' (2009) 33(2) *Marine Policy* 419, 427.

¹⁸² BOBLME (n 178) 383–385.

¹⁸³ *ibid* (n 178) 386.

¹⁸⁴ *ibid* 385.

vessels are also operating illegally in Vietnam's waters. Thai vessels, for example, have been known to fish off the coasts of South Vietnam since 1964.¹⁸⁵ These foreign vessels can be more than 25 metres in length with an engine of more than 200 HP.¹⁸⁶ It is estimated that around 300-500 foreign vessels fish illegally in Vietnamese waters every year.¹⁸⁷ These vessels are active offshore during the day and inshore during the night.¹⁸⁸

In addition to IUU fishing in its waters, Vietnam has the problem of IUU fishing by its nationals in foreign waters, such IUU fishing boats sometimes being referred to as "blue boats" (since their colour is predominantly blue). The head of the Vietnamese delegation to the annual meeting of the Western and Central Pacific Fisheries Commission (WCPFC) in 2016, Vu Duyen Hai, stated that "blue boats" are estimated to total 105,000 in number.¹⁸⁹ He stated that he was aware of the "blue boats" operation but was unsure whether they were Vietnamese vessels or were Vietnamese flagged.¹⁹⁰ He further stated that since "blue boats" are not equipped with GPS, they follow the fish and unintentionally enter the EEZ of other countries.¹⁹¹ The "blue boats" cross-border operation is not only detected in the waters surrounding Vietnam's borders but also reaches the Pacific waters.

¹⁸⁵ Lydia Teh and others, 'Reconstructing Vietnam's Marine Fisheries Catch, 1950-2010' (2014) Fisheries Centre The University of British Columbia Working Paper Series #2014-17, 7 <<http://www.seaaroundus.org/doc/publications/wp/2014/Teh-et-al-Vietnam.pdf>> accessed 4 September 2018.

¹⁸⁶ FAO, 'FAO Fishery Country Profile - The Socialist Republic of Vietnam' (2005) <<http://www.fao.org/fi/oldsite/FCP/en/VNM/profile.htm>> accessed 25 September 2018.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ Bernadette Carreon, 'The Blue Threat: Vietnamese Poachers Are Rocking The Boat In The Pacific' Pacific Note (10 January 2017) <<https://www.pacificnote.com/single-post/2017/01/10/The-Blue-Threat-Vietnamese-Poachers-Are-Rocking-The-Boat-In-The-Pacific>> accessed 1 October 2018.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*



Figure 4. A depiction of typical “blue boats”

Source: Directorate of Fisheries, MARD <<https://www.fistenet.gov.vn/capture-fisheries/doc-tin/009848/2018-02-01/national-action-plan-to-prevent-and-eliminate-illegal-unreported-and-unregulated-iuu-fishing>>

The overwhelming “blue boats” operations in the waters of Pacific countries frustrated James Movic, Director-General of the Pacific Islands Forum Fisheries Agency (FFA) (an intergovernmental organisation for fisheries resources of 17 countries).¹⁹² In a March 2017 interview, Movic urged everyone to refer to “blue boats” as Vietnamese “reef robbers”.¹⁹³ Movic further emphasised that Vietnam should assume responsibility for these “reef robbers” until and unless Vietnam could demonstrate that those boats were not primarily Vietnamese boats.¹⁹⁴ Countries around the Pacific waters such as Australia, Federated States of Micronesia, New Caledonia, Papua New Guinea, Solomon Islands and Vanuatu have been impacted by the IUU fishing activities of the “blue boats” and have implemented

¹⁹² The Pacific Islands Forum Fisheries Agency (FFA) is an intergovernmental organisation which consists of 17 members, established in 1979 to assist member countries in managing their fisheries resources. FFA members are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. For more information on the FFA visit <https://www.ffa.int/>.

¹⁹³ Radio New Zealand, ‘Vietnamese “Reef Robbers” Not Blue Boats’ Radio New Zealand (31 March 2017) <<https://www.radionz.co.nz/international/programmes/datelinepacific/audio/201838723/vietnamese-’reef-robbers’-not-blue-boats-ffa>> accessed 30 August 2018.

¹⁹⁴ *ibid.*

robust measures against them.¹⁹⁵ New Caledonia, for example, imprisoned two Vietnamese “blue boat” captains for one year for fishing sea cucumbers and shark fins illegally in its waters. At the same time, the other 30 crew were deported back to Vietnam.¹⁹⁶ In another operation, held by the Solomon Islands in March 2017, two Vietnamese “blue boats” were captured with 43 Vietnamese crew members.¹⁹⁷ The operations of the “blue boats” in the Central and South Pacific, are assumed to involve logistic arrangements between these boats and a fleet of carriers. The carriers load the catch and provide fuel to the “blue boats” thereby allowing the boats to stay at sea for extended periods and reach destinations as far as New Caledonia.¹⁹⁸

In the waters close to Vietnam, cases of illegal Vietnamese fishing vessels (operating without a valid fishing licence) can also be found almost all over the region. Indonesia, for example, on 20 August 2018, sunk 86 Vietnamese vessels that were conducting IUU fishing activities.¹⁹⁹ The presence of Vietnamese vessels can also be found in Malaysia. It was believed by the Malaysia Maritime Enforcement Agency (MMEA) that hundreds of vessels illegally enter Malaysian waters from Tok Bali in Kelantan to Desaru in Johor, collaborating with local actors in their IUU fishing activities.²⁰⁰ The vessels were

¹⁹⁵ *ibid.*

¹⁹⁶ Radio New Zealand, ‘New Caledonia Jails Vietnamese Poachers’ Radio New Zealand (6 December 2017) <<https://www.radionz.co.nz/international/pacific-news/345578/new-caledonia-jails-vietnamese-poachers>> accessed 30 August 2018.

¹⁹⁷ Radio New Zealand, ‘Vietnamese “reef Robbers” Not Blue Boats’ (n 193).

¹⁹⁸ Francisco Blaha, ‘Illegal Fishing in the Central and South Pacific’ (2017) The Pacific Community (SPC) Fisheries Newsletter £151, 21 <https://spccfpstore1.blob.core.windows.net/digitallibrary-docs/files/49/492a618ccacb6f83dc33aba28777c7ee.pdf?sv=2015-12-11&sr=b&sig=KvapmgPF%2BQenFn7SOzD2r79OTYsPgeZ83eIzKIXQDD4%3D&se=2021-05-11T20%3A21%3A09Z&sp=r&rscc=public%2C%20max-age%3D864000%2C%20max-stale%3D86400&rsct=application%2Fpdf&rscd=inline%3B%20filename%3D%22FishNews151_21_Blaha.pdf%22> accessed 30 August 2018.

¹⁹⁹ Quy Nguyen, ‘Indonesia Sinks 86 Vietnamese Fishing Boats’ VnExpress International (24 August 2018) <<https://e.vnexpress.net/news/news/indonesia-sinks-86-vietnamese-fishing-boats-3797210.html>> accessed 30 August 2018.

²⁰⁰ Mohd Farhaan Shah, ‘Syndicate Uses “Mother Ship” and Disguised Fishing Boats to Slip through Dagnet’ The Star (*Kota Tinggi*, 5 August 2017) <<https://www.thestar.com.my/news/nation/2017/08/05/viet-trawlers-stay-one-step-ahead>>

believed to be supported by a mothership which supplied them with diesel, food and clean water since it would take more than two months for a vessel to travel from Vietnam to Johor.²⁰¹ A mothership which was possibly supporting Vietnamese vessels was also sighted in Malaysian waters on a different occasion in August 2017. It was reported that a huge mothership (there is no further information on the nationality of the mothership) was sitting in international waters while dozens of smaller boats crewed by Vietnamese fishermen, some armed with guns, encroached on Malaysian territory.²⁰² Vietnamese illegal boats were believed to be acting as a syndicate in operations with local informers and had deep pockets to pay lawyers and settle fines imposed against them.²⁰³ In November 2017, for example, the Malaysian Anti-Corruption Commission (MACC) arrested 22 individuals involved in the illegal fishing syndicate. The syndicate comprised Vietnamese nationals, including Vietnamese vessel owners and also six Malaysian civil servants, five of whom were MMEA personnel and one of whom was from the Malaysian Fisheries Department.²⁰⁴

The “blue boats” operations in the neighbouring waters and the Pacific have displayed a resemblance to certain characteristics of OCGs, such as being conducted by a structured group of three or more people, existing for a period of time, acting in concert, having the aim to commit a serious crime and to obtain financial benefits. The “blue boats” also operated transnationally, which is an essential characteristic of TOC. Thus, a typical “blue boat” transnational operation would fit the characteristics of OCGs. The use of arms, the existence of a mother ship, and the involvement of

syndicate-uses-mother-ship-and-disguised-fishing-boats-to-slip-thr/> accessed 2 October 2018.

²⁰¹ *ibid.*

²⁰² The Strait Times, ‘Vietnamese Boats Encroach Malaysian Waters in Search of Prized Sea Cucumber Loot’ *The Strait Times* (4 August 2017) <<https://www.straittimes.com/asia/se-asia/vietnamese-boats-encroach-malaysian-waters-in-search-of-prized-sea-cucumber-loot>> accessed 4 October 2018.

²⁰³ *ibid.*

²⁰⁴ Bernama, ‘MACC Nabs 22, Seizes RM1.9 Mil from Illegal Fishing Syndicate’ *Free Malaysia Today* (6 November 2017) <<https://www.freemalaysiatoday.com/category/nation/2017/11/06/macc-nabs-22-seizes-rm1-9-mil-from-illegal-fishing-syndicate/>> accessed 2 October 2018.

syndicates consisting of Vietnamese nationals and nationals of the country where the IUU fishing is being conducted have displayed the seriousness and the connection to the TOC dimensions of the illegal action, something that needs to be addressed collectively by Vietnam's government and relevant countries.

“Blue boats” that are fishing illegally in foreign waters have been confiscated, burned and even blown up in a spectacular fashion including by Indonesia, Palau and New Caledonia.²⁰⁵ These harsh actions against Vietnam's “blue boats” do not result in deterring “blue boats” from fishing illegally in foreign waters, most probably because these boats are low-cost and losing a few of them will not be enough to serve as a deterrent.²⁰⁶ The cost of a small “blue boat” with a 10-13 crew capacity is around 300 million Vietnamese Dong (approximately €11,300),²⁰⁷ while the large “blue boat” with a 16-17 crew capacity costs around 600 million Vietnamese Dong (approximately €22,600).²⁰⁸ It will cost about €10,900 to fuel a trip of 2-3 months for a larger boat.²⁰⁹ The costs of losing a boat are significantly lower than the value of the catch. A catch by a Vietnamese vessel in July 2018 in Malaysian waters, for example, was valued at RM 1 million (approximately €210,000).²¹⁰ The high value of the illegal catch and the low costs of the operation are likely to remain a significant factor for illegal Vietnamese vessels operating in foreign waters.

²⁰⁵ Blaha (n 198) 22; Rieka Rahadiana, ‘Indonesia Sinks 13 Vietnamese Boats in War on Illegal Fishing’ *Bloomberg* (5 May 2019) <<https://www.bloomberg.com/news/articles/2019-05-05/indonesia-sinks-13-vietnamese-boats-in-war-on-illegal-fishing>> accessed 10 August 2020; Elaine Kurtenbach, ‘Palau Burns Vietnamese Boats Caught Fishing Illegally’ *The Associated Press* (Tokyo, 12 June 2015) < <https://apnews.com/3f6a26d1f5cf40a19c4996753c9d615f/palau-burns-vietnamese-boats-caught-fishing-illegally>> accessed 10 August 2020; Charlie Salini, ‘Attempt to Burn Vietnamese Blue Boats Results in “Near-Death” Accident’ *Solomon Islands Broadcasting Corporation* (14 December 2017) <<http://www.sibconline.com.sb/attempt-to-burn-vietnamese-blue-boats-results-in-near-death-accident/>> accessed 10 August 2020.

²⁰⁶ Blaha (n 198) 22.

²⁰⁷ *ibid* 21.

²⁰⁸ *ibid* 22.

²⁰⁹ *ibid*.

²¹⁰ Zazali Musa, ‘MMEA Detains Vietnamese Boat for Illegal Fishing off Johor’ *The Star* (Kota Tinggi, 22 July 2018) <<https://www.thestar.com.my/news/nation/2018/07/22/mmea-detains-vietnamese-boat-for-illegal-fishing-off-johor/>> accessed 3 October 2018.

The firm actions from countries affected by illegal Vietnamese vessels have caused concerns for the Vietnamese government since it negatively affects the country's image. The Prime Minister's Official Telegram No. 732/CD-TTg of 2017 stated that, since 2010, Vietnamese line ministries and localities have implemented measures to stop and reduce Vietnamese vessels and fishers being seized by foreign countries.²¹¹ However, from late 2015 until now, violations by Vietnamese fishing vessels and fishers have been increasing, particularly from the provinces of Quang Ngai, Kien Giang, Ca Mau, Binh Dinh, Ba Ria – Vung Tau, Binh Thuan, Ben Tre, and Tien Giang, which are detrimental to the image of Vietnam's fishery exports to the international market.²¹²

4.3.1.1. Vietnam and the Idea of the Criminalisation of IUU fishing as TOC

Vietnam takes an opposite position to Indonesia on the idea of the criminalisation of IUU fishing as a TOC. During the ARF Workshop on Illegal, Unregulated and Unreported (IUU) Fishing Bali, Indonesia, 19-21 April 2016, the Vietnamese delegation emphasised that IUU fishing activity is not as dangerous as other transnational organised crimes.²¹³ Vietnam suggested that the link between IUU fishing and transnational organised crimes should be studied carefully to prevent undesirable human consequences for the economic and social aspects of the community.²¹⁴ Vietnam stated that the prevention, deterrence and elimination of IUU fishing should be undertaken through a step-by-step approach and reiterated the importance of treating fishers in the most humane manner possible.²¹⁵ On a different occasion in the S. Rajaratnam School of International Studies Workshop on ASEAN Mechanisms on Maritime Security Cooperation, 12 December 2017, it was also highlighted that Vietnam

²¹¹ Prime Minister's Official Telegram No. 732/CD-TTg on Prevention, Reduction and Stopping of Infringements by Vietnamese Fishing Vessels and Fishermen regarding Illegal Fishing in Foreign Countries' Waters 2017 para 1.

²¹² *ibid* para 2.

²¹³ 'Co-Chairs' Summary Report of ARF Workshop on Illegal, Unregulated and Unreported (IUU) Fishing' (Bali, 19-21 April 2016) para 11.

²¹⁴ *ibid*.

²¹⁵ *ibid*.

took the position that IUU fishing requires imperative responses and cooperation among concerned states.²¹⁶ However, the criminalisation of IUU fishing activities or the imposition of brutal punishment could not address the root causes of IUU fishing itself.²¹⁷ From these two events, it can be seen that Vietnam seems to disagree on the idea of the criminalisation of IUU fishing. This position can be understood by bearing in mind that a high number of illegal Vietnamese vessels are actively plundering foreign waters, and their acts could be liable under the UNTOC. Nonetheless, the criminalisation could also benefit Vietnam's fisheries sector since it would give a boost of trust for the government's commitment against IUU fishing to external parties. At the same time, it would send a strong signal to its citizens and vessel owners that IUU fishing is a serious crime that cannot be tolerated.

The characteristics of OCGs apparent in an IUU fishing operation, especially on its vessels operating abroad, has made Vietnam a suitable case study for this chapter, along with Indonesia. The following section 4.3.2. will explain how Vietnam is managing its fisheries resources, regulations and enforcement practices against IUU fishing and the implementation of international fisheries obligations, before seeing if there are gaps at the national level in addressing IUU fishing.

4.3.2. Vietnam National Regulatory and Enforcement Policy Framework

4.3.2.1. Vietnam's Fisheries Resources

Vietnam covers an area of more than 3,448,000 km² with a long coastline of 3,260 km.²¹⁸ The country has territorial waters of 226,000

²¹⁶ S. Rajaratnam School of International Studies, 'Event Report ASEAN Mechanisms on Maritime Security Cooperation' (Singapore, 26 September 2017) 16 <https://www.rsis.edu.sg/wp-content/uploads/2017/12/ER171212_ASEAN-Mechanisms-on-Maritime-Security-Cooperation_WEB.pdf> accessed 29 July 2018.

²¹⁷ *ibid.*

²¹⁸ Tuan Uyen Nguyen, 'Fisheries Country Profile: Viet Nam' (SEAFDEC, 2017) <<http://www.seafdec.org/fisheries-country-profile-viet-nam/>> accessed 28 August 2018.

km² and an EEZ of more than 1 million km²²¹⁹ with five fishing areas: the Gulf of Tonkin (shared with China), the central area of Vietnam, the south-eastern area of Vietnam, the south-west area of Vietnam (part of the Gulf of Thailand, shared with Cambodia and Thailand), and the central South China Sea.²²⁰ Vietnam divides its fishing areas into three categories: “i) the coastal area which lies between the water edge of the coastline and the coastal route, ii) the inshore area which lies between the coastal route and inshore route, and iii) the offshore area which lies between the inshore route and the outer boundary of the EEZ.”²²¹ In regulating fishing activities in these areas, the government established different vessel classifications, depending on their engine capacity, for particular fishing areas. Motor vessels of 90 Horse Power (HP) or higher can only operate in the offshore area, not in the coastal and inshore areas.²²² 20 HP up to 90 HP motor vessels must operate in inshore and offshore areas, not in the coastal area and the open sea.²²³ Motor vessels under 20 HP or non-motor vessels can only operate in the coastal area, not in the inshore and offshore areas, and the open sea.²²⁴ Vessels netting small fishes and mollusks are excluded from the limitation of capacity when they operate in coastal and inshore areas.²²⁵

The fisheries sector represents an important source of economic growth, employment, and foreign exchange for Vietnam.²²⁶ The waters of Vietnam have relatively high biodiversity with more than 2,000 fish species, of which 130 are of commercial importance.²²⁷ Among them, the most important commercial species groups are shrimp,

²¹⁹ *ibid.*

²²⁰ Thanh Viet Nguyen, Manh Hung Nguyen and Quang Le Van, ‘Is Green Growth Possible in Vietnam? The Case of Marine Capture Fisheries’ (2018) 3 *BioPhysical Economics and Resource Quality* 9, 9.

²²¹ Government’s Decree No. 33/2010/ND-CP of March 31 on the Management of Fishing Activities in Sea Areas by Vietnamese Organisations and Individuals’ art 4.

²²² *ibid* art 5(2)(a).

²²³ *ibid* art 5(2)(b).

²²⁴ *ibid* art 5(2)(c).

²²⁵ *ibid* art 5(2)(d).

²²⁶ Nguyen, Nguyen and Le Van (n 220) 9.

²²⁷ FAO, ‘FAO Fishery Country Profile - The Socialist Republic of Vietnam’ (n 186).

tuna, squid, sea bream, snapper, grouper and small pelagic.²²⁸ Overall, Vietnam's fishery resource potential is estimated at 4.2 million tonnes, of which the annual allowable catch is 1.7 million tonnes. The fisheries sector has experienced significant transformation, making Vietnam one of major exporters of fish fish products.²²⁹ The FAO report of 2020 shows that Vietnam was the seventh largest marine capture producer in the world with 3.19 million tonnes of production which also makes it the second largest marine capture producer in Southeast Asia, behind Indonesia.²³⁰ Vietnam was also the third largest exporter of fish and fish products in terms of value which accounts for 5% of the global export of fish and fish products.²³¹

Vietnam's marine fisheries are concentrated in coastal waters (more than 70% of the vessels in the country mainly operate in coastal waters, accounting for around 35% of the country's total catch)²³² resulting in over-exploitation in near-shore fisheries.²³³ The freedom of small vessels to catch fish combined with an inability to control the increasing number of vessels operating in coastal waters has contributed to the over-exploitation of fisheries resources in the area.²³⁴ The government has been trying to reduce fishing activities in the coastal area; however, due to ineffective and unclear demarcations among authorities, lack of a scientific basis for management and low investment, the results have not been satisfactory.²³⁵ The over-exploitation of near-shore fisheries has caused earnings from fishing

²²⁸ *ibid.*

²²⁹ Development Economics Research Group, University of Copenhagen and Central Institute for Economic Management, Ministry of Planning and Investment of Vietnam, 'The Fisheries Sector in Vietnam: A Strategic Economic Analysis' (2010) 12 <<http://www.ciem.org.vn/Portals/1/CIEM/Publications/2010/FishReportUoCCiem.pdf>> accessed 28 August 2018.

²³⁰ FAO, 'The State of World Fisheries and Aquaculture 2020. Sustainability in Action' (n 22) 13. Indonesia had 6.71 million tonnes of marine capture production in 2018.

²³¹ *ibid* 76.

²³² Ministry of Planning and Investment, 'Viet Nam's Voluntary National Review Report on the Implementation of the Sustainable Development Goals' (June 2018) 73 <<https://sustainabledevelopment.un.org/content/documents/16445JapanVNR2017.pdf>> accessed 14 November 2018.

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ Nguyen, Nguyen and Le Van (n 220) 8.

activities to decrease and sometimes earnings are insufficient to cover fishing costs.²³⁶

The over-exploitation of fisheries resources in coastal waters compelled the government to develop offshore fishing.²³⁷ The efforts to develop offshore fishing started in 1997 when Vietnam introduced an investment programme for offshore vessels and, in 2008, the government introduced fuel cost compensation subsidies.²³⁸ These subsidies encouraged the growth of under-developed offshore fisheries through the expansion of vessels and an increase in production.²³⁹ The government projected a need for investment of VND42.2 trillion (approximately €1.53 billion) in supporting offshore fishing.²⁴⁰ The investment is expected to come from the state budget, local government budget, and foreign support for the period of 2018-2030.²⁴¹ Out of the total investment, 46.2% will be used in the 2018-2020 period, while the rest will be used for the 2021-2030 period. This investment is expected to increase the production of offshore fishing and create jobs for 243,300 people by 2030.²⁴²

The Vietnamese government has an ambitious plan for its fisheries sector as elaborated in the Prime Minister Decision No. 1445/QĐ-TTg of 16 August 2013, on the Approval of the Master Plan on Fisheries Development through 2020 with a Vision towards 2030. The decision sets out that the fisheries sector will be industrialised by 2020 and modernised by 2030.²⁴³ In reorganising the marine fishing

²³⁶ Pomeroy, Nguyen and Thong (n 181) 421.

²³⁷ Ngoc Duy Nguyen and others, 'Open-Access Fishing Rent and Efficiency—The Case of Gillnet Vessels in Nha Trang, Vietnam' (2012) 127-128 *Fisheries Research* 98, 98.

²³⁸ Ngoc Duy Nguyen, Ola Flaaten and Kim Long Le, 'Government Support and Profitability Effects – Vietnamese Offshore Fisheries' (2015) 61 *Marine Policy* 77, 77.

²³⁹ *ibid.*

²⁴⁰ In this study, €1 is equal to VND27,500.

²⁴¹ Vietnam News, '\$1.87 Billion Projected for Offshore Fishing Development' Vietnam News (Hanoi, 29 September 2017) <<https://vietnamnews.vn/economy/394699/187-billion-projected-for-offshore-fishing-development.html#SPGw4kXLCsfAv6a3.97>> accessed 13 November 2018.

²⁴² *ibid.*

²⁴³ Prime Minister Decision No. 1445/QĐ-TTg of August 16, 2013, Approving the Master Plan on Fisheries Development through 2020 with a Vision toward

sector, Vietnam is also planning to reduce the number of fishing vessels to 110,000 by 2020 and 95,000 by 2030 with an annual decrease of 1.5%.²⁴⁴ Based on this plan, the total number of fishing vessels operating in inshore waters will be reduced to 70% from its current numbers by 2020, and the number of offshore fishing vessels will be between 28,000 and 30,000.²⁴⁵ This reduction of vessels is in line with the government's vision to modernise its fisheries sector through the rationalisation of the existing organisation so as to be more productive, efficient and competitive. Up until now, however, there no information information available on the status of implementation of these objectives.

4.3.2.2. Vietnam's Policies against IUU Fishing

Vietnam's policies against IUU fishing are shifting towards stricter regulations and enforcement as a result of the issuance of a "yellow card" by the European Commission (EC). The "yellow card" is a notification to a third country of the possibility of that country being identified as a non-cooperating country in respect of European Council Regulation No. 1005/2008 (the IUU Regulation).²⁴⁶ The "yellow card" could be followed by formal identification as a non-cooperating country, by means of a "red card", or by the lifting of the "yellow card" which would result in the issuance of a "green card", depending on the progress of the targeted country.²⁴⁷

The process of the "yellow card" against Vietnam began on 15-19 May 2017 when the Directorate General for Maritime Affairs and Fisheries (DG-MARE) of the European Commission came to Vietnam to assess the country's compliance with the EU's IUU regulations.²⁴⁸ The meeting resulted in five recommendations that

2030, sII(1) (Overall Objectives).

²⁴⁴ *ibid* sIII(1)(C) (Planning of Fishing Vessels).

²⁴⁵ *ibid*.

²⁴⁶ Environmental Justice Foundation and others, 'Improving Performance in the Fight against Illegal, Unreported and Unregulated (IUU) Fishing. The EU IUU Regulation Carding Process: A Review of European Commission Carding Decisions' (Issue Brief April 2016) 5 < https://ejfoundation.org/resources/downloads/IUU_Carding_Brief.pdf > accessed 12 September 2018.

²⁴⁷*ibid*.

²⁴⁸ Vietnam Association of Seafood Exporters and Producers (VASEP),

needed to be implemented by Vietnam before 30 September 2017 otherwise Vietnam would receive a “yellow card”.²⁴⁹ The EC, on 23 October 2017, then officially issued a yellow card due to insufficient efforts having been made to meet the IUU regulations.²⁵⁰ The EC, in its notification, identified that Vietnam had failed to discharge its responsibilities as the flag, port, coastal or market state under international law and had failed to take action to prevent, deter and eliminate IUU fishing.²⁵¹ For the “yellow card” to be lifted, the EC provided recommendations that would need to be implemented by Vietnam in addressing IUU fishing which included revising the legal framework, ensuring effective implementation and enforcement, addressing the deficiencies in the MCS, enhancing traceability of fisheries products and strengthening cooperation with other countries.²⁵² The carding mechanism used by the EU is considered to be effective to bring pressure to bear on third countries to comply with IUU regulations due to the unwanted consequence of losing market access to the EU. However, this unilateral mechanism has also been criticised because the process of identification is not particularly transparent.²⁵³ The information that has been released by the EC on the process of identification is minimal and raises questions on the transparency of the process and the rationale of identifying third countries. The identified third country has no choice but to respond to the identification and wait for the decision by the EC.

The “yellow card” has had a significant negative impact on Vietnam’s exports to the EU, which could also be followed by

‘Whitebook on Combating IUU Fishing in Vietnam’ (2018) 16 <<http://seafood.vasep.com.vn/sach-trang-en.pdf>> accessed 11 July 2018.

²⁴⁹ *ibid.*

²⁵⁰ Commission Decision of 23 October 2017 notifying the Socialist Republic of Vietnam of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing’ [2017] OJ C364/3 (Commission Decision C 364/3 of 2017).

²⁵¹ *ibid* para 32.

²⁵² VASEP (n 248) 16-17.

²⁵³ Eva Romée van der Marel, ‘An Opaque Blacklist: the Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation’ in Lawrence Martin, Constantinos Salonidis and Christina Hioureas (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas Under National Jurisdiction and Beyond* (Juris, International Law Institute 2017).

exports to the US and other potential markets.²⁵⁴ It is reported that due to the “yellow card” Vietnam’s seafood exports to the EU fell by 6.5% to US\$390 million (approximately €351 million) in 2018 and by 11.5% to US\$345.2 million (approximately €310.6 million) in 2019.²⁵⁵ If no significant progress is shown, there is a possibility that, in the long term, the EU may stop orders from Vietnam, and other foreign markets are also likely to impose stricter controls. Being aware of the risks to its international reputation, Vietnam has been carrying out numerous actions, including:

- a) promulgating Law No. 18/2017/QH14 dated 21 November 2017 on Fishery;
- b) issuing Directive No. 45/CT-TTg dated 13 December 2017 on A Number of Tasks and Solutions to Remove the Warning of the European Commission against Illegal, Unreported and Unregulated Fishing;
- c) issuing Decision No. 78/QD-TTg dated 16 January 2018 on National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing up to 2025.

The EC’s inspection on 15-24 May 2018 did not result in the lifting of the “yellow card”.²⁵⁶ However, the EC has taken note of the country’s efforts to address IUU fishing.²⁵⁷ In response to this inspection, Vietnam’s Ministry of Agriculture and Rural Development (MARD) acknowledges that, despite considerable achievements, Vietnam still struggles with IUU fishing, especially over the control of catching and tracing exploited aquatic products.²⁵⁸ In addition, the country also

²⁵⁴ VASEP (n 248) 17.

²⁵⁵ Vietnam Plus, ‘Provinces Ramp Up Installation of Systems to Fight Illegal Fishing’ Vietnam Plus (Hanoi, 12 May 2020) <<https://en.vietnamplus.vn/provinces-ramp-up-installation-of-systems-to-fight-illegal-fishing/173181.vnp>> accessed 28 May 2020.

²⁵⁶ Nguyet Nhu, ‘EC Will Review the “Yellow Card” for Vietnam in January 2019’ (Directorate of Fisheries MARD, 28 June 2018) <<https://tongcucthuysan.gov.vn/en-us/capture-fisheries/doc-tin/010922/2018-07-02/ec-will-review-the-yellow-card-for-vietnam-in-january-2019>> accessed 12 September 2018.

²⁵⁷ Vietnam Plus, ‘EC to Review Yellow Card against Vietnamese Fisheries in Early 2019’ Vietnam Plus (27 June 2018) <<https://en.vietnamplus.vn/ec-to-review-yellow-card-against-vietnamese-fisheries-in-early-2019/133561.vnp>> accessed 12 September 2018.

²⁵⁸ Nguyet Nhu, ‘EC Will Review the “Yellow Card” for Vietnam in January

lacks the finance to equip all fishing vessels with adequate tracking equipment. For example, out of around 110,000 fishing vessels, only 3,000 vessels are equipped with Movimar, satellite geo-positioning devices.²⁵⁹

Another point of concern is the regulations and implementation at the local level that still inadequate.²⁶⁰ In addressing this concern, the MARD instructed provinces and cities to enhance its campaign on raising awareness on the “yellow card” and anti-IUU fishing regulations.²⁶¹ The MARD also recommended local governments to mobilise resources to monitor local fishing fleets and encouraged them to apply strict punishment to fishers arrested or detected whilst engaging in IUU fishing in foreign waters. Local governments in Vietnam, such as the province of Kien Giang, have been said to fully support the government’s efforts in removing the “yellow card”. The province has been working to enhance law enforcement capacities and to address IUU fishing by local vessels in foreign waters through the establishment of special inspection units.²⁶² However, the EC’s delegation stated that Vietnam’s efforts at the local level have shown minimal improvement and remained weak in addressing IUU fishing.²⁶³

In a conference chaired by the Deputy Minister of MARD on 5 May 2018, it was reported that, since the beginning of 2018, no Vietnamese fishing vessels had been involved in IUU fishing.²⁶⁴ This

2019’ (n 256).

²⁵⁹ *ibid.*

²⁶⁰ Vietnam Plus, ‘EC to Review Yellow Card against Vietnamese Fisheries in Early 2019’ (n 257).

²⁶¹ Voice of Vietnam, ‘Ministry Urges Localities to Continue Fighting IUU Fishing’ *Voice of Vietnam* (4 July 2018) <<https://english.vov.vn/economy/ministry-urges-localities-to-continue-fighting-iuu-fishing-378282.vov>> accessed 12 September 2018.

²⁶² Vietnam Plus, ‘Kien Giang Works towards Eliminating EC’s Fishing Yellow Card’ *Vietnam Plus* (27 August 2018) <<https://en.vietnamplus.vn/kien-giang-works-towards-eliminating-ecs-fishing-yellow-card/137150.vnp>> accessed 3 September 2018.

²⁶³ *Voice of Vietnam*, ‘Ministry Urges Localities to Continue Fighting IUU Fishing’ (n 261).

²⁶⁴ Vietnam News, ‘Zero Cases of Illegal Fishing since 2018 Beginning’ *Vietnam News* (7 May 2018) <<https://vietnamnews.vn/economy/427519/zero-cases-of->

statement is in contradiction to the fact that Vietnamese vessels had been identified in different IUU fishing activities in 2018. On 15 August 2018, for example, a Vietnamese vessel and its crew of 10 Vietnamese citizens were detained for fishing without a licence in Malaysian waters.²⁶⁵ In 2019, the Indonesian government sunk 49 Vietnamese vessels for fishing illegally in its waters, the highest number among other countries (see Figure 2). More recently, on 20 May 2020, the Indonesian government captured 2 Vietnamese vessels, with 22 crew members, fishing illegally in Indonesian waters.²⁶⁶

Although Vietnam has made several efforts to fight IUU fishing, it was acknowledged by Vietnam's Deputy Director of the Directorate of Fisheries that the country has yet to establish an effective management mechanism at all levels of government that enforces policies against IUU fishing.²⁶⁷ The Deputy Director also stated that there are no effective measures to detect and prevent Vietnamese fishing boats from encroaching on foreign waters as small administrative fines for violations do not serve as a deterrent.²⁶⁸ The Prime Minister Directive No. 45/CT-TTg in 2017 also acknowledged that Vietnamese fishing vessels still conduct IUU fishing in foreign waters despite efforts that have been made by the government.²⁶⁹ In the last visit by the EC in November 2019, the Commission commended the progress that Vietnam had made. However, several important

illegal-fishing-since-2018-beginning.html#dcchP4W4F8qX8hr1.97> accessed 3 September 2018.

²⁶⁵ Jude Toyat, 'Foreign Fishing Vessel, Crew Detained for Suspected Illegal Fishing' *The Borneo Post Online* (Sarawak, 16 August 2018) <<http://www.theborneopost.com/2018/08/16/foreign-fishing-vessel-crew-detained-for-suspected-illegal-fishing/>> accessed 3 September 2018.

²⁶⁶ MMAF, 'Kado Lebaran, KKP Tangkap Lagi 2 Kapal Illegal Fishing' [Eid al-Fitr Gift, KKP Captured 2 Illegal Fishing Vessel] (KKP News, 20 May 2020) <<https://news.kkp.go.id/index.php/kado-lebaran-kkp-tangkap-lagi-2-kapal-illegal-fishing/>> accessed 28 May 2020.

²⁶⁷ Vietnamnet, 'Seafood Exports Face Problems Ahead Due to EC's IUU Fishing Warning' Vietnamnet (24 August 2018) <<http://english.vietnamnet.vn/fms/business/207425/seafood-exports-face-problems-ahead-due-to-ec-s-iuu-fishing-warning.html>> accessed 30 August 2018.

²⁶⁸ *ibid.*

²⁶⁹ Prime Minister Directive No. 45/CT-TTg on A Number of Tasks and Solutions to Remove the Warning of the European Commission against Illegal, Unreported and Unregulated Fishing (IUU) (13 December 2017) para 2.

aspects still need much improvement, including the legal framework, MCS, seafood traceability and fishing certification.²⁷⁰ As of 30 August 2020, the yellow card against Vietnam is still in place.²⁷¹

4.3.2.3. Vietnam's IUU Fishing Regulations

Vietnam's fisheries sector started its development in 1986 when the economic reforms of "Doi Moi", liberalised trade by allowing private enterprises and access to foreign markets.²⁷² As a consequence, fishing operations both inshore and offshore increased significantly and, since the early 1990s, the country has considered fisheries to be one of its key economic sectors.²⁷³

Until 2003, fisheries management in near-shore waters was limited despite the available structure of management.²⁷⁴ The catch was poorly reported and under-reported.²⁷⁵ Provincial governments did not implement many laws and regulations fearing that they would impose hardship on small-scale fishers.²⁷⁶ Enforcement was also limited due to budgetary reasons. In this period, IUU fishing was a serious problem, although destructive fishing methods were banned.²⁷⁷ Law No. 17/2003/QH 11 on Fisheries Law brought new hope for a more comprehensive and more robust legal base for the

²⁷⁰ Vietnam News, 'EC Recognises Vietnam Improvements in Combating IUU fishing' *Vietnam News* (Hanoi, 27 December 2019) <<https://vietnamnews.vn/economy/570420/ec-recognises-viet-nams-improvements-in-combating-iuu-fishing.html>> accessed 28 May 2020.

²⁷¹ EC, 'Overview of the Existing Procedures as Regards Third Countries' <https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf> accessed 30 August 2020.

²⁷² Teh and others (n 185) 2.

²⁷³ Long Tri Duong, 'Vietnam Fisheries Report' (15th Standing Committee on Tuna and Billfish, Honolulu, 22-27 July 2002) 1 <https://spccfpstore1.blob.core.windows.net/digitalibrary-docs/files/4f/4fe153609058a46040879845b0f9ccb4.pdf?sv=2015-12-11&sr=b&sig=mGI177VgIWHx%2FXc%2BLHKxITpL7pJ3W2e8an3LNtPSPoK%3D&se=2021-05-12T19%3A44%3A23Z&sp=r&rscc=public%2C%20max-age%3D864000%2C%20max-stale%3D86400&rsct=application%2Fpdf&rscd=inline%3B%20filename%3D%22nfr_vietnam.pdf%22> accessed 2 February 2019. .

²⁷⁴ Pomeroy, Nguyen and Thong (n 181) 424.

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

management of fisheries resources. However, the reality is different. This Fisheries Law of 2003 has not performed to its fullest expectation due to its lack of clarity and enforcement, which allowed IUU fishing activities to spread both within and outside Vietnam's waters. The Fisheries Law of 2003 also lacks specific provisions to support the country's coastal, flag, and port states obligations.²⁷⁸ The substantial shortcomings of the Fisheries Law, coupled with the pressure from the EC "yellow card", pushed the government to enact the Fisheries Law of 2017 which was approved on 21 November 2017 by the 14th National Assembly of Socialist Republic of Vietnam and came into force on 1 January 2019.²⁷⁹ In supporting the new Fisheries Law, the MARD is also in the process of accelerating the establishment of related decrees and circulars to support the law.

Vietnam, in its Fisheries Law, enumerates 14 different acts as illegal commercial fishing activities under Article 60 as follows:

- 1) commercial fishing without a licence;
- 2) commercial fishing in the banned areas and period; catching and transporting aquatic species banned from commercial fishing; catching aquatic species whose sizes are smaller than those prescribed by law; using prohibited gear;
- 3) illegal catch of endangered, precious and rare aquatic species;
- 4) illegal commercial fishing in the waters under the management of RFMOs, other countries or territories;
- 5) illegal commercial fishing exceeding the production of each aquatic species, failure to catch aquatic species in the areas and within the period specified in the licences;
- 6) concealment, counterfeiting or destruction of evidence for violations of regulations related to catching and protection of aquatic resources;
- 7) stopping and resisting persons carrying out inspections and supervision of compliance with regulations on extracting and protecting aquatic resources;
- 8) transshipping or providing assistance for vessels determined to be involved in illegal

²⁷⁸ Commission Decision C 364/3 of 2017 (n 250) paras 22, 32, 35, 36.

²⁷⁹ Law No. 18/2017/QH14 on Fisheries (21 November 2017) (Law No. 18/2017/QH14) art 104(1).

- 9) commercial fishing, except for force majeure;
- 10) failure to have sufficient communication equipment and vehicle tracking devices or operate them in accordance with regulations of law;
- 11) failure to have certificates of eligibility for food safety as prescribed by law;
- 12) temporary importation, temporary exportation, trade and transit of aquatic
- 13) species and aquatic products originating from illegal commercial fishing;
- 14) failure to keep fishing logbooks, failure to keep sufficient and proper logbooks, failure to
- 15) submit fishing logbooks or reports in accordance with regulations of law;
- 16) use of stateless commercial fishing vessels or vessels obtaining nationality of non-member countries for illegal commercial fishing in the international waters under the management of RFMOs;
- 17) failure to use commercial fishing vessels in accordance with regulations on extracting and protecting aquatic resources in the international waters not under the management of RFMOs

Organisations and individuals in violation of the 14 activities above, depending on the extent of violations, will face administrative or criminal sanctions. However, the Fisheries Law does not elaborate further on which violation will be dealt with by administrative or criminal sanctions, nor does it explain the length or amount of the sanctions. The types of administrative and criminal sanctions related to illegal commercial fishing are regulated in existing Vietnamese laws such as Government's Decree No. 103/2013/ND-CP on Administrative Sanction in the Fisheries Field and the Vietnamese criminal code both of which will be explained below.

4.3.2.3.1. Administrative Regulations and Enforcement

The provisions on administrative sanctions in the fisheries field are laid out by Government's Decree No. 42/2019/ND-CP

on Administrative Sanction in the Fisheries Activities.²⁸⁰ The decree imposes specific fines for different violations, including those of illegal fishing. Vietnamese and foreign organisations and individuals are subject to the administrative sanctions.²⁸¹ The sanctions main form is a fine of a maximum VND 1,000,000,000 (approximately €36,363).²⁸² However, depending on the nature and level of violation, additional sanctions may also be imposed such as suspension of licenses,²⁸³ suspension of operations,²⁸⁴ confiscation of material evidences,²⁸⁵ and remedial measures.²⁸⁶

The Decree No. 42/2019/ND-CP specifies a wide range of violations in the fisheries field that are subject to administrative sanctions. The decree covers violations of regulations in different areas including aquatic resources protection,²⁸⁷ aquatic seeds,²⁸⁸ aquaculture food and aquaculture treatment products,²⁸⁹ aquaculture fisheries,²⁹⁰ capture fisheries.²⁹¹ In the area of capture fisheries, the decree covers different violations including serious violation in the fishing operations,²⁹² violation of fishing areas,²⁹³ violation of catch quotas,²⁹⁴ violation of the fishing license,²⁹⁵ violation of

²⁸⁰ Government's Decree No. 42/2019/ND-CP of Administrative Sanctions in the Fisheries Activities (16 May 2018) (Government's Decree No. 42/2019/ND-CP).

²⁸¹ *ibid* art 2(1).

²⁸² *ibid* art 4, 5(1).

²⁸³ *ibid* art 4(2)(a).

²⁸⁴ *ibid*.

²⁸⁵ *ibid* art 4(2)(b). The confiscation of material evidences can include fishing vessels, fishing gear, banned substances, and fishing products.

²⁸⁶ *ibid* art 4(3). The remedial measures can include the obligation to release live aquatic specie back to their habitat, destroy fish catches, and re-export the imported fish species.

²⁸⁷ *ibid* ch 2 s 1.

²⁸⁸ *ibid* ch 2 s 2.

²⁸⁹ *ibid* ch 2 s 3.

²⁹⁰ *ibid* ch 2 s 4.

²⁹¹ *ibid* ch 2 s 5.

²⁹² *ibid* art 20.

²⁹³ *ibid* art 21.

²⁹⁴ *ibid* art 22.

²⁹⁵ *ibid* art 23.

transhipments,²⁹⁶ violation of fishing gear,²⁹⁷ and violations of banned substances for fishing.²⁹⁸ For some violations, the fines which will be imposed commensurate with the size of the vessels. For example, for fishing without a license or using an expired license, a fine between VND20,000,000 (approximately €727) and 30,000,000 (approximately €1,090) shall be imposed for a fishing vessel of a length between 6 and 12 meters.²⁹⁹ The fine increases to between VND 800,000,000 (approximately €29,090) and 1,000,000,000 (approximately €36,363) if the fishing vessel's length is 24 meters or more.³⁰⁰ In addition to the fine, other sanctions may also be imposed such as the confiscation of fishery products, fishing gear and the suspension of diplomas and certificates of the fishing vessel's captain.³⁰¹

With the enactment of the 2017 Fisheries Law, the law increased the maximum fine for individuals to VND1,000,000,000 (approximately €36,363) from VND100,000,000 (approximately €3,636) which is also reflected in the Decree No. 42/2019/ND-CP.³⁰² In a case where an administrative violation has been committed in an organised manner,³⁰³ it will be considered as an aggravating circumstance which can result in an increased administrative fine.³⁰⁴ However, it could not be higher than the maximum fine.³⁰⁵ The increase in fines is in response to the recommendation of the “yellow card”, which considered that the previous administrative sanctions failed to ensure the deterrence of the sanctioning scheme and did not reflect Article 21 of the IPOA-IUU which requires sufficiently severe sanctions to effectively prevent, deter and eliminate IUU fishing.³⁰⁶

²⁹⁶ *ibid* art 24.

²⁹⁷ *ibid* art 27.

²⁹⁸ *ibid* art 29.

²⁹⁹ *ibid* art 23(1).

³⁰⁰ *ibid* art 20(3).

³⁰¹ *ibid* art 20(4), 23(4).

³⁰² *ibid* art 5(1); Law No. 18/2017/QH14 (n 279) art 105(1).

³⁰³ Law No.15/2012/QH13 on Handling Administrative Violations 2012 art 10(1)(a).

³⁰⁴ *Ibid* Art 23 (4).

³⁰⁵ *ibid* art 23 (4).

³⁰⁶ Commission Decision C 364/3 of 2017 (n 250) para 39.

Decree No. 42/2019/ND-CP distributed the power to impose administrative sanctions to several authorities, i.e. the people's committees, People's Public Security Force, Border Guard, Coast Guard, Customs, Market Management, MARD, and FRSF.³⁰⁷ The power to impose administrative sanctions is distributed incrementally, based on the different levels of government or the ranks of the officers. These authorities can only impose sanctions on specific administrative violations as stipulated in Decree No. 42/2019/ND-CP. A personnel of the People's Public Security Force, for example, has the power to impose fines up to VND500,000 (approximately €18).³⁰⁸ The station heads and team leaders can impose fines up to VND1,500,000 (approximately €54).³⁰⁹ The chiefs of the commune-level offices can impose fines up to VND2,500,000 (approximately €90).³¹⁰ The chiefs of district-level offices has the power to impose fines up to VND25,000,000 (approximately €909).³¹¹ The directors of provincial level can impose fines up to VND50,000,000 (approximately €1,818)³¹² and the directors of the departments can impose fines up to VND 1,000,000,000 (approximately €36,363).³¹³ The power to impose fines is also supplemented with other powers including to suspend the fishing operation, confiscate material evidences and apply remedial measures.

Upon detecting administrative violations, the competent authority must make a violation record which shows several details including the date and place of the violation, personal details of the perpetrator, and acts of violation.³¹⁴ The competent authority must decide on administrative sanctions within seven days after recording the violation. If the case is complicated, the competent authority could ask for an extension for a maximum of 30 days before it issues a decision.³¹⁵ After the decision is issued, the implementation of that

³⁰⁷ Government's Decree No. 42/2019/ND-CP (n) arts 46-53.

³⁰⁸ *ibid* art 47(1).

³⁰⁹ *ibid* art 47(2).

³¹⁰ *ibid* art 47(3).

³¹¹ *ibid* art 47(4).

³¹² *ibid* art 47(5).

³¹³ *ibid* art 47(5).

³¹⁴ Law No.15/2012/QH13 on Handling Administrative Violations (n 326) art 58.

³¹⁵ *ibid* art 66.

decision is limited to 10 days after the date of receipt of the decision.³¹⁶ If the case has criminal characteristics, the competent authority must immediately transfer the case to the criminal procedure agencies.³¹⁷

4.3.2.3.2. Criminal Regulations and Enforcement

With regard to criminal sanctions, the Vietnamese criminal code contains several provisions where fisheries violations can amount to criminal offences. The Law No.12/2017/QH14 on Amendments to the Criminal Code No. 100/2015/QH13, Article 242, divides criminal sanctions for fisheries violations into three categories, based on the amount of losses of aquatic resources and the severity of the actions. The first category (Article 242 (1)) concerns several actions such as using forbidden fishing methods, fishing in a banned area, fishing banned fish species, which cause a loss of aquatic resources ranging in value from VND100,000,000 (approximately €3,636) to VND500,000,000 (approximately €18,181). These offences are liable to a fine of from VND50,000,000 (approximately €1,818) to VND300,000,000 (approximately €10,909), or to a penalty of up to three years community sentence or 6-36 months imprisonment. The second category (Article 242 (2)) concerns more severe effects such as the loss of aquatic resources ranging in value from VND500,000,000 (approximately €18,181) to VND1,500,000,000 (approximately €54,545). This second category also applies to the death of a person, in which case the offence causes a total Whole Person Impairment (WPI) of 122 per cent – 200 per cent for more than one person. For these offences, the perpetrator will be liable to a fine ranging from VND300,000,000 (approximately €10,909) to VND1,000,000,000 (approximately €36,363) or a penalty of 3-5 years imprisonment. The third category (Article 242 (3)) is aimed at the most severe effects such as the loss of aquatic resources of more than 1,500,000,00 VND (approximately €54,545) in value, the death of more than two people, and the offence causes a total WPI of more than 201% for more than three persons. In respect of these offences, the Article imposes a penalty of imprisonment of 5-10 years.

The above provisions of criminal sanctions raise the question as

³¹⁶ *ibid* art 68 (2).

³¹⁷ *ibid* art 62.

to whether they violate Article 73 (3) of UNCLOS on the prohibition of imprisonment or any other form of corporal punishment for violations of fisheries laws and regulations in the EEZ in the absence of agreements by the concerned states. The criminal code does not directly address this issue, but it states in Article 5 that the criminal code applies to criminal offences committed within the territory of Vietnam (including EEZ). Criminal liability of foreigners, according to the criminal code, can only be excluded if they are granted diplomatic immunity. The Law No. 18/2012/QH13 on the Law of the Sea of Vietnam provides the answer to this issue. Article 30 of the Law states that the application of criminal procedures over foreign vessels must conform with Vietnamese law and treaties to which Vietnam is a contracting party. Since Vietnam is a party of UNCLOS, the provisions of Article 73 (3), as a consequence, apply to foreign vessels. Therefore imprisonment or other corporal punishment for violations of Vietnam's criminal code in the EEZ cannot be implemented unless there is an agreement between the concerned states.

The legal basis for law enforcement against fisheries criminal offences in Article 242 of the Criminal Code can be found under the Fisheries Law, Law No. 99/2015/QH13 on Organisation of Criminal Investigation Bodies, and Law No. 101/2015/QH13 on Criminal Procedure Code. Unlike Indonesia, which has special procedures regarding fisheries criminal offences, Vietnam does not differentiate its investigation, prosecution and adjudication processes for fisheries criminal offences in particular procedures. Instead, the country opts to place them with other criminal offences under general procedures within the existing legislation as will be explained below.

a. Investigation of Fisheries Criminal Offences

The investigation of fisheries criminal offences can be done by three agencies, i.e. the Border Guard Force, the Marine Police and the Fisheries Resources Surveillance Force. For less serious crimes, the three bodies have the authority to carry out several actions, including to institute criminal cases, investigate crime scenes, search and take testimonies of offenders, conclude the investigation and transfer the case files to the prosecutor's office within one month

after the issuance of the decision to institute the case.³¹⁸ For serious, very serious, and extremely serious crimes, the three bodies have the authority to transfer the files to competent investigating bodies within seven days after the issuance of the decision to institute the case.³¹⁹ The three bodies can also apply preventive and coercive measures established by the Criminal Procedural Code³²⁰ such as detainment of persons and distraintment of property.³²¹

b. Prosecution of Fisheries Criminal Offences

The prosecutor's office, after receiving the necessary documents from the investigators, can decide whether to prosecute, return the documents for further investigation, or dismiss the case. In deciding on one of these three actions, the prosecutor has 20 days for less serious crimes or 30 days for serious and extremely serious crimes from receiving the case files and written conclusion of the investigation. If necessary, the decision to prosecute can be extended for ten additional days for less serious crimes, 15 additional days for serious crimes and 30 additional days for extremely serious crimes.³²² When the prosecutor decides to prosecute a suspect before the court, he must issue charging documents. The documents are to consist of the details of the crime, including the identity of the suspect, purposes, and aggravating circumstances.³²³ Three days after issuing the charging documents, the prosecutor must submit the case files and the charging documents to the court.³²⁴

c. Examination in Court

The examination in the first instance court is conducted by a panel of one judge and two assessors. When the crime is serious and complex, the panel must comprise two judges and three assessors.

³¹⁸ Law No. 99/2015/QH13 on Organisation of Criminal Investigation Bodies (26 November 2015) arts 32(1)(a), 35(1)(a), 36(1)(a).

³¹⁹ *ibid* arts 32(1)(b), 35(1)(b), 36(1)(b).

³²⁰ *ibid* art 32(1)(c), 35(1)(c), 36(1)(c).

³²¹ Law No. 101/2015/QH13 on Criminal Procedure Code (27 November 2015) Chapter VII.

³²² *ibid* art 240 (1).

³²³ *ibid* art 243.

³²⁴ *ibid* art 244.

In the appellate court, the panel must comprise three judges.³²⁵ The presiding judges are given 30 days for a less serious crime, 45 days for a serious crime, two months for very serious crime and three months for an extremely serious crime, before they decide on whether they will hear the case, return documents for further investigation or suspend or dismiss the case.³²⁶ If the court decides to hear the case, the trial must be held within 15 days.³²⁷ After the case has been held and a judgment has been delivered, the defendant can appeal against the judgment to the appeal court within a maximum of 15 days after the judgment has been delivered.³²⁸

4.3.3. Vietnam and International Fisheries Instruments

In the “yellow card,” it was noted that Vietnam was not in line with Article 11 of the IPOA-IUU which encourages states to ratify, accept or accede to international fisheries instruments.³²⁹ At that time, Vietnam was only a party to the UNCLOS³³⁰ and not to any of the other instruments such as the Compliance Agreement, the UNFSA or the PSMA. The lack of ratification of the related international fisheries instruments has categorised Vietnam as failing to implement international rules as stated under Article 31 (6) of the IUU Regulation. The “yellow card” brought strong pressure to bear on Vietnam to become a party to the related instruments. In responding to this pressure, Vietnam established an NPOA-IUU in January 2018 by which Vietnam is scheduled, between May 2018-2020, to become a party to the UNFSA and the PSMA, and also, if possible, to join the related RFMOs such as CCAMLR, WCPFC, IWC, IOTC and ICCAT. In its implementation, Vietnam became a party to the UNFSA on 18 December 2018³³¹ and a party to the PSMA on 3 January

³²⁵ *ibid* art 254.

³²⁶ *ibid* art 277.

³²⁷ *ibid* art 277 (3).

³²⁸ *ibid* art 333.

³²⁹ Commission Decision C 364/3 of 2017) (n 250) para 48.

³³⁰ Prime Minister Decision No. 78/QĐ-TTg on National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing Up To 2025 (16 January 2018).

³³¹ For Vietnam’s status as a party to the UNFSA see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&clang=en#EndDec> accessed 28 May 2020.

2019.³³² The following part will examine the different obligations of flag, coastal, and port states of the international fisheries instruments to see whether Vietnam has complied with these obligations or if there are still deficits that need to be addressed.

4.3.3.1. Vietnam and Flag State Obligations

4.3.3.1.1. Fishing Vessel Registration

With regard to vessel registration, the Vietnam Fisheries Law obliges fishing vessels with a minimum length of six metres to be registered in the national register of commercial fishing vessels.³³³ A vessel will be issued with a registration certificate if the application is supported by certain required conditions including³³⁴ i) documents of legal ownership of the vessel, ii) certificate of technical safety, and iii) the ship's owner has a head office or permanent place of residence in Vietnam. A vessel's registration could be cancelled if the vessel is destroyed, sunk, missing, exported, sold, or the owner so requests. Once it is cancelled, the competent authorities must revoke the registration certificates, erase the name from the national register, and issue a certificate of cancellation.³³⁵ With regard to registration and its cancellation, the MARD has the role of prescribing the procedures for registration and its cancellation, while the implementation is in the hand of the Provincial People's Committee in each province.³³⁶

4.3.3.1.2. Record of Fishing Vessels

Provisions on a record of fishing vessels cannot be found in the Vietnam Fisheries Law. In a report submitted by the MARD to the WCPFC in 2010, a record of fishing vessels was identified as one of Vietnam's legislation gaps in complying with the WCPFC regulations. The Vietnamese government was recommended to supplement Decree No. 33/2010/ND-CP on The Management of Fishing Activities in

³³² For Vietnam's status as a party to the PSMA see <http://www.fao.org/treaties/results/details/en/c/TRE-000003/> accessed 28 May 2020.

³³³ Law No. 18/2017/QH14 (n 279) art 71(1).

³³⁴ *ibid* art 71(3).

³³⁵ *ibid* art 72.

³³⁶ *ibid* art 71(4)-(5).

Sea Areas by Vietnamese Organisations and Individuals to include the requirement of maintaining a record of fishing vessels.³³⁷

4.3.3.1.3. Authorisation to Fish

Vietnam established regulations regarding organisations and individuals engaged in fishing outside Vietnam's maritime boundary in the Fisheries Law. In general, Vietnamese vessels have to comply with international treaties to which Vietnam is a signatory and the law of destination countries, territories and RFMOs.³³⁸ Vietnamese vessels which want to engage in fishing activities outside Vietnam's maritime boundary need to have a licence issued by the MARD³³⁹ for the issuance of which they need to satisfy several requirements such as i) being approved by authorities of destination countries or issued with fishing quotas by relevant RFMOs, ii) being seaworthy, registered, having a certificate of technical safety valid for at least six months, and having sufficient safety and communication equipment, iii) the master and chief engineer of the vessel need to have suitable certificates, and iv) complying with other requirements of the destination countries or RFMOs.³⁴⁰ The vessel also needs to submit a dossier to the Directorate of Fisheries which consists of different documents such as an application for a permit, a notarised copy of the cooperation contract, a copy of vessel registration certificate, a list of the crew and copies of diplomas of the captain and chief engineer.³⁴¹ Within five days from the submission, the Directorate of Fisheries must issue or refuse to issue the permit to operate in foreign countries.³⁴² If the licence is granted, the Fisheries Directorate must

³³⁷ Nguyen Long and Nguyen Dinh Dzung, 'Review of Vietnam's Legal, Policy and Institutional Arrangements in Light of WCPFC Requirements' (Ministry of Agriculture and Rural Development of Vietnam, 2010) 46 <<https://www.wcpfc.int/system/files/PLI-VNM-01-%5BConsultancy-report-%28Y2%29-Review-PLI-Arrangement-Jun2010%5D.pdf>> accessed 2 October 2018.

³³⁸ Law No. 18/2017/QH14 (n 279) art 54.

³³⁹ *ibid* art 54(1).

³⁴⁰ *ibid* art 53.

³⁴¹ The Government Decree No. 53/2012/ND-CP of June 20, 2012, Amending and Supplementing a Number of Articles of the Decrees of Fisheries (20 June 2012) art 3(4) (To amend Article 7 of the Government's Decree No. 33/2010/ND-CP)).

³⁴² *ibid*.

notify the localities, the Ministry of National Defence, the Ministry of Public Security and the Ministry of Foreign Affairs so as to achieve coordinated control and management.³⁴³

4.3.3.1.4. Vietnam's Challenges in Implementing Flag State Obligations

Under flag state obligations, Vietnam has established regulations on vessel registration and licensing to ensure that only vessels that comply with those regulations are allowed to fish on the high seas or in foreign waters. Vietnam, however, does not have provisions regarding a record of fishing vessels. Despite the country's efforts in establishing those regulations, the implementation shows a different reality. The regulations do not seem to have yielded positive results, as can be seen from the high number of Vietnamese fishing vessels that have been continuing to fish illegally on both the high seas and in the EEZs of Asia-Pacific countries.³⁴⁴ The over-exploited fishing zones in Vietnam's waters and increasing competition in the South China Sea, mainly from Chinese vessels, are believed to be the reason why Vietnamese vessels are fishing illegally in foreign waters.³⁴⁵ The failure of Vietnam in preventing its vessels from conducting IUU fishing on the high seas and in foreign waters has also made the EC conclude that Vietnam has failed to uphold its flag state responsibilities thereby violating Article 94(1)-(2) and Article 62(4) of UNCLOS, and Article 24 of the IPOA-IUU.³⁴⁶

4.3.3.2. Vietnam and Coastal State Obligations

4.3.3.2.1. Monitoring, Control, and Surveillance

In terms of Monitoring, Control, and Surveillance (MCS) of fishing activities, the Vietnamese government has established several provisions. The Fisheries Law stipulates that in order to be granted a fishing licence, fishing vessels with a minimum length of 15 metres

³⁴³ *ibid.*

³⁴⁴ Ganapathiraju Pramod, 'Vietnam-Country Report' in *IUU Risk Intelligence, Policing the the Open Seas: Global Assessment of Fisheries Monitoring Control and Surveillance in 84 Countries (Policy Report No. 1 2017)* 8.

³⁴⁵ *ibid.* 4.

³⁴⁶ Commission Decision C 364/3 of 2017 (n 250) para 20.

need to be equipped with a tracking device.³⁴⁷ This requirement also applies to vessels fishing outside the country's maritime boundary³⁴⁸ and to foreign vessels fishing within the country's maritime boundary.³⁴⁹ The Fisheries Law considers failure to have an adequate tracking device as illegal commercial fishing under Article 60(1) (i). In the "yellow card", it was reported that of the 33,000 vessels that operate in the EEZ of Vietnam, only 10% are equipped with tracking devices.³⁵⁰ The cost of installing adequate tracking devices is relatively high for the majority of Vietnamese fishers, which has caused the majority of vessels to fail to comply with the regulations to install adequate tracking devices.³⁵¹

Vietnam, in its enforcement efforts, established the Fisheries Resources Surveillance Force (FRSF) through Government Decree No. 102/2012/ND-CP on the Organisation and Operation of the Fisheries Resources Surveillance Force, as a specialised force of the state under the Directorate of Fisheries of the MARD. The FRSF enforces Vietnam's laws and those international treaties to which Vietnam is a signatory related to extraction and protection of aquatic resources.³⁵² The FRSF's functions are to patrol, inspect, control, detect, and take action against violations of law as well as preventing such violations in Vietnam's maritime zones.³⁵³ The members of the FRSF consist of civil servants appointed to perform surveillance tasks.³⁵⁴ The FRSF, according to Article 88(2) of the Decree 102/2012/ND-CP has three powers: i) to request relevant organisations and individuals to provide the necessary information, ii) to use weapons, combat gear, and

³⁴⁷ Law No. 18/2017/QH14 (n 279) art 50(2)(dd).

³⁴⁸ *ibid* art 53 (1)(b).

³⁴⁹ *ibid* art 55(5).

³⁵⁰ Commission Decision C 364/3 of 2017 (n 250) para 43.

³⁵¹ Nguyet Nhu, 'Many Fishing Vessels Have Not yet Installed Satellite Positioning Equipment' (Directorate of Fisheries MARD, 29 August 2018) <<https://tongcucthuysan.gov.vn/en-us/capture-fisheries/doc-tin/011263/2018-08-29/many-fishing-vessels-have-not-yet-installed-satellite-positioning-equipment>> accessed 14 September 2018.

³⁵² Government's Decree No. 102/2012/ND-CP of November 29, 2012, on the Organization and Operation of the Fisheries Resources Surveillance Force (29 November 2012) art 3.

³⁵³ *ibid*.

³⁵⁴ *ibid* art 6.

necessary methods in implementing its duties, and iii) to prevent, chase, and arrest people and vehicles in contravention of the regulations.

4.3.3.2.2. Ensure No Fishing without Authorisation

A fishing licence in Vietnam's Fisheries Law is obligatory for organisations and individuals using commercial fishing vessels with a minimum length of six metres.³⁵⁵ A fishing licence is generally granted based on the submission of supporting documents such as papers related to vessel inspection, registration papers and on the payment of a small licence fee (proportional to the engine size).³⁵⁶ The licence is issued if the applicant complies with the requirements such as i) ensuring the availability of communication and tracking equipment, ii) obtaining a certificate of technical safety; and iii) obtaining a registration certificate.³⁵⁷ The licence can be issued, extended, reissued or revoked by the Provincial People's Committee. For foreign organisations and individuals, and those engaged in fishing activities outside Vietnam's maritime boundary, the fishing licence can only be issued, extended and revoked by the MARD.³⁵⁸ The fishing licence registration is generally not an obstacle to joining the fisheries sector since applicants only have to submit supporting documents and pay a small licence fee (proportional to engine size). Thus, marine capture fisheries in Vietnam is, in fact, an open-access resource,³⁵⁹ which has led to overfishing and overcapacity of the fleet within national waters and driven the fleet's vessels to offshore fishing even when it is illegal.³⁶⁰

4.3.2.2.3. Avoid Licensing Vessels with IUU Fishing History

Vietnam avoids licensing national vessels with an IUU fishing history at the stage of reissuance of the expired licence. Article 50(2) (h) of the Fisheries Law provides that in the case of reissuance of the expired licence, organisations or individuals, in addition to the

³⁵⁵ Law No. 18/2017/QH14 (n 279) art 50(1).

³⁵⁶ Nguyen, Nguyen and Le Van (n 220) 9.

³⁵⁷ *ibid* art 50(2).

³⁵⁸ *ibid* art 51(2).

³⁵⁹ Nguyen, Nguyen and Le Van (n 220) 9.

³⁶⁰ Blaha (n 198) 22.

established requirements, must also ensure that the vessel is not included in the IUU fishing list published by the MARD. A similar approach is also applied to foreign vessels fishing inside Vietnam's maritime boundary. However, in these cases the decision is taken at the issuance stage instead of at the reissuance stage, where one of the requirements for obtaining the licence is to prove that the vessel is not included in the IUU fishing list of the MARD, RFMOs or other international authorities.³⁶¹

4.3.2.2.4. Vietnam's Challenges in Implementing Coastal State Obligations

In the implementation of coastal state obligations, Vietnam has enacted different provisions to support its MCS efforts, ensuring that there is no fishing without authorisation and avoiding the licensing of those vessels which have a history of IUU fishing. However, Vietnam, like many other developing countries, is facing the challenge of implementation. The lack of coastal patrols and of enforcement in coastal waters has also provided an opportunity for IUU fishing by domestic and foreign vessels. In offshore waters, Vietnam also has weak operational capability due to limited resources. The limited resources have also restricted Vietnam to conducting only 12 surveillance trips per year in different provinces, with offshore patrols concentrated mainly around the Gulf of Tonkin and the South China Sea.³⁶² Vietnam also has a shortage of inspectors for surveillance operations. The Fisheries Inspection Department has a staff of only 311, of which 111 are inspectors.³⁶³ The low number of inspectors is not sufficient for managing landing sites and recording arrivals of commercial fishing vessels at remote fishing bases.³⁶⁴ In addition to the lack of human resources, Vietnam's agencies, such as provincial Departments of Capture Fisheries and Resource Protection, are also known to be lacking sufficient budgetary resources for the management, monitoring, surveillance

³⁶¹ Law No. 18/2017/QH14 (n 279) art 55(3).

³⁶² Pramod (n 344) 6.

³⁶³ *ibid* 3.

³⁶⁴ *ibid*.

or enforcement in the country's inshore and offshore waters.³⁶⁵ The lack of human resources and an insufficient budget has made the country's efforts in fighting IUU fishing far from ideal. Investment in personnel and equipment, along with stronger enforcement against IUU fishing, are needed to support Vietnam's efforts in addressing IUU fishing in its waters. In addition, some Vietnamese fishers are insufficiently aware of the fisheries regulations. In some cases, fishers do not comply with the regulations due to limited awareness, while other fishers deliberately oppose and cause difficulties for the inspection authorities.³⁶⁶

4.3.3.3. Vietnam and Port State Measures

4.3.3.3.1. Entry into Port

The 2003 Fisheries Law, which was the basis for the imposition of the “yellow card”, says little on port control measures, a shortcoming which was then improved by the 2017 Fisheries Law. In the 2017 Fisheries Law, the management of fishing ports in Vietnam, including the ports' entry and exit mechanisms, are handled by supervisory organisations.³⁶⁷ The supervisory organisations have the right to refuse entry to fishing vessels and persons that fail to comply with the regulations, or request such vessels or persons to leave the port.³⁶⁸ The supervisory organisations are required to refuse the handling of aquatic products if the vessels have engaged in IUU fishing activities and notify the competent authorities so that the matter can be processed in accordance with the law.³⁶⁹

When a national vessel wants to enter into port, the master of the vessel must comply with the control of the supervisory organisation and regulations of the port.³⁷⁰ When a national vessel wants to leave port, the master must notify the supervisory organisation at least one

³⁶⁵ Nguyen, Nguyen and Le Van (n 220) 8.

³⁶⁶ Nguyet Nhu, 'Nghe An: IUU Has Not Been Thoroughly Dealt With' (Directorate of Fisheries MARD, 22 August 2018) <<https://tongcucthuysan.gov.vn/en-us/capture-fisheries/doc-tin/011258/2018-08-29/nghe-an-iuu-has-not-been-thoroughly-dealt-with>> accessed 14 September 2018.

³⁶⁷ Law No. 18/2017/QH14 (n 279) art 80.

³⁶⁸ *ibid* art 81(b).

³⁶⁹ *ibid* art 81(2)(h).

³⁷⁰ *ibid* art 82(2).

hour prior to departure.³⁷¹ When a foreign fishing vessel wants to enter a Vietnamese port, the vessel can only enter fishing ports specified in the licence or the ports approved by the MARD.³⁷² The master of a foreign vessel needs to notify the supervisory organisation at least 24 hours prior to entering the port along with providing details such as name, call sign, registration number and estimated time of arrival.³⁷³ If the foreign vessel wants to leave the port, the master must notify the supervisory organisation at least 12 hours prior to departure.³⁷⁴

4.3.3.3.2. Inspections and Follow-up Actions

The Fisheries Law states that when national and foreign shipowners and masters of the vessels are in the port, they are obliged to comply with inspections and controls related to the extracting of and protecting aquatic resources, food safety, environmental safety and fire safety.³⁷⁵ If a vessel is found to have engaged in illegal fishing, the supervisory organisation of the port must refuse the handling of the products and notify the competent national authorities so that the matter can be dealt with in accordance with the law.³⁷⁶ However, the Fisheries Law does not have any provision requiring the notification to relevant states, RFMOs and other international organisations as required under Article 18 of the PSMA.

4.3.3.3.3. Vietnam's Challenges in Implementing Port State Obligations

Vietnam has more than 70 coastal landing ports of which fewer than 10 receive occasional inspections due to the low number of inspectors.³⁷⁷ The Fisheries Law does not provide detailed regulations on the required actions as provided in the PSMA, for example, the notifications to relevant parties when a vessel is found to be engaged in IUU fishing. The EC delegation, in its visit in May 2018, concluded

³⁷¹ *ibid* art 82(4).

³⁷² *ibid* art 83(1).

³⁷³ *ibid* art 83(2).

³⁷⁴ *ibid* art 83(6).

³⁷⁵ *ibid* art 82(3), 83(3).

³⁷⁶ *ibid* art 82(2)(h).

³⁷⁷ Pramod (n 344) 7.

that Vietnam's MCS system did not fully control the ports' entry and exit activities or the origin certification of catch products, both of which shortcomings contribute to the IUU fishing in the country.³⁷⁸ The delegation further suggested that Vietnam should accede to the PSMA and the UNFSA so that Vietnam could take full port state and flag state responsibilities in addressing IUU fishing.³⁷⁹ In response to this recommendation, Vietnam became a party to the PSMA in 2019. Nevertheless, Vietnam still needs to adjust its legislation in accordance with the PSMA provisions and ensure its compliance with them, two matters that can be challenging for the country.

4.4. Comparative Analysis

4.4.1. National Fisheries Framework

4.4.1.1. Policies

Both Indonesia and Vietnam, as the above examination shows, suffer from IUU fishing operations. Indonesia is a victim of IUU fishing where domestic and foreign vessels are fishing illegally in its national waters. Vietnam is also suffering from IUU fishing activities in its waters carried out by domestic and foreign vessels. However, Vietnamese vessels are also the perpetrators of IUU fishing in foreign waters, ranging from the neighbouring waters including Indonesia and Malaysia to the waters of Pacific countries such as New Caledonia and the Solomon Islands.

The updated policies against IUU fishing of both countries are generally strict. Indonesia took strong measures against IUU vessels in its waters by placing a moratorium on foreign fishing vessels and banning fish transshipment. The country also implemented its debated burning and/or sinking policy for vessels that conduct IUU fishing. The stricter policies implemented in Indonesia have resulted

³⁷⁸ Tra Huong, 'The Vietnamese Government has Agreed to Accede to the Agreement on Port State Measure (PSMA) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Fishing)' (Directorate of Fisheries MARD, 12 July 2018) <<https://tongcuthuysan.gov.vn/en-us/capture-fisheries/doc-tin/011019/2018-07-20/the-vietnamese-government-has-agreed-to-accede-to-the-agreement-on-port-state-measure-psma-to-prevent-deter-and-eliminate-illegal-unreported-and-unregulated-fishing-iuu-fishin>> accessed 15 September 2018.

³⁷⁹ *ibid.*

in a decrease of IUU fishing operations and an increase in national fish stocks. Vietnam has also implemented strict measures against IUU fishing vessels, especially after the issuance of the EC “yellow card”. The country has made significant progress in reforming its legislation including through the enactment of a new Fisheries Law in 2017 and the establishment of NPOA-IUU in 2018. Other policy measures have been directed at Vietnam’s vessels fishing illegally abroad, as they can damage the reputation of the country’s fisheries products in the international market. In 2017, Vietnam issued a Prime Minister’s telegram to prevent, reduce and stop Vietnamese vessels fishing illegally abroad. Vietnam’s stricter policies have resulted in some positive results, especially in the enactment of new legislation. However, there are still many aspects that need to be improved, especially regarding implementation.

4.4.1.2. Regulatory and Enforcement Framework

Indonesia and Vietnam have established their regulations on fisheries mainly in their fisheries laws supported by related ministerial regulations or decrees. Both countries have made changes to their fisheries laws since the fisheries sector has become more important, and the operations of IUU fishing have become serious concerns for both countries. Indonesia updated its Fisheries Law in 2009 which included new measures against IUU fishing, including the provision of its burning and/or sinking policy along with the details of the sanctioning mechanism. Vietnam’s Fisheries Law was updated in 2017 and includes regulations concerning illegal commercial fishing provisions, licence issuance and revocation, port entry and exit procedures and the increase of fines to a maximum of VND1,000,000,000 (€36,363).

Indonesia and Vietnam have their sanctions written down in different ways. Indonesia lays down its sanction provisions in detail in the fisheries laws and relevant ministerial decrees. Meanwhile, Vietnam includes the sanctions in the criminal code and the law on handling administrative violations together with other non-fisheries offences. Both countries, in their legislation, have a double track enforcement system that allows for the application of both administrative and criminal enforcement measures against IUU fishing violations. With regard to administrative sanctions,

Indonesia imposes licence-related sanctions such as the issuing of a warning, suspension of a licence and revocation of a licence without imposing a fine. Meanwhile, Vietnam has chosen to impose a fine as a sanction, in addition to a warning, suspension and revocation. With regard to criminal sanctions, Indonesia applies more severe sanctions than Vietnam. As an example, for using prohibited gear or methods, Indonesia imposes imprisonment up to a maximum of six years and a maximum fine of Rp1.5 billion (approximately €90,100). Meanwhile, Vietnam only imposes a fine of between VND50,000,000 (approximately €1,818) and VND300,000,000 (approximately €10,909) or imposes a penalty of up to three years' community sentence or 6-36 months' imprisonment.

The enforcement of fisheries-related regulations in general falls to the ministries handling fisheries affairs, namely the MMAF for Indonesia and the MARD for Vietnam. Both ministries are responsible for implementing these provisions ranging from registration, to conservation and to licensing. However, the enforcement of sanctions, both administrative and criminal, is shared among other institutions.

With regard to administrative sanctions, Indonesia has given the power of enforcement to the MMAF, i.e. the Director-General for Capture Fisheries, the governors, and regents. The Director-General, governors and regents have the power to issue a warning, to suspend and to revoke a licence. The governors and regents can establish local regulations to support this enforcement power, but such regulations must be in line with the Fisheries Law. In Vietnam, the enforcement of administrative sanctions is carried out by several institutions, i.e. people's committees, fishery inspectors, fisheries control authority, coast guard, border guards, and the people's police. Each institution has different powers based on the different levels of government or the ranks of the officers.

With regard to the enforcement of criminal sanctions, Vietnam has given investigation powers on fisheries offences to the Border Guard Force, the Marine Police, and the FRSF. Meanwhile, Indonesia has provided the power to the PPNS, the navy and the police. The prosecution stage is similar in both countries where the prosecutors hold the primary role of prosecuting the cases. The main difference

between the two countries is at the adjudication stage. Indonesia has established fisheries courts as a special court that specifically adjudicates fisheries offences while in Vietnam such offences are handled by the general court.

The availability of information on enforcement practices in both countries is varied. Indonesia's MMAF provides general information on its enforcement practice publicly through its annual report, including the number of vessels and crews detained, although other details are limited. Indonesia also publishes the courts' decisions regarding IUU fishing cases on the courts' websites. For Vietnam, information on its enforcement practice is difficult to obtain through public access; it could be because it does not exist or because it is not made public. Although it was mandated by the Supreme People's Court Resolution No. 03 /2017/NQ-HDTP on the Publication of Court Judgments and Decisions, the publication of cases is not yet available.

4.4.2. Obligations under International Instruments

The fisheries regulations in both countries have generally moved in the right direction to comply with international fisheries obligations. Indonesia has sufficient legislation regarding the flag state and coastal state obligations. However, it still lacks some port states-related obligations since the country is still in the process of enacting the necessary legislation after it ratified the PSMA in 2016. Meanwhile, Vietnam is currently catching up in complying with the flag, coastal and port state obligations due to the pressure from the "yellow card". Vietnam is making good progress with its legislation, particularly with the recent enactment of its Fisheries Law in 2017 and the recent accessions to the UNFSA and the PSMA. Vietnam, however, still needs to speed up the enactment of the implementing regulations to support the new Fisheries Law and to comply with the "yellow card" recommendations and international fisheries obligations.

The international fisheries obligations that have been transposed into national laws have, in general, been useful in supporting both countries' efforts in combating IUU fishing. Different obligations for flag, coastal and port states in the international instruments have

been instrumental in shaping the national legislation that implements stricter control and enforcement against IUU fishing. Indonesia has been using provisions related to these obligations to regulate and sanction IUU fishing, such as the obligations on authorisation to fish, MCS and fishing vessel registration. The recent ratification of the PSMA by Indonesia is a demonstration of the importance of international instruments in tackling IUU fishing for Indonesia, although Indonesia still needs to enact the implementing legislation. Vietnam has also been using related international obligations in its legislation in dealing with IUU fishing. The recent pressure from the “yellow card” has placed international obligations in a more prominent position in domestic legislation. The recent improvement of national fisheries-related legislation and accession to the UNFSA and the PSMA is a manifestation of Vietnam’s commitment to international obligations and its role in tackling IUU fishing.

4.4.3. IUU fishing and the Involvement of OCGs

IUU fishing operations in both countries indicate the involvement of OCGs. Characteristics of OCGs such as a structured group of three or more persons, existing for a period of time, acting in concert, having the aim to commit a serious crime and to obtain financial benefits, are present in those who carry out IUU fishing in both Indonesia and Vietnam. In Indonesia, the involvement of OCGs is more apparent in the IUU fishing operations by foreign vessels where the operations are transnational and carried out by groups with more crew, better vessels and equipment. These groups conspire with local actors in conducting their illegal operations. IUU fishing operations in Indonesia are also connected to other TOCs, such as people trafficking, drug trafficking and migrant smuggling. In Vietnam, the indication of involvement of OCGs is more apparent in the transnational operation of its vessels in foreign waters. Some of the Vietnamese vessels are operating for months in foreign waters and some have even been accompanied by mother ships and armed with guns, which shows the seriousness of the problem. Despite the apparent involvement of OCGs, both countries, unfortunately, do not consider such involvement in their regulations and enforcement. Their legislations and enforcement are more directed at the regular actors of IUU fishing which do not have OCGs characteristics.

4.5. Interim Conclusion

This chapter has examined two case studies, Indonesia and Vietnam, to analyse how the two states have shaped their fisheries policies and regulatory and enforcement framework, and how they have implemented and transposed relevant international obligations as established in the international instruments. From the examination of the two case studies, it has been found that both countries have both administrative and criminal enforcement available to be used against IUU fishing violations. Indonesia generally apply more stricter sanctions than Vietnam against IUU fishing offences. Both countries are in the process of implementing international obligations by transposing them into national laws, although improvement in implementation is still needed. The transposed international obligations, in general, are useful for both countries in implementing and enforcing fisheries conservation and management measures as coastal, flag and port states. IUU fishing operations in both countries have indicated the involvement of OCGs. Characteristics of OCGs are present in those who carry out IUU fishing in both Indonesia and Vietnam. The transnational dimension is also evident in both states. However, both countries do not consider the involvement of OCGs in IUU fishing as there are no specific provisions or enforcement practices related to their involvement in IUU fishing. Thus, in both case studies the deficits of regulation and enforcement against the involvement of OCGs are apparent.

CHAPTER 5

The Criminalisation of IUU Fishing at Global Level

5.1. Introduction

IUU fishing, as explained in Chapters 2 and 4, is both a global and a domestic problem. In trying to tackle the problem, states and the international community have established different international instruments related to fisheries with the hope of curtailing IUU fishing. However, the existing international instruments related to fisheries, as shown in Chapter 2, have deficits in terms of their regulatory and enforcement content, particularly in addressing the TOC dimensions of IUU fishing. The deficits are also apparent at national level, as shown in Chapter 4.

This dissertation argues that the deficits in the existing international instruments regarding the TOC dimensions can be supplemented by the criminalisation of IUU fishing both at global and regional levels. This chapter will examine the option for criminalisation at a global level while the next chapter will discuss criminalisation at a regional level. In this chapter, the option of criminalisation at a global level will be elaborated in several steps. Firstly, this chapter will explain the notion of the global criminalisation of IUU fishing. Secondly, it will continue with a discussion on the concept of the suppression conventions as a way of tackling transnational concerns of states, including the elements of those conventions, i.e. substantive law, jurisdiction, investigative tools and international cooperation. Lastly, this chapter, based on those

elements of suppression conventions, will offer three alternatives on how the criminalisation of IUU fishing at a global level can be achieved, i.e. i) criminalisation under the UNTOC, ii) establishment of a stand-alone suppression convention and iii) integration of suppression provisions into international fisheries instruments.

5.2. Criminalisation of IUU Fishing at Global Level

The idea of the criminalisation of IUU fishing at a global level could find its ground in the serious negative harms for states and individuals ranging from the economy, the environment, and social aspects to the legal order aspects as discussed in Chapter 2. These harms have caused international concern as exhibited by different states and international organisations alike.¹ The United Nations has proclaimed 5 June as the annual International Day for the Fight against IUU Fishing, to draw attention to the threats posed by IUU fishing.² A more recent report in January 2019 on the IUU Fishing Index reinforces the international concerns against IUU fishing by stating that “the index scores provide a strong indication that the SDG target – to eliminate IUU fishing by 2020 – will not be achieved, and that combating IUU fishing remains a huge global problem”.³

These international concerns stemming from states and international organisations, coupled with the facts that OCGs’ involvement magnifies the harms of IUU fishing, raise the question of whether IUU fishing needs to be criminalised at a global level. An answer to that question could be found by taking a look at the status of IUU fishing as transnational crime and further examination of if and how IUU fishing could be prohibited under the scheme of a suppression convention and its provisions, which will be explained in this chapter.

¹ See Chapters 2 and 4.

² UNGA Res 72/72, ‘Sustainable fisheries, including through the 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, and related instruments’ (19 January 2018) UN Doc A/RES/72/72 para 70.

³ G. Macfadyen and others, ‘The IUU Fishing Index’ (Poseidon Aquatic Resource Management Limited and the Global Initiative Against Transnational Organized Crime, 2019) 103 <<https://globalinitiative.net/wp-content/uploads/2019/02/IUU-Fishing-Index-Report-web-version.pdf>> accessed 31 March 2019.

Before the discussion of IUU fishing as a transnational crime, we need to look at what constitutes a transnational crime. The term “transnational crime” is considered to be of criminological origin, being defined as criminal activities that transcend the jurisdiction of any given state.⁴ The term was coined at the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva, 1975.⁵ The meeting identified different categories of transnational crimes, including white-collar crime and corruption, offences involving works of art and other cultural property, criminality associated with illegal drug trading, and organised crime.⁶ In 1994, at the Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, transnational crime was defined as “offences whose inception, prevention and/or direct or indirect effects involved more than one country”. The meeting managed to identify 18 categories of transnational crimes.⁷ Different authors have also offered their definitions of transnational crime. Williams, for example, defined transnational crime as “a crime undertaken by an organisation based in one state but committed in several host countries, whose market conditions are favourable, and risk apprehension is low”.⁸ Boister states “at its simplest, transnational crime describes conduct that has actual or potential transboundary effects of national and international concern”.⁹ The UNTOC offers a more elaborate description of what constitutes a transnational element in a crime which covers a broad set of circumstances.¹⁰ The

⁴ Dimitri Vlassis and Phil Williams, *Combating Transnational Crime: Concepts, Activities and Responses* (Routledge 2013) 13.

⁵ *ibid.*

⁶ *ibid.* The 18 categories are: money laundering, illicit drug trafficking, corruption and bribery of public officials as defined in national legislation and of party officials and elected representatives as defined in national legislation, infiltration of legal business, fraudulent bankruptcy, insurance fraud, computer crime, theft of intellectual property, illicit traffic in arms, terrorist activities, aircraft hijacking, sea piracy, hijacking on land, trafficking in persons, trade in human body parts, theft of art and cultural objects, environmental crime and other offences committed by organised criminal groups.

⁷ *ibid.* 14.

⁸ Phil Williams, ‘Transnational Criminal Organisations and International Security’ (1994) 36(1) *Global Politics and Strategy* 96, 96.

⁹ Neil Boister, ‘“Transnational Criminal Law”?’ (2003) 14(5) *European Journal of International Law* 953, 954.

¹⁰ See Section 5.4.2.1.2.

term “transnational crime”, based on the different definitions above, can cover a broad range of criminal activities that cross national borders.

Based on the broad concept of transnational crime, IUU fishing (along with its TOC dimensions) could be categorised as such a crime. The activity crosses national borders and has direct or indirect significant economic, environmental and social harms for numerous countries, as explained in Chapter 2. These harms are not confined to a single country, but also affect other countries as is shown by, for example, the rampant IUU fishing activities by Vietnamese blue boats that affect countries in Southeast Asia and the Pacific, contributing to more significant economic, environmental and social harms in those countries as explained in Chapter 4. In line with the notion of IUU fishing as a transnational crime, Don Liddick states that “IUU fishing is a significant transnational crime problem that causes severe economic, social and environmental harm”.¹¹ He further argues that IUU fishing should be recognised “not merely as a manifestation of a profit-driven, transnational crime perpetrated by corporate interests and organised criminals, but also a phenomenon that is linked to, if not derivative of, weak, incompetent and corrupt governance”.¹²

The cross-border nature of IUU fishing activities is also generally in line with the description of transnational crime which emphasises transnationality. IUU fishing actors often operate across borders for two main reasons. First, they need to move from one place to another to avoid detection by the authorities and to exploit weak regulations and corrupt officials. This was the case, for example, for the illegal fishing vessel “Thunder” which sailed from one jurisdiction to another to avoid detection.¹³ Second, the actors follow where the fish are. Since fish stocks are varied and migrate among states, the IUU fishing actors will go where they have the highest chance of catching them, including crossing states’ waters. The cross-border movements of IUU fishing support the categorisation of IUU fishing as a transnational crime.

¹¹ Don Liddick, ‘The Dimensions of a Transnational Crime Problem: The Case of IUU Fishing’ (2014) 17 *Trends in Organized Crime* 290, 309.

¹² *ibid* 310.

¹³ See Chapter 2, Section 2.5.1.

5.3. Suppression Conventions to Combat Transnational Crimes

5.3.1. What are Suppression Conventions?

Transnational crimes cross borders and so one state cannot tackle transnational crimes alone. Thus, international cooperation among states is needed. States generally have sufficient transnational interests for international cooperation in fighting transnational crimes for several reasons such as the level of societal anxiety, media interest, strategic concerns, morality and security.¹⁴ Based on their transnational interests in dealing with transnational crimes, states cooperate with each other and, in many cases, they agree to criminalise such crimes through the establishment of suppression conventions. Neil Boister defines suppression conventions as “multilateral treaties that oblige states to criminalise certain forms of conduct and to provide legal assistance to other states in order to suppress treaty crimes or crimes of international concern”.¹⁵ Roger S. Clark, in a similar vein, described “suppression conventions as bilateral or multilateral treaties that contain obligations to criminalise certain activities”.¹⁶ Another description is provided by Robert J. Currie, who sees suppression conventions as “treaties agreed by states, usually multilateral, to coordinate crime suppression efforts among them”.¹⁷

Historically, few efforts were made to coordinate cross-border prohibition, jurisdiction, and enforcement due to national sovereignty in criminal justice matters. States cooperated mainly on a partial and reactionary basis which responded to the perceived problems of the time.¹⁸ One of the first examples of suppression conventions is a Roman law which obliged the Kings of Cyprus, Alexandria, Egypt, Cyrene, and Syria to prevent the harbouring of pirates.¹⁹ Another

¹⁴ Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 20.

¹⁵ Neil Boister, ‘Human Rights Protections in the Suppression Conventions’ (2002) 2(2) *Human Rights Law Review* 199, 199.

¹⁶ Roger S. Clark, ‘Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus’ (2011) 22 *Criminal Law Forum* 519, 520.

¹⁷ Robert J. Currie and Joseph Rikhof, *International and Transnational Criminal Law* (2nd edn, Irwin Law 2013) 328.

¹⁸ *ibid.*

¹⁹ The *Cnidus Text* (1974) 64 *Journal of Roman Studies*, 195-220 cited in Neil

early example of suppression conventions is the bilateral British/United States treaty in 1794 (known as the Jay Treaty) which was also related to preventing the harbouring of pirates as piracy was one of the transnational crimes at that time.²⁰ The journey of suppression conventions from the nineteenth century onwards was marked by the abolition of the slave trade and by the suppression of different terrorist acts, as a result of terrorist attacks in the late 1960s and 1970s.²¹ Robert Currie observes that there has been increasing willingness among states to increase and expand cooperation, resulting in the growing sophistication and complexity of the conventions.²² The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,²³ for example, has developed provisions on confiscation and repatriation of the proceeds of crime and obligations for states to provide mutual legal assistance.²⁴ Until now, different conventions have been concluded to suppress particular transnational crimes including slavery,²⁵ corruption,²⁶ trafficking in persons,²⁷ smuggling of migrants²⁸ and illicit manufacturing and trafficking of firearms.²⁹

Boister, 'Treaty-Based Crimes' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 540.

²⁰ Treaty of Amity, Commerce and Navigation between Great Britain and the United States of America (signed 19 November 1794) 52 CTS 243 cited in Clark; Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus' (n 16) 520.

²¹ Currie and Rikhof (n 17) 328.

²² *ibid.*

²³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95

²⁴ Currie and Rikhof (n 17) 329.

²⁵ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

²⁶ United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

²⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol) (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

²⁸ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling of Migrants Protocol) (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.

²⁹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms,

5.3.2. Objectives

Suppression conventions aim at creating a level playing field among states, by introducing similar tools in the criminal justice systems at the domestic level. So, states are the principal actors, as they negotiate the text, sign it, ratify it and transpose it into domestic law. However, international organisations also play an essential role, as most conventions are multilateral conventions within the frame of the UN or regional bodies. Moreover, these international organisations monitor the implementation process in domestic laws and their application in judicial practice.

Currie argues there are three main essential and interrelated objectives of the suppression conventions: i) ensuring criminalisation of particularly harmful or destructive transnational crimes; ii) ensuring as many states as possible will exercise jurisdiction over these transnational crimes; and iii) providing cooperation between interested states, particularly for sharing of resources and expertise which will assist the poorer states. In a similar way, Boister explains that states initially tried to pursue offenders through the unilateral application of extraterritorial jurisdiction and bilateral agreements. Over time, states developed suppression conventions that tried to coordinate different national criminal laws of States Parties in a substantive and procedural sense.³⁰ Already the era of the League of Nations, a number of several suppression conventions were established due to the shared interests among states in countering certain transnational crimes such as the Slavery Convention and the International Convention for the Suppression of Counterfeiting Currency.³¹ After World War II, many of the suppression conventions were developed in a multilateral setting such as the United Nations or at the regional level, for example, the Council of Europe's Money Laundering Convention (CETS 141). The multilateral suppression

Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol) (adopted 31 May 2001, entered into force 3 July 2005) 2326 UNTS 208.

³⁰ Neil Boister, 'Responding to Transnational Crime: The Distinguishing Features of Transnational Criminal Law' in Harmen van der Wilt and Christophe Paulussen (eds), *Legal Responses to Transnational and International Crimes. Towards an Integrative Approach* (Edward Elgar Publishing 2017).

³¹ International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371.

conventions developed during this time were entirely penal in nature as they focused on criminalisation. After the 1990s, as well as criminalisation, modern suppression conventions were also dealing with relevant aspects of criminal justice such as jurisdiction, criminal procedure and cooperation in the field of extradition, gathering evidence, and confiscation as can be seen from the UNTOC and the UNCAC.

5.3.3. Elements of Suppression Conventions

The suppression conventions can be considered to have four main elements: i) substantive law, ii) jurisdiction, iii) investigative tools, and iv) international cooperation. The following Sections 5.3.3.1. to 5.3.3.4. will elaborate further on these elements.

5.3.3.1. Substantive Law

The substantive law in suppression conventions can be seen in provisions that suppress certain harmful activities of transnational nature, effects or concerns by means of the criminal law.³² This substantive law is usually further specified in the provisions covering specific activities which need to be suppressed, in the sanctions imposed, and in the enforcement that can be taken by member states. These different components then create a minimum standard or a common legal basis in substantive criminal law to be applied by States Parties in suppressing transnational crimes.³³ States Parties, ideally, then must take necessary steps, including in their domestic legislation, to be in line with these standards so that they can implement their obligations under the suppression conventions. When states adhere to these standards and therefore have harmonised legal frameworks, they can be a powerful tool against transnational crime since the loopholes in different states can be minimised and, at the same time, the double criminality standard can be met. These standards make cross-border cooperation more effective.

³² Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

³³ Charles Monteith and Pedro Gomes Pereira, 'Asset Recovery' in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

Boister explains that suppression conventions provide a penal anchor for transnational governance even when it takes on a more administrative or regulatory form.³⁴ States Parties are obliged by the suppression conventions to adopt a baseline of criminalisation and punishment.³⁵ They cannot adopt narrower offences or more lenient punishment without being in contravention of their treaty obligations, although this does not generally prevent them from adopting offences with a broader scope or more severe punishments.³⁶ In protecting states' sovereignty over criminal justice, the suppression conventions are not generally designed to be self-executing.³⁷

The enforcement of suppression conventions relies on indirect enforcement systems which means that conventions leave it to the States Parties to enforce their international obligations in the conventions through domestic legal systems, including by criminalising the prohibited conduct. States Parties, therefore, are expected to enforce their national criminal laws and to cooperate in the prosecution and suppression of the conduct.³⁸ National criminal laws will then create individual liability for the offence, ideally based on the minimum standards prescribed under the suppression conventions. Once an offence has been committed, states will be responsible for enforcing their national law and for prosecuting the offenders, subject to the jurisdiction rules both in the suppression conventions and in the national laws.

Suppression conventions provide States Parties with an extensive discretionary margin when it comes to implementing their criminalisation provisions, through the incorporation of standard provisions in the convention.³⁹ Where the criminalisation provisions are entirely novel, they will tend to be followed very closely by national legislation. However, where offences exist prior to the convention,

³⁴ Boister, *An Introduction to Transnational Criminal Law* (n 14) 23.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ M. Cherif Bassiouni, 'International Crimes: The Rationae Materiae of International Criminal Law' in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).

³⁹ Boister, *An Introduction to Transnational Criminal Law* (n 14) 24.

States Parties will tend to adapt and thus dilute the substance of the treaty obligations into existing statutory schemes.⁴⁰

5.3.3.2. Jurisdiction

Christopher Blakesley described the term “jurisdiction” as “the authority to affect legal interests – to prescribe rules of law (prescriptive jurisdiction); to adjudicate legal questions (adjudicative jurisdiction); and to compel, induce compliance or take any other enforcement action (enforcement jurisdiction)”.⁴¹ He further asserted that adjudicative and enforcement jurisdictions are dependent on prescriptive or legislative jurisdiction.⁴² Cedric Ryngaert asserts that to enforce laws or decisions related to transnational or foreign situations, states are required to resort to territorial measures.⁴³ An example of this situation is where in the case of enforcing a sentence of imprisonment, the convict must be voluntarily present in the territory or that he/she is brought in the territory by extradition.⁴⁴

Harvard Research in International Law, in 1935, described five traditional bases of jurisdiction: territorial, nationality, protective, passive personality and universal, as the foundation for a state to assert jurisdiction over criminal conduct.⁴⁵ The territorial principle permits states to prescribe jurisdiction over conduct, an element or the effect of which takes place within their territory.⁴⁶ The territorial principle is the primary source of jurisdiction where states are authorised and even obliged to criminalise certain conduct committ-

⁴⁰ *ibid.*

⁴¹ Christopher L. Blakesley, ‘*Extraterritorial Jurisdiction*’ in M Cherif Bassiouni (ed), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Brill 2008).

⁴² *ibid.* 89.

⁴³ Cedric Ryngaert, *Jurisdiction in International Law*, (2nd edn, Oxford University Press) 9.

⁴⁴ *ibid.*

⁴⁵ Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 445 (Supp. 1935) cited in Blakesley (n 41) 92.

⁴⁶ *ibid.* 93; Gregory L. Rose and Ben Tsamenyi, ‘Universalising Jurisdiction over Marine Living Resources Crime’ (WWF, 2013) 56 <<http://ro.uow.edu.au/lhapapers/1256>> accessed 20 March 2018.

ed within their boundaries.⁴⁷ The nationality principle provides states with jurisdiction over certain criminal offences committed by their nationals abroad.⁴⁸ The protective principle permits states to exercise jurisdiction over crimes committed abroad, which have an impact on or threaten to harm their national interests.⁴⁹ The passive personality principle gives states jurisdiction over crimes which result in the harm of their nationals. The universal jurisdiction principle provides states with the power to assert jurisdiction over particular, universally condemned acts irrespective of the place of commission and the nationality of the perpetrator or the victim. Universal jurisdiction is restricted to only a few international crimes such as piracy, genocide, crimes against humanity and war crimes.⁵⁰

The jurisdiction-related provisions in the suppression conventions differ from one convention to another. Usually, the establishment of jurisdiction in suppression conventions is based on a close link between the suspect and the state concerned. Most conventions require states to establish territorial and nationality jurisdictions, while some provide other grounds such as the passive personality jurisdiction as in the case of the 1997 Convention for the Suppression of Terrorist Bombings.⁵¹ The UNTOC and the UNCAC oblige States Parties to establish a territorial jurisdiction when offences are committed in their territories. Both conventions also give states the option to establish nationality and passive personality jurisdictions in the case of specified offences committed by or against their nationals.⁵² The obligation to establish jurisdiction means that a State Party is obliged to prescribe the reach of its domestic law over particular conduct as a criminal offence. This then enables the national authorities to enforce the laws against those offences and its offenders. These laws also give competence to the relevant national judicial bodies. However,

⁴⁷ Rose and Tsamenyi (n 46) 56.

⁴⁸ Blakesley (n 41) 94; Rose and Tsamenyi (n 46) 57.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 336.

⁵² UNTOC, art 15; UNCAC, art 42.

the obligation to establish jurisdiction does not mean that a State Party must also exercise that jurisdiction.⁵³ In the case where a state does not exercise its jurisdiction and there is an extradition request, that state is generally obliged to extradite the alleged offender to the requesting state under the *aut dedere aut judicare* principle.⁵⁴

By adopting a suppression convention, States Parties have a means for the reasonable extension of national jurisdiction against particular crimes.⁵⁵ In this context, States Parties grant each other special competence on the jurisdictional principles provided in the conventions and thus agree to the extension of national jurisdiction.⁵⁶ When parties agree to establish jurisdiction against a particular crime, it indicates a mutual interest in the suppression of that crime.⁵⁷ In some cases, states have enacted and enforced their national laws so as to affect the behaviour of their citizens within foreign jurisdictions, which is known as the long-arm criminal jurisdiction. New Zealand, for example, under its Fisheries Act of 1996, criminalises illegal fishing by its citizens in a foreign jurisdiction and New Zealand citizens can be fined up to NZ\$250,000 (approximately €140,000) if found guilty of an offence.⁵⁸

5.3.3.3. Investigative Tools

In combating transnational crimes, many suppression conventions oblige States Parties to provide support for investigation against specific illegal conduct and to allow different investigative tools to be employed. In investigating transnational crimes, different investigative tools might be used. Special investigative tools have been developed since traditional investigative methods face difficulties in

⁵³ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007) 167.

⁵⁴ Cryer and others (n 51) 69-70; Boister, *An Introduction to Transnational Criminal Law* (n 14) 264-267; ILC, 'Final Report. Working Group on the Obligation to Extradite or Prosecute (aut dedere aut judicare) of its 66th Session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/CN.4/L.844.

⁵⁵ Boister, *An Introduction to Transnational Criminal Law* (n 14) 250.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Fisheries Act 1996 of New Zealand s 113A (2) cited in Rose and Tsamenyi (n 46) 58.

tackling transnational crimes as those crimes' methods and networks become more sophisticated. The Council of Europe defines "Special Investigative Tools (Techniques)" as "techniques applied by the competent authorities in the context of criminal investigations for the purpose of preventing, detecting, prosecuting and suppressing serious crimes, aiming at gathering information in such a way as not to alert the target persons".⁵⁹

Different special investigative tools such as controlled delivery, undercover operations, financial analysis, use of informants and electronic surveillance (e.g. wiretapping and communication interception) are often provided by suppression conventions to be utilised to combat transnational crimes. For example, suppression conventions such as the UNTOC and the UNCAC have obliged their States Parties to allow special investigative tools to be used by their competent authorities if permitted by their national legal systems. The 1998 Drugs Convention also obliges its member states to allow the appropriate use of controlled delivery to identify and take legal action against persons involved in such trafficking.⁶⁰ The obligations established by suppression conventions concerning investigative tools can urge member states to establish legal frameworks (for those that do not already have them) or strengthen the existing legislation and practice so that their enforcement officials can utilise these tools appropriately. Although in many cases investigative tools can be effective, these tools can also be seen as intrusive and have the potential to violate individual rights and privacy. Thus, the application of investigative tools needs to be limited and supervised appropriately. Van Dijk argues that intrusive investigative tools, along with witness protection and harsh penal measures, are necessary since investigations against organised crime need to be done in a proactive manner.⁶¹

⁵⁹ Council of Europe, 'Recommendation Rec (2005) 10 of the Committee of Ministers to Member States on "Special Investigative Techniques" in relations to Serious Crimes including Acts of Terrorism' (adopted by the Committee of Ministers on 20 April 2005 at the 924th Meeting of the Ministers' Deputies).

⁶⁰ 1998 Drugs Convention, art 11.

⁶¹ Jan van Dijk, 'Transnational Organized Crime, Civil Society and Victim Empowerment' in Rianne Letschert and Jan van Dijk (eds), *The new faces of Victimhood. Globalisation, Transnational Crimes and Victim Rights* (Springer 2011).

5.3.3.4. International Cooperation

International cooperation holds an essential place in the suppression conventions as it is stated as one of the purposes of most conventions.⁶² Such cooperation has a dual function: preventing the commission of a crime and bringing the perpetrators to justice.⁶³ In suppression conventions, the substantive provisions are linked to the procedural regime because international cooperation is impossible without some standardisation of criminalisation.⁶⁴ The procedural regimes either oblige or permit States Parties to establish both territorial and extraterritorial jurisdiction over these offences and to enforce that jurisdiction through policing and adjudication.⁶⁵ Most procedural provisions found in suppression conventions are directed at international cooperation with some directed at increasing the efficiency of domestic prosecution.⁶⁶ These provisions depend heavily on the existing framework of regional and bilateral treaties for criminal cooperation and, at the same time, enable state parties to use their laws to assist other parties.⁶⁷

Different conditions may contribute to the less effective international cooperation in criminal matters.⁶⁸ Some of the most common conditions include differences in legal values, lack of enabling legislation, absence of channels of communication, lack of capacity, and a wide range of different national approaches and priorities. Although international cooperation holds an important place in the suppression conventions, the international cooperation regime can still generally be said to be weak, fragmented and unpredictable

⁶² Yvon Dandurand and Vivienne Chin, 'Implementation of Transnational Criminal Law' in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

⁶³ Ahmed Seif El-Dawla, 'Effects of Contemporary International Obligations for Combating the Financing of Terrorism on Interstate Cooperation in Criminal Matters' in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).

⁶⁴ Boister, *An Introduction to Transnational Criminal Law* (n 14) 27.

⁶⁵ Boister, 'The Concept and Nature of Transnational Criminal Law' (n 32) 17.

⁶⁶ *ibid* 18.

⁶⁷ *ibid*.

⁶⁸ Dandurand and Chin (n 62) 439.

and much remains to be done at national and international levels to strengthen the international cooperation regime.⁶⁹

The main international cooperation modalities that often appear in the suppression conventions include Mutual Legal Assistance (MLA) and extradition. The UNODC defines MLA as “a process by which States seek and provide assistance in gathering evidence for use in criminal cases”.⁷⁰ John Vervaele explains that “MLA in criminal matters deals with the mechanisms for legal assistance in the gathering of criminal evidence abroad, that is in jurisdictions other than that in which the investigation, prosecution or adjudication has been triggered (investigative or forum jurisdiction)”.⁷¹ He further explains that “the tools of this evidence gathering can range from non-coercive measures, such as the exchange of judicial information or voluntary interrogation of experts and witnesses, to very intrusive measures such as search and seizure, tapping, controlled delivery and undercover surveillance of criminal organisations”.⁷² MLA is for the benefit of governments which means individuals cannot make use of it nor benefit from it. Governments can make exclusive use of the evidence which they exchange between each other and deny access by the interested individuals to evidence which they have obtained from their foreign counterparts.⁷³ Vervaele underlines the necessity of MLA since without it, judicial authorities are unable to execute investigative measures beyond their territory unless provided by international treaties or ad hoc agreements. Despite the necessary role of MLA, the process is not without challenges. Variation of national legal standards in the collection of evidence has become one of the main challenges for MLA, where the evidence might become inadmissible in a criminal trial of a different jurisdiction.⁷⁴

⁶⁹ *ibid.*

⁷⁰ UNODC, ‘Manual on Mutual Legal Assistance and Extradition’ (United Nations Publication 2012) 19.

⁷¹ John A.E. Vervaele, ‘Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality’ in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

⁷² *ibid* 122.

⁷³ M. Cherif Bassiouni, ‘The Modalities of International Cooperation in Penal Matters’ in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Brill 2008).

⁷⁴ Rose and Tsamenyi (n 46) 49.

Extradition is the oldest method of international cooperation in penal matters. It has been the subject of various bilateral, regional and multilateral agreements dealing with different aspects of international criminal law.⁷⁵ The UNODC defines extradition as a “formal process whereby a State requests the enforced return of a person accused or convicted of a crime to stand trial or serve a sentence in the requesting State”.⁷⁶ Joanna Harrington describes extradition, at its essence, as a “bilateral act of mutual legal assistance between a requesting (or receiving) state and a requested (or sending) state, valued for the very purpose of securing the individual’s presence, with or without his or her consent, in the requesting state”.⁷⁷ A typical extradition treaty will stipulate the conditions for and the exceptions to an agreed obligation to extradite, with the grounds of refusal an otherwise valid extradition request.⁷⁸ Efforts to suppress transnational crimes mainly rely on various pre-existing extradition arrangements rather than creating new processes to facilitate cross-border cooperation.⁷⁹ Although there are extradition provisions in several suppression conventions, there is no extradition treaty of universal application mainly because of the political and cultural obstacles.⁸⁰

5.4. Criminalisation of IUU Fishing under Suppression Conventions

5.4.1 The Need for Criminalisation of TOC Dimensions of IUU Fishing

One of the main arguments for criminalisation of conduct that is particularly harmful to society is deterrence.⁸¹ In this sense, the enactment of criminal law against certain conduct will protect the

⁷⁵ Bassiouni, ‘The Modalities of International Cooperation in Penal Matters’ (n 73) 4.

⁷⁶ UNODC, ‘Manual on Mutual Legal Assistance and Extradition’ (n 70) 9.

⁷⁷ Joanna Harrington, ‘Extradition of Transnational Criminals’ in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

⁷⁸ *ibid* 154.

⁷⁹ *ibid* 153.

⁸⁰ *ibid* 163.

⁸¹ Stephen C. McCaffrey, ‘Criminalization of Environmental Protection’ in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).

interests of society against the harm that is caused by such conduct and will be instrumental in deterring or preventing the same conduct happening in the future.⁸² The harm to others provides a sufficient (or even necessary) condition for states' intervention through criminal law, which is also known as the "harm principle".⁸³ The conduct that would fall into the category of the harm principle is that which causes, or may cause, serious or significant harm, and the determination of such categorisation is under the authority of the state.⁸⁴ Criminal law, effectively enforced, can raise the cost to the perpetrator of certain illegal conduct and thereby encourage compliance with laws that would otherwise be largely ignored (see Chapter 2, Section 2.4.2. for related discussion).⁸⁵ The cost can be both monetary and non-monetary. Monetary costs can take the form of imposing or raising a fine for prescribed violations.⁸⁶ Equally important is the non-monetary cost that covers the deprivation of liberty or social condemnation.⁸⁷ The deprivation of liberty, through imprisonment, is often a cost that many potential violators would be unwilling to pay.⁸⁸ Breaches of criminal law can give rise to criminal sanctions that can take the form of fines, imprisonment, corporal punishment, and confiscation of assets.

The transnational and organised crime dimensions of IUU fishing organisations have the potential to cause greater harm than individuals acting alone.⁸⁹ This collective illegal action is supported by better capital and human resources, networks and technology and thus can amplify the scale of IUU fishing operations and obviously the harm caused. This dissertation argues that such amplification of harm, caused by the transnational and organised crime dimensions,

⁸² *ibid* 1015.

⁸³ Nina Peršak, 'Norms, Harms and Disorder at the Border; The Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory in Nina Peršak, *Legitimacy and Trust in Criminal Law, Policy, and Justice: Norms, Procedures, Outcomes* (Routledge 2014) 15.

⁸⁴ *ibid* 17.

⁸⁵ McCaffrey (n 81) 1015.

⁸⁶ *ibid*.

⁸⁷ *ibid* 1016.

⁸⁸ *ibid*.

⁸⁹ James O. Fickenaer, 'Problems of Definition: What is Organized Crime?' (2005) 8 *Trends in Organized Crime* 63, 78.

is worthy of a more severe punishment in the form of criminal law under the framework of suppression conventions at global and regional levels.

The issue of IUU fishing is further complicated by its connections with OCGs and related TOCs, such as trafficking in persons, migrant smuggling, drug trafficking and corruption. These four specified TOCs have possible linkages with IUU fishing (and the fishing industry in general). In these TOCs, OCGs are also found to be involved, in addition to IUU fishing, to increase their profits. The linkage between IUU fishing and trafficking in persons exists mainly for forced labour and to some extent also for sexual exploitation⁹⁰ where the senior crew, recruiters, and the fishing company are the main actors that can be identified in this criminal activity.⁹¹ Victims of trafficking have to endure excessive workloads and inhumane working conditions that make them ill and severely malnourished. Cases concerning trafficking in persons in Indonesia have shown that, in 2015 alone, more than 1,000 fishermen from Cambodia, Laos Myanmar, and Thailand were trafficked to work in Ambon and Benjina in IUU fishing-related activities.⁹² They were forced to work more than 20 hours per day on a boat in the middle of the sea with the threat of murder facing them.⁹³ The excessive working hours, along with insanitary working conditions, physical abuse and, in several cases, sexual abuse are not uncommon in trafficking in persons cases in the fishing industry where the victims are not only male adults but also women and children.⁹⁴

In the case of migrant smuggling, many unemployed fishers engage in this illicit activity to supplement their incomes. Those fishers

⁹⁰ UNODC 'Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking' (2011) 23.

⁹¹ *ibid* 35.

⁹² International Organization for Migration (IOM), Indonesian Ministry of Marine Affairs and Fisheries (KKP), and Coventry University, 'Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry' (IOM, 2016) 35 <<https://pureportal.coventry.ac.uk/en/publications/human-trafficking-forced-labour-and-fisheries-crime-in-the-indone>> accessed 5 July 2017.

⁹³ *ibid*.

⁹⁴ *ibid*.

are not generally involved in criminal activity, but are recruited on an *ad hoc* basis.⁹⁵ Overfishing (to which IUU fishing activities also contribute), indebtedness, poverty, and pollution have driven fishers, in some cases, to migrant smuggling as a means of making a living. In a 2016 study conducted in Rote Island, Eastern Indonesia, it was found that the island's fishers engaged in migrant smuggling due to indebtedness and lack of opportunities to make a legal income (the rationality of despair).⁹⁶ In general, fishing vessels are probably favoured for smuggling migrants since they have less chance of being detected because of their natural reasons for being at sea.⁹⁷

Fishing vessels are also believed to be linked to drug trafficking where the IUU operation uses the fishing companies, fish processing plants and distribution networks as legitimate cover and storage facilities.⁹⁸ The smuggled drugs are often put in the fish freezer to lower the chance of detection. The UNODC found that fishing vessels may be used to traffic cocaine, ATS and its precursors, and heroin, although cocaine seems to be the most common.⁹⁹ In addition, IUU fishing operations may also be connected to corruption particularly in the issuance of fishing licences and in licensing conditions as well as the control and inspection of fishing.¹⁰⁰ In Africa, for example, bribery, political influence and conflict of interest are the types of corruption that support the IUU fishing operations and where, in practice, it often involves public officials.¹⁰¹

The amplification of harm, caused by the transnational and organised crime dimensions of IUU fishing, is argued in this

⁹⁵ UNODC, 'Transnational Organized Crime in the Fishing Industry' (n 90) 93.

⁹⁶ Antje Missbach, 'Perilous Waters: People Smuggling, Fishermen, and Hyper-precarious Livelihoods on Rote Island, Eastern Indonesia' (2016) 89(4) *Pacific Affairs* 749, 770.

⁹⁷ UNODC, 'Transnational Organized Crime in the Fishing Industry' (n 90) 73.

⁹⁸ *ibid* 93.

⁹⁹ *ibid* 75-92.

¹⁰⁰ *ibid*, 120.

¹⁰¹ Maira Martini, 'U4 Expert Answer: Illegal, Unreported and Unregulated Fishing and Corruption,' (Transparency International, 2013) 5-6 < https://www.transparency.org/files/content/corruptionqas/392_Illegal_unreported_and_unregulated_fishing_and_corruption.pdf > accessed 10 July 2017.

dissertation to be worthy of a more severe punishment in the form of criminal regulations and enforcement under the framework of suppression conventions at global and regional levels. The linkage between IUU fishing and other TOCs further strengthened the need for such criminalisation. The following Section 5.4.2. will elaborate on how such criminalisation can be done through suppression conventions at global and regional levels.

5.4.2 Criminalisation of IUU Fishing under Suppression

Conventions: the Three Alternatives

IUU fishing with TOC dimensions, as explained in Chapter 2, is a harmful transnational conduct that causes significant economic, environmental, social and legal order harms. In addressing the TOC dimensions of IUU fishing, this dissertation argues that IUU fishing needs to be criminalised under the suppression conventions and their provisions. The criminalisation of IUU fishing and its TOC dimensions would be beneficial in tackling the problem in five ways: i) it would send a strong signal to the international community that IUU fishing is a serious threat; ii) it could facilitate the harmonisation of substantive law to criminalise IUU fishing that ultimately could minimise legal differences among states; iii) it could oblige the establishment of jurisdiction by states to ensure that the crime would not go unpunished; iv) it could provide an endorsement of the use of investigative techniques; and v) it could provide a broader range of international cooperation tools that could be employed by states (see Chapter 7, Section 7.3.3., for further discussion on the advantages and challenges of IUU fishing criminalisation through suppression conventions). This idea of criminalisation under a suppression convention is generally in line with the recommendation of the Second AIDP World Conference on the Protection of the Environment through Criminal Law held in Bucharest, 2016. The Conference recommended that “States and the international community elaborate a Suppression Treaty about serious violations to ecosystems and criminal justice in order to ensure the punishment of the most serious attacks against the environment that should be considered international crimes”.¹⁰²

¹⁰² Jose Luis de la Cuesta, ‘Protection of the Environment through Criminal Law:

In this chapter, it is argued that the criminalisation of IUU fishing at a global level should be done under the framework of suppression conventions and their provisions through three main alternatives. The first alternative is to criminalise IUU fishing under the UNTOC. The second alternative is to establish a stand-alone suppression convention, and the third alternative is to integrate the suppression provisions into the existing international fisheries instruments. The following Sections 5.4.2.1. to 5.4.2.3. will elaborate on the three alternatives based on the main elements of suppression conventions as explained in Section 5.3.3. These sections will conclude with a comparison between the three alternatives in Section 5.4.2.4.

5.4.2.1. IUU Fishing Criminalisation under the UNTOC

The first alternative for criminalising IUU fishing at a global level is to criminalise IUU fishing under the UNTOC. Since IUU fishing operations are also connected with the involvement of OCGs, the UNTOC is a natural candidate to suppress such conduct. The following Sections 5.4.2.1.1. to 5.4.2.1.5. will give an overview of the UNTOC, the offences covered by the Convention, how the criminalisation of IUU fishing under the UNTOC can be achieved.

5.4.2.1.1. An Overview of the UNTOC

The UNTOC is a suppression convention which was established in 2010 due to the global concern on “the negative economic and social implications related to organised criminal activities”.¹⁰³ The purpose of the Convention is to “promote cooperation to prevent and combat transnational organized crime more effectively”.¹⁰⁴ Its member states believed that by having a convention on TOC, they would have “an effective tool and the necessary legal framework

Final Recommendations’ in Jose Luis de la Cuesta and others (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).

¹⁰³ UNGA ‘United Nations Convention against Transnational Organized Crime’ (8 January 2001) UN Doc A/RES/55/25 para 7.

¹⁰⁴ UNTOC, art 1.

for international cooperation in combating the organized criminal activities”¹⁰⁵ Andreas Schloenhardt argues that the convention has two main goals. The first is to eliminate differences between national legal systems, and the second is to set standards for domestic laws to fight transnational organised crime effectively.¹⁰⁶ The convention, as of 30 May 2020, has 190 parties¹⁰⁷ with three specific protocols that deal with particular issues: Trafficking in Persons Protocol, Smuggling of Migrants Protocol and Firearms Protocol.

5.4.2.1.2. Substantive Law

The convention provisions, as stated by Article 3 of the UNTOC, only apply to the prevention, investigation and prosecution of three types of offences. The first type is the offences established in Articles 5 (participation in an OCG), 6 (laundering of proceeds of crime), 8 (corruption) and 23 (obstruction of justice). In this regard, Roger S. Clark explains that the criminalisation of the offence in Article 5 (participation in an OCG) is the fundamental obligation of the convention while criminalisation of the offences in Articles 6, 8 and 23 is more subsidiary in nature.¹⁰⁸ The second type of offence, where the UNTOC is applicable, is serious crime. Offences under Articles 5, 6, 8 and 23 plus serious crime can only be covered if they are transnational in nature and involve an OCG, as established by Article 3 of the Convention. In addition to these two types of offences, there is a third type which is provided by the protocols of the UNTOC. The protocols set out their own offences which are then regarded as offences established under the Convention.

To better understand the offences covered by the UNTOC, it is first necessary to be familiar with several important terminologies

¹⁰⁵ UNGA ‘United Nations Convention against Transnational Organized Crime’ (n 103) para 10.

¹⁰⁶ Andreas Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (Brill 2010) 34.

¹⁰⁷ For updated status visit: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en> accessed 30 May 2020.

¹⁰⁸ Roger S. Clark, ‘The United Nations Convention against Transnational Organized Crime’ (2004) 50(1) *Wayne Law Review* 161, 165.

closely related to the offences, such as “transnational”, “organised criminal group”, and “structured group”. The convention provides the meaning of transnational under Article 2 which states that “an offence is transnational if:

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

Further, the convention also provides a definition of an OCG under Article 2 (a) as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. Structured group is defined under Article 2 (c) as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”.

In providing a better understanding of the offences criminalised by the UNTOC which will be useful for the forthcoming discussion, the following Sections 5.4.2.1.2.1. to 5.4.2.1.2.3. will explain the offences under Articles 5, 6, 8 and 23, serious crime and offences under the UNTOC’s protocols.

5.4.2.1.2.1. Offences under Articles 5, 6, 8, and 23 of the UNTOC

Article 5 (Criminalisation of Participation in an OCG) underlines the obligations of states to adopt legislative and other measures as may be necessary to establish participation in an OCG as a criminal offence when committed intentionally. The Article provides two models of participation that can be criminalised: a conspiracy offence

(Article 5(1)(a)(i)) and an offence of participating in an OCG (Article 5(1)(a)(ii)). States Parties can choose to criminalise one or both of the offences as offences distinct from other offences involving the attempt or completion of the criminal activity (Article 5(1)(a)). The offence of participation in an OCG is argued to be broader than the offence of conspiracy since it opens the door for the criminalisation of persons who are more remotely connected to criminal activities. It can cover persons who contribute to activities that are designed to achieve a criminal aim but without being involved in the criminal activities themselves.¹⁰⁹

Article 6 (Criminalisation of the Laundering of Proceeds of Crime) obliges States Parties to criminalise the laundering of the proceeds of crime under domestic law when committed intentionally. The offences cover acts related to property that is the proceeds of crime, i.e. the conversion or transfer of property,¹¹⁰ the concealment or disguise of the true nature of property,¹¹¹ possession or use of property¹¹² and participation in or conspiracy to commit the offences of Article 6.¹¹³ Parties to the convention must seek to criminalise the laundering of proceeds from the widest range of predicate offences.¹¹⁴

Article 8 (Criminalisation of Corruption) obliges States Parties to criminalise acts of corruption under domestic law when committed intentionally. These acts consist of the promise, offering or giving to a public official and the solicitation or acceptance by a public official “directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties”.¹¹⁵ When the bribery is conducted by a foreign public official or international civil servant, the Article recommends States Parties to consider its

¹⁰⁹ Schloenhardt (n 106) 52.

¹¹⁰ UNTOC, art 6(1)(a)(i).

¹¹¹ *ibid* art 6 (1)(a)(ii).

¹¹² *ibid* art 6 (1)(b)(i).

¹¹³ *ibid* art 6 (1)(b)(ii).

¹¹⁴ *ibid* art 6 (2)(a).

¹¹⁵ *ibid* arts 8(1)(a)-(b).

criminalisation.¹¹⁶ The Article further obliges the criminalisation of participation as an accomplice in corruption.¹¹⁷

OCGs are known to resort to violence and intimidation to avoid the course of justice.¹¹⁸ With this in mind, Article 23 (Criminalisation of Obstruction of Justice) obliges States Parties to criminalise the acts of obstruction of justice under domestic law when committed intentionally. The Article requires the criminalisation of two actions. The first action is “the use of physical force, threats or intimidation or the promise, offering or giving an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings related to offences covered by the UNTOC”. The second action is ‘the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the UNTOC”.

5.4.2.1.2.2. Serious Crime

Serious crime is defined by Article 2 (b) of the UNTOC as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. Boister explains that the four-year time frame was concluded based on an analytical study by the United Nations Secretariat for the Ad Hoc Committee which revealed that average minimum sentences for serious offences ranged from one to five years with an average of three years.¹¹⁹ Four years instead of three may have been chosen because the three-year threshold left out a range of serious crimes.¹²⁰ Regarding the definition of serious crime, Clark explains that the decision to opt for the content-free definition of serious crime has turned the application of the UNTOC more towards the seriousness

¹¹⁶ *ibid* art 8 (2).

¹¹⁷ *ibid* art 8 (3).

¹¹⁸ McClean (n 53) 256.

¹¹⁹ Neil Boister, ‘The UN Convention against Transnational Organised Crime 2000’ in Hauck Pierre and Peterke Sven (eds), *International Law and Transnational Organised Crime* (1st edn, Oxford University Press 2016).

¹²⁰ *ibid* 135.

of activities rather than to substantive content.¹²¹ It is left to the UNTOC's protocols to set out some specific substantive areas to which the basic obligations of the convention are to be applied.¹²² In this sense, the protocols can be considered as more traditional suppression conventions which criminalise the substantive activities that are prohibited by them.¹²³

5.4.2.1.2.3. Offences of the UNTOC's Protocols

In addition to the offences established by Articles 5, 6, 8 and 23, and serious crime, the Protocols of the UNTOC also established their subject matter as offences under the Convention. For example, the Trafficking in Persons Protocol established trafficking in persons as an offence;¹²⁴ the Smuggling of Migrants Protocol established smuggling of migrants and the producing of fraudulent documents for enabling the smuggling of migrants as offences;¹²⁵ and the Firearms Protocol established illicit manufacturing and illicit trafficking of firearms, their parts and components and ammunition as offences.¹²⁶ These UNTOC Protocols established their offences in Article 1, paragraph 3 of each Protocol.

5.4.2.1.2.4. Criminalisation of IUU Fishing under the UNTOC

The criminalisation of IUU fishing under the UNTOC could be achieved in two ways. The first way would be to establish IUU fishing as a serious crime and the second way would be to establish an additional protocol on IUU fishing. The following SectionS 5.4.2.1.2.4.1. to 5.4.2.1.2.4.2. will explain the possible methods of implementing the two alternatives.

5.4.2.1.2.4.1 Establishing IUU Fishing as a Serious Crime

Serious crime as one of the offences under the UNTOC has the

¹²¹ Clark 'The United Nations Convention against Transnational Organized Crime' (n 108) 169.

¹²² *ibid.*

¹²³ *ibid* 170.

¹²⁴ Trafficking in Persons Protocol, art 5.

¹²⁵ Smuggling of Migrants Protocol, art 6.

¹²⁶ Firearms Protocol, art 5.

potential to be used to criminalise IUU fishing under the Convention. The open definition of serious crime has enabled the Convention to be used flexibly.¹²⁷ In having such a definition, the UNTOC does not need to have a list of serious crimes and, at the same time, it can accommodate new and emerging crimes in the future, including IUU fishing, as long as the crime is punishable for at least four years, is transnational in nature, and involves an OCG. Other crimes punishable for less than four years will then be excluded and not deemed to be serious crimes.

Hypothetically, IUU fishing could be considered as a serious crime and thus trigger the application of the UNTOC. In the application, the threshold of four years in serious crime is problematic since countries have different domestic legislation in sanctioning IUU fishing. It would be possible for IUU fishing activities in country A to be considered to be serious crime and punishable by a minimum of four years of deprivation of liberty while, in country B, they would not be so considered. This could happen due to different national circumstances. For a landlocked country, IUU fishing might not be the top priority to be considered as a serious crime, while for a country with abundant fish stocks and high IUU fishing activities, having IUU fishing as a serious crime would be of great national importance. The uneven national treatment of IUU fishing might create problems in the application of the Convention. Ideally, when certain conduct is considered to be a serious crime, all States Parties should adapt their legislation to accommodate the four-year threshold. However, the UNTOC, unfortunately, lacks the necessary provisions to enable its Conference of the Parties to make decisions that can oblige its members to increase the penalties to four or more years when they have agreed that certain conduct is to be categorised as serious crime.¹²⁸

The main issue of categorising IUU fishing as serious crime would be to unify states' positions. One possible way to do this is to

¹²⁷ UN 'The Notion of Serious Crime in the United Nations Convention against Transnational Organized Crime' Note by the Secretariat on the Conference of the Parties to the United Nations Convention Sixth Session held in Vienna on 15-19 October 2012 (20 September 2012) UN Doc CTOC/COP/2012/CRP.4 para 34.

¹²⁸ Boister, 'The UN Convention against Transnational Organised Crime 2000' (n 119) 179.

engage states through bilateral, regional or multilateral approaches and through education and discussion on the danger of IUU fishing and the need to consider it as a serious crime. Once there is enough support from like-minded states, a resolution affirming the status of IUU fishing as a serious crime could be established. A resolution from like-minded countries could be proposed through CCPCJ or the CoP UNTOC in which member states are urged to make IUU fishing a serious crime as defined in the UNTOC. Ideally, although it is difficult, member states would amend their domestic legislation to accommodate the new status of IUU fishing as an offence punishable by a minimum of four years imprisonment. However, it should be noted that there is no mechanism in the CCPCJ or CoP UNTOC to force member states to implement the resolution. Thus, full implementation would be highly dependent on the willingness of the member states. One could, however, reflect on the efforts of states to categorise the illicit trafficking in protected species of wild fauna and flora as a serious crime through the Resolution of the Economic and Social Council E/RES/2013/40 in 2013 which was followed up by the General Assembly in similar resolutions, A/RES/69/314 and A/RES/71/326. These three resolutions encouraged member states to categorise such conduct as a serious crime as defined in Article 2(b) of the UNTOC. A similar resolution of the CCPCJ or the CoP UNTOC could be attempted as a follow-up after enough support had been gathered to criminalise IUU fishing as a serious crime.

5.4.2.1.2.4.2 Establishing an Additional UNTOC Protocol against IUU Fishing

The establishment of an additional UNTOC Protocol against IUU fishing could be another alternative for criminalising IUU fishing at a global level under the UNTOC. Until now, the Convention has been supplemented by three protocols: the Trafficking in Persons Protocol, the Smuggling of Migrants Protocol and the Firearms Protocol. Concerning the relations between the UNTOC and its protocols, Michael Kilchling explains that “the convention is designed as an open system which can easily be supplemented by additional protocols in the future which then may focus on other specific, maybe new, upcoming

areas of transnational organised crime”.¹²⁹ This open system could be used by States Parties if they deem it necessary to criminalise new offences, including IUU fishing, by establishing additional protocols under the UNTOC.

The new protocol on IUU fishing would take a supplementary position towards the UNTOC. The UNTOC would still be the main reference point for tackling TOC in general. The new protocol would not have to repeat the existing provisions such as extradition, MLA, international cooperation and others since they are already dealt with in the UNTOC as the parent convention. The new protocol would deal with more specific provisions relevant to its subject matter which would supplement the general provisions of the UNTOC.¹³⁰ The three protocols mentioned above have taken this approach. The Smuggling of Migrants Protocol, for example, establishes provisions on security and control of documents¹³¹ which are not in the Convention but which were deemed necessary in dealing with offences concerning the smuggling of migrants.

Since general matters have been dealt with in the Convention, the new protocol could focus on providing specific provisions that are deemed crucial to the suppression of IUU fishing. Some of the specific provisions that are important in tackling IUU fishing include the clarification on jurisdictions and measures that can be taken by states. In this regard, the Smuggling of Migrants Protocol provides a useful example of such provisions under Article 8 on measures against the smuggling of migrants by sea. The Article provides different scenarios in which a State Party can take steps regarding vessels suspected of smuggling migrants. First, a State Party may request the assistance of other parties in suppressing the use of the vessel

¹²⁹ Michael Kilchling, ‘Substantive Aspects of the U.N. Convention Against Transnational Organized Crime: A Step Towards an “Organized Crime Code”?’ in Hans Jörg Albrecht and Cyrille Fijnaut (eds), *The containment of transnational organized crime: comments on the UN convention of December 2000* (Max-Planck-Institut für Ausländisches und Internationales Strafrecht 2002) 87.

¹³⁰ Christopher Ram, ‘The United Nations Convention against Transnational Organized Crime and Its Protocols’ (2001) 1(2) *Forum on Crime and Society* 135, 138.

¹³¹ Smuggling of Migrants Protocol, art 12.

that is under the requesting State Party's nationality.¹³² The requested State Party then is obliged to render assistance to the extent possible within its means.¹³³ Second, a State Party may request authorisation from the flag state to take measures, i.e. boarding the vessel, searching the vessel and, if the evidence is found, taking appropriate measures regarding the vessel, persons and cargo on board.¹³⁴ Third, a State Party may board and search a vessel that is without nationality and take appropriate measures according to relevant domestic and international laws.¹³⁵ The Protocol also underlines the primacy of flag state jurisdiction by obliging the requesting state to request prior authorisation from the flag state and, at the same time, limiting the requesting State Party's actions based on such authorisation. The Protocol also sets safeguarding clauses under Article 9 to protect certain fundamental interests and clarify the relationship between the Protocol and other areas of international law, including the law of the sea. One of the safeguarding measures explicitly states that any measure taken must not interfere with or affect "the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea"¹³⁶ or "the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel".¹³⁷

Reflecting on the Smuggling of Migrants Protocol's provisions outlined above, the new protocol on IUU fishing could use similar provisions as a basis for further expansion since these particular provisions of the Smuggling of Migrants Protocol only cover the basic principles of enforcement and flag state jurisdiction and do not greatly add to the existing legal framework of the law of the sea. Further clarification on the jurisdiction and measures of the coastal, flag and port states is needed to avoid confusion in the implementation, taking into account the rights and obligations embedded in the existing international instruments on fisheries. In internal and territorial

¹³² *ibid* art 8 (1).

¹³³ *ibid*.

¹³⁴ *ibid* art 8 (2).

¹³⁵ *ibid* art 8(7).

¹³⁶ *ibid* art 9(3)(a).

¹³⁷ *ibid* art 9(3)(b).

waters, the Convention could oblige the establishment of coastal state jurisdiction based on territorial principles against offences committed in these waters. In the EEZ, the coastal State must have primary jurisdiction over the flag state jurisdiction, against offences which have been committed. The jurisdiction and measures on the high seas could also be clarified in any protocol to fight IUU fishing on the high seas, bearing in mind the flag state's jurisdiction over vessels flying its flag. In order to provide firmer measures in tackling IUU fishing, the new protocol could establish limitations on the flag state's jurisdiction through the insertion of a provision based on a right of visit under Article 110 of the UNCLOS. As Article 110 of the UNCLOS requires powers conferred by treaty, the new protocol could be the treaty that confers powers to limit flag state jurisdiction through the application of the right of visit.

Another specific provision needed in the protocol is clarification on imprisonment or other corporal punishment. Article 73(3) of the UNCLOS forbids imprisonment or other corporal punishment without prior agreement between the states concerned. The new protocol could establish itself as a legal basis of such agreement for States Parties to the protocol.

States Parties need to negotiate and agree on the establishment of a new protocol of IUU fishing under the framework of the UNTOC. Reflecting on the establishment of the UNTOC and its protocols, the establishment of a new protocol could take the same path through the General Assembly as already taken by the three existing protocols of the UNTOC. The Trafficking in Persons Protocol and the Smuggling of Migrants Protocol were established under General Assembly Resolution 55/25 of 15 November 2000,¹³⁸ in one package with the Convention. The Firearms Protocol was not adopted at that time since the Ad Hoc Committee had not completed its work on the protocol by then.¹³⁹ The Firearms Protocol was adopted in 2001 under General Assembly Resolution 55/255.¹⁴⁰ The states interested in a new

¹³⁸ UN Doc A/RES/55/25 (n 102).

¹³⁹ *ibid* point 4.

¹⁴⁰ UNGA 'Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime' (8 June 2001)

protocol on IUU fishing could try to convince their counterparts, through the General Assembly, to establish a resolution to start work on the establishment of a new protocol. Based on that mandate, an Ad Hoc Committee or similar body could be formed to prepare a series of discussion events on the matters relating to the suppression of IUU fishing. When the draft has been prepared, interested states could convince other states to adopt the draft protocol by means of a General Assembly resolution. An alternative way of establishing a new protocol is through the CoP UNTOC. Christopher Ram argues that the mandate of the CoP under Article 3 of the UNTOC includes periodic implementation reviews and the making of recommendations to improve the UNTOC and its implementation. This mandate could be used by the CoP to propose new protocols as deemed necessary. The mandate to proceed with the negotiation of a new protocol, however, should come from the General Assembly.¹⁴¹

5.4.2.1.3. Jurisdiction

Jurisdiction-related provisions are provided in the Convention mainly under Article 15, which applies to offences under Articles 5, 6, 8 and 23. Article 15 obliges each State Party to adopt necessary measures to establish its jurisdiction over the UNTOC offences when: i) the offence is committed in the territory of that party; or ii) the offence is committed on board a vessel that is flying the flag of that party or an aircraft that is registered under the laws of the party at the time that the offence is committed.¹⁴² Article 15 mandates states to establish jurisdiction for specified offences but does not oblige the exercise of that jurisdiction in any particular case.¹⁴³ Further, a State Party may also establish its jurisdiction over any such offence¹⁴⁴

UN Doc A/RES/55/255.

¹⁴¹ Ram (n 130) para 144.

¹⁴² UNTOC, art 15(1).

¹⁴³ McClean (n 53) 167.

¹⁴⁴ The offence is further explained by art 15(2)(c) of UNTOC as “(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory; (ii) One of those established in accordance with article 6, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1(a)(i) or (ii) or (b) (i), of this Convention within its territory.”

when the offence is committed against a national of that State Party (passive personality principle) or where it is committed by a national of the State Party (nationality principle) or a stateless person who has his or her habitual residence in the territory.¹⁴⁵

States that do not extradite their nationals must adopt all necessary measures to establish their jurisdiction over the UNTOC offences when they do not extradite on this basis. This provision corresponds to the *aut dedere aut judicare* principle.¹⁴⁶ The necessary measures also may be adopted when States Parties do not extradite the alleged offender for reasons other than his/her nationality.¹⁴⁷ Article 15(5) also includes the coordination provision where if a State Party exercising jurisdiction has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation into, prosecution of or judicial proceedings concerning the same conduct, the competent authorities of those states must coordinate their actions with each other. The coordination between relevant States Parties is important due to the possibility of a conflict of jurisdiction where two or more states act concurrently and there is a chance of double jeopardy occurring.¹⁴⁸

5.4.2.1.4. Investigative Tools

The UNTOC requires States Parties, if permitted by their domestic legal systems, to establish necessary measures under domestic law that will allow the use of special investigative techniques such as controlled delivery, electronic surveillance and undercover operations.¹⁴⁹ The Convention provides a definition of controlled delivery under Article 2, but not of undercover operations or electronic surveillance.¹⁵⁰ Controlled delivery is acknowledged as

¹⁴⁵ UNTOC, art 15(2).

¹⁴⁶ *ibid* art 15(3).

¹⁴⁷ *ibid* art 15(4).

¹⁴⁸ Clark 'The United Nations Convention against Transnational Organized Crime' (n 108) 181.

¹⁴⁹ UNTOC, art 20 (1).

¹⁵⁰ Art 2 (i) UNTOC defines controlled delivery as "the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of

one of the most effective investigative tools in fighting transnational crimes, especially illicit drug trafficking.¹⁵¹ It enables the mapping of criminal schemes and structures of OCGs for the purpose of prosecution.¹⁵² Despite its potential for success, its failure could mean that the illicit goods would penetrate the market. An undercover operation can be understood as an investigation involving undercover activities by an agent over a period of time.¹⁵³ An undercover operation is also an example of an effective investigation tool due to its ability to penetrate criminal networks. Undercover operations, in many cases, are implemented together with controlled delivery.¹⁵⁴ Electronic surveillance generally can be categorised into four types: audio surveillance, visual surveillance, tracking surveillance and data surveillance.¹⁵⁵ Electronic surveillance could collect a broader range of evidence and be a particularly useful tool when physical surveillance is not possible. However, this method of surveillance is intrusive in nature, and its use is subject to strict judicial control and legal safeguards to prevent the breach of individual rights and privacy.¹⁵⁶ Due to its intrusive nature, electronic surveillance should not be the first choice of investigative tool. These special investigative techniques can also be applied to IUU fishing, perhaps with any additional method specifically useful for combating IUU fishing such as aerial surveillance.

persons involved in the commission of the offence’

¹⁵¹ UNAFEI, ‘Work Product of the 116th International Training Course “Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes”’ (UNAFEI, 2001) Resource Material Series No. 58, 229 <https://www.unafei.or.jp/publications/pdf/RS_No58/No58_00All.pdf> accessed 11 June 2019.

¹⁵² UNODC, ‘Organized Crime Module 8 Key Issues: Special Investigative Techniques - Controlled Deliveries’ (UNODC, 2018) <<https://www.unodc.org/e4j/en/organized-crime/module-8/key-issues/special-investigative-techniques/controlled-deliveries.html>> accessed 11 June 2019.

¹⁵³ US Attorney General Guidelines on FBI Undercover Operations Revised 11/13/92 cited in UNAFEI (n 151) 232.

¹⁵⁴ *ibid.*

⁰ UNODC, ‘Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime’ (United Nations Publication 2009) 2.

¹⁵⁶ UNODC, ‘Organized Crime Module 8 Key Issues: Special Investigative Techniques - Controlled Deliveries’ (UNODC, 2018) <<https://www.unodc.org/e4j/en/organized-crime/module-8/key-issues/special-investigative-techniques/physical-and-electronic-surveillance.html>> accessed 11 June 2019.

In supporting international cooperation to combat transnational crimes, the Convention also encourages the conclusion of bilateral and multilateral agreements or arrangements to employ those special investigative techniques.¹⁵⁷ When there is no such agreement or arrangement, the use of special investigative techniques must be implemented on a case-by-case basis and in consideration of financial arrangements and understanding regarding the exercise of jurisdiction by the related States Parties.¹⁵⁸

The UNTOC, in addition to the use of investigative tools, also encourages parties to conduct joint investigations when possible. Article 19 of the UNTOC encourages the conclusion of bilateral or multilateral agreements or arrangements that enable competent authorities to establish joint investigative bodies.¹⁵⁹ When there is no such agreement or arrangement, the joint investigation may be conducted by agreement on a case-by-case basis.¹⁶⁰ The UNTOC does not provide definition of “joint investigative bodies”. Nonetheless, the UNODC Expert Working Group on Joint Investigative Teams considered that a “joint investigative body” is distinct from a “joint team” and “joint investigation” where the “joint investigative body is intended to be a more permanent structure on the basis of a bilateral agreement.¹⁶¹ The UNDOC guidelines further explain that the joint investigative bodies would be more suitable for investigating certain types of crime, e.g. people trafficking, and not just isolated cases, over a longer period of time.¹⁶² As the involvement of OCGs in IUU fishing involves different jurisdictions in most cases, joint investigations would be necessary in increasing efficiency and reducing barriers, particularly in information exchange and the need for multiple request letters. In this way, the investigators could carry

¹⁵⁷ UNTOC art 20 (2).

¹⁵⁸ *ibid* art 20 (3).

¹⁵⁹ *ibid* art 19.

¹⁶⁰ *ibid*.

¹⁶¹ United Nations (UN) ‘Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session, held in Vienna from 8 to 17 October 2008’ (1 December 2008) UN Doc CTOC/COP/2008/19 para 210.

¹⁶² UNODC, ‘Trafficking in Persons & Smuggling of Migrants. Guidelines on International Cooperation’ (UNDOC 2010) 41.

out any necessary actions with more agility and pursue immediate relevant actions.¹⁶³

5.4.2.1.5. International Cooperation

Law enforcement authorities are increasingly relying on international cooperation due to its transnational nature and compound operational methods. The UNTOC, as with the majority of suppression conventions, acknowledges the importance of the promotion of international cooperation to prevent and combat transnational organised crime more effectively.¹⁶⁴ The Convention is expected to provide effective tools and the necessary legal framework for international cooperation in combating different transnational organised crimes.¹⁶⁵ Thus, its provisions are aimed at playing a pivotal role in harmonising obligations by providing the basis for different international cooperation mechanisms and addressing legal gaps in international cooperation where no bilateral or multilateral arrangements exist between countries seeking to cooperate.¹⁶⁶

In the area of international cooperation, the UNTOC includes provisions on international cooperation mechanisms which can be used to fight IUU fishing, ranging from formal judicial cooperation such as extradition and mutual legal assistance (MLA) to more informal law enforcement methods such as joint investigations and special investigative techniques. Regarding extradition, the Convention, under Article 16, offers a basis for extradition mechanisms to be observed and implemented by States Parties. A number of important provisions are provided in the application of extradition including the

¹⁶³ UN, 'Best Practices in Joint Investigations and Specialized Prosecution. Background Paper Prepared by the Secretariat' The 10th Session of the Working Group on Trafficking in Persons in Vienna, 10 and 11 September 2020 (26 June 2020) UN Doc CTOC/COP/WG.4/2020/3 para 23.

¹⁶⁴ UNTOC, art 1.

¹⁶⁵ UN Doc A/RES/55/25 (n 102) para 10.

¹⁶⁶ UN, 'Use of the United Nations Convention against Transnational Organised Crime as a Legal Basis for International Cooperation against All Forms of Transnational Organised Crime' The 6th Session of the Working Group on International Cooperation in Vienna, 27 and 28 October 2015 (18 August 2015) CTOC/COP/WG.3/2015/3, para 20.

scope of application,¹⁶⁷ the dual criminality principle,¹⁶⁸ the inclusion of extraditable offences in existing and future treaties,¹⁶⁹ the use of the UNTOC as a legal basis for extradition,¹⁷⁰ and the *aut dedere aut judicare* principle.¹⁷¹ The Convention pushes cooperation between states further with regard to extradition by obliging the requested state to consult with the requesting state before refusing extradition¹⁷² and urging States Parties to conclude bilateral and multilateral agreements or arrangements to implement or to enhance the effectiveness of extradition.¹⁷³

Regarding MLA, the Convention provides States Parties with comprehensive provisions under Article 18, which is often referred to as a “mini-treaty” with its 30 paragraphs.¹⁷⁴ The Article sets out different technicalities of MLA, including the accepted purposes of MLA requests,¹⁷⁵ the use of certain UNTOC provisions as the legal basis for MLA,¹⁷⁶ refusal of MLA based on banking secrecy,¹⁷⁷ the dual criminality principle,¹⁷⁸ and fiscal matters,¹⁷⁹ content of the MLA request,¹⁸⁰ postponement of MLA,¹⁸¹ and the cost of executing MLA requests.¹⁸² As with extradition (Article 16), the Convention also urge States Parties to consider the conclusion of bilateral or multilateral agreements or arrangements that would implement or enhance the provisions related to MLA in the Convention.

¹⁶⁷ UNTOC, art 16 (1).

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid* art 16(3).

¹⁷⁰ *ibid* art 16 (4)-(5).

¹⁷¹ *ibid* art 16(10).

¹⁷² *ibid* art 16(16).

¹⁷³ *ibid* art 16(17).

¹⁷⁴ UNODC, ‘Manual on Mutual Legal Assistance and Extradition’ (n 70) 2; Vervaele (n 71) 125.

¹⁷⁵ UNTOC, art 18(3).

¹⁷⁶ *ibid* art 18(7).

¹⁷⁷ *ibid* art 18(8).

¹⁷⁸ *ibid* art 18(9).

¹⁷⁹ *ibid* art 18(22).

¹⁸⁰ *ibid* art 18(15).

¹⁸¹ *ibid* art 18(25).

¹⁸² *ibid* art 18(28).

In the spirit of promoting international cooperation, the UNTOC also provides other methods for member states to be able to prevent and combat transnational organised crime more effectively. Such methods include international cooperation for purposes of confiscation (Article 13), disposal of confiscated proceeds of crime or property (Article 14), transfer of sentenced persons (Article 17), joint investigations (Article 19), cooperation to use special investigative techniques (Article 20), transfer of criminal proceedings (Article 21) and law enforcement cooperation (Article 27).¹⁸³ In supporting the effective implementation of these methods, States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance.¹⁸⁴

In light of the alternative of IUU fishing criminalisation under the UNTOC, it is necessary to look for other alternatives that can be considered by states. The following two Sections 5.4.2.2. and 5.4.2.3. will explore two other alternatives, i.e. the establishment of a stand-alone suppression convention and the integration of suppression provisions into international fisheries instruments, before the last Section 5.4.2.4. offers a comparison of the three alternatives.

5.4.2.2 Establishment of a Stand-alone Suppression Convention against IUU Fishing

The second alternative way to criminalise IUU fishing at a global level is to establish a stand-alone suppression convention. The stand-alone convention is a viable alternative if states want to create a convention which can accommodate different concerns from interested states. A stand-alone suppression convention could be established when states come to an agreement that IUU fishing (and its transnational and organised crime dimensions) is a transnational crime that needs to be suppressed globally. Serious negative harms caused by IUU fishing could be a foundation for common consensus among concerned states in criminalising the illegal conduct. Since these harms are not exclusively confined within national borders,

¹⁸³ UN, 'Use of the United Nations Convention against Transnational Organised Crime as a Legal Basis for International Cooperation against All Forms of Transnational Organised Crime' (n 166) para 28.

¹⁸⁴ UNTOC, art 30(4).

states have strong reasons in uniting their interests to form an agreement to suppress IUU fishing through criminalisation under a suppression convention.

The stand-alone suppression convention could be established under the framework of the United Nations. The convention then could take advantage of the expertise and network of the different institutions under the United Nations, such as the FAO and the UNODC. The ability to collaborate with relevant institutions would be an added value for the convention, especially since it is dealing with two intertwined aspects: fisheries and criminal justice.

The following Sections 5.4.2.2.1. to 5.4.2.2.4. will try to illustrate what the stand-alone convention would be like based on the elements of suppression conventions explained above in Section 5.3.3

5.4.2.2.1. Substantive Law

The substantive criminalisation in this convention would consist of minimum standards in substantive criminal law for States Parties to suppress IUU fishing. The standards would then have to be transposed into domestic legislation and be implemented by the local authorities.

Before substantive criminalisation can be achieved, states would need to agree on what constitutes IUU fishing. As discussed in Chapter 3 of this dissertation, the broad definition of IUU fishing provided by the IPOA-IUU has created obscurity and overlap among its elements, i.e. “illegal”, “unreported” and “unregulated”. The three elements sometimes overlap and can create confusion in their interpretation and implementation. Several aspects of “unreported” and “unregulated” fishing can also be covered by “illegal” fishing due to its overarching description. If states agreed to criminalise IUU fishing under a suppression convention, a clearer definition should be among the first priorities that need to be discussed. The definition has to be much more precise to provide an unbiased meaning of which activities should be deemed a crime since not every activity of IUU fishing may deserve criminalisation, particularly when it is related to “unregulated” fishing some elements of which are not illegal. The need for a clearer definition also applies to the other two

options of global criminalisation, i.e. criminalisation through the UNTOC and the integration of suppression provisions into existing fisheries instruments.

In ensuring that States Parties criminalise IUU fishing, the convention could oblige States Parties to carry out two main actions. First, states would need to establish IUU fishing offences as a criminal offence and, second, states would be obliged to make the commission of such offences liable to sanctions. Regarding the first action, the convention would need, first of all, to give clear guidance on what constitutes an offence or offences within IUU fishing terminology. This need, of course, relates to the above discussion on the overlapping elements of IUU fishing which make the term unclear and which could create confusion. In the process of establishing a clearer definition of IUU fishing, one could consider the 1998 Drugs Convention. The 1998 Drugs Convention provides in detail, in Article 3, different actions that must be categorised as offences, from the production to the importation or exportation of any narcotic drug or any psychotropic substances in contravention to the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances. Relatively clear terminologies of offences are also set out in the three protocols of the UNTOC, i.e. the protocols on Trafficking in Persons, Smuggling of Migrants and Firearms. The three protocols provide definitions of what constitutes trafficking in persons, smuggling of migrants and, for the firearms protocol, the definition of firearms, parts and components, ammunition, illicit manufacturing, illicit trafficking and tracing. Clearer terminologies will contribute to higher legal certainty, which is needed both by states in the implementation of the convention and by the perpetrator in protecting his or her basic rights in the criminal justice process. The first step of finding such a definition perhaps can be found in the description of serious violations in Article 21 (11) of the UNFSA. The Article describes nine activities that are considered to be serious violations, including: fishing without a valid licence; fishing in a closed area; using prohibited gear; and falsifying or concealing the markings, identity or registration of a fishing vessel. States could scrutinise which of these serious violations are suited for inclusion in a definition of IUU fishing. Among these violations, at least two of them could be considered by states to be worthy of criminalisation, i.e. fishing without a valid licence and using prohibited gear. These two

violations can commonly be found in the IUU fishing cases involving OCGs.

The second action is to make the commission of IUU fishing (as a criminal offence) liable to sanctions. In doing so, the convention could oblige states to establish sanctions over IUU fishing offences which could include imprisonment or other forms of deprivation of liberty and confiscation of assets. Due to the involvement of OCGs in IUU fishing, the convention could also insert provisions which take into account this phenomenon and make both the involvement of OCGs in IUU fishing and a transnational aspect to IUU fishing prerequisites for the application of the stand-alone convention, as is the case in Article 3 of the UNTOC. Ideally, the established minimum standard of sanctions set out by the convention will push States Parties to revise their national legislation on IUU fishing offences so as to be in line with the convention. As more and more states adopt the minimum standard of sanctions, the chance of perpetrators to exploit weaker regulations in some states will be reduced.

The enforcement of this stand-alone convention will depend on an indirect enforcement system. The system will leave the enforcement endeavours to the states' domestic legal systems. It would then be contingent on states' willingness to provide their best efforts to utilise different enforcement measures under their legal systems to ensure that provisions in the convention are enforced. In helping to ensure that states' enforcement efforts are effective, the convention could provide review mechanisms to measure the efforts of states and, at the same time, provide training and technical assistance aimed at improving states' enforcement efforts.

5.4.2.2.2. Jurisdiction

The convention will need to establish jurisdictions over IUU fishing offences to ensure that states can enforce the provisions against the perpetrators. States could choose which jurisdictions are to be established in the convention. Options for jurisdictions could come from the five traditional bases of jurisdiction, i.e. territorial, nationality, protective, passive personality and universal.

Among these jurisdictions, territorial jurisdiction could become one of the viable options. Territorial jurisdiction in principle could cover IUU fishing offences carried out by vessels in internal and territorial waters. This jurisdiction in internal and territorial waters in principle and in practice would be under the jurisdiction of coastal states.¹⁸⁵

With regard to IUU offences in the EEZ, the UNCLOS provides coastal states with jurisdiction and enforcement powers in the EEZ under Article 73. Article 73 (1) of the UNCLOS provides coastal states with the right to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary for compliance with laws and regulations established by the coastal state.¹⁸⁶ ITLOS Advisory Opinion of 2015 further strengthens the enforcement powers of coastal states by stating that “the primary responsibility for the conservation and management of living resources in the exclusive economic zone, including the adoption of such measures as may be necessary to ensure compliance with the laws and regulations enacted by the coastal State in this regard, rests with the coastal State”. Thus, the application of criminal sanctions, if there were to be a suppression convention against IUU fishing, would be under the jurisdiction of coastal states. The application of criminal sanctions in the form of imprisonment and other forms of corporal punishment is limited by Article 73 (3) the UNCLOS which declares that coastal states may not impose sanctions for violations of fisheries laws and regulations in the EEZ which include imprisonment or any other form of corporal punishment without agreement by the states concerned. The agreement of states to establish IUU fishing activities as offences under a stand-alone suppression convention would be a solution to the limitation imposed by Article 73 (3) of the UNCLOS. The agreement in the stand-alone suppression convention, multilateral in nature, could be considered as the required agreement by the states concerned to impose imprisonment or other forms of corporal punishment as a requirement demanded by the UNCLOS.

¹⁸⁵ Efthymios D. Papastavridis, ‘Crimes at Sea : A Law of the Sea Perspective’ in Efthymios D. Papastavridis and Kinderley N. Trapp (eds) *Crimes at Sea/La criminalité en mer* (Brill Nijhoff 2014).

¹⁸⁶ Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Martinus Nijhoff Publishers 1987) 84.

Thus, in this context, the suppression convention and the UNCLOS could still go hand-in-hand.

Another relevant matter regarding jurisdiction is the jurisdiction applicable on the high seas. The general rule under Article 92 of the UNCLOS is that flag states have exclusive jurisdiction over vessels flying their flag on the high seas. This general rule could be used by the suppression convention to oblige flag states to establish jurisdiction over their vessels when they undertake IUU fishing activities on the high seas. This obligation to establish jurisdiction is also in line with Article 94 of the UNCLOS and the UNFSA which requires flag states to exercise jurisdiction and control over ships flying their flag effectively and to take necessary measures to ensure safety at sea. The exclusive jurisdiction of flag states is also confirmed by related suppression conventions such as the 1998 Drugs Convention and the Migrant Smuggling Protocol. The 1998 Drugs Convention under Article 17 (3) requires a party to request authorisation from the flag state before it can take appropriate measures against a suspected vessel engaged in illicit traffic. The Migrant Smuggling Protocol also has a similar provision on the requirement of authorisation from the flag state under Article 8 (2). The authorisation from the flag state may include actions to board the vessel, to search the vessel and, if the evidence is found, to take necessary measures regarding the vessel, persons and cargo on board.

The UNCLOS allows some exceptions to the exclusive jurisdiction of flag states such as the right of visit in Article 110. This Article gives warships and other duly authorised government ships the right of visit on the high seas against foreign ships when they are suspected, on reasonable grounds, to be engaged in activities such as piracy, slave trading or unauthorized broadcasting, or to be a ship without nationality or to be of the same nationality as the inspecting ships.¹⁸⁷ The Article provides the opportunity to expand the exceptions to the flag state's exclusive jurisdiction through powers conferred by a treaty. As a result, states have established different multilateral and bilateral treaties which provide for the right of visit on the high seas to suppress illicit activities.¹⁸⁸ One of the examples is the bilateral

¹⁸⁷ UNCLOS, art 110(1).

¹⁸⁸ Papastavridis (n 185) 18.

treaty between Italy and Spain of 1990,¹⁸⁹ which established illicit drug trafficking as an exception to the exclusive jurisdiction of the flag state. The treaty, under Article 5 (Right of Intervention), provides that “should there be reasonable grounds to suspect that offences covered by Article 2¹⁹⁰ are being committed, each Party recognises the other’s right to intervene as its agent in waters outside its own territorial limits, in respect of ships displaying the flag of the other State”. This Article gives advanced authorisation from the other party to perform enforcement measures against suspected ships on the high seas. In the same way as in this treaty, states could use the stand-alone Convention as a legal basis to limit flag state jurisdiction when a vessel is conducting IUU fishing activities on the high seas.

Port state jurisdiction can also be used in the fight against IUU fishing.¹⁹¹ The Convention could oblige port states to establish jurisdiction over vessels entering its ports based on territorial, quasi-

¹⁸⁹ The Treaty between the Kingdom of Spain and the Republic of Italy to Combat Illicit Drug Trafficking at Sea (signed 23 March 1990, entered into force on 7 May 1994) 1776 UNTS 230.

¹⁹⁰ *ibid*, art 2 (Offences):

1. Each Contracting Party shall treat as an offence, and punish accordingly, all acts committed on board ships or through the use of any boat or surface vessel which are not excluded from the scope of this Treaty under the terms of article 3, connected with the possession of narcotic drugs and psychotropic substances, as defined by the international treaties by which the Parties are bound, for the purposes of distribution, transport, storage, sale manufacture or processing.
2. Attempting to commit an offence, failing to commit an offence for reasons beyond the control of the perpetrator, participation and complicity are likewise punishable.”

¹⁹¹ For more detailed discussion on Port State Jurisdiction see Erik J. Molenaar, ‘Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage’ (2007) 38 (1-2) *Ocean Development & International Law* 225; Erik J. Molenaar, ‘Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement’ in Dawn A. Russel and David L. Van der Zwaag (eds), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives* (Martinus Nijhoff Publishers 2010); Erik J. Molenaar, ‘Port State Jurisdiction’ in Rudiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010); Judith Swan, ‘Port State Measures, from Residual Port State Jurisdiction to Global Standards’ (2016) 31(3) *The International Journal of Marine and Coastal Law* 395.

territorial or extra-territorial principles.¹⁹² Based on the territorial principle, states can establish jurisdiction over vessels that carry out IUU fishing activities in their internal waters, archipelagic waters or territorial sea.¹⁹³ Quasi-territorial jurisdiction can be used to establish jurisdiction over IUU fishing in their EEZ or continental shelf pursuant to Articles 56 and 77 of the UNCLOS.¹⁹⁴ States can also establish jurisdiction based on the extra-territorial principle over IUU fishing on the high seas or in the maritime zones of other states.¹⁹⁵

5.4.2.2.3. Investigative Tools

Investigation of IUU fishing activities is an important aspect of ensuring that the actors are not getting away with their crimes. In doing so, the stand-alone convention against IUU fishing could set out provisions on different investigative tools that are available to be employed for States Parties. The range of investigative tools can cover a wide array of choices. Investigative tools such as electronic surveillance, undercover operations, financial analysis and use of informants could be provided in the suppression convention to assist States Parties in gathering necessary information about IUU fishing actors. Another tool, aerial surveillance, can be one of the key investigative tools, more specifically geared towards IUU fishing activities. Aerial surveillance can cover larger areas of water than a regular fishing vessel patrol and can be used by law enforcement officers to collect photographic and observational evidence on possible IUU fishing activities.¹⁹⁶

In addition to investigative tools, the stand-alone suppression convention can encourage the establishment of various types of joint investigations such as joint parallel investigations, joint investigative teams and joint investigative bodies. Joint investigations would

¹⁹² Molenaar explains that there are three legal basis for port state jurisdiction i.e. territorial, quasi territorial and extra-territorial. For more discussion on the three legal basis see publications by Molenaar in footnote 193.

¹⁹³ Molenaar, 'Port State Jurisdiction' (n 191) para 16.

¹⁹⁴ *ibid* para 20.

¹⁹⁵ *ibid*.

¹⁹⁶ Evelyne Meltzer, *The Quest for Sustainable International: Regional Efforts to Implement the 1995 United Nations Fish Stocks Agreement : An Overview for the May 2006 Review Conference* (NRC Research Press 2009) 231.

assist states in investigating IUU fishing cases that involve different jurisdictions. They would benefit investigations in numerous ways including through the facilitation of information exchange (formal and informal), by reducing the amount of request letters, and by enhancing trust and relationships. Overall, joint investigations can assist the investigators and be more flexible in pursuing immediate necessary actions.

5.4.2.2.4. International Cooperation

International cooperation is an important factor in the suppression of IUU fishing. The cross-border nature of IUU fishing activities means that states must have effective international cooperation mechanisms to suppress such conduct. The stand-alone suppression convention could offer different forms of international cooperation for States Parties in tackling IUU fishing. Among the basic forms that could be provided to States Parties are the exchange of information, MLA and extradition.

5.4.2.2.4.1. Exchange of Information

As far as the exchange of information is concerned, the stand-alone convention could oblige States Parties to establish and facilitate channels of communication between their competent authorities regarding IUU fishing offences. The exchange of information might include several matters such as the identity, whereabouts and activities of IUU fishing suspects and also information on the companies committing such offences and their beneficial owners. Such information should be kept confidential and should not be used other than for the stated purpose. Another exchange of information, that is not directly related to specific cases, could include patterns and trends in IUU fishing, and the best practices for combating IUU fishing.

5.4.2.2.4.2. Mutual Legal Assistance

International cooperation through MLA is one of the key features in fighting IUU fishing. The suppression convention could use MLA as a way to seek and provide legal assistance in gathering evidence of IUU fishing offences. By having MLA in the convention, States

Parties have the means to execute investigative measures beyond their borders. Different measures can be used in this process, from the exchange of judicial information to undercover surveillance. The suppression convention could reflect the UNTOC's provisions on MLA, as stated in Article 18, which provides more specific guidance on the implementation of MLA, ranging from the basis of MLA requests to the grounds of MLA refusal. As Vervaele noted, the UNTOC has consolidated the developments of MLA in the past decades.¹⁹⁷ The provisions on MLA in the UNTOC have complemented existing and future bilateral or multilateral treaties.¹⁹⁸

5.4.2.2.4.3. Extradition

Extradition provisions have an important place in a suppression convention. This method of international cooperation has been vital in rendering criminal fugitives from a requested state to a requesting state to face trial or to serve a sentence in the requesting state. The suppression convention against IUU fishing could establish provisions on extradition and oblige States Parties, based on *aut dedere aut judicare* principles, to extradite IUU fishing offenders to States Parties that are willing to prosecute if the custodial state does not want to prosecute.¹⁹⁹ One of the most important conditions for extradition is the principle of double criminality which requires that the acts committed are a criminal offence under the laws of both the requesting and requested state.²⁰⁰ In complying with the double criminality principle, the suppression convention on IUU fishing could establish provisions which oblige States Parties to deem offences of IUU fishing to be extraditable offences in their domestic legislation and any extradition treaty existing between the parties.

The convention could also be the basis of extradition between States Parties if they do not have a bilateral extradition treaty.²⁰¹ This basis of extradition has been used, for example, in Article 6 of the 1998 Drugs Convention which encourages States Parties to consider

¹⁹⁷ Vervaele (n 71) 125.

¹⁹⁸ *ibid.*

¹⁹⁹ Currie and Rikhof (n 17) 478.

²⁰⁰ Boister, *An Introduction to Transnational Criminal Law* (n 14) 259.

²⁰¹ Currie and Rikhof (n 17) 478.

the Convention as the legal basis for extradition when they have no bilateral extradition treaty. In a similar vein, Article 16 (4) of the UNTOC also encourages the idea that the convention could serve as the legal basis for extradition.

5.4.2.3. Integration of Suppression Provisions into International Fisheries Instruments

Another alternative for criminalising IUU fishing at a global level is to integrate suppression convention provisions into the existing international fisheries instruments. Integration is an option if states do not want to establish a new stand-alone suppression convention or limit themselves within the scope of application of the UNTOC. A discussion on the integration of suppression provisions would consider the framework of existing international fisheries instruments as discussed in Chapter 3, i.e. the UNCLOS, the Compliance Agreement, the UNFSA, the IPOA-IUU and the PSMA.

Any discussion on integrating suppression provisions would naturally consider the questions of which instrument these provisions should be inserted into and how it could be done. On the first question, hypothetically, any of the instruments has the potential to accommodate the suppression provisions, although it largely depends on the endorsement of the States Parties. However, it should be acknowledged that those international fisheries instruments focus mainly on the conservation and management of marine living resources and are less interested in or focused on the criminal justice approach.

On the second question, i.e. regarding how the integration can be implemented, there are three possible alternative mechanisms: i) amendment of instruments; ii) establishment of an implementing agreement; and iii) establishment of a voluntary instrument. With regard to the first alternative, the amendment of instruments, each instrument has a mechanism for an amendment, except for the IPOA-IUU as it is a voluntary instrument. The UNCLOS, for example, provides States Parties with an opportunity to propose an amendment of the Convention and communicate such proposal

to the Secretary-General of the United Nations.²⁰² Although a procedure for amendment is provided, the amendment procedure is considered to be almost impossible in practice. The amendment would require significant time and resources as 150 parties would need to agree on amending a Convention that is well established in States' practice. Reisman calls this phenomenon a "myth" system, i.e. a system where "veneration for existing prescription is great or formal amendment procedures are cumbersome".²⁰³ Similar opportunities for amendments can also be found in the Compliance Agreement,²⁰⁴ the UNFSA²⁰⁵ and the PSMA.²⁰⁶ Although, hypothetically, amendment is possible, in reality amending a multilateral agreement has always been a difficult and arduous process. The majority of States Parties to that agreement have to agree on the amendment, which can take a long time and many resources due to varied interests among states. This will almost certainly be found to be the case in the integration of suppression provisions into those international fisheries instruments.

The second alternative is to establish an implementing agreement which would be attached to the specific instrument. This process could be an alternative to making an amendment by appealing to a number of interested States Parties. However, this could also be a lengthy process when one considers the ongoing process of establishing an implementing agreement under the UNCLOS on Biodiversity Beyond National Jurisdiction (the BBNJ process).²⁰⁷ The BBNJ process started in 2004 with the establishment of an Ad Hoc Open-ended Informal Working Group to study issues relating

²⁰² UNCLOS, arts 312-313.

²⁰³ W.M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment* (Brill Nijhoff 2013) 99.

²⁰⁴ Compliance Agreement, art 13.

²⁰⁵ UNFSA, art 45, .

²⁰⁶ PSMA, art 33.

²⁰⁷ For an overview and discussions of the BBNJ process, see David Freestone (ed), 'Conserving Biodiversity in Areas beyond National Jurisdiction' (Brill Nijhoff 2019); David Freestone, 'The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges' in David Freestone (ed), 'Conserving Biodiversity in Areas beyond National Jurisdiction' (Brill Nijhoff 2019); Alex G. Oude Elferink, 'Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction' (2019) 28(3) RECIEL 236.

to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. The process still continues and the latest meeting of the Third Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UNCLOS on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction was held between 19-30 August 2019. The BBNJ process, which has already taken more than a decade, shows that establishing an implementing agreement can be a long process. This lengthy process would also be likely to happen in the case of the implementing agreement on suppression provisions against IUU fishing.

The third alternative, taking a lesson from the IPOA-IUU, is to establish a voluntary instrument such as a guidance or a plan of action which incorporates such provisions to be implemented voluntarily by interested states. This voluntary instrument could be an initial way to build support for interested states which do not want the hassle of complicated amendment procedures and which want to customise the content based on their needs and interests. The voluntary instrument, once there is enough support from states, could climb its way up into a part of an international fisheries instrument or perhaps as a proper convention in the future.

The following Sections 5.4.2.3.1. to 5.4.2.3.4. will try to describe what the integration would be like based on the four elements: substantive law, jurisdiction, investigative tools and international cooperation. The substance of these four elements bears a substantial resemblance to the elements found in the second alternative on establishing a stand-alone suppression convention against IUU fishing and so does not need to be dealt with at length. The following sections will only describe the new and relevant substance relevant to the international fisheries instruments. These sections should be read in conjunction with the elements explained in Section 5.4.2.2. (Establishment of a Stand-alone Suppression Convention against IUU fishing).

5.4.2.3.1. Substantive Law

The substantive law for suppression provisions would largely depend on the focus of each instrument. For example, integration of suppression provisions into the PSMA would have to be adapted

to the port states' rights and obligations. The same circumstances would also be found in the UNFSA where the provisions would need to be readjusted with the rights and obligations of flag states, and the conservation and sustainable use of straddling and highly migratory fish stocks. The integration of suppression provisions into the main international fisheries instruments would become the main topic for negotiation since it is beyond the scope of the international fisheries instruments.

5.4.2.3.2. Jurisdiction

The jurisdiction provisions, as is the case with substantive law explained above, would depend on each fisheries instrument. The PSMA, for example, would require a port state to establish jurisdiction when a vessel entering its port is suspected of IUU fishing with OCG involvement. The obligation, however, would not cover coastal and flag states as the PSMA's focus is on port states. As is also the case with substantive law, the different focus of specific instruments would potentially create a fragmented approach in the establishment of jurisdiction as each instrument would obviously focus on its main mandate.

5.4.2.3.3. Investigative Tools

The international fisheries instruments do not make specific provisions on investigative tools that can be used by States Parties. However, they do provide general provisions on investigation. The UNFSA under Article 19, for example, obliges States Parties to investigate any alleged violation of subregional or regional conservation and management measures, which may include a physical inspection. Unfortunately, the Article does not specify which investigative tools are available to States Parties. The integration of suppression provisions could set out provisions on different investigative tools that would be good options against IUU fishing such as electronic surveillance, undercover operations, financial analysis, use of informants and aerial surveillance.

The investigation of IUU fishing violations can be conducted by individual states and also in cooperation with other states. International fisheries instruments welcome collaboration between

states in investigation of such violations. For example, Article 20 (3) of the UNFSA provides that a flag state may undertake investigations directly, in cooperation with other interested states or through relevant subregional or regional fisheries management organisations or arrangements. Similar in essence, Article 28.3. of the IPOA-IUU encourages states to allow and enable their MCS practitioners or enforcement personnel to cooperate in the investigation of IUU fishing. The integration alternative should strengthen provisions on investigations by providing mechanisms to conduct joint investigations including joint fisheries inspections and joint criminal investigations.

5.4.2.3.4. International Cooperation

International cooperation provisions relating to enforcement can be found in all five international fisheries instruments. For example, the UNFSA, under Article 20, obliges states to establish arrangements to make available evidence related to alleged violations, to the extent permitted by national laws and regulations. The Compliance Agreement also requires its parties to cooperate and, in particular, to exchange information and evidentiary material relating to activities of fishing vessels so as to assist the flag state to identify its vessels reported to have been engaged in proscribed activities.²⁰⁸ The integration of suppression provisions could complement these existing provisions by adding more detailed provisions for international cooperation. Methods such as MLA, extradition, exchange of information and joint investigation could be integrated to make international cooperation more effective.

5.4.3 Comparative Analysis of the Three Alternatives

The three alternatives for the criminalising of IUU fishing at a global level, namely through the UNTOC, or through the establishment of a stand-alone convention, or through the integration of suppression provisions, each have their own pros and cons which would need to be carefully scrutinised by states which want to proceed with one of the three options. The following Sections 5.4.2.4.1. to 5.4.2.4.3. will explore such pros and cons. Further, this section will

²⁰⁸ Compliance Agreement, art V(1), .

compare the three alternatives using three main categories: scope of application, feasibility and operationality in section 5.4.2.4.4.

5.4.3.1 Pros and Cons of IUU fishing Criminalisation under the UNTOC

Pros

The criminalisation of IUU fishing under the UNTOC could have several advantages. First, the Convention has a well-established set of provisions which can be used by states such as substantive law, jurisdiction, investigative tools and international cooperation. These well-established provisions can save much time and many resources that will otherwise need to be spent if states have to negotiate from scratch. Second, the UNTOC has almost universal ratification with 190 States Parties²⁰⁹ which brings with it global legitimation and an extensive pool of resources and networks to be used by states. Third, the UNTOC already has institutional support provided by the Centre for International Crime Prevention of the United Nations Office for Drug Control and Crime Prevention (UNODC).²¹⁰ The UNODC could assist states through research and support in the adoption and implementation of provisions of the new protocol. States also could earmark their contribution for specific programmes in the UNODC related to the implementation of the new protocol.

Cons

The use of the Convention in criminalising IUU fishing at a global level could, however, have several disadvantages. First, the well-established provisions mean that the application of the Convention is limited only to those occasions when there is an involvement of OCGs and the offence is transnational. States would not be able to bring a different approach to the table, for example, to criminalise IUU fishing offences that do not involve an OCG and do not have transnational elements. Second, the UNODC does not

²⁰⁹ As of 30 May 2020, Republic of the Congo and the Islamic Republic of Iran have signed the UNTOC but they have not yet ratified the Convention. For the full status of ratification, see UNTOC Status of Ratification <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en>.

²¹⁰ UN Doc A/RES/55/25 (n 102) point 11.

have expertise in IUU fishing or fisheries in general, which would be a drawback in implementing the fight against IUU fishing. To address this issue, the UNODC could establish formal cooperation with the FAO in creating a joint effort as a way to share expertise or even creating a joint instrument against IUU fishing which would be a combination of criminal justice and fisheries perspectives. Third, the Convention could encounter difficulties in convincing 190 States Parties to agree to criminalise IUU fishing since different states have different interests regarding IUU fishing and fisheries in general. Until now, the support from States Parties to criminalise IUU fishing has been far from satisfactory. From meetings held by CCPCJ²¹¹ or CoP UNTOC,²¹² there were only a handful of countries that supported the notion. Such a low degree of support from states would suggest that a substantial effort and much time would be needed to convince states of the importance of including IUU fishing criminalisation in the Convention.

5.4.3.2 Pros and Cons of a Stand-alone Suppression Convention

Pros

A stand-alone suppression convention could have several advantages as an alternative to criminalising IUU fishing at a global level. First, a stand-alone convention is a blank canvas where states could be creative in setting down provisions against IUU fishing. States could expand and adapt necessary provisions regarding substantive law, jurisdiction, investigative tools and international cooperation tailored to their needs while still taking into account existing international rights and obligations. Second, a stand-alone convention, at the initial stage, does not need approval from a large number of countries, unlike the case with the UNTOC. This would offer more flexibility and practicality since only a handful of interested States would be required to establish the stand-alone

²¹¹ CCPCJ, 'Report on the 24th Session of the Commission on Crime Prevention and Criminal Justice (5 December 2014 and 18-22 May 2015)' E/2015/30 and E/CN.15/2015/19, 94.

²¹² UN, 'Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session, held in Vienna from 8 to 17 October 2008' (n 161) para 210.

convention, gradually expanding to include the participation of other states at a later stage. Third, a stand-alone suppression convention, as a new instrument, could draw expertise from organisations such as the UNODC and the FAO or other organisations without being limited by a pre-determined structure or by bureaucracy.

Cons

The use of a stand-alone convention to criminalise IUU fishing at a global level could have several disadvantages. First, States could spend a great deal of time and resources in drafting the new convention as it would still be a blank convention allowing states to propose different provisions to be incorporated. Second, the new convention would have to secure funding and maybe institutional support such as a secretariat to make the convention operational. If funding is limited, the new convention could face difficulties in its implementation.

5.4.3.3 Pros and Cons of Integration of Suppression Provisions

Pros

Integrating suppression provisions into the existing international fisheries instruments could have several advantages. First, through such integration, states could use and expand the existing provisions available in the instruments with relevant suppression provisions so as to make the instruments more comprehensive. Second, states could simply take advantage of the existing mechanisms and the network of expertise already available within the instruments. When necessary, States could also establish cooperation with other organisations such as the UNODC to complement the existing fisheries-related expertise.

Cons

The integration of suppression provisions could, however, bring several disadvantages with it. First, integration could potentially create extra costs for states in its implementation due to the additional provisions of criminal justice measures. The extra costs would also apply to the previous alternatives of the UNTOC and the stand-alone Convention. Nevertheless, if implemented well, the

benefits of having a much lower level of IUU fishing could mitigate the costs. Second, the negotiations could take a long time since suppression provisions are of a different nature from the fisheries-related provisions. Third, there could be an interruption in the implementation by authorities that had previously carried out the fisheries management provisions, and which would now have to implement the new suppression provisions or share their authority with other colleagues.

5.4.3.4 Comparison of the Three Alternatives

5.4.3.4.1 Scope of Application

The stand-alone convention, in general, has more room in its scope of application than the UNTOC or the integration alternatives since the stand-alone convention is a blank canvas on which states can hypothetically paint any provisions which they deem to be necessary for suppressing IUU fishing offences. The UNTOC, on the other hand, is more limited in the sense that the general provisions and the scope of application are already established in the Convention. The integration alternative is also limited, although more flexible than the UNTOC, in the sense that it needs to be in line with the scope of application of the principal instrument. This limitation could cause difficulties with the integration process, bearing in mind that integration brings a different approach (the criminal justice approach) from the existing conservation and management approach. Some states could have difficulties in accepting the blending of the two different approaches.

The UNTOC, the stand-alone convention or the integration alternative could potentially establish any type of IUU fishing offences as preferred by their States Parties. However, it should be noted that the UNTOC and its protocols are bound by its scope of application, as stated in Article 3, which requires offences to be transnational in nature and to involve an OCG. This scope of application would exclude IUU fishing offences which are not transnational or which do not involve an OCG. A stand-alone convention and the integration alternatives, on the other hand, are not limited by such scope of application and therefore could still cover a wider range of offences, including the involvement of OCGs as an aggravating factor.

5.4.3.4.2 Feasibility

IUU fishing criminalisation through any of the three alternatives needs to have enough support from states, which will not necessarily be easily achieved. Until now, support for the criminalisation of IUU fishing globally has been minimal, and only a few states publicly support the idea, including Indonesia. If there was enough support, a new protocol under the UNTOC would be more feasible since the foundation already exists. It would be, hypothetically, easier for states to continue the groundwork of the UNTOC and only discuss specific matters related to IUU fishing which would take less time and fewer resources. However, this is not the case with a stand-alone convention where states have to lay the substantive foundation from scratch and build it up gradually – a process which could take years and consume considerable resources as was seen in the UNTOC's establishment.²¹³ The integration alternative would also require much time since suppression provisions need to be fine-tuned to accord with the provisions of the principal instrument. However, the integration alternative does not have to start from scratch as it can utilise the relevant existing provisions in its principal fisheries instrument. For example, in the case of investigation and international cooperation, states could utilise the existing provisions in the principal instruments since they already have some provisions covering such matters.

5.4.3.4.3 Operationality

In terms of operationality, IUU fishing criminalisation under the UNTOC could be better than the stand-alone convention and the integration alternatives. States could use the UNTOC's existing infrastructure, which is provided by the UNODC. The UNODC could assist states, through research and support, in the adoption and implementation of provisions of the new protocol. States also could earmark their contribution for specific programmes in the UNODC related to the implementation of the new protocol. Meanwhile, it is possible that a stand-alone convention might not have the same support, depending on the commitment of its States Parties. Dedicated

²¹³ McClean (n 53) 1–31; Boister, 'The UN Convention against Transnational Organised Crime 2000' (n 119) 128–130.

institutional support would have to be figured out or created in assisting States Parties to implement the convention, which would require a substantial budget and resources. This also applies to the integration of suppression provisions where the need for additional funding may or may not be supported by States Parties.

Each of the alternatives also has its limitation in terms of its expertise. The UNTOC, for example, through the UNODC, has in-depth expertise regarding criminal justice, but it does not have expertise in fisheries-related issues. The FAO, on the other hand, has extensive knowledge of fisheries-related issues, but not on criminal justice. In providing a more comprehensive approach against IUU fishing, cooperation between criminal justice and fisheries expertise is needed. Each of the three alternatives could explore the possibility of bringing the two types of expertise together. A further step in such cooperation might be to establish a joint effort to combat IUU fishing, perhaps through a joint initiative of an instrument from the UNODC and the FAO which, potentially, could combine the best of the two types of expertise and result in more effective and comprehensive tackling of IUU fishing.

This brief comparison of the three categories could be useful in assisting states to make up their minds in choosing the best option if they decide to criminalise IUU fishing at a global level. As discussed, none of the three options has the absolute upper hand. Each has its own strong and weak points.

5.5 Interim Conclusion

This chapter has discussed three alternatives for the criminalisation of IUU fishing at a global level through the use of a suppression convention, i.e. by criminalising IUU fishing under the UNTOC, establishing a stand-alone global suppression convention or integrating suppression provisions into the existing international fisheries instruments. As already discussed in this chapter, the three alternatives are possible, each with its own strong and weak points. States have to carefully scrutinise each alternative if they decided to criminalise IUU fishing through a suppression convention. The most challenging task is probably not the substantive discussion on the necessary provisions to be included in the convention, rather, it

lies in the efforts of states in finding support in the establishment of such a suppression convention.

Another valuable option in the criminalisation of IUU fishing can also be pursued at a regional level. At a regional level, states could have more in common, both in backgrounds and interests, in tackling IUU fishing, which could attract more states in the region and produce stronger commitment. To explain this idea more fully, the next chapter will use Southeast Asia region as its focus. This chapter will then offer two alternatives for criminalising IUU fishing at a regional level, i.e. through the establishment of a stand-alone regional suppression convention, or through the integration of suppression provisions into the existing regional international fisheries instruments. The elements of suppression conventions will also be analysed in the two alternatives.

CHAPTER 6

The Criminalisation of IUU Fishing at Regional Level

6.1. Introduction

The TOC dimensions of IUU fishing and the deficits in the existing international fisheries instruments call for the proposal of IUU fishing criminalisation as explained in Chapters 2, 3 and 4. Chapter 5 has elaborated how IUU fishing can be criminalised at a global level through three alternatives: criminalisation under the UNTOC; the establishment of a stand-alone suppression convention; and the integration of suppression provisions into the existing international fisheries instruments. In addition to the global criminalisation of IUU fishing, this dissertation argues that the criminalisation can also be done at a regional level. In supporting this argument, this chapter will elaborate on how the IUU fishing criminalisation at a regional level can be implemented. This chapter will first explain the rationale of IUU fishing criminalisation at a regional level. To better explain the regional criminalisation, this chapter will use Southeast Asia region as its focus. It will then discuss the region's problem with IUU fishing and how the region has been trying to combat the problem. In exploring the possibility of IUU fishing criminalisation, this chapter will further elaborate on Southeast Asia's efforts in addressing transnational crime and explain the possibility of IUU fishing criminalisation in the region. This chapter will then offer two alternatives to criminalising IUU fishing at a regional level: through the establishment of a stand-alone, regional suppression convention; and the integration of suppression provisions into the existing regional fisheries instruments.

6.2. The Rationale of Criminalisation of IUU Fishing at Regional Level

Regional cooperation is essential in tackling transnational crimes. The UNTOC, in its preamble, recognised the importance of strengthening cooperation at the regional level, along with national and international levels, to prevent and combat organised criminal activities more effectively. There is no universally accepted definition of what constitutes a region. For some, a region may relate to the geographical location of states,²¹⁴ while others define regions in terms of non-geographic criteria and place relatively little emphasis on physical location.²¹⁵ Joseph Nye offers a mid-point in defining a region as a group of states linked together by both a geographical relationship and a degree of mutual interdependence.²¹⁶ The states in the group then interact with one another and use cooperation and coordination to pursue their goals – a phenomenon referred to as regionalism.²¹⁷ Regionalism can include a broad range of policies and projects which operate at various levels and which may include any intentional cross-border activity and extend as far as the integration of a region.²¹⁸

In the maritime context, there is no universally agreed definition of what constitutes a region. Although the terms “region” and “regional” can be found in the UNCLOS, the convention does not offer a definition of the terms. Alan Boyle defined the term “region” in the maritime context in three ways: the formal; the functional; and the political.²¹⁹ The formal definition of a marine region focuses

²¹⁴ Louise Fawcett, ‘Exploring Regional Domains: A Comparative History of Regionalism’ (2013) 80(3) *International Affairs* (Royal Institute of International Affairs) 429, 432.

²¹⁵ Edward D. Mansfield and Helen V. Milner, ‘The New Wave of Regionalism’ (1999) 53(3) *International Organization* 589, 591.

²¹⁶ Joseph Nye, *International Regionalism* (Little, Brown & Company 1968) vii cited in Fawcett (n 1) 432.

²¹⁷ For discussions on regionalisms see Timothy M. Shaw, J. Andrew Grant and Scarlett Cornelissen (eds), *The Ashgate Research Companion to Regionalisms* (Ashgate Publishing 2011); Tanja A Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press 2016).

²¹⁸ Rick Fawn, ‘Regions’ and Their Study: Wherefrom, What for and Whereto?’ (2009) 35 *Review of International Studies* 5, 13.

²¹⁹ Alan Boyle, ‘Globalism and Regionalism in the Protection of the Marine Environment’ in Davor Vidas (ed), *Protecting the Polar Marine Environment* (Cambridge University Press 2000).

on its physical and geographical character such as an enclosed or semi-enclosed sea.²²⁰ Some regions can cover an entire ocean or span different continents such as the Indian Ocean region or the Asia-Pacific region, while some can cover smaller areas such as the Barents Sea.²²¹ The functional definition concentrates on patterns of use including resource exploitation, navigation, fisheries and defence.²²² The political definition of a marine region focuses on the decision of a group of states to cooperate with some consideration of geographical proximity, such as the Association of Southeast Asian Nations (ASEAN).²²³

Bulmer-Thomas asserts that “almost every country in the world has chosen to meet the challenge of globalisation in part through a regional response”.²²⁴ This assertion is also true in the case of transnational crime. Different regional arrangements have emerged to respond to the threats of transnational crime. For example, the European Union established the Convention against Corruption involving Public Officials²²⁵ and the Council Framework Decision on the Fight against Organised Crime²²⁶ along with other instruments related to the fight against transnational crime.²²⁷ In the Asia-Pacific

²²⁰ *ibid* 26.

²²¹ Alex G. Oude Elferink, Erik J. Molenaar and Donald R. Rothwell, ‘The Regional Implementation of the Law of the Sea and the Polar Region’ in Erik J. Molenaar, Alex G. Oude Elferink and Donald R. Rothwell (eds) *Interactions between Global and Regional Regimes* (Brill Nijhoff 2013).

²²² Boyle (n 6) 26.

²²³ *ibid*.

²²⁴ Victor Bulmer-Thomas, ‘Regional Integration in Latin America and the Caribbean’ (2001) 20(3) *Bulletin of Latin American Research* 360, 363.

²²⁵ Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union [1997] OJ C195/2.

²²⁶ Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime [2008] OJ L300/42.

²²⁷ For example, Council Framework Decision 2001/413/JHA of 28 May 2001 on Combating Fraud and Counterfeiting of Non-Cash Means of Payment [2001] OJ L149/1; Council Decision 2010/765/CFSP of 2 December 2010 on EU Action to Counter the Illicit Trade of Small Arms and Light Weapons (SALW) by Air [2010] OJ L327/44; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing [2005] OJ L309/15;

region, countries established the Bali Process in 2002 to address people smuggling, trafficking in persons and related transnational crime.²²⁸ In Southeast Asia, the ASEAN established the ASEAN Convention against Trafficking in Persons, especially Women and Children (ACTIP)²²⁹ and the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) to oversee the region's fight against transnational crime as will be further elaborated in section 6.4.

The importance of a regional response to transnational issues is also acknowledged in the maritime context. The UNCLOS acknowledges the importance of regional cooperation under its Article 197 where states are required to cooperate “on a global and, as appropriate, on a regional basis, directly or through competent international organisations ... for the protection and preservation of the marine environment, taking into account characteristic regional features”. Rochette and others distinguish three main types of regional oceans governance mechanisms used by states: i) regional seas programmes, where the majority are supported or coordinated by the United Nations Environment Programme (UNEP); ii) Regional Fisheries Bodies (RFBs) which include RFMOs and Advisory RFBs; and iii) Large Marine Ecosystem (LME) mechanisms.²³⁰ These regional mechanisms are established to address the different regional maritime concerns ranging from marine pollution to conservation of marine biodiversity and to IUU fishing. These mechanisms have been experiencing some success in providing forums for states to discuss and cooperate on necessary measures specific to the region's marine problems. However, it should also be acknowledged that these mechanisms also suffer from challenges including low participation level, lack of political will, and limited financial and human

Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector [2003] OJ L192/54; Council Decision 2001/887/JHA of 6 December 2001 on the Protection of the Euro Against Counterfeiting [2001] OJ L329/1.

²²⁸ The Bali Process is a Regional Consultative Process established in 2002 with 49 members. For more information see: <https://www.baliprocess.net/>

²²⁹ ASEAN Convention against Trafficking in Persons, Especially Women and Children (adopted 21 November 2015, entered into force 8 March 2016) (ACTIP).

²³⁰ Julien Rochette and others, 'Regional Oceans Governance Mechanisms: A Review' (2015) 60 *Marine Policy* 9, 9.

resources. These traits are also common in many intergovernmental mechanisms.²³¹

These regional approaches are appealing for several reasons. A regional approach could encourage states to commit to common actions that are more practical and feasible than those based on a global scheme. These common actions can be seen in regional organisations, such as the Council of Europe where states were willing to agree on suppression conventions beyond the classic topics of organised crime, terrorism, cybercrime, trafficking of persons and extend the conventions coverage to new transnational crimes in the areas of public health and counterfeiting of medical products,²³² protection of cultural property²³³ and protection of the environment²³⁴. Another example can be seen in how the ASEAN tackle the common regional problem of trafficking in persons through establishing the ACTIP. The ASEAN is also opening the possibility of establishing, as necessary, regional instruments in tackling new transnational crimes (see Section 6.4.). The regional approaches could also produce institutions that have more cohesion and may be more effective in implementation. Furthermore, regional cooperation may be easier to organise and could be more effective.²³⁵ With these considerations, regional approaches could be more appealing than global approaches.

There are also reasons that could make states not want to use the existing global approaches. For instance, states in a specific region

²³¹ *ibid*; Robin Warner, Kristina Gjerde and David Freestone, 'Regional Governance for Fisheries and Biodiversity' in Serge M. Garcia, Jake Rice and Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation* (1st edn, Wiley-Blackwell 2014).

²³² Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health (opened for signature 28 October 2011, entered into force 1 January 2016) CETS No. 211.

²³³ Convention on Offences relating to Cultural Property (opened for signature 19 May 2017) CETS No. 221.

²³⁴ Convention on the Protection of Environment through Criminal Law (opened for signature 4 November 1998) CETS No. 172.

²³⁵ Alvin Poh Heng Tan, 'Advancing International Criminal Justice in Southeast Asia through the Regionalisation of International Criminal Law' (PhD thesis, University of Nottingham 2014) 64.

may think that an existing global body is unlikely to take action with a regulatory regime which would accord with their preferred outcomes. This could result in some states developing a new regulatory regime that suits their interests. Another possible reason is that there is only little support from the international community to tackle a specific issue, which would encourage like-minded States to establish their cooperation mechanism. Despite the strengths and weaknesses, regional approaches are important in addressing regional problems of states, and have the potential to be more effective than a global approach.

The following sections will try to elaborate on the option of regional criminalisation by using the Southeast Asian region as its focus. Southeast Asia is chosen for two main reasons. First, Southeast Asian waters are among the most productive and biologically diverse in the world, which makes them critical for global economy and food security and as a conservation priority.²³⁶ The region is an important player in global marine capture production. Six out of ten countries in the region are in the top 20 major producer countries with Indonesia ranked 3rd, Vietnam ranked 7th, the Philippines ranked 11th, Thailand ranked 12th, Malaysia ranked 14th and Myanmar ranked 18th.²³⁷ However, the region and its member states are still struggling to tackle IUU fishing. The negative impacts of IUU fishing have made some of the member states take strict measures and, in some cases, have caused tensions among members. It is interesting to consider how the region could deal with this problem through regional criminalisation. Second, the Southeast Asia region is struggling to fight IUU fishing and its TOC dimensions, demonstrated by numerous cases in the region. The third reason is that the region has not yet criminalised the TOC dimensions of IUU fishing. However, at the same time, the regional instrument leaves open the possibility of the criminalisation of new transnational crimes, which could include IUU fishing.

²³⁶ Robert Pomeroy and others, 'Improving Marine Fisheries Management in Southeast Asia: Results of a Regional Fisheries Stakeholder Analysis' (2016) 65 *Marine Policy* 20, 20.

²³⁷ FAO, 'The State of World Fisheries and Aquaculture. Sustainability in Action' (FAO 2020) 13.

6.3. IUU Fishing in Southeast Asia

Fisheries are an important sector in Southeast Asia and have long been a primary source of protein, generating employment, alleviating poverty, and increasing national revenues for the population.²³⁸ In the region, at least 10 million people fish and over 100 million people are supported by marine fisheries. The fisheries industry in the region has been developing since the 1960s, particularly through the introduction of new fishing gear technologies as well as post-harvest and processing equipment.²³⁹

In Southeast Asia, IUU fishing is one of the significant maritime challenges in the region. The increasing number of fishing fleets coupled with rapid increases in harvesting capacity has, unfortunately, not been matched by the development of national capacities in managing and conserving their fisheries resources.²⁴⁰ Limited national fishing management, regulation and control have led to unsustainable fishing practices. This limitation, along with the increasing demand for fisheries products, has contributed to the IUU fishing activities in the region, including encroachment into other countries' EEZ.²⁴¹ Although accurate estimates of the extent of IUU fishing are not available, the general levels may be drawn from a study in 2009 of three regions: the Eastern Indian Ocean; the Northwest Pacific; and the Western Central Pacific which covers the Southeast Asian waters. The study argues that the three regions had among the highest estimated percentages of IUU fishing globally, namely 32, 33 and 34 per cent respectively between 2000 and 2003.²⁴² The numbers indirectly support the anecdotal evidence that IUU

²³⁸ 'Strategic Plan of Action on ASEAN Cooperation on Fisheries 2016-2020' (2015) ss 1.2; SEAFDEC, 'ASEAN Regional Plan of Action for the Management of Fishing Capacity (RPOA-Capacity)' (SEAFDEC, 2017) 5 <<http://repository.seafdec.org/bitstream/handle/20.500.12066/1087/RPOA-Capacity.pdf?sequence=1&isAllowed=y>> accessed 3 September 2019.

²³⁹ SEAFDEC, 'ASEAN Regional Plan of Action for the Management of Fishing Capacity (RPOA-Capacity)' (n 25) 5.

²⁴⁰ *ibid.*

²⁴¹ *ibid.* 6.

²⁴² David J. Agnew and others, 'Estimating the worldwide extent of illegal fishing' (2009) 4(2) PLoS ONE 1 cited in Meryl J. Williams, 'Will Multilateral Arrangements Help Southeast Asian States Solve Illegal Fishing?' (2013) 35(2) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 258, 259.

fishing has become a significant problem to maritime and resource security in the region.²⁴³ The significant problem of IUU fishing in Southeast Asia can also be seen from the case studies of Indonesia and Vietnam in Chapter 4, where both countries have been experiencing a significant number of IUU fishing incidents. Countries in the region also acknowledge the problem of IUU fishing in the region as they consider IUU fishing as both management and security issues and have implemented several initiatives to fight against the problem (see section 6.4). The acknowledgement of the IUU fishing problem in Southeast Asia is well summarised in the Joint ASEAN-SEAFDEC Declaration which states: “IUU fishing is a serious concern and threatens the sustainability of the region’s fisheries management and conservation measures, fishery resources and aquatic ecosystems, as well as economic viability and food security”.²⁴⁴

The apparent problem of IUU fishing in the region is aggravated by the fact that some states are lagging behind in their efforts to counter the problem particularly because of limited national capacity in fishing management, regulation and enforcement. Several Southeast Asian states have been given a “yellow card” and one state has been given a “red card” by the European Commission as the result of non-compliance towards the duty to take action to prevent, deter and eliminate IUU fishing. However, some have been successful in having the card lifted.²⁴⁵ Vietnam was given a “yellow card” in 2017 and up until now it is still trying to have the card lifted (see Chapter 4). Thailand also received a “yellow card” in 2015 but was able to have the card lifted in early 2019.²⁴⁶ The same success of having the yellow card lifted was also achieved by the Philippines which received

²⁴³ *ibid.*

²⁴⁴ ‘Joint ASEAN-SEAFDEC Declaration on Regional Cooperation for Combating Illegal, Unreported and Unregulated (IUU) Fishing and Enhancing the Competitiveness of ASEAN Fish and Fishery Products’(Bangkok, 3 August 2016) para 4.

²⁴⁵ EC, ‘Overview of the Existing Procedures as Regards Third Countries’ <https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf> accessed 13 August 2019.

²⁴⁶ EC, ‘Commission Lifts “Yellow Card” from Thailand for Its Actions against Illegal Fishing’ (8 January 2019) Press Release IP/19/61 <https://europa.eu/rapid/press-release_IP-19-61_en.htm> accessed 13 August 2019.

the card in 2014 and had it lifted in 2015.²⁴⁷ Cambodia is the only country in the ASEAN that received a red card as a non-cooperating country in November 2013, and since March 2014 its products have been blacklisted in the EU.²⁴⁸ The red card was received by Cambodia because the country failed to comply with its international obligations as the flag, port, coastal or market state as identified in the yellow card which was received in November 2012.²⁴⁹

6.3.1. Southeast Asia's Fight against IUU Fishing

As far as the problem of IUU fishing is concerned, Southeast Asian states have been trying to address the issue through the establishment of regional arrangements, bilateral cooperation and also cooperation with states outside the region. Nonetheless, the problem persists. Different regional arrangements that cover parts of the Southeast Asian waters have been established to address and improve fisheries management issues, including the issue of IUU fishing. Their membership is not exclusive to the Southeast Asian States only, and not all Southeast Asian States are members. One example of such a regional arrangement is the Regional Plan of Action to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region (RPOA-IUU), which was established in 2007.²⁵⁰ It has 11 members, i.e. Australia, Brunei Darussalam, Cambodia, Indonesia, Malaysia, Papua New Guinea, Philippines, Singapore, Thailand, Timor-Leste and Vietnam and aims to strengthen regional efforts to

²⁴⁷ EC, 'EU Acts on Illegal Fishing: Yellow Card Issued to Thailand while South Korea & Philippines are Cleared' Press Release IP/15/4806 <https://europa.eu/rapid/press-release_IP-15-4806_en.htm> accessed 13 August 2019.

²⁴⁸ Council Implementing Decision of 24 March 2014 Establishing a List of Non-Cooperating Third Countries in Fighting IUU Fishing Pursuant to Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2014/170/EU) [2014] OJ L91/43.

²⁴⁹ Council Decision of 15 November 2012 on Notifying the Third Countries that the Commission Considers as Possible of Being Identified as Non-Cooperating Third Countries Pursuant to Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2012/C354/01) [2012] OJ C 354/1.

²⁵⁰ 'Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing in the Region' (RPOA-IUU), 'Who we are' (RPOA-IUU) <<http://www.rpoaiuu.org/>> accessed 19 September 2019.

tackle IUU fishing in the South China Sea, Sulu-Sulawesi Seas and the Arafura-Timor Seas.²⁵¹ Other examples of regional arrangements include the ASEAN-SEAFDEC Strategic Partnership (ASSP),²⁵² and the Coral Triangle Initiative on Coral Reefs, Fisheries, and Food Security (CTI-CFF).²⁵³

These regional arrangements are not specifically designed to address IUU fishing. Instead, they aim to address and improve fisheries management in general. Nonetheless, these arrangements have been able to produce numerous initiatives to address IUU fishing. The ASSP, for example, has produced several guidelines for Southeast Asian states which include the Regional Guidelines for Responsible Fisheries in Southeast Asia²⁵⁴ and ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain.²⁵⁵ The CTI-CFF has also developed its own Regional Plan of Action which includes actions to fight IUU fishing, e.g. by improving fisheries management and enforcement.²⁵⁶ In addition, the CTI-CFF has also conducted several workshops to address IUU fishing such as the Workshop on Catch Documentation and Traceability System Design and Development based on Ecosystem Approach to Management of Fisheries in June

²⁵¹ *ibid.*

²⁵² ASSP was formalised in November 2007 in Bangkok, Thailand. ASSP is aimed at enhancing closer cooperation between ASEAN and SEAFDEC and its member countries in achieving long term common goals towards collective regional development and management of sustainable fisheries. SEAFDEC is an autonomous inter-governmental body established in 1967 with the aim to promote and facilitate concerted actions among Member Countries to ensure the sustainability of fisheries and aquaculture in Southeast Asia. SEAFDEC members are Brunei Darussalam, Cambodia, Indonesia, Japan, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. For more information visit <http://asspfisheries.net/> and <http://www.seafdec.org/about/>.

²⁵³ CTI-CFF is a multilateral cooperation which was established in 2009 with members of 6 countries: Indonesia, Malaysia, Papua New Guinea, Philippines, Solomon Islands and Timor-Leste. For more information visit: <http://www.coraltriangleinitiative.org/about>

²⁵⁴ SEAFDEC, 'Regional Guidelines for Responsible Fisheries Management in Southeast Asia' (SEAFDEC 2003) MFRDMD/SP/3.

²⁵⁵ 'ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain' (endorsed by the 36th SOM-AMAF, 24 August 2015).

²⁵⁶ CTI-CFF, Regional Plan of Action (CTI-CFF 2016).

2019.²⁵⁷ The RPOA-IUU has established three Monitoring, Control and Surveillance Sub Regional Groups to promote the elimination of IUU fishing in the region, i.e. Arafura-Timor Seas, Gulf of Thailand, and Southern and Eastern Area of the South China Sea and Sulu-Sulawesi Seas. The three Groups also encourage member states to develop and implement their national plans of action to fight IUU fishing.²⁵⁸

Different forms of bilateral cooperation have also been used in fighting IUU fishing. For example, in 2018 Indonesia and Vietnam issued a Joint Communiqué on Voluntary International Cooperation to Combat IUU Fishing and to Promote Sustainable Fisheries Governance, which strengthens both countries' commitment against IUU fishing through various means including information sharing and capacity building.²⁵⁹ Both countries also agreed on a Plan of Action for the Implementation of the Strategic Partnership (2019-2023) which specifies five actions to fight IUU fishing including capacity building, exchange of best practices, promotion of public awareness and strengthening of cooperation to combat illegal trade in fish and fisheries products.²⁶⁰ Other states such as Thailand and Vietnam have also established a Joint Working Group and a joint Navy patrol to address IUU fishing.²⁶¹

²⁵⁷ CTI-CFF, Workshop on Catch Documentation and Traceability System Design and Development based on Ecosystem Approach to Management of Fisheries (2019) <<http://www.coraltriangleinitiative.org/events/workshop-catch-documentation-and-traceability-cdt-system-design-and-development-based-ecosy-0>> accessed 20 September 2019.

²⁵⁸ RPOA-IUU (n 37) 'Meeting Document' <<http://www.rpoaiuu.org/meeting-document/>> accessed 20 September 2019.

²⁵⁹ 'Joint Communiqué on Voluntary International Cooperation to Combat IUU Fishing and to Promote Sustainable Fisheries Governance' (Hanoi, 11 September 2018).

²⁶⁰ 'Plan of Action for the Implementation of the Strategic Partnership between the Socialist Republic of Vietnam and the Republic of Indonesia (2019-2023)' (Hanoi, 11 September 2018).

²⁶¹ Vietnam Government Portal, 'Vietnam and Thailand have Issued Joint Press Statement on the Occasion of the Official Visit of His Excellency Mr. Nguyen Xuan Phuc, Prime Minister of the Socialist Republic of Viet Nam to the Kingdom of Thailand from August 17-19 (VGP, 19 August 2017) < <http://primeminister.chinhphu.vn/Home/VN-Thailand-issue-Joint-Press-Statement/20178/3500.vgp>> accessed 20 September 2019.

Some of the Southeast Asian states are also active in several RFMOs that implement regulations to tackle IUU Fishing, such as the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC) (see Figures 5 and 6 below).²⁶² The CCSBT was established in 1993 to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.²⁶³ The CCSBT has adopted several initiatives in fighting IUU fishing including establishing a list of vessels presumed to have carried out IUU fishing activities for southern bluefin tuna²⁶⁴ and a scheme for minimum standards for inspection in port to prevent, deter and eliminate IUU fishing.²⁶⁵ The IOTC was established in 1993 to ensure the conservation of tuna and tuna-like species and promote their optimum utilisation in the Indian Ocean.²⁶⁶ Several measures implemented by the IOTC to address IUU fishing include establishing a list of vessels presumed to have carried out IUU fishing in the IOTC area,²⁶⁷ and preventing and deterring vessels without nationality from fishing as they are presumed to have carried out IUU fishing.²⁶⁸ The WCPFC was established in 2004 with the objective to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the Western and Central Pacific Ocean.²⁶⁹ The Commission's measures

²⁶² 'ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain,' (n 42) Annex 2, ss 3f.

²⁶³ Convention for the Conservation of Southern Bluefin Tuna (adopted 10 May 1993, entered into force 20 May 1994) 1819 UNTS 360, art 3.

²⁶⁴ Commission for the Conservation of Southern Bluefin Tuna (CCSBT), 'Resolution on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities for Southern Bluefin Tuna (SBT)' (revised at the 26th Annual Meeting, 17 October 2019).

²⁶⁵ CCSBT, 'Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port' (revised at the Twenty-Fifth Annual Meeting: 18 October 2019).

²⁶⁶ Indian Ocean Tuna Commission (IOTC), 'Basic Texts' < <https://iotc.org/about-iotc/basic-texts> > accessed on 29 September 2019.

²⁶⁷ IOTC, 'Resolution 18/03 on Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence' (2018).

²⁶⁸ IOTC, 'Resolution 16/05 on Vessels Without Nationality' (2016).

²⁶⁹ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted 5 September 2000,

in tackling IUU fishing include establishing an IUU fishing vessels list,²⁷⁰ maintaining a record of fishing vessels and not providing authorisation to fish for vessels with an IUU fishing history,²⁷¹ and undertaking port inspection on fishing vessels suspected of engaging in IUU fishing or its supporting activities.²⁷²

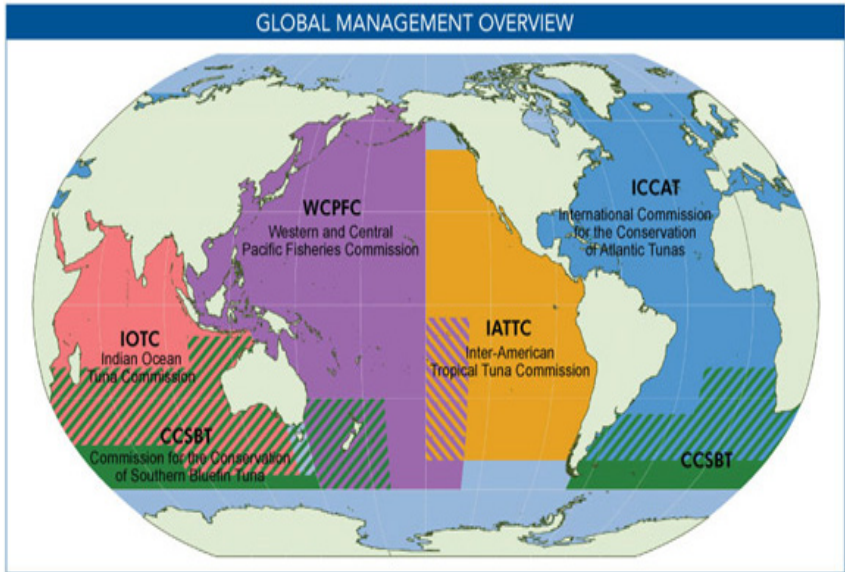


Figure 1

Source: https://www.pewtrusts.org/media/legacy/uploadedimages/peg/publications/fact_sheet/tunarmfomaprcjpg.jpg?la=en&hash=8C676FDA5D40DF0BF720B0293F21C093B5B00380

entered into force 19 June 2004) 2275 UNTS 43 art 2.

²⁷⁰Western and Central Pacific Fisheries Commission (WCPFC), ‘Conservation and Management Measure to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO (CMM 2019-07)’ (Commission Sixteenth Regular Session, 5-11 December 2019).

²⁷¹ WCPFC, ‘WCPFC Record on Fishing Vessels and Authorization to Fish (CMM 2018-06)’ (Commission Fifteenth Regular Session, 10-14 December 2018).

²⁷² WCPFC, ‘Conservation and Management Measure on Minimum Standards for Ports State Measures (CMM 2017-02)’ (Commission Fourteenth Regular Session, 3-7 December 2017).

Figure 2

Country	Status of Membership		
	CCSBT	IOTC	WCPFC
Brunei	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx
Cambodia	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx
Indonesia	8 April 2008	20 June 2007	30 October 2013
Laos	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx
Malaysia	xxxxxxxxxxxxxxxxxxxxxx	22 May 1998	xxxxxxxxxxxxxxxxxxxxxx
Myanmar	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx
Philippines	xxxxxxxxxxxxxxxxxxxxxx	9 January 2004	17 June 2005
Singapore	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx
Thailand	xxxxxxxxxxxxxxxxxxxxxx	17 March 1997	Cooperating non-member
Vietnam	xxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxxxx	Cooperating non-member

Source:
<https://www.ccsbt.org/en/content/origins-convention>
<https://iotc.org/about-iotc/structure-commission>
<https://www.wcpfc.int/about-wcpfc>

6.4. IUU Fishing as a Transnational Crime under ASEAN

In addition to their national efforts, Southeast Asian countries are trying to fight IUU fishing through regional efforts under the ASEAN framework. ASEAN is an intergovernmental organisation²⁷³ that comprises ten states, i.e. Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.²⁷⁴ All ASEAN Member States (AMS) have their marine areas, except for Laos which is a land-locked country.

ASEAN sees IUU fishing as a fisheries management issue and a security issue at the same time. As a fisheries management issue, ASEAN has established several initiatives against IUU fishing such as the Resolution and Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region towards 2020²⁷⁵ and the Strategic Plan of Action on ASEAN Cooperation in Fisheries (2016-2020).²⁷⁶ The

²⁷³ Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter) art 3.

²⁷⁴ *ibid* art 4.

²⁷⁵ SEAFDEC, 'Resolution and Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region towards 2020' (SEAFDEC 2011).

²⁷⁶ 'Strategic Plan of Action on ASEAN Cooperation in Fisheries (2016-2020)'

strategic plan consists of 6 Strategic Thrusts, 19 Action Programmes, 40 activities and 62 sub-activities. Concerning IUU Fishing, ASEAN puts it under Strategic Thrust 6 (Strengthen ASEAN joint approaches on international and regional issues affecting the food, agriculture and fisheries sectors) by engaging regional and international processes to improve the governance of transboundary fishing and traceability of fishery products (action programme 6.3.). In addition to the Plan of Action, the region also established several instruments such as the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain and the ASEAN Catch Documentation Scheme for Marine Capture Fisheries.²⁷⁷ ASEAN has also established different bodies in managing its fisheries cooperation. The Senior Officials Meeting of the ASEAN Ministers on Agriculture and Forestry (SOM-AMAF) is tasked with being the main ASEAN body that oversees the overall ASEAN cooperation in fisheries under the guidance of the ASEAN Ministers on Agriculture and Forestry (AMAF).²⁷⁸ The SOM-AMAF in implementing its tasks is supported by ASEAN Sectoral Working Group on Fisheries (ASWGF).²⁷⁹

ASEAN also considers IUU fishing as a security issue as shown in ASEAN Political-Security Community (APSC) Blueprint 2025, a non-legally binding document that guides the ASEAN member states in how to achieve the APSC by 2025. Under its sub-section B.6.2 (promote maritime cooperation to address maritime issues comprehensively), ASEAN is set to expand its maritime cooperation to combat transnational crimes and address transboundary challenges through concrete and practical activities. The blueprint explains further that transnational crimes includes maritime terrorism, smuggling of goods, people and weapons, drug trafficking, trafficking in persons, piracy, hijacking, and armed robbery against ships. At the same time, the transboundary challenges include oil

(n 25).

²⁷⁷ ASEAN Catch Documentation Scheme for Marine Capture Fisheries (adopted by 39th AMAF Meeting, 28 September 2017).

²⁷⁸ ASEAN, 'ASEAN Ministerial Meeting on Agriculture and Forestry (AMAF)' (ASEAN) <<https://asean.org/asean-economic-community/asean-ministerial-meeting-on-agriculture-and-forestry-amaf/>> accessed 25 July 2019.

²⁷⁹ *ibid.*

spill incidents and IUU fishing. In this sense, IUU fishing is not categorised as a transnational crime by the APSC Blueprint 2025, but it is considered as a transboundary challenge. Although the blueprint does not recognise IUU fishing as a transnational crime, the Kuala Lumpur Declaration²⁸⁰ and the ASEAN Plan of Action in Combating Transnational Crime (2016-2025)²⁸¹ are open to the possibility of the expansion of the scope of transnational crime, which may include the categorisation of IUU fishing as a transnational crime.

AMS started to promote regional cooperation against transnational crime from 1976 by focusing on the fight against illicit drug trafficking which resulted in the ASEAN Declaration of Principles to Combat the Abuses of Narcotic Drugs.²⁸² In the mid-1990s, ASEAN was forced to recognise that other forms of transnational crime, in addition to drug trafficking, had become a threat to regional development and stability.²⁸³ In July 1996, the ASEAN Ministerial Meeting recognised the urgent need to tackle transnational problems such as drug trafficking, money laundering, smuggling of migrants and environmental crimes.²⁸⁴ The Heads of Government on 30 November 1996 requested the relevant ASEAN body to study the possibility of regional cooperation on criminal matters including extradition.²⁸⁵ ASEAN then endorsed the “ASEAN Declaration on Transnational Crime” on 20 December 1997 which underlined its concern over the pernicious effects of transnational crime on regional stability and development, the rule of law and the welfare of the region.²⁸⁶ The Declaration also established the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) and requested a high-level ad hoc Experts Group to formulate the “ASEAN Plan

²⁸⁰ ‘Kuala Lumpur Declaration in Combating Transnational Crime’ (Kuala Lumpur, 30 December 2015).

²⁸¹ ‘ASEAN Plan of Action in Combating Transnational Crime (2016-2025)’ (adopted by 11th AMMTC, 20 September 2017).

²⁸² Ralf Emmers, ‘ASEAN and the Securitization of Transnational Crime in Southeast Asia’ (2003) 16(3) *The Pacific Review* 419, 424.

²⁸³ *ibid.*

²⁸⁴ ‘Joint Communiqué of the 29th ASEAN Ministerial Meeting (AMM)’ (Jakarta, 20-21 July 1996) para 44.

²⁸⁵ ‘Press Statement of the First Informal ASEAN Heads of Government Meeting,’ (Jakarta, 30 November 1996) para 15.

²⁸⁶ ‘ASEAN Declaration on Transnational Crime,’ (Manila, 20 December 1997).

of Action on Transnational Crime”.²⁸⁷ This Plan of Action was then adopted on 23 June 1999 in Yangon, Myanmar to expand member states’ efforts in tackling transnational crime from the national and bilateral levels to the regional level.²⁸⁸ These efforts are detailed in six programmes of priorities, i.e. information exchange, legal matters, legal enforcement matters, training, institutional capacity-building and extra-regional cooperation.²⁸⁹ The Plan of Action also, as part of its institutional framework, established the Senior Officials’ Meeting on Transnational Crime (SOMTC).

ASEAN Ministers, on the sidelines of the 10th AMMTC in Kuala Lumpur, Malaysia, signed the “Kuala Lumpur Declaration in Combating Transnational Crime” on 1 October 2015. The Declaration acknowledged the emergence of new forms of transnational crime and recognised the continued need to address those crimes in an effective and timely manner. The Kuala Lumpur Declaration also mandated the formulation of a new “ASEAN Plan of Action to Combat Transnational Crime”, which was then formulated and adopted in 2017 under the title “ASEAN Plan of Action in Combating Transnational Crime (2016-2025)”.

One of the 2017 Plan of Action’s objectives is to cooperate closely to prevent and combat transnational crimes under the purview of the AMMTC and SOMTC, namely terrorism, illicit drug trafficking, trafficking in persons, arms smuggling, sea piracy, money laundering, international economic crime (including credit card fraud, counterfeit currency and illicit trading of shares),²⁹⁰ cybercrime, illicit trafficking of wildlife and timber, and people smuggling.²⁹¹ The 2017 Plan of Action also opens the possibility of expanding the scope of responsibility of both the AMMTC and SOMTC, as stated in its objectives, to deal effectively with new methods and forms of

²⁸⁷ *ibid.*

²⁸⁸ ‘ASEAN Plan of Action in Combating Transnational Crime (2016-2025)’ (n 68).

²⁸⁹ *ibid.*

²⁹⁰ For examples of international economic crime see ‘ASEAN-Japan Joint Declaration on Cooperation to Combat Terrorism and Transnational Crime’ (Nay Pyi Taw, 12 November 2014).

²⁹¹ ‘ASEAN Plan of Action in Combating Transnational Crime (2016-2025)’ (n 68) s IV (Objectives) para 1.

transnational crime where it is necessary and mutually agreed.²⁹² This possibility could hypothetically include IUU fishing as one of the new forms of transnational crime that needs to be dealt with in ASEAN if the AMS agree to it. An example of the inclusion of a new form of transnational crime can be seen from illicit trafficking of wildlife and timber and also people smuggling where the Kuala Lumpur Declaration endorsed these two crimes as new areas of transnational crimes under the purview of the AMMTC. It can then be argued that IUU fishing could be categorised as a transnational crime if the AMS agreed to do so.

As explained in Chapter 5, a transnational crime could be addressed through the mechanism of a suppression convention. The following Section 6.5. will elaborate on how this could be done under a suppression convention within the regional context through two alternatives: i) the establishment of a stand-alone regional suppression convention or ii) the integration of suppression convention provisions into the existing regional fisheries instruments.

6.5. Criminalisation of IUU Fishing through a Suppression Convention: The Two Alternatives

6.5.1. Establishment of a Stand-alone Regional Suppression Convention

One method of criminalising IUU fishing in Southeast Asia is to establish a stand-alone regional suppression convention under the framework of the ASEAN. The increasing concern about the significant negative harms caused by IUU fishing, along with the interests of some ASEAN member states to suppress such a crime, could be the trigger to initiate the formation of a stand-alone convention.

The possibility of the establishment of a regional stand-alone suppression convention finds its foundation in the ASEAN Charter. The charter, in Article 1(8), states that one of the purposes of ASEAN is to “respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges”. In its implementation, the ASEAN

²⁹² *ibid.*

Plan of Action to Combat Transnational Crime of 1999 encourages AMS to work for the criminalisation of specific transnational crimes such as illicit drug trafficking, money laundering, terrorism, piracy, arms smuggling and people trafficking. The 1999 Plan of Action further encourages the harmonisation of national policies on transnational crime among the AMS and the development of multilateral or bilateral legal arrangements to enhance mutual legal and administrative assistance among its members. The development of new legal arrangements is also encouraged by the 2017 ASEAN Plan of Action in Combating Transnational Crime (2016-2025). The 2017 Plan of Action set the development of new regional legal instruments in the areas of transnational crime as one of its main priority areas.²⁹³ Based on this possibility, the AMS could, hypothetically, establish a stand-alone regional convention against IUU fishing if they agreed to do so.

A stand-alone convention against transnational crime is not something entirely new for ASEAN member states. In 2007, AMMTC agreed to explore the possibility of developing the ACTIP. After a series of meetings, the ACTIP was established in 2015 and entered into force in 2017.²⁹⁴ The convention was the second regional convention in the world after the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, and its substance is highly consistent with the UNTOC's Trafficking in Persons Protocol.²⁹⁵ It was established mainly due to strong political will in tackling people trafficking stemming from member States' concerns over national reputations in managing their territory and population flows coupled with external pressure such as from the US and the EU on the people trafficking problem in the region.²⁹⁶

ACTIP is a good example of how a suppression convention is established in ASEAN. ACTIP can provide an illustration both of

²⁹³ 'ASEAN Plan of Action in Combating Transnational Crime (2016-2025)' n (68) s V (Legal Matters) para 3.

²⁹⁴ Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2018) 8 *Asian Journal of International Law* 258, 272-273.

²⁹⁵ Guangyu Qiao and Nana Oishi, 'Policy Transfer from the UN to ASEAN: The Case of Trafficking in Persons' (2018) 40(2) *Policy Studies* 131, 132.

²⁹⁶ *ibid* 143.

the process of establishing a suppression convention and also of what kinds of suppression provisions are acceptable to the ASEAN Member States. The following Sections 6.5.1.1. to 6.5.1.4. will elaborate on what the stand-alone regional convention against IUU fishing might be like based on the four elements of suppression conventions while taking into account the process and substance of ACTIP.

6.5.1.1. Substantive Law

The substantive law in the stand-alone convention would be the benchmark for the AMS' national substantive criminal laws in tackling IUU fishing in the region. Several important provisions could be included in the convention foremost amongst which would be the definition of IUU fishing. The definition should clarify the coverage of the three elements of IUU fishing, i.e. illegal, unreported and unregulated (see Chapter 5 for more detailed discussion) by redefining the terminology to suit the common interests of the AMS. As suggested in Chapter 5, the AMS could also consider which conducts among serious violations mentioned the UNFSA to be included in the IUU fishing definition. Among them, fishing without a valid licence and fishing using prohibited gear and methods could be considered to be worthy of criminalisation. In defining IUU fishing, one of the crucial aspects that would need further consideration is the exclusion of small-scale fishermen as they constitute a significant portion of fisheries activities in the region. Harming small-scale fisheries is also one of the concerns of Vietnam, which makes that country reluctant to support the idea of IUU fishing criminalisation.²⁹⁷ However, it is, of course, important to define what constitutes “small-scale fishermen” to prevent perpetrators of IUU fishing, such as “blue boats”,²⁹⁸ from being excluded from criminalisation. After the AMS agrees the definition of IUU fishing, the convention could oblige parties to adopt national legislative and other measures as may be necessary to establish an agreed definition of IUU fishing as criminal offences.

The stand-alone convention could also contain provisions which make the involvement of OCGs and transnational element to be

²⁹⁷ ‘Co-Chairs’ Summary Report of ARF Workshop on Illegal, Unregulated and Unreported (IUU) Fishing’ (Bali, 19-21 April 2016) para 11.

²⁹⁸ For discussions on “blue boats” see Section 4.3. of Chapter 4.

prerequisites for the application of the stand-alone convention. By having these prerequisites, the convention would only apply to IUU offences when they are transnational and involve an OCG. These prerequisites would help to clarify the scope of the convention and to address the concerns of Vietnam where the criminalization of IUU fishing could harm small-scale fishermen, as these prerequisites would exclude small-scale fishermen who only fish for their subsistence.

The stand-alone convention could provide provisions for effective procedural cooperation among the AMS in tackling IUU fishing which either obliges or permits parties to establish jurisdiction against IUU fishing and to enforce such jurisdiction through policing and adjudication. The convention could also be the basis for regional cooperation in tackling IUU fishing through several measures such as exchange of information, MLA, and extradition.

Another important aspect of IUU fishing criminalisation is the enforcement of the stand-alone convention. As the nature of suppression convention enforcement is indirect (enforcement is in the hands of the sovereign states), the stand-alone regional convention would also adopt the indirect approach. The stand-alone convention would need to establish provisions which require each of the member states to enforce their national criminal laws and to cooperate in the prosecution and suppression of IUU fishing activities. National criminal laws of the member states would then create individual liability for the offence based on the minimum standards prescribed in the stand-alone convention. Once an offence is committed, member states will be responsible for enforcing their national laws and for prosecuting the offenders.

Once the stand-alone convention has been implemented, there is the issue of the review mechanism. ASEAN treaty practice, especially in ASEAN political-security instruments, has been known to lack a clear and meaningful compliance mechanism.²⁹⁹ ACTIP is a good example of how ASEAN is still deficient both in its review of implementation and also in the procedures of non-compliance. ACTIP's review mechanism is carried out by the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) and supported

²⁹⁹ Ranyta Yusran (n 81) 285.

by the ASEAN Secretariat.³⁰⁰ The SOMTC then reports periodically to the AMMTC on the effective implementation of ACTIP.³⁰¹ However, AMMTC has not been very critical of the work of SOMTC. For example, in the 12th AMMTC meeting in October 2018, the ministers merely welcomed the effective implementation of the SOMTC Work Programme 2016-2018 and looked forward to the finalisation and adoption of the SOMTC Work Programme 2019-2021 to implement the ASEAN Plan of Action in Combating Transnational Crime (2016-2025)³⁰² without providing further meaningful comments or inputs on the work of the SOMTC. In the field of trafficking in persons, the ministers commended the progress in the implementation of the Bohol Trafficking in Persons Work Plan 2017-2020 and the efforts in its effective implementation³⁰³ without providing any further guidance on the quality of the implementation. In the 13th AMMTC meeting in November 2019, the meeting only took note of the outcomes of the 19th SOMTC³⁰⁴ and the significant progress in addressing the need for a monitoring and reporting mechanism for the ACTIP. The lenient approach taken by ASEAN on the implementation of any treaty is likely to continue due to the high regard paid to the principle of non-intervention.³⁰⁵ If a stand-alone convention against IUU fishing were to be established, its review mechanism and compliance mechanism are likely to be as lenient as in the case of ACTIP.

6.5.1.2. Jurisdiction

The AMS would need to insert provisions on jurisdiction in the stand-alone regional convention to ensure that states can enforce provisions against IUU fishing perpetrators. In this sense, the stand-alone regional convention could serve as a jurisdictional framework for the AMS by prescribing powers for the adoption and enforcement

³⁰⁰ ACTIP, art 24(1).

³⁰¹ *ibid* art 24(2).

³⁰² 'Joint Statement Twelfth ASEAN Ministerial Meeting on Transnational Crime' (Nay Pyi Taw, 31 October 2018) para 8.

³⁰³ *ibid* 9.

³⁰⁴ 'Joint Statement of the Thirteenth ASEAN Ministerial Meeting on Transnational Crime (13th AMMTC)' (Bangkok, 27 November 2019) paras 4 and 6.

³⁰⁵ Robin Ramcharan, 'ASEAN and Non-Interference: A Principle Maintained' (2000) 22(1) *Contemporary Southeast Asia* 60.

of legislation relating to IUU fishing activities. Different bases of jurisdiction could be chosen by the AMS, i.e. territorial, nationality, protective, passive personality and universal.³⁰⁶ Territorial jurisdiction, as elaborated in Chapter 5, is one of the viable options in tackling IUU fishing as it will cover IUU fishing offences in the internal and territorial waters under the jurisdiction of coastal states. In the EEZ, the stand-alone convention could establish jurisdiction to board, inspect, arrest, and initiate judicial proceedings that would fall under coastal states, as stated in Article 73 (1) of the UNCLOS. The AMS could use the stand-alone convention as the basis to apply penalties, including imprisonment, for violations of fisheries laws and regulations in the EEZ as stated by Article 73 of the UNCLOS. On the high seas, the AMS could establish provisions on flag states' jurisdiction against IUU fishing offences committed there. The application of port states' jurisdiction is also essential in fighting IUU fishing in the region. The AMS could also establish port states' jurisdiction to establish and enforce measures over foreign vessels within their ports, including denying entry to IUU fishing vessels and also the power to board and inspect vessels suspected to have engaged in IUU fishing or related supporting activities. Some of the AMS (Indonesia, Myanmar, Philippines, Thailand and Vietnam) could use the PSMA to apply necessary port states' measures in tackling IUU fishing as they are already members of that agreement.

6.5.1.3. Investigative Tools

Investigative tools are essential in ensuring that IUU fishing perpetrators do not get away with their crimes. The AMS could install different investigative tools that must be employed by the parties of the stand-alone convention. The stand-alone convention could provide options for which investigative tools can be used. The ASEAN Plan of Action in Combating Transnational Crime (2016-2025) encourages the AMS to allow the use of special investigative techniques such as electronic surveillance and undercover operations to combat transnational crime effectively, to the extent permitted by the AMS domestic laws.³⁰⁷ Other investigative tools such as aerial

³⁰⁶ For discussion on jurisdiction see Chapter 5, section 5.3.3.2.

³⁰⁷ 'ASEAN Plan of Action in Combating Transnational Crime (2016-2025)' (n

surveillance will be particularly useful to be included in the convention as such surveillance can assist parties in collecting photographic and observational evidence that can be used by law enforcement officers against IUU fishing activities in the region.

6.5.1.4. Regional Cooperation

ASEAN acknowledges regional cooperation as an essential factor in tackling transnational crime. In the Kuala Lumpur Declaration in Combating Transnational Crime, the AMS reaffirmed their commitment to continue to cooperate closely to prevent and combat transnational crimes. In the Declaration, the AMS further agreed to enhance cooperation and coordination among their law enforcement, operational and intelligence units responsible for tackling transnational crimes.³⁰⁸ It has also been planned to strengthen cross-sectoral coordination on border management information sharing and intelligence exchange among ASEAN bodies.³⁰⁹ The Plan of Action 2016-2025 further details the efforts to enhance regional cooperation including through: i) reviewing national policies and laws to strengthen regional cooperation in MLA, extradition and law enforcement cooperation;³¹⁰ ii) enhanced cooperation and coordination through the exchange of information and intelligence sharing;³¹¹ and iii) strengthening cross-sectoral coordination and improving information sharing with relevant ASEAN Sectoral Ministerial Bodies on issues related to combating transnational crimes.³¹² The stand-alone convention can use and build upon these commitments in its provisions and at the same time give more weight to important aspects of cooperation in transnational crime such as extradition and MLA.

Regarding extradition, the stand-alone convention can use, as a reference point, the agreed Model ASEAN Extradition Treaty of

68) s V (Law Enforcement Matters) para 7.

³⁰⁸ 'Kuala Lumpur Declaration in Combating Transnational Crime' (n 67) paras 1 and 17.

³⁰⁹ *ibid* para 19.

³¹⁰ ASEAN Plan of Action in Combating Transnational Crime (2016-2025) (n 68) s V (National Strategies/Action Plans) para 4.

³¹¹ *ibid* s V (Law Enforcement Matters) para 3.

³¹² *ibid* s VI (Institutional Framework and Way Forward) para 7.

2018, which covers a broad range of aspects including the obligation to extradite and the surrender of property.³¹³ The Model Treaty will be the foundation of the ASEAN Extradition Treaty, which is currently being prepared by the ASEAN Senior Law Officials Meeting, as a next step to strengthen ASEAN's resilience and capacity to combat transnational crimes and enhance cooperation within ASEAN to ensure respect for the rule of law.³¹⁴ Regarding MLA, the stand-alone convention can draw suitable provisions from the Treaty on Mutual Legal Assistance in Criminal Matters³¹⁵ the status of which is in the process of being elevated into an ASEAN Treaty.³¹⁶

6.5.2. Integration of Suppression Provisions into Southeast Asia's Fisheries Instruments

The criminalisation of IUU fishing at a regional level can also be achieved through the integration of suppression convention provisions into the existing regional fisheries instruments. It is an alternative for states that do not want to establish a new stand-alone convention.

The elements of suppression provisions that would be integrated into the existing instruments such as substantive law, jurisdiction, investigation tools and international cooperation have a resemblance to the contents of the stand-alone regional suppression convention as discussed in section 6.5.1. of this chapter and in section 5.4.2.2. of Chapter 5. It is thus unnecessary to repeat the discussion. Instead, this section will discuss other relevant aspects of integration such as Southeast Asia's preference for a regional instrument, which existing instruments are suitable for integration, and how the process of integration would be carried out.

³¹³ 'Model ASEAN Extradition Treaty' (endorsed by the 10th ASEAN Law Ministers Meeting, Vientiane, 12 October 2018).

³¹⁴ 'Chairman's Statement of the 33rd ASEAN Summit' (Singapore, 13 November 2018) para 14.

³¹⁵ 'Treaty on Mutual Legal Assistance in Criminal Matters' (Kuala Lumpur, 29 November 2004).

³¹⁶ 'Chairman's Statement of the 34th ASEAN Summit' (Bangkok, 23 June 2019) para 12.

6.5.2.1. The Preference for a Non-binding Instrument

The integration of suppression provisions would give rise to questions on which regional instrument is the most suitable and how integration could be achieved. To answer these questions we need to understand what type of approach ASEAN prefers, whether binding or voluntary, through the examination of the existing arrangements and instruments in the region. The examination would be the basis to determine the most suitable instrument and how integration could be achieved, as will be explained below.

The ASEAN region does not have its own internal legally binding instruments on fisheries. As discussed above, the fisheries-related instruments in the region are mostly in the form of guidelines and plans of action. There are several guidelines on different issues related to fisheries such as the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain, and Regional Guidelines for Responsible Fisheries Management in Southeast Asia. Along with the guidelines, the ASEAN also has a number of plans of action that assist the AMS in fisheries management such as the ASEAN Regional Plan of Action for the Management of Fishing Capacity, the Strategic Plan of Action on Cooperation on Fisheries 2016-2020, and the Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2020. In addition to the guidelines and plans of action, the commitments and concerns related to fisheries management and IUU fishing are also mentioned in numerous ASEAN documents such as the Chairman's Statements of various ASEAN meetings and the declarations made both by ASEAN and also with its external partners. Despite numerous established guidelines and plans of action related to fisheries, these instruments are not legally binding and thus their implementation is highly dependent on the willingness of the AMS to adopt the provisions laid out in the instruments.

From the above examination of the existing regional arrangements and instruments, it can be deduced that ASEAN prefers a non-legally binding approach towards fisheries issues. This non-binding approach can be applied to the scenario of integrating suppression provisions into ASEAN fisheries instruments. The AMS could create a non-binding instrument on IUU fishing with suppression provisions or the AMS could amend an existing regional instrument to include

suppression provisions. A non-binding instrument could be well received at the initial stage since there is a low level of obligation on the part of states to implement the provisions in the instrument. As states become more comfortable with the instrument, it can move its way up to being a more binding instrument in the future.

6.5.2.2. The Selection of a Regional Instrument

After accepting the region's preference for non-binding instruments, the follow-up question is into which instrument(s) discussed above can the suppression provisions be integrated? This section will explore options on possible instruments where suppression provisions can be integrated.

The first option is the possibility of integrating suppression provisions into the existing RFMOs' instruments which have mandates covering parts of the Southeast Asia region. As explained in section 6.3.1., there are three RFMOs, i.e. CCSBT, IOTC and WCPFC, that have competence to manage fisheries in parts of the Southeast Asia region. Nonetheless, none of the three RFMOs has competence covering all the region's waters (see Figure 5). The participation of Southeast Asia's states in these RFMOs is also partial (see Figure 6). Some states that are under the area of competence of an RFMO are not yet members or participating non-members. For example, Myanmar is not a member of the IOTC and Malaysia is not a member of the WCPFC, although they are under the area of competence of the respective RFMOs. The partial coverage of the area of competence and the issue of membership could make the integration of suppression provisions into the three RFMOs difficult as the provisions would then only apply to some parts of the Southeast Asia region. This would hinder the effective implementation of regional criminalisation as the suppression provisions would not bind some states. Another point of concern is the fact that RFMOs' conventions and decisions are legally binding. Although many of the Southeast Asian states are members of different RFMOs and so are bound by its conventions and decisions, the AMS do not display such willingness when it comes to the ASEAN instruments, showing a preference for non-binding instruments as discussed in Section 6.5.2.1. Considering the preference of Southeast Asian States for non-legally binding instruments in the area of fisheries, the inclusion

of suppression provisions into the RFMOs instruments would not be acceptable, unless the suppression provisions were to be made voluntary in nature.

The second option is to integrate the suppression provisions into the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain, a voluntary and non-binding instrument. Established in 2015, it guides the AMS in different areas in tackling IUU fishing: i.e. managing fishing activities within the ASEAN;³¹⁷ regulating transshipment and landing of fish catch across borders;³¹⁸ preventing poaching in the EEZs of the AMS;³¹⁹ controlling illegal fishing and trading practices of live reef food fish, reef-based ornamentals and endangered aquatic species;³²⁰ and strengthening the management of fishing in the high seas and RFMO areas.³²¹ The guidelines do not have law enforcement or criminal justice provisions that can guide the AMS in tackling IUU fishing, let alone how to deal with the involvement of OCGs. The guidelines rely more on non-coercive measures such as promoting community-based management to prevent, deter and eliminate any violation in fisheries,³²² compiling a list of vessels that have been operating illegally and sharing the list among relevant countries,³²³ and cooperating with relevant RFMOs in complying with their Catch Documentation Schemes.³²⁴ The integration of suppression provisions into the guidelines would appeal to states that are interested in pursuing stricter measures against IUU fishing and at the same time would give room for unenthusiastic states to still apply the measures as the guidelines are voluntary in nature. The disadvantage of this

³¹⁷ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain,' (n 42) s 7 (Managing Fishing Activities within a ASEAN Member States).

³¹⁸ *ibid* s8 (Regulating Transshipment and Landing of Fish/Catch Across Borders).

³¹⁹ *ibid* s9 (Preventing Poaching in the EEZs of ASEAN Member States).

³²⁰ *ibid* s10 (Controlling Illegal Fishing and Trading Practices of Live Reef Food Fish, Reef-based Ornamentals and Endangered Aquatic Species).

³²¹ *ibid* s11 (Strengthening the Management of Fishing in the High Seas and RFMO Areas).

³²² *ibid* s7.3.4.

³²³ *ibid* s9.2.

³²⁴ *ibid* s11.3.

option is that, as this would be voluntary, it is possible that not many states would want to implement the provisions and thus the goal of effective regional criminalisation would not be achieved.

The third option is the integration of suppression provisions into the Strategic Plan of Action on Cooperation on Fisheries 2016-2020. The Strategic Plan has six strategic thrusts that cover a wide range of measures including enhancing the quality of production sustainably, enhancing trade facilitation of fish products, and strengthening ASEAN's joint approaches on international and regional issues affecting the fisheries sector. The Strategic Plan does not have law enforcement or criminal justice provisions. In implementing the six strategic thrusts, the Strategic Plan elaborates 19 Action Programmes which are further detailed into 40 activities and 62 sub-activities, ranging from the promotion of the efficient use of potential fisheries³²⁵ to the development of capacity among the AMS to support more sustainable fisheries and to building up capacity among the AMS to effectively meet the requirements of port state measures and flag state responsibilities.³²⁶ One problem of the Strategic Plan is that it will end in 2020. The AMS would need to extend the period of the plan if they decide to integrate the suppression provisions into the plan. The integration of suppression provisions into the Strategic Plan of Action would have similar advantages and disadvantages to the second option.

The fourth option is the integration of the suppression provisions into the Regional Plan of Action to Promote Responsible Fishing Practices, including Combating IUU Fishing in the Region (RPOA-IUU). The RPOA-IUU is a voluntary instrument which draws its core principles from international fisheries instruments including the UNCLOS, the Compliance Agreement, the UNFSA, and the IPOA-IUU.³²⁷ The RPOA-IUU lays out different measures including the implementation of coastal state responsibilities, flag state responsibilities, port state measures, regional market measures and regional capacity building. In its implementation, the RPOA-IUU

³²⁵ 'Strategic Plan of Action on ASEAN Cooperation on Fisheries (2016-2020)' (n 25) v activities 1.1.1.

³²⁶ *ibid* activities 6.3.4.

³²⁷ RPOA-IUU (n 37) para 4..

has three sub-regional groups: Gulf of Thailand (Thailand, Vietnam, Cambodia and Malaysia), Southern and Eastern Area of the South China Sea and Sulu-Sulawesi Seas (Indonesia, Brunei Darussalam, Malaysia and the Philippines), and Arafura-Timor Seas (Australia, Indonesia, Papua New Guinea and Timor-Leste). As mentioned in Section 6.3.1., the RPOA-IUU covers almost all the Southeast Asian States except for Myanmar and Laos (a land-locked country). This gives the RPOA-IUU a majority coverage of Southeast Asia's waters which is beneficial if suppression provisions were to be integrated into it. The voluntary nature of the instrument could also bring advantages (and disadvantages) for similar reasons to those given in the second option above. Another advantage is the RPOA-IUU's attachment to the different international fisheries instruments and broad coverage of measures provided by the instrument. These advantages make the RPOA-IUU a potential candidate for the integration of suppression provisions. A point of caution is the inactivity of the members in the organisation as reflected in the 11th Coordination Committee Meeting of the RPOA-IUU in November 2018 where the RPOA-IUU Secretariat pointed out the challenges of getting an active response from the members. The inactivity of members could potentially hinder both the process of integrating suppression provisions into the instrument and also its implementation.³²⁸

6.5.2.3. The Process of Integration

The process of integration for the four options above (see Section 6.5.2.2) can be categorised into two mechanisms. The first mechanism is under the ASEAN framework for the second and third options, and the second mechanism is outside the ASEAN framework for the first and fourth options.

For the first mechanism, the integration of suppression provisions into the existing regional instruments of ASEAN generally is achieved through the initiative of the AMS. For example, Article 12 of the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing into the Supply Chain states that the

³²⁸ *ibid* 'Summary Report of the 11th Coordination Committee Meeting on the Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region' (Yogyakarta, 13-14 November 2018) s 3.1.

AMS shall propose the review of the guidelines. In the same vein, the Strategic Plan of Action on ASEAN Cooperation in Fisheries 2016-2020 also states that the Strategic Plan may be reviewed as necessary taking into account new developments and agreement by the AMS. The process of establishing a new or amended instrument could come from the ASEAN Sectoral Working Group on Fisheries (ASWGF_i), to be discussed and approved by the Senior Officials Meeting of the ASEAN Ministers on Agriculture and Forestry (SOM-AMAF) and finally to be discussed and adopted by the ASEAN Ministers Meeting on Agriculture and Forestry (AMAF). If the integration of suppression provisions were to be agreed, the close involvement of SOMTC and AMMTC would be important to provide criminal justice expertise to the instrument. In this case, both sectoral bodies of agriculture/forestry and transnational crime could have a joint meeting to discuss the necessary synchronisation between the fisheries management and suppression provisions so as to create a comprehensive and effective instrument and further cooperation as the provisions are being implemented. It would also be beneficial to involve the SEAFDEC in the process as SEAFDEC has been greatly involved in the establishment and implementation of fisheries instruments in the region. The involvement of SEAFDEC would contribute to the technical aspects of fisheries management.

For the second mechanism, the integration of suppression provisions into the existing instruments outside the ASEAN framework would depend on the internal mechanism of each instrument. In the case of WCPFC, an amendment of the WCPFC Convention could be proposed by any member to the Executive Director. The proposal then would be considered at the annual meeting and adopted by consensus.³²⁹ The IOTC Agreement states that an amendment may be made by any member of the Commission or by the Director-General.³³⁰ The amendment then needs to be agreed by a three-quarters majority of the members of the Commission.³³¹ Amendments involving new obligations for members come into force for each member only upon that member's

³²⁹ WCPFC Convention, art 40.

³³⁰ IOTC Agreement, art XX(2).

³³¹ *ibid* art XX(1).

acceptance of it.³³² The RPOA-IUU does not set out procedure for amendment. It states, however, that the implementation of the RPOA-IUU will be reviewed by a Coordination Committee, a high-level decision-making body that provides strategic advice and direction to participating countries.³³³ The RPOA-IUU Coordination Committee could perhaps facilitate the integration of suppression provisions into the RPOA-IUU, if agreed by the members.

6.6. Comparative Analysis between the Two Alternatives

This chapter has set out two alternatives for regional criminalisation of IUU fishing: i.e. the establishment of a stand-alone regional convention and the integration of suppression provisions into the existing regional fisheries instruments. This section will assess pros and cons of the two alternatives. Further, this section will compare the two alternatives using three main lenses, i.e. scope of application, feasibility and operationality.

6.6.1. Pros and Cons of a Stand-alone Regional Suppression Convention

Pros

The establishment of a regional stand-alone suppression convention could have several advantages. First, the convention can provide advantages through its four elements i.e. substantive law, jurisdiction, investigative tools and international cooperation. The convention can facilitate harmonisation of substantive law to criminalise IUU fishing that could minimise legal differences among states. The convention can oblige the establishment of jurisdiction by states to ensure that the crime would not go unpunished. Further, the convention can provide an endorsement of the use of different investigative techniques and provide a broader range of international cooperation tools. Second, the convention can provide states with the flexibility to establish necessary provisions based on the region's characteristics and concerns. In the context of Southeast Asia, the harm to small-scale fisheries can be given greater focus by

³³² *ibid* art XX(5).

³³³ RPOA-IUU (n 37) para 13.

establishing provisions that clarify that small-scale fisheries would not be criminalised. Third, the regional convention would provide more confidence and credibility in the Southeast Asian Countries' efforts in marketing its fish products and in fighting IUU fishing, especially for those states that are receiving “yellow card” (Vietnam) and “red card” (Cambodia) from the European Commission. Lastly, the regional convention could utilise the existing ASEAN institutional mechanisms to support in its implementation, including for monitoring and reviewing implementation, organising meetings, and conducting relevant studies. For example, the convention could task SOMTC to monitor and review the convention implementation. The convention could also task the ASEAN Secretariat to allocate resources for organising meetings and conducting necessary studies. Further, the convention could also draw expertise and support from the existing mechanisms related to fisheries including the ASWGF, SOM-AMAF, and AMAF.

Cons

The stand-alone regional suppression convention could have several challenges. First, the regional convention could suffer from the lack of support from the Southeast Asian states. The different national positions on IUU fishing criminalisation makes it possible that Southeast Asian countries would be hesitant to come together in establishing the regional convention. For those countries such as Vietnam, where there are many IUU fishing cases involving their citizens, it could be hard to support a regional suppression convention as there is a possibility that their citizens would be rendered liable to the convention. Second, the drafting of the regional convention could take a significant time and resources since Southeast Asian states have different opinions on the criminalisation of IUU fishing at the regional level. Third, the convention can entail significant costs to implement. At the national level, states must bear the costs of implementation through enacting or adopting national laws, allocating human and financial resources for the investigation, prosecution, and adjudication of IUU fishing cases. At the regional level, states need to allocate human and financial resources to monitor and review the performance of the convention.

6.6.2. Pros and Cons of Integration of Suppression Provisions

Pros

The integration of suppression provisions into Southeast Asia's fisheries instruments could have several advantages. First, Southeast Asia's nations could expand the existing regional instruments with relevant suppression provisions which would make the instruments more comprehensive. In this context, the suppression provisions can offer substantive criminal law provisions, obligation to establish jurisdiction against agreed offences, and availability of investigative and international cooperation tools. Second, in the case of the Southeast Asian voluntary fisheries instruments, integration offers States flexibility by not being constrained by a binding instrument such as in the case of the establishment of a regional convention. However, at the same time, the integration process still offers states the possibility to apply the available suppression provisions in the existing instruments when needed. This flexibility could increase states' participation in the broadened instrument.

Cons

Several possible drawbacks can come with the alternative of integrating suppression provisions into Southeast Asia's fisheries instruments. First, since the instruments are non-binding and voluntary in nature, effective implementation is in question. The suppression provisions could be of secondary importance when there is no obligation to implement them. Second, integration could cause extra costs for states due to additional provisions of criminal justice measures. For example, the costs related to the investigation, executing MLA requests, prosecution and adjudication of criminal cases which can take considerable human and financial resources, especially for countries with limited resources. If the extra costs are not managed well, this could hamper the willingness and effectiveness of the implementation. Third, there could be an implementation gap by Southeast Asian authorities that are used to carrying out the fisheries instruments. In addressing this problem, the integration of suppression provisions would require comprehensive training for those authorities.

6.6.3. Comparison between the Two Alternatives

6.6.3.1. Scope of Application

In terms of the scope of application, the stand-alone regional convention potentially has more room for improvisation than the integration alternative. The Southeast Asian states can discuss and negotiate a wide range of provisions which they deem necessary to suppress IUU fishing offences. The integration alternative is, in some ways, more limited since the suppression provisions need to be in line with the scope of application of the principal instrument.

6.6.3.2. Feasibility

The support of Southeast Asian states for IUU fishing criminalisation will not be obtained easily for either of the options. Until now, the issue of IUU fishing criminalisation is still contested among the states, as explained in Section 6.5.1.1. However, in recent years, there has been a growing trend in the Southeast Asian states to ratify a regional legal instrument on issues that are considered as threats to the region; one of the examples of this is the establishment and ratification of the ACTIP. This tendency is also shown by the Kuala Lumpur Declaration and the ASEAN Plan of Action in Combating Transnational Crime (2016-2025) as they both open up the possibility of the expansion of the concept of transnational crime and the inclusion of IUU fishing as a transnational crime.

6.6.3.3. Operationality

In terms of operationality, alternatives are likely to experience potential operational ineffectiveness. For the integration alternative, examples of potential operational ineffectiveness can be inferred from the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain where there are no provisions as to how the guidelines can be implemented or on the availability of institutional support. Further, in the RPOA-IUU, a Secretariat has been established; however it is acknowledged that inactivity on the part of the members has caused challenges for the Secretariat. For the regional stand-alone convention option, referring to the ACTIP, the convention has support from the ASEAN

Secretariat for supervising and coordinating its implementation.³³⁴ If a regional convention against IUU fishing was established, the Secretariat is likely to be tasked to support the convention, as is the case with the ACTIP.³³⁵

The brief comparison of the two alternatives in these three subjects shows that each alternative has its own strong and weak points. Further discussion and recommendations will be offered in Chapter 7.

6.7. The Nexus between Regional and Global Criminalisation of IUU fishing

The criminalisation of IUU fishing at a regional level has been explored through two alternatives as explained above, where either of the two could be implemented if the member states were to agree upon them. To achieve greater success, regional criminalisation could be connected with global criminalisation; regional criminalisation could serve as a complementary solution to the global criminalisation of IUU fishing. For example, in the case of ASEAN, as all the AMS are parties of the UNTOC (see Figure 7), the stand-alone regional convention could serve as a complementary solution to the UNTOC. The regional convention could draw from the UNTOC provisions so as to establish synchronisation between the two while still taking into account regional circumstances. This could result in greater support for the regional convention, in both its establishment and implementation since all the AMS are parties to the UNTOC and already familiar with the UNTOC provisions.

³³⁴ ACTIP, art 24(2).

³³⁵ For the role of the ASEAN Secretariat see Paththarapong Rattanaseevee, 'Towards Institutionalised Regionalism: the Role of Institutions and Prospects for Institutionalisation in ASEAN' (2014) 3 (1) SpringerPlus 556; Avery Pool, 'Ambitions Versus Capacity: The Role of Institutions in ASEAN in Annika Björkdahl, Natalia Chaban, John Leslie, Annick Masselot (eds) Importing EU Norms. *Conceptual Framework and Empirical Findings* (Springer 2015); Deepak Nair, 'A Strong Secretariat, a Strong ASEAN? A Re-evaluation' (2016) 8 ISEAS Yusof Ishak Institute Perspective.

Figure 3				
Status of Ratification and Accession (a)				
Country	UNTOC	Trafficking in Persons Protocol	People Smuggling Protocol	Firearms Protocol
Brunei	25 Mar 2008	xxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxx
Cambodia	12 Dec 2005	2 Jul 2007	12 Dec 2005	12 Dec 2005 a
Indonesia	20 Apr 2009	28 Sep 2009	28 Sep 2009	xxxxxxxxxxxxxxxxxxx
Laos	26 Sep 2003 a	26 Sep 2003	26 Sep 2003 a	26 Sep 2003 a
Malaysia	24 Sep 2004	26 Feb 2009 a	xxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxx
Myanmar	30 Mar 2004 a	30 Mar 2004 a	30 Mar 2004 a	xxxxxxxxxxxxxxxxxxx
Philippines	28 May 2002	28 May 2002	28 May 2002	xxxxxxxxxxxxxxxxxxx
Singapore	28 Aug 2007	28 Sep 2015 a	xxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxx
Thailand	17 Oct 2013	17 Oct 2013	xxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxx
Vietnam	8 Jun 2012	8 Jun 2012 a	xxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxx

Source: <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>

It should also be acknowledged that there is a possibility that global criminalisation cannot be realised and that regional criminalisation of IUU fishing is the only option. The absence of global criminalisation would not lessen the value of regional criminalisation. As explained in Section 6.2., regional criminalisation brings apparent advantages for states in addressing specific regional issues, including IUU fishing. A relevant example in this matter is the criminalisation of corruption. Before the establishment of the UNCAC in 2003, a global instrument to fight corruption, several regional conventions were established to cater to the regions’ needs to tackle and criminalise corruption, e.g. the Inter-American Convention against Corruption of 1996³³⁶ and the Council of Europe Criminal Law Convention on Corruption.³³⁷ Based on these examples, states in Southeast Asia could continue with regional criminalisation without having any global criminalisation instrument already in place. By pursuing regional criminalisation, Southeast Asia could be the pioneer of a more global movement (and maybe global criminalisation) against IUU fishing in the future.

³³⁶ Inter-American Convention against Corruption (adopted 29 March 1996, entered into force 6 March 1997) 35 ILM 724.

³³⁷ Criminal Law Convention on Corruption (opened for signature 27 January 1999, entered into force 1 July 2002) ETS No. 173,.

6.8. Interim Conclusion

This chapter has set out two alternatives for IUU fishing criminalisation at a regional level through suppression conventions, namely either, by establishing a stand-alone regional suppression convention or through integrating suppression provisions into the existing regional fisheries instruments. Analyses of both alternatives have been undertaken in this chapter. The first alternative, namely the establishment of a stand-alone regional suppression convention, could be achieved through using the ASEAN mechanism as a legally binding instrument as in the case of ACTIP. The second alternative, namely the integration of suppression provisions, could be achieved through regional instruments that are voluntary in nature.

The discussion on regional criminalisation in this chapter and on global criminalisation in the previous chapter reveals that these can both serve as solutions to the problem of IUU fishing and its TOC dimensions. The criminalisation of IUU fishing at a regional level could be used to complement global criminalisation, or it could be pursued independently without the existence of global criminalisation. Regional criminalisation could give countries in the region the opportunity to accommodate regional preferences and concerns. With such customisation, it is to be hoped that more countries will support such efforts and commit to implementation.

CHAPTER 7

The Criminalisation of IUU Fishing through Suppression Conventions at Global and Regional Levels

The previous chapters of this dissertation have showed that IUU fishing is a global problem that causes significant economic, environmental, social and legal order harms. These harms are exacerbated by the involvement of OCGs with its extensive networks and resources. This study also has tested the two hypotheses proposed in Chapter 1 i.e. i) the international fisheries instruments allow states exercising a wide discretion in designing and applying their regulations and enforcement systems against IUU fishing, and ii) the international fisheries instruments do not provide any solution in its provisions for addressing the involvement of OCGs in IUU fishing. Unfortunately, the two hypotheses are confirmed to be true in this study (see Chapter 3) and thus considered as deficits. So far as the first deficit is concerned, the wide discretion in the international fisheries instruments allows states to apply different regulations and enforcement which can cover administrative, civil or criminal, or a combination among the three in addressing IUU fishing. This wide discretion contributes to the inconsistency of regulations and enforcement among states which can be exploited by IUU fishing operators, including OCGs, where they will find and operate in jurisdiction with lax regulations and enforcement. So far as the second deficit is concerned, the provisions in the existing international fisheries instruments are directed more towards the “regular” actors of IUU fishing and do not consider the involvement of OCGs. This is also considered as a deficit in this dissertation. The

two deficits can also be found at the national level as was shown in Chapter 4.

This dissertation argues that such deficits can be tackled through suppression conventions at the global and regional levels. Regarding the first deficit, the suppression conventions can provide a more harmonised criminal regulations and enforcement system and measures among states, and thus minimise the inconsistency and loopholes that can be exploited by IUU fishing actors, including OCGs. Regarding the second deficit, the suppression conventions directly address the involvement of OCGs in IUU fishing. It can provide guidance on the substantive elements of criminalisation, the use of investigative tools, the jurisdiction clauses and the tools of international cooperation that can be used by states in curtailing OCGs operation.

In supporting the use of suppression conventions in addressing OCGs involvement in IUU fishing, this dissertation is answering the main question:

How can the criminalisation of IUU fishing under suppression conventions tackle the deficits of regulations and enforcement at the international and national levels?

In addition to the main research question, this dissertation also examines five sub-questions:

1. What is the extent of IUU fishing, in particular by transnational organised crime groups, and what types of harms does it cause?
2. What is the extent of regulatory and enforcement deficits in the international and national fisheries instruments?
3. Can suppression conventions tackle the deficits in the existing international and national fisheries instruments?
4. How can criminalisation of IUU fishing under suppression conventions be regulated at a global level?
5. How can criminalisation of IUU fishing under suppression conventions be regulated at a regional level?

Chapter 7 will use the findings of the previous chapters to answer the main research question and sub-questions. In providing answers to the sub-questions, Section 7.1. will elaborate on the extent of IUU fishing's harms and the related TOC dimensions to answer sub-question 1. Once the harms of IUU fishing and the TOC dimensions have been established, the chapter will argue, in Section 7.2., that there are deficits in existing international and national fisheries instruments in tackling the involvement of OCGs in IUU fishing, thus dealing with sub-question 2. Section 7.3.1 and 7.3.2. will propose, when considering sub-question 3, solutions to these deficits by criminalising IUU fishing through suppression conventions. The advantages of suppression conventions and the challenges will be explored in Section 7.3.3. This chapter will then put forward two solutions, in dealing with sub-questions 4 and 5. The first solution is to criminalise IUU fishing at the global level in Section 7.3.4. and the second solution is to criminalise IUU fishing at a regional level in Section 7.3.5. In each option, a number of alternatives will be explored under the context of the elements of suppression conventions, i.e. substantive law, jurisdiction, investigative tools and international cooperation, and will then be followed by recommendations on which alternative is the most suitable for each option. Based on these elements of suppression conventions, at a global level, three alternatives will be proposed: i.e. i) the criminalisation under the UNTOC; ii) the establishment of a stand-alone global suppression convention; and iii) the integration of suppression provisions into international fisheries instruments. At a regional level, two alternatives will be explored: i.e. i) the establishment of a stand-alone regional suppression convention; and ii) the integration of suppression provisions into regional fisheries instruments. This study will offer recommendations on the most suitable alternatives at global and regional level in Section 7.3.5.4. This dissertation will conclude with final remarks in Section 7.4.

7.1. The Extent of Harms caused by IUU Fishing and related Transnational Organised Crimes

Chapter 2 has confirmed that IUU fishing, on a large scale, has become a national, regional and global problem that generates significant economic, environmental, social and legal order harms affecting multiple countries. In terms of economic harms, the

economic loss from IUU fishing, at a global level, is estimated between US\$10-23 billion (approximately €9-21.1 billion) per year.¹ Numerous states have suffered from IUU fishing. For example, Indonesia loses between US\$1.5 and US\$4 billion (approximately €1.35 and €3.6 billion),² Vietnam loses between US\$ 669 million (approximately €602 million) and \$1.8 billion (approximately €1.62 billion)³ while Guinea loses US\$105.3 million (approximately €94.7 million) annually due to IUU fishing.⁴ States suffer losses of revenue at the national level (from the fish that is illegally removed from the country) to the loss of licensing fees and taxes.⁵ The economic costs of IUU fishing could disrupt the development agenda particularly when the countries are heavily dependent on the fisheries sector. IUU fishing has also caused significant harms to the environment. The activity places tremendous strain on the already depleted fish stocks and seriously affects the efforts to rebuild them. Some non-target species such as seabirds, marine mammals and sea turtles have also been affected by IUU fishing operations. It is found that around 100,000 seabirds are killed each year by illegal longline vessels in the Southern Ocean.⁶ The use of illegal fishing methods and gear have also damaged the marine ecosystem, including destroying coral reefs. Thus, IUU fishing is not only destroying the target fish species; it is also damaging the broader marine ecosystem. IUU fishing also creates social harms by creating unfair competition, by not adhering

¹ David J. Agnew and others, 'Estimating the worldwide extent of illegal fishing' (2009) 4(2) PLoS ONE 1, 2.

² Bay of Bengal Large Marine Ecosystem (BOBLME), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries in Asia' (BOBLME, 2015) 182 < <https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-fishing-developing-countries-asia> > accessed 12 June 2017

³ *ibid* 390.

⁴ Marine Resources Assessment Group Ltd (MRAG), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries: Final Report' (MRAG, 2005) 37 <<https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-iuu-fishing-developing-countries>> accessed 15 June 2017 .

⁵ Frank Meere and Claire Delpuech, 'The Challenge of Combating Illegal, Unreported and Unregulated (IUU) Fishing' in FAO/OECD, 'Fishing for Development' (2015) FAO Fisheries and Aquaculture Proceedings No. 36, 36.

⁶ Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers 2010) 11.

to the regulations and taxes and by provoking a culture of crime and non-compliance. Further, IUU fishing also contributes to the loss of employment opportunities and potential social dislocation as fish stocks become overexploited.⁷ IUU fishing also undermines the legal order by violating the fisheries laws and regulations at national, regional and global levels and disrupting a state's authority concerning its fisheries conservation and management efforts.

The involvement of OCGs in IUU fishing has also been revealed in Chapters 2 and 4. These two chapters explain how IUU fishing is not only being carried out by regular commercial fishing operators, but also by different OCGs operating on a transnational scale. Different examples of OCGs' involvement have been identified, especially those related to high-value fish products such as abalone, shark fins, sturgeon and caviar. OCGs from different parts of the world were found operating transnationally, cooperating with local partners and in some cases acting with violence. Chapter 2 provides several examples of such involvement which include the Chinese OCGs that poach abalone from South Africa and smuggle them through Mozambique or Zimbabwe to Asia as the final destination. Other examples can also be seen in Chapter 4 where Vietnamese OCGs are operating "blue boats" (estimated to be 105,000 boats) to plunder fish from neighbouring countries thereby creating tensions amongst affected countries. Among these cases, common characteristics of OCGs can be identified, such as a structured group of three or more people, existing for a period of time, acting in concert, aiming to commit a serious crime and to obtain financial benefits.

OCGs are found to be transnational in their operations so far as their involvement in IUU fishing is concerned. The transnational dimensions cover not only the physical movement of the vessels, but also include related aspects in the supply chain, such as identification of opportunities, preparation, planning, direction, control, up to the sale of the illicit catch and laundering of its proceeds. IUU fishing vessels are moving all the time for various reasons, including: avoiding detection; disguising the illegal origin of catches and transshipments; finding new fish stocks; and exploiting weak regulations and corrupt

⁷ APEC, 'Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific'; (APEC, November 2008) APEC#208-FS-01.5, 33.

officials to support their illegal operations. The transnational dimensions of OCGs' operations can be seen, for example, in the case of the vessel "Thunder" as explained in Chapter 2. The vessel was detected in several areas, such as the North Indian Ocean in August 2012 under the name "Kuko", then in a Singapore shipyard using the name "Wuhan N4" in October 2012, before it was spotted in Malaysia under the name "Wuhan 4" in April 2013 and using the name "Thunder" in Indonesia a few days later.⁸ The cross-border movement of "Thunder" is believed to have been the main reason why the vessel had avoided being caught violating fisheries regulations.⁹ Similar transnational operations have also been employed by other IUU fishing vessels, such as "Kunlun", "Songhua" and "Yongding", which have also moved to different locations and used different names and flags to avoid detection by the authorities.¹⁰

The act of organisation of individuals, existing for a period of time, acting in concert, aiming to commit breaches of fisheries regulations and/or fisheries offences to obtain financial benefits, can cause greater harms than individuals acting alone.¹¹ These collective actions, thus, pose greater risks to society than individual actions and are worthy of a greater punishment.¹² This notion can also be applied to the involvement of OCGs in IUU fishing. Chinese OCGs, for example, have greater capital and human resources, and better networks and technology than individual poachers of abalone in South Africa and thus cause greater harm to the abalone stocks than individual poachers. Another example, "Bandit 6" (six IUU fishing vessels known for poaching for Patagonian Toothfish in the Southern Ocean for ten years), had larger

⁸ INTERPOL, 'Countries Unite to Identify Illegal Fishing Vessel via Interpol' (INTERPOL, 5 December 2013) <<https://www.interpol.int/News-and-media/News/2013/PR152>> accessed 26 June 2017.

⁹ *ibid.*

¹⁰ INTERPOL, 'Spanish Operation Nets Suspects Behind Illegal Fishing' (INTERPOL, 18 March 2016) <<https://www.interpol.int/News-and-media/News/2016/N2016-030>> accessed 26 June 2017.

¹¹ James O. Fickenauer, 'Problems of Definition: What is Organized Crime?' (2005) 8 *Trends in Organized Crime* 63, 78.

¹² Ethan Gerber, 'A RICO you can't refuse': New York's Organised Crime Control Act" 53 *Brooklyn Law Review* 979, 1003 cited in Andreas Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (Brill 2010) 12.

vessels, more crew, and better technology and networks,¹³ compared with individual poachers. The harms caused by OCGs are arguably significantly greater than those generated by the “regular” actors of IUU fishing such as fishermen or fishing companies which do not have the characteristics of OCGs. The transnational dimensions of the OCGs’ operations in IUU fishing make it more difficult to enforce regulations against the groups. Thus, it is paramount for the international community to consider the involvement of OCGs when tackling the global problem of IUU fishing. Unfortunately, as discussed in Chapters 3 and 4, the existing international and national fisheries instruments allow states exercising a wide discretion in designing and applying their regulations and enforcement against IUU fishing, and have not yet considered in their provisions the involvement of OCGs in IUU fishing. The next section 7.2. will elaborate such deficits.

7.2. The Deficits of International Fisheries Instruments at Global and National Levels

7.2.1. The Deficits of International Fisheries Instruments at a Global Level

Different international instruments have been developed and implemented to support the conservation and management of marine living resources, including the tackling of IUU fishing. The international instruments examined in this study are the UNCLOS,¹⁴ the Compliance Agreement,¹⁵ the UNFSA,¹⁶ the IPOA-IUU¹⁷ and

¹³ Eskil Engdal and Kjetil Sæter, *Catching Thunder. The True Story of the World’s Longest Sea Chase* (Zed Books 2018).

¹⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 71 (UNCLOS).

¹⁵ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered in force 24 April 2003) 2221 UNTS (Compliance Agreement).

¹⁶ 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 (adopted 4 August 1995, entered in force 11 December 2001) 2167 UNTS 3 (UNFSA).

¹⁷ FAO, ‘International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO 2001) (adopted 2 March 2001, endorsed 23 June 2001) (IPOA-IUU).

the PSMA.¹⁸ Despite the existence of these instruments, IUU fishing is still a threat to the fish stocks at national, regional and global levels. In Chapter 3, it was found that the existing instruments had mainly been established to achieve the goals of conservation and management of marine living resources. The underlying perspectives of fisheries management and conservation are arguably causing the international fisheries instruments to rely on measures that support the goal of fisheries management and conservation, including fishing vessel registration, record of fishing vessels, authorisation to fish, entry into ports and the use of ports. In the implementation, these instruments leave a wide discretion in the formulation of regulations and their enforcement in the hand of states. This wide discretion can cause inconsistency between the different national regulatory and enforcement designs which may hamper international cooperation and open the possibility for exploitation by OCGs.

In terms of enforcement system, the fisheries instruments do not have a clear preference for a particular type of enforcement system or related sanctions that should be used by states. Several provisions on enforcement from the fisheries instruments provide examples of sanctions that can be applied by states. The Compliance Agreement and the UNFSA, for example, provide sanctions against violations in terms of refusal, withdrawal or suspension of authorisations.¹⁹ The IPOA-IUU in Article 21 provides that sanctions may include the adoption of civil sanction regimes based on an administrative penalty scheme. The IPOA-IUU and its Guidelines of Implementation do not explain further what is meant by the civil sanction regime based on an administrative penalty scheme. The Guidelines, however, mention examples as to how sanctions can be applied. For IUU fishing conducted by its own nationals, a state can impose sanctions including monetary fines, confiscation of fishing vessels and fishing gear and denial of future fishing licences. For serious offences of IUU fishing, the Guidelines provide examples of sanctions that can be imposed by flag states which should include the withdrawal or suspension of the vessel's authorisation to fish and withdrawal or

¹⁸ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (opened for signature 22 November 2009, entered into force 5 June 2016) (PSMA).

¹⁹ Compliance Agreement, art III (8); UNFSA, art 19.

suspension of the master's and other officers' authorisations to serve in those capacities. These instruments only provide general guidelines where such sanctions should be of sufficient severity to secure compliance, discourage violations, and to deprive offenders from enjoying the benefits of from the illegal activities. These instruments do not have a preference on which enforcement system should be applied by states. Thus, states have wide discretion in designing and applying its enforcement system which can be administrative, civil or criminal. The UNCLOS also does not provide specific preference on the enforcement system. Nonetheless, the UNCLOS, in Article 73.3 provides limitation to the application of criminal enforcement where that coastal states' penalties may not include imprisonment or other corporal punishment for the violation of fisheries laws and regulations (which may include IUU fishing) in EEZ in the absence of an agreement established by the states involved, which may reduce the prospect of imprisonment or other corporal punishment. This condition, i.e. the requirement of an agreement between states, may influence countries to lean towards a non-criminal enforcement rather than a criminal one as establishing such agreements requires significant time and efforts. The lack of preference on regulations and enforcement which can cause inconsistency among states is considered as a deficit in this dissertation.

The international fisheries instruments also do not provide specific provisions to tackle the phenomenon of the OCGs' involvement in IUU fishing. The organised crime dimensions, which include the involvement of OCGs in IUU fishing operations, are often carried out in complete disregard for regulations, compounded by the use of violence and involve a complex network of operators, thus causing significant harms compared with the "regular" actors of IUU fishing. The transnational dimensions transform IUU fishing into sophisticated operations that cross national borders and thus require strong international cooperation to tackle them. Combined, the organised crime and transnational dimensions would make IUU fishing a serious threat to the commons and thus to the interests of the human population in general. Unfortunately, the international fisheries instruments do not consider the TOC dimensions, particularly OCGs' involvement in their provisions. The provisions of international fisheries instruments examined in this dissertation

are directed more towards the “regular” actors of IUU fishing. There is no mention nor consideration of OCGs involvement in IUU fishing the international fisheries instruments. This is understandable since the attention on OCGs’ involvement is more recent, and it was not a determinant factor in the establishment of the Agreement. This lack of consideration of OCGs’ involvement in IUU fishing in the international fisheries instruments is considered as a deficit in this dissertation.

7.2.2. The Deficits of International Fisheries Instruments at a National Level

The deficits are not only found at a global level, but also at a national level. Chapter 4 examines Indonesia and Vietnam as national case studies to see how states implement and transpose relevant international obligations as set down in the international instruments. Indonesia and Vietnam have established their regulations on fisheries, mainly in their fisheries laws, supported by related ministerial regulations or decrees. Both countries have experienced changes in their fisheries laws since the fisheries sector has become more important and the IUU fishing activities have become a more serious concern for both countries. Indonesia updated its Fisheries Law in 2009 which accommodates new measures against IUU fishing, including the burning and/or sinking policy, along with the details of the sanctioning mechanism. Vietnam’s fisheries law was updated in 2017 which includes details of the illegal commercial fishing provisions, licence issuance and revocation, port entry and exit procedures and the increase of fines to a maximum of 1,000,000,000 VND (approximately €37,600).

Indonesia lays down its sanction provisions in detail in the fisheries laws and relevant ministerial decrees, while Vietnam put the sanctions into the criminal code and into the law on handling administrative violations together with other non-fisheries offences. Both countries, in their legislation, have the option to apply both administrative and criminal sanctions against IUU fishing violations. Regarding administrative sanctions, Indonesia has imposed licence-related sanctions such as issuing a warning, freezing of licences and revocation of licences without imposing a fine, while Vietnam chose to impose a fine as a sanction in addition to a warning, freezing and

revocation. Regarding criminal sanctions, Indonesia applies more severe sanctions compared with Vietnam. As an example, for using prohibited gear or methods, Indonesia imposes imprisonment up to a maximum of 6 years and a maximum fine of 1.5 billion rupiah (approximately €90,100). Vietnam, however, only imposes a fine of VND 50,000,000 (approximately €1,880) up to VND 300,000,000 (approximately €11,300) or a penalty of up to 3 years' community sentence or from 6 to 36 months' imprisonment. The variety of regulations and enforcement between the two countries is in line with the wide discretion given by the international fisheries instruments to states. The wide discretion in this case has created inconsistencies on the regulations and enforcement and can be exploited by IUU fishing actors, including OCGs. There is a possibility that OCGs will choose Vietnam over Indonesia as their basis of operation and also their target considering the lower sanctions imposed by Vietnam. The same possible scenarios can also be applied in a global context where OCGs will find and target jurisdictions with weak regulations and enforcement. The inconsistencies among states mean that OCGs can move from one jurisdiction to another to exploit the weak regulations and enforcement and continue their operations.

From the examination in Chapter 4, it was found that both states have been implementing international obligations by transposing them into national laws, although improvement in the implementation is still very much needed. IUU fishing operations in both countries show indications of involvement by OCGs. Characteristics of OCGs, such as a structured group of three or more people, existing for a period of time, acting in concert, aiming to commit a serious crime and to obtain financial benefits, are present in the IUU fishing operators in both Indonesia and Vietnam. The transnational dimensions are also evident in both states. However, neither country appears to give consideration to the involvement of OCGs in IUU fishing as there are no specific provisions or enforcement practices in the legislation of either country related to the involvement of OCGs. Thus, in the countries in both case studies, the deficits of regulations and enforcement provisions against the involvement of OCGs are apparent.

This section confirms that both international and national fisheries instruments are inconsistent and do not consider the fact

that there is OCGs' involvement, with transnational dimensions, in various IUU fishing operations. There are no regulations and enforcement provisions to be found in the international and national fisheries instruments that address this phenomenon. Thus, this counts as a deficit that needs to be addressed. As a solution against the deficit, this dissertation proposes that IUU fishing should be criminalised through suppression conventions to supplement the existing fisheries instruments.

7.3. The Criminalisation of IUU Fishing through Suppression Conventions

7.3.1. The Rationale for Criminalisation

One of the main reasons to criminalise conduct that is particularly harmful to society is deterrence.²⁰ In this sense, the enactment of criminal law against certain conduct is an attempt to protect the interests of society against the harms that are caused by such conduct and to deter or prevent the same conduct happening in the future.²¹ The harms to others provide a sufficient (or even necessary) condition for states' intervention through criminal law; this is known as the 'harm principle'.²² The conduct that would fall into the category of the harm principle is that which causes or may cause serious or significant harm, and the determination of such categorisation is under the authority of the state.²³ Criminal law, effectively enforced, can raise the costs involved in certain illegal conduct and thereby encourages compliance with laws that would otherwise be largely ignored.²⁴ The costs can be both monetary and non-monetary. Monetary costs can take the form of imposing or raising a fine for prescribed violations.²⁵

²⁰ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013) 16-17.

²¹ Stephen C. McCaffrey, 'Criminalization of Environmental Protection' in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008) 1015.

²² Nina Peršak, 'Norms, Harms and Disorder at the Border; The Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory in Nina Peršak, *Legitimacy and Trust in Criminal Law, Policy, and Justice: Norms, Procedures, Outcomes* (Routledge 2014) 15.

²³ *ibid* 17.

²⁴ McCaffrey (n 21) 1015.

²⁵ *ibid*.

Equally important are the non-monetary costs which cover the deprivation of liberty or social condemnation.²⁶ The deprivation of liberty, through imprisonment, is often a cost that many potential violators would be unwilling to pay.²⁷ Breaches of the criminal law result in criminal sanctions which can include fines, imprisonment or confiscation of assets.

IUU fishing, as explained above, causes significant economic, environmental, social and legal order harms. Harms caused to the environment, in particular, and its TOC dimensions have triggered a new interest in protecting the environment through criminal law.²⁸ The amplification of harms to society caused by OCGs' involvement in IUU fishing is argued in this study to be a qualifying condition for the intervention of states intervention through criminal law. In this case, the use of criminal law and its sanctions is preferable to civil or administrative law for four main reasons. First, the application of criminal law shows a higher societal disapproval of IUU fishing than would be shown by the use of civil or administrative law. Second, the sanctions of criminal law can be more severe and serve as a deterrent, e.g. the possibility to impose imprisonment, compared with civil or administrative sanctions that generally take the form of monetary penalties. Third, criminal law authorises the use of special investigation methods that are needed in bringing perpetrators to justice, something that cannot be achieved by civil or administrative law. Fourth, criminal law enables the use of international cooperation mechanisms such as MLA and extradition that are generally not used by civil or administrative law.

7.3.2. The Need for Suppression Conventions

The need to apply criminal justice responses in countering emerging and evolving forms of crime was clearly acknowledged by the Thirteenth United Nations Congress on Crime Prevention and

²⁶ *ibid* 1016.

²⁷ *ibid*.

²⁸ John A.E. Vervaele, 'International Cooperation in the Investigation and Prosecution of Environmental Crime. Problems and Challenges for the Legislative and Judicial Authorities' in Jose Luis de la Cuesta and others (eds), *Protection of the Environment through Criminal Law (AIDP World Conference Bucharest, Romania, 18th-20th May 2016)* (Maklu 2016) 251.

Criminal Justice (Crime Congress) in 2015. In its Doha Declaration, it is stated that states must strive “to develop and implement comprehensive crime prevention and criminal justice responses, including strengthening of the capacities of our judiciary and law enforcement institutions, and to adopt, when necessary, legislative and administrative measures to effectively prevent and counter new, emerging and evolving forms of crime at the national, regional and international levels, taking into account the scope of application of the United Nations Convention against Transnational Organized Crime with regard to ‘serious crimes’, in accordance with national legislation”.²⁹

In 2008, the CoP UNTOC, through Decision 4/2, introduced the term “emerging forms of transnational organised crimes”.³⁰ The term was used to cover, in essence, a variety of new crimes including serious crimes that might emerge in the future. Based on this broad definition, IUU fishing could be categorised as an emerging form of TOC. This possibility was also mentioned by several speakers at the Fourth CoP UNTOC who noted the links between organised crime and emerging forms of crime such as IUU fishing, along with trafficking in cultural property, trafficking in timber, wildlife and other forest biological resources.³¹ The seventh CoP UNTOC also noted with concern that TOC had diversified globally and that new and emerging forms of crime required effective responses that depended upon strengthened international cooperation in criminal matters.³² This concern is well connected with this study.

²⁹ Para 9 (a), ‘Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation’ (13th United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015) para 9(a).

³⁰ United Nations (UN) ‘Implementation of the Provisions on International Cooperation of the United Nations Convention against Transnational Organised Crime’ Decision 4/2 (Fourth Session of the Conference of the Parties of the UNTOC, Vienna, 8-17 October 2008) para (h).

³¹ UN ‘Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session, held in Vienna from 8 to 17 October 2008’ (1 December 2008) UN Doc CTOC/COP/2008/19 para 210.

³² UN, ‘Implementation of the Provisions on International Cooperation of the United Nations Convention against Transnational Organised Crime’ Resolution

The need to respond to new and emerging crimes (and also to the more established transnational crimes) through cross-jurisdiction cooperation arises from the fact that no state is able to tackle these crimes alone. In the context of OCGs involvement in IUU fishing, there are three main reasons to tackle this issue through cross-jurisdiction cooperation. First, the involvement of OCGs in IUU fishing is transnational. The groups move from one country to another to exploit laws and avoid detection. Their sophisticated methods and networks allow them to keep ahead of national law enforcement authorities which are often limited by jurisdiction and capabilities. Second, this transnational nature has converted the harms created by the OCGs in IUU fishing into transnational harms. The harms are not isolated in one or more countries, rather they occur across jurisdictions. The suppression of one OCG in one jurisdiction could lead to the relocation of the group to another jurisdiction and so on, which would make them difficult to apprehend. This would be particularly so when states have different (or weaker) regulations and their national law enforcement is limited by national jurisdiction and resources. Third, the transnational movement and harms of IUU fishing and its TOC dimensions require states to negotiate agreements among themselves in terms of regulation and enforcement. The agreements are necessary to create a level playing field for states in tackling the illegal conduct, where states are obliged to establish jurisdiction, make available investigative tools and strengthen international cooperation. In this dissertation, it is suggested that such agreements should be set up through suppression conventions.

Chapter 5 explains that one of the main objectives of suppression conventions is to criminalise certain harmful transnational conduct. The decision as to whether a specific transnational conduct has reached a certain degree of harm and therefore deserves to be criminalised under a suppression convention is in the hands of like-minded states. In deciding which transnational conduct deserves to be criminalised, Boister acknowledged that “there is no clear international system to identify and respond to transnational criminal threats and nor is it clear what weight of evidence of a threat is necessary to tip the scale

7/4 (Seventh Session of the Conference of the Parties of the UNTOC, Vienna 6-10 October 2014) para 4.

towards suppression”.³³ Nevertheless, this study argues that there are several common factors that can be considered in determining whether a conduct ought to be criminalised under a suppression convention, i.e. significant negative harms and the transnational and organised crime dimensions. These factors are common factors that can be found in numerous suppression conventions. These three elements are also evident in IUU fishing as explained in Section 7.1.

This dissertation then argues that IUU fishing, conducted by OCGs, along with its transnational dimension, ought to be criminalised under suppression conventions. In providing a better understanding of IUU fishing criminalisation through suppression conventions, the Section 7.3.3. will first explain the advantages and challenges in pursuing such option. After that, the Section 7.3.4. and 7.3.5. will elaborate the two solutions offered in this dissertation, i.e. IUU fishing criminalisation at global and regional levels. At the global level, three alternatives will be proposed, i.e. under the UNTOC framework, or by the establishment of a stand-alone global suppression convention, or by the integration of suppression provisions into the international fisheries instruments. At the regional level (Southeast Asia) two alternatives will be proposed, i.e. the establishment of a stand-alone regional suppression convention or the integration of suppression provisions into the regional fisheries instruments.

7.3.3. Advantages and Challenges of IUU Fishing Criminalisation through Suppression Conventions

7.3.3.1. Advantages

The criminalisation of IUU fishing both at global and regional levels could bring several advantages. The first advantage is that suppression conventions would send a strong signal to the international community that IUU fishing is a serious threat. This could alert different stakeholders, e.g. states, NGOs or individuals, and maybe persuade them to treat IUU fishing in a more serious manner. As more stakeholders get involved in the fight against IUU fishing, it could significantly limit the incidence of IUU fishing. Not only will these measures send a strong signal to the international community,

³³ Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 13.

but they will also have the same effect on the IUU fishing actors, including OCGs. Hypothetically, as more and more states commit to tackle IUU fishing through suppression conventions, the costs of conducting IUU fishing will increase since there are more chances of the actors being caught and having to face criminal sanctions. Ideally, the increased costs will outweigh the benefits of IUU fishing itself and thus discourage IUU fishing actors from engaging in the illegal conduct. However, the hypothesis would also be subject to the market's demand and supply conditions.

The second advantage is that the suppression conventions and their provisions could facilitate the harmonisation among states of obligations to criminalise IUU fishing. Like-minded states could agree on common minimum standards in substantive criminal law on which and how conduct needs to be criminalised, including the specific conduct that needs to be suppressed, the requirement of *mens rea* elements, the sanctions imposed and the establishment of jurisdiction for enforcement. The agreed standards would then, ideally, be transposed into each state's domestic legislation and become national law. When states adhere to these standards and therefore have harmonised legal frameworks, the legal gaps between them will be minimised and the illegal conduct will be suppressed. There are several options concerning the sanctions that can be employed by states, such as imprisonment, fines, seizure and confiscation. Imprisonment will limit the operation of OCGs while fines, seizure and confiscation will limit the material benefits obtained from IUU fishing activities. Combined, they can increase the costs of operations and will deter OCGs from carrying out IUU fishing.

The third advantage is that suppression conventions can oblige the establishment of jurisdiction by states so that transnational crime would not go unpunished. Different types of jurisdiction can be established under suppression conventions. The main preference for obligatory jurisdiction is still territorial. The UNTOC, for example, requires each State Party to adopt necessary measures to establish its jurisdiction over the UNTOC offences when i) the offence is committed in the territory of that party, or ii) the offence is committed on board a vessel that is flying the flag of that party or an aircraft that is registered under the laws of the party at the time that the offence

is committed.³⁴ However, suppression conventions also open up the possibility for the use of permissive jurisdiction which includes controversial principles such as the potential effects and protective principles.³⁵ The obligation to establish jurisdiction would ensure that fewer jurisdictional gaps could be exploited by OCGs.

The fourth advantage of having suppression conventions is that the conventions provide an endorsement of the use of investigative techniques, including special investigative techniques, in the investigation of offences covered by the conventions. The availability of special investigative techniques is especially useful when dealing with OCGs since it is inherently difficult to obtain access to their operations and gather the information and evidence needed for prosecution.³⁶ It is acknowledged that special investigative techniques are often irreplaceable for the success of investigation and prosecution of organised crime.³⁷ The UNTOC, for example, endorses the use of controlled delivery, electronic surveillance and undercover operations under its Article 20 (1). The UNTOC further encourages the conclusion of bilateral and multilateral arrangements for the use of these special techniques in the context of cooperation at the international level. However, in the absence of such arrangements, the decisions to cooperate at the international level must be made on a case-by-case basis, thereby providing the flexibility for states to cooperate without prior arrangements between them. The availability of special investigative techniques will certainly be useful for states in countering OCGs due to the covert nature of such groups.

The last advantage is that suppression conventions provide a wide range of international cooperation tools. For example, in the UNTOC there is a wide array of tools that can be utilised by member states in tackling transnational crimes such as extradition,³⁸ mutual legal

³⁴ UNTOC, art 15(1).

³⁵ Boister (n 33) 27.

³⁶ UNODC, 'Implementation of the United Nations Convention against Transnational Organized Crime: Needs Assessment Tools' (UN 2016) 53.

³⁷ UNODC, 'Digest of Organized Crime Cases: A Compilation of Cases with Commentaries and Lessons Learned' (UN 2012) 42.

³⁸ UNTOC, art 16.

assistance,³⁹ confiscation,⁴⁰ disposal of confiscated proceeds of crime or property,⁴¹ transfer of sentenced persons,⁴² joint investigation,⁴³ special investigative techniques,⁴⁴ and transfer of criminal proceedings.⁴⁵ Such tools could assist states in the prevention of the commission of IUU fishing and in bringing the perpetrators to justice. As these tools are available to the member states, they could use one or more of these tools when they need to, without the burden of entering into different bilateral treaties. The UNTOC and the 1998 Illicit Drugs Trafficking Convention, for example, state that they serve as a legal basis for states to cooperate in extradition and mutual legal assistance.⁴⁶ This would potentially eliminate the need to conclude numerous bilateral treaties and at the same time fill the possible legal gaps in the pre-existing bilateral treaties. The availability of these tools will also enhance international cooperation among states.

This wide array of international cooperation tools is not available in the existing fisheries instruments, either globally or regionally, as examined in this dissertation. These instruments only formulate general provisions whereby states must cooperate with each other in implementing the instruments without giving much detail as to what measures are available to states. A common tool of international cooperation that can be found in these instruments is the exchange of information whereby states are required to exchange information on vessels that are suspected of having violated the agreed conservation and management measures. Although useful, the exchange of information can only go so far and thus needs to be supplemented by the stronger tools which are provided in the suppression conventions.

³⁹ *ibid* art 18,.

⁴⁰ *ibid* art 13.

⁴¹ *ibid* art 14.

⁴² *ibid* art 17.

⁴³ *ibid* art 19.

⁴⁴ *ibid* art 20.

⁴⁵ *ibid* art 21.

⁴⁶ *ibid* arts 16(4), 18(7); 1998 Drugs Convention, arts 6(3), 7(7).

7.3.3.2. Challenges

It is acknowledged that the idea of IUU fishing criminalisation under suppression conventions is not without challenges. This dissertation identified that there are several challenges that need to be addressed before the idea can be realised.

The first challenge is to provide a clearer definition of IUU fishing. As acknowledged in Chapter 2, the elements of IUU fishing (illegal, unreported and unregulated) overlap with one another. The adoption of the current IUU fishing definition from the IPOA-IUU as an offence in a suppression convention would cause confusion in its implementation. States would be able to interpret the definition with wide variations according to their national circumstances and interests. In the end this could defeat the purpose of suppression conventions, which is to ensure that the substantive law is harmonised between states. It would be possible, in one country, for fishing without a licence to be a criminal offence and, in another country, for it not to be an offence. Thus, it is necessary to have a clearer definition of IUU fishing in the suppression conventions. As suggested in Chapter 5, Section 5.4.2.2.1., states could use Article 21 (11) of the UNFSA (with modifications as necessary) as a starting point as that Article describes nine activities as serious violations.⁴⁷

⁴⁷ The serious violations in the UNFSA referred to in Article 21 (8) and elaborated by Article 21 (11) as:

- (a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with article 18, paragraph 3 (a);
- (b) failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement;
- (c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement;
- (d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- (e) using prohibited fishing gear;
- (f) falsifying or concealing the markings, identity or registration of a fishing vessel;
- (g) concealing, tampering with or disposing of evidence relating to an investigation;
- (h) multiple violations which together constitute a serious disregard of conservation and management measures; or
- (i) such other violations as may be specified in procedures established by

Among them, at least two activities can be considered to be worthy of criminalisation by states, i.e. fishing without a valid licence and fishing using prohibited gear. It was found in many IUU cases in Chapter 4 that OCGs do not have proper licences for their fishing activities and that they also employ destructive gear to gain maximum catch, with minimum effort, without any concern for the harms caused. Both types of conduct are arguably commonly found in IUU fishing cases involving OCGs. This is not to say the other IUU fishing activities should not be criminalised. In the end, of course, it is up to states to agree on which activities are to be considered to be offences. The offences could be defined in a limited sense covering specific activities focusing only on actions relating directly to IUU fishing. A comparison could be made here with the 1997 International Convention for the Suppression of Terrorist Bombings where Article 2 (1) described specific actions as offences relating to terrorist bombings, i.e. delivery, placing, discharging or detonating an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility. The IUU fishing offences could also be defined in a broader way, as in the Article 3 (1)(a)(i) of the 1998 Drugs Convention, which included the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any proscribed narcotic drug or psychotropic substance. Although the coverage of IUU fishing offences will be in the hands of states, it is suggested that only those that are related to the execution of fishing activities (extraction of fish from the sea) should be considered. As explained in the previous paragraph, it can include, at least, two conducts i.e. fishing without a valid licence and fishing using prohibited gear since both types of conduct are commonly found in IUU fishing cases involving OCGs. That said, other conduct such as distribution, sales, transportation, export or import are excluded as well as the usage of fishing vessels to smuggle contraband items or people, and other conduct not related to fishing activities. In this context, states should scrutinise which relevant fishing activities are harmful and serious

the relevant subregional or regional fisheries management organization or arrangement

enough to require criminalisation. The criminalisation of such conduct would require the elements of the involvement of OCGs and the transnational nature.

The second challenge is to formulate and agree on the substance of the suppression conventions. Since IUU fishing is highly related to fisheries and management regulations, the substance of the suppression conventions should be in line with the different rights and obligations of coastal, flag and port states as established in the existing international fisheries instruments, especially for those states which have to investigate, prosecute and adjudicate the violations. Further, the suppression conventions also need to take into account the different water regimes, such as territorial, EEZ and high seas, as they are also related to the rights and obligations of coastal, flag and port states. The compatibility between the substance of the suppression conventions and the fisheries instruments is important in order to ensure that the suppression conventions complement and do not conflict with the existing instruments. In doing so, one could use the examples of the Smuggling of Migrants Protocol⁴⁸ or the 1998 Illicit Drugs Trafficking Convention⁴⁹ to show how suppression conventions could integrate different rights and obligations of states in accordance with international fisheries instruments. In the case of the establishment of a stand-alone suppression convention, and the integration of suppression convention provisions into international fisheries instruments, the formulation of their contents could also draw on the UNTOC, particularly on the scope of application, types of offences, and international cooperation tools.

The third challenge is the lack of support from like-minded countries. Nadelmann describes five common stages of global prohibition regimes against transnational activities, including transnational crimes. In the first stage, the targeted activity is regarded as legitimate under certain conditions.⁵⁰ During the second stage, the activity is redefined as a problem where the explicit government

⁴⁸ Smuggling of Migrants, art 8.

⁴⁹ 1998 Drugs Convention, art 17.

⁵⁰ Ethan A. Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44(4) *International Organization* 479, 484.

involvement in the activity is gradually delegitimised.⁵¹ In the third stage, the proponents of a global prohibition regime start to push for the suppression and criminalisation of the activity by all states and for the formation of international conventions. This is usually done by those states or organisations which are able to exert “hegemonic” influence.⁵² At the fourth stage, the activity becomes the subject of criminal laws throughout much of the world and through international institutions, and conventions emerge to play a coordinating role – a condition described as a “global prohibition regime”.⁵³ In most cases, the regime arrives only at the fourth stage. However, in a few cases a fifth stage can be achieved where the prohibited activity is reduced significantly.⁵⁴

In reflecting on these five stages, it would seem that the notion of IUU fishing criminalisation is currently somewhere between the second and third stages. Some states are still trying to redefine IUU fishing as a problem and pushing for criminalisation. Nevertheless, currently, the political support from states for criminalising IUU fishing both at global and regional levels is still minimal. Several arguments are often raised against the idea of criminalising IUU fishing such as, for example, IUU fishing is not as dangerous as other TOCs,⁵⁵ or the criminalisation of IUU fishing might harm the small-scale fisheries,⁵⁶ or IUU fishing should be discussed in the framework of fish stocks depletion and food security.⁵⁷ Some states also share the opinion that IUU fishing is more of a management issue than a criminal issue, and thus the option of criminalisation is not the preferred solution for those states.⁵⁸ These arguments have

⁵¹ *ibid* 485.

⁵² *ibid*.

⁵³ *ibid*.

⁵⁴ *ibid*.

⁵⁵ ‘Co-Chairs’ Summary Report of ARF Workshop on Illegal, Unregulated and Unreported (IUU) Fishing’ (Bali, 19-21 April 2016) para 11.

⁵⁶ CCPCJ, ‘Report of the 25th Session of the Commission on Crime Prevention and Criminal Justice (11 December 2015 and 23-27 May 2016)’ E/2016/30 and E/CN.15/2016/13, Chapter VII para 113.

⁵⁷ ‘Summary of the Ninth Meeting of the UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea’ (23-27 June 2008) 25(55) Earth Negotiations Bulletin 11.

⁵⁸ CCPCJ ‘Outcome of the UNODC/WWF Fisheries Crime Expert Group

been responded to in this dissertation where it is argued, in Section 7.1, that IUU fishing is more than a fisheries management issue. IUU fishing has apparent TOC dimensions which can cause greater harms and thus deserves to be criminalised under a suppression convention framework. Building shared interests among states on the importance of the criminalisation of IUU fishing is paramount in order to generate more support from states. This could be achieved through bilateral, regional and international forums, such as the CCPCJ, the CoP UNTOC or through informal forums such as seminars and other platforms of discussion. As acknowledged by Nadelmann, it is also important to have “hegemonic” states or organisations to support the criminalisation as they can better exert their influence in many ways such as diplomatic pressure, economic inducements, and propaganda campaigns.⁵⁹ In this context, hegemonic states also need to be asked to be on board to support the idea of the criminalisation of IUU fishing.

After exploring the advantages and challenges of criminalising IUU fishing through suppression conventions, it can be concluded that suppression conventions bring significant advantages and can be a suitable solution for tackling the TOC dimensions of IUU fishing. The challenges of suppression conventions can still be managed proportionately through the attainment of states’ support and through further substantive study on the content of such conventions. The following Sections 7.4.3. and 7.3.5. will explain how the criminalisation of IUU fishing through suppression conventions can be achieved at global and regional levels based on the findings from Chapters 5 and 6.

7.3.4. The Criminalisation of IUU Fishing through Suppression Conventions at Global Level

At a global level, this dissertation offers three alternative ways in which IUU fishing could be criminalised under a suppression

Meeting, 24-26 February 2016, Vienna’ (11 May 2016) UN Doc E/CN.15/2016/CRP.2, 4; Anastasia Telesetsky, ‘Laundering Fish in the Global Undercurrents: Illegal Unreported, and Unregulated Fishing and Transnational Organized Crime’ (2015) 41 (4) *Ecology Law Quarterly* 939, 969.

⁵⁹ Nadelmann (n 50) 485.

conventions' framework. The first way is to criminalise IUU fishing under the UNTOC. There are two ways of doing this put forward in this dissertation, namely to categorise IUU fishing as a serious crime or to establish an additional UNTOC Protocol against IUU fishing. The second way to criminalise IUU fishing is for like-minded states to establish a stand-alone suppression convention against IUU fishing. The third way is to integrate suppression provisions into the existing international fisheries instruments.

7.3.4.1. Criminalisation under the UNTOC

On the option of IUU fishing criminalisation under the UNTOC, Chapter 5, Section 5.4.2.1.2.4.1., points out that such criminalisation can be achieved through categorising IUU fishing as a serious crime. Such categorisation can be pursued through a resolution from like-minded countries using the framework of CCPCJ or the CoP UNTOC in which member states will be urged to make IUU fishing a serious crime as defined in the UNTOC. Ideally, although it would be difficult, member states would amend their domestic legislation to accommodate the new status of IUU fishing as an offence punishable by a minimum four years of deprivation of liberty. However, it should be noted that there is no mechanism in the CCPCJ or CoP UNTOC to force member states to implement such a resolution. Thus, full implementation would be highly dependent on the willingness of the member states. In addition to categorising IUU fishing as a serious crime, IUU fishing criminalisation under the UNTOC can also be achieved through the establishment of an additional UNTOC Protocol and this process is discussed in Chapter 5, Section 5.4.2.1.2.4.2.

As both alternatives, i.e. the categorization of IUU fishing as a serious crime and the establishment of an additional UNTOC Protocol, would be implemented under the UNTOC, the existing provisions of the UNTOC on substantive law, jurisdiction, investigative tools and international cooperation would also be applied. Nonetheless, so far as the option of establishing an additional UNTOC Protocol is concerned, it is suggested that several modifications would be needed, particularly in relation to the jurisdiction and measures of the coastal, flag and port states, to avoid confusion.

7.4.4.2. Establishment of a Stand-alone Convention

On the option of establishing a stand-alone convention against IUU fishing, Chapter 5, Section 5.4.2.2., explained that such a stand-alone convention could be established when states come to an agreement that IUU fishing with TOC dimensions is a transnational organised crime that needs to be suppressed globally. Significant harms caused by OCGs' involvement in IUU fishing could be the foundation of a common consensus for criminalisation among concerned states. Since these harms are not exclusively confined within national borders, states have stronger reasons to unite their interests into forming an agreement to suppress IUU fishing through criminalisation under a stand-alone suppression convention.

In Chapter 5, Section 5.4.2.2., the elements of suppression conventions are explored for this second option. On the substantive law, the stand-alone suppression convention would first need to establish IUU fishing offences as criminal, and then to oblige parties to make the commission of such offences liable to sanctions. On the question of jurisdiction, the convention would need to establish jurisdiction over IUU fishing offences to ensure that states can enforce the provisions of the convention against the perpetrators. Among the five traditional bases of jurisdiction (territorial, nationality, protective, passive personality and universal), territorial jurisdiction could become one of the more viable options. On the question of investigative tools, the convention could provide tools such as electronic surveillance, undercover operations, financial analysis and use of informants, to assist states parties in gathering necessary information against IUU fishing operators. In addition, aerial surveillance could be used as one of the key investigative tools, more specifically in relation to IUU fishing activities. On the question of international cooperation, the convention could offer different methods of international cooperation for states parties in tackling IUU fishing, for example exchange of information, MLA or extradition.

7.3.4.3. Integration of Suppression Provisions into International Fisheries Instruments

On the third option, namely that of integrating suppression provisions into the existing international fisheries instruments, as explained in Chapter 5, Section 5.4.2.3., any of the five instruments

cited in that Section has the potential to accommodate the suppression provisions, although it largely depends on the endorsement of the States Parties. However, it should be acknowledged that those international fisheries instruments focus mainly on the conservation and management of marine living resources and are less interested in the criminal justice approach. There are three alternatives that can be used in pursuing the third option: i) amendment of instruments; ii) establishment of an implementing agreement; and iii) establishment of a voluntary instrument. With regard to the first alternative, namely the amendment of instruments, each instrument has a mechanism of amendment, with the exception of IPOA-IUU as it is a voluntary instrument. The UNCLOS, for example, provides States Parties with an opportunity to propose an amendment to the Convention and to communicate such proposal to the Secretary-General of the United Nations.⁶⁰ Similar opportunities for amendments can also be found in the Compliance Agreement,⁶¹ the UNFSA⁶² and the PSMA.⁶³ Although, hypothetically, amendment is possible, in reality amending a multilateral agreement has always been a difficult and arduous process. The majority of States Parties to the agreement have to agree on the amendment which can take a long time and a lot of resources due to varied interests among states. This will almost certainly be found to be the case in the integration of suppression provisions into those international fisheries instruments. The second alternative is to establish an implementing agreement attached to the specific instrument. This process could bypass the need for amendment by appealing to a number of interested States Parties which could be the drivers of the whole process and parties to the implementing agreement.⁶⁴ However, the process of establishing an implementing agreement could be lengthy. An example of this is the process of establishing an agreement on BBNJ, as an implementing agreement of the UNCLOS. Until now, the BBNJ process has taken almost two decades since its first inception in 2004. A similarly arduous process could also happen with an implementing agreement with suppression

⁶⁰ UNCLOS, arts 312-313.

⁶¹ Compliance Agreement, art 13 .

⁶² UNFSA, art 45.

⁶³ PSMA, art 33.

⁶⁴ See section 5.4.2.3.

provisions. The third alternative, taking a lesson from the IPOA-IUU, is to establish a voluntary instrument such as a guidance or a plan of action which would incorporate suppression provisions to be implemented voluntarily by interested states. This could be an initial way to build support for interested states and possibly without the hassle of complicated amendment procedures and, if there were enough support, a voluntary instrument could climb its way up and become a part of an amended instrument in the future if necessary.

7.3.4.4. Comparison of the Three Options

The three options of global criminalisation as discussed above have their own strong and weak points. Chapter 5, Section 5.4.2.4. has elaborated the strong and weak points under three main categories: scope of application, feasibility and operationality.

7.3.4.4.1. Scope of application

In terms of the scope of application, the stand-alone convention has more room for improvisation than the UNTOC or the integration alternative since the stand-alone convention is a blank canvas on which states can, hypothetically, paint any provision they deem necessary in suppressing IUU fishing offences. The UNTOC, on the other hand, is more limited in the sense that the general provisions and the scope of application are already established in it. The integration alternative is also limited, although more flexible than the UNTOC, in the sense that it needs to be in line with the scope of application of the principal instrument, which could be difficult considering that integration brings a different approach (the criminal justice approach) into the existing conservation and management approach. Some states could have difficulties in accepting the synchronisation of the two different approaches.

Either the UNTOC, or a stand-alone convention or the integration alternative could potentially establish any type of IUU fishing offences as preferred by their States Parties. However, it should be noted that the UNTOC and its Protocols are bound by its scope of application as stated in Article 3 which requires offences to be transnational in nature and to involve an OCG. This scope of application would exclude those IUU fishing offences which are

not transnational and which do not involve an OCG. A stand-alone convention and the integration alternatives, on the other hand, are not limited by such a scope of application. States could opt to insert the involvement of OCGs as a default requirement for the application of the provisions, or to make such involvement an aggravating factor which would trigger a higher penalty.

7.3.4.4.2. Feasibility

The criminalisation of IUU fishing through any of the three alternatives needs to gather enough support from states, which is not easy. Until now, support for the criminalisation of IUU fishing globally has been minimal and only a few states publicly support the idea, including Indonesia. If there were enough support, the new protocol under the UNTOC would be more feasible since the foundation already exists and it would be, hypothetically, easier for states to build on. However, this is not the case with a stand-alone convention where states have to lay the substantive foundation from scratch and build it gradually – a process which could take years and consume many resources as was the case in the UNTOC's establishment.⁶⁵ The integration alternative would also require a lot of time since suppression provisions would need to be fine-tuned in accordance with the principal instrument's provisions, although the integration alternative would not have to start from scratch as it could utilise the relevant existing provisions in the principal instrument. For example, in the case of investigation and international cooperation, states could utilise the existing provisions in the principal instruments since those instruments already contain some provisions covering those matters.

7.3.4.4.3. Operationality

In terms of operationality, the criminalisation of IUU fishing under the UNTOC might be better than the stand-alone convention or the integration alternatives. States could use the UNTOC's existing

⁶⁵ David McClean, *Transnational Organized Crime : A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007) 1–31; Neil Boister, 'The UN Convention against Transnational Organised Crime 2000' in Hauck Pierre and Peterke Sven (eds), *International Law and Transnational Organised Crime* (1st edn, Oxford University Press 2016) 128–130.

infrastructure which is supported by the Centre for International Crime Prevention of the United Nations Office for Drug Control and Crime Prevention (UNODC). For example, if states chose to establish a new Protocol, the UNODC could assist states, through research and support, in the adoption and implementation of provisions of the new Protocol. States also could earmark their financial contribution to specific programmes in the UNODC related to the implementation of the new Protocol. Meanwhile, a stand-alone convention would still have to figure out or create dedicated institutional support in assisting States Parties to implement the convention which would require a substantial budget and resources. This would also be the case so far as the integration of suppression provisions is concerned, where the need for additional funding might or might not be supported by States Parties.

Each of the alternatives in which IUU fishing could be criminalised has their limitations in terms of expertise. The UNTOC, for example, through the UNODC, has in-depth expertise regarding criminal justice, but it does not have expertise in fisheries-related issues. FAO, on the other hand, has extensive knowledge on fisheries-related issues, but not on criminal justice. To provide a more comprehensive approach towards IUU fishing, cooperation between criminal justice expertise and fisheries expertise is needed. Each of the three alternatives could explore the possibility of bringing the two types of expertise together. A step further in this cooperation is the possibility of establishing a joint effort to combat IUU fishing, for example through a joint initiative of an instrument from the UNODC and FAO which potentially could combine the best of the two types of expertise and result in a more effective and comprehensive way to tackle IUU fishing.

7.3.4.5. Recommendations

Based on the evaluation of the strong and weak points of the three options, this dissertation considers that the criminalisation of IUU fishing under the UNTOC would be the most suitable option compared with the other two, despite its weak points. In terms of scope of application, member states of the UNTOC have already agreed on the limitation under Article 3 which requires the involvement of OCGs and the element of transnationality in the offence. This agreed

limitation means that states can skip the process of discussion and negotiation on the subject which can consume a significant amount of time. States can then focus on other substantive aspects of IUU fishing, such as determining which offences would be criminalised, the jurisdictions on different areas such as internal and territorial waters, EEZs, high seas and ports, and the additional investigative tools such as aerial surveillance. In terms of feasibility, the UNTOC also has the advantage where states can use the existing substantive foundation and mechanism rather than starting from scratch, as in the case of the second option (a stand-alone convention), or trying to find a middle ground with fisheries conservation and management provisions as in the third option (integration of suppression provisions). In terms of operationality, the UNTOC could be a better alternative since it already has existing institutional support, i.e. the UNODC, which, ideally, could provide resources in terms of expertise and funding. The UNODC, in supplementing its lack of fisheries expertise, could also form collaboration with relevant institutions, including the FAO. The already established institutional support provided by the UNODC is an advantage that the other two options do not have. The preference for the UNTOC in this dissertation does not exclude the two other options entirely as they also have their advantages. The final decision concerning which option will be pursued is in the hands of the states.

In going forward, ideally, the criminalisation of IUU fishing under the UNTOC would be set out in the form of an additional Protocol against IUU fishing. The states interested in a new Protocol on IUU fishing could try to convince their counterparts, through the United Nations General Assembly, to pass a resolution to start work on the establishment of the new Protocol. Based on that resolution, an Ad Hoc Committee or similar body could be formed to prepare a series of discussions on the matters related to the suppression of the protocol. When the draft has been prepared, the interested states could convince other states to adopt the additional Protocol through a General Assembly resolution. An alternative way to establish a new Protocol would be through the CoP UNTOC. Christopher Ram argues that the mandate of the CoP under Article 3 of the UNTOC includes periodic implementation reviews and making recommendations to improve the UNTOC and its implementation. This could be used by

the CoP to propose new Protocols as deemed necessary. The mandate to proceed with the negotiation of an additional Protocol, however, should come from the General Assembly.⁶⁶

7.3.5. The Criminalisation of IUU Fishing through Suppression Conventions at Regional Level

Regional cooperation is important in tackling transnational crimes. States take action in combating transnational crimes through a regional approach since it can be more practical and feasible than an approach based on a global scheme. The details of how the criminalisation of IUU fishing can be implemented in a regional setting are explained in Chapter 6 in which the Southeast Asia region is used as its focus. This dissertation proposes two alternatives that can be pursued for the criminalisation of IUU fishing under suppression conventions at a global level, i.e. the establishment of a stand-alone regional suppression convention and the integration of suppression provisions into regional fisheries instruments. Sections 7.3.5.1. to 7.3.5.4. will explain these alternatives.

7.3.5.1. Establishment of a Stand-alone Regional Suppression Convention

The development of a new regional legal instrument, which could include a suppression convention, in the fight against transnational crime is encouraged by the ASEAN Plan of Action in Combating Transnational Crime (2016-2025).⁶⁷ The Plan of Action, in its objectives, opens up the possibility of expanding the AMMTC and SOMTC's scope of responsibility to deal effectively with new methods and forms of transnational crime where it is necessary and mutually agreed.⁶⁸ This could include future transnational crimes that are deemed to be worthy of suppression, including IUU fishing.

⁶⁶ Christopher Ram, 'The United Nations Convention against Transnational Organized Crime and Its Protocols' (2001) 1(2) Forum on Crime and Society 135, para 144.

⁶⁷ 'ASEAN Plan of Action in Combating Transnational Crime (2016-2025)' (adopted by 11th AMMTC, 20 September 2017).

⁶⁸ *ibid* s IV(1) (Objectives).

In providing a more concrete illustration of what the suppression convention might comprise, Chapter 6 further elaborates different elements of such a regional suppression convention, i.e. substantive law, jurisdiction, investigative tools and regional cooperation. Regarding substantive law, the convention would cover: the definition of IUU fishing; substantive criminalisation provisions that would include the involvement of OCGs in IUU fishing and the transnational dimensions requirements; the enforcement mechanisms; and the review mechanisms. On the jurisdiction, the convention could set out provisions which cover different areas, such as the internal and territorial waters, EEZ, high seas and ports, taking into account the states' enforcement jurisdiction as coastal, flag or port states. In the internal and territorial waters, the convention could require the establishment of coastal state jurisdiction, based on the territorial principle, against offences committed in these waters. In the EEZ, the coastal state must have the primary jurisdiction over the flag state jurisdiction against any offences committed. This is in line with the advisory opinion of the ITLOS which clarifies that the primary responsibility for the conservation and management measures rests with the coastal state, including the adoption of measures to ensure compliance with the laws and regulations of the coastal state.⁶⁹ The regional convention could also establish itself as a basis for agreement among states in imposing imprisonment as a criminal sanction, the application of which has been previously limited by Article 73 (3) of the UNCLOS. This would clarify and strengthen the application of criminal sanctions in the EEZ. On the question of the high seas, a flag state must establish jurisdiction over offences committed on board its vessels. On the question of ports, the suppression convention could oblige states parties to establish jurisdiction over IUU fishing vessels that enter voluntarily into their ports, whilst giving due consideration to the flag state jurisdiction. The availability of investigative tools and special investigative tools, such as electronic surveillance, undercover operations and aerial surveillance, also needs to be included in a convention aimed at combating IUU fishing operations. On the regional cooperation, the convention could build upon the

⁶⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (ITLOS Advisory Opinion) (Advisory Opinion, 2 April 2015) Case No. 21, ITLOS Reports 2015, para 124.*

commitments on regional cooperation set out in the ASEAN Plan of Action in Combating Transnational Crime (2016-2025).⁷⁰ The convention could also draw suitable provisions on extradition from the Model ASEAN Extradition Treaty of 2018 and on MLA from the Treaty on Mutual Legal Assistance in Criminal Matters.⁷¹

7.3.5.2. Integration of Suppression Provisions into Regional Fisheries Instruments

The second alternative is to integrate suppression convention provisions into the existing regional fisheries instruments. This dissertation examines four instruments related to the Southeast Asia region into which the suppression provisions could be integrated in Chapter 6, Section 6.5.2. The first possibility is the existing RFMOs which have mandates covering parts of the Southeast Asia region, i.e. CCSBT, IOTC and WCPFC. The second possibility is the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain. The third and fourth options are the Strategic Plan of Action on Cooperation on Fisheries 2016-2020 and the RPOA-IUU. Among these options, integration into existing RFMOs is not a suitable option since none of the three RFMOs have the competence to cover all the region's waters, and there is only partial participation by Southeast Asian states in these RFMOs. This would hinder the effective implementation of regional criminalisation as the suppression provisions would then only apply to some parts and some members of the Southeast Asia region. The integration of suppression provisions into the other three options would be more possible. These three instruments are voluntary and non-binding, a trait that is preferred by ASEAN member states. If a regional arrangement were to be voluntary and non-binding in nature, it is to be hoped that many Southeast Asian states would want to sign-up. However, this would mean that there is a possibility that some states would choose not to be bound by the suppression provisions, either partially or wholly. There is also a possibility that the commitment level to a fully pledged implementation would not be very high.

⁷⁰ See Chapter 6, Section 6.5.1.4.

⁷¹ *ibid.*

7.3.5.3. Comparison of the Two Options

The two options' have their strong and weak points which can be assessed using the three main categories, namely, scope of application, feasibility and operationality. Section 7.3.5.3.1. to 7.3.5.3.3. will elaborate such points.

7.3.5.3.1. Scope of Application and Substantive Law

In terms of the scope of application and substantive law, the regional stand-alone convention potentially has more room for improvisation than the integration alternative. Southeast Asian states could discuss and negotiate on a wide range of provisions which they deem necessary in suppressing IUU fishing offences. The integration alternative is, in a way, more limited since the suppression provisions need to be in line with the scope of application of the principal instrument. This could be difficult considering that the integration alternative brings a different approach (criminal justice approach) to the existing conservation and management approach. Southeast Asian states could find the fusion of the two different approaches to be difficult.

7.3.5.3.2. Feasibility

Obtaining the support of Southeast Asian states for the criminalisation of IUU fishing will not be easy for either of the options. Until now, the issue of the criminalisation of IUU fishing has still been contended among the states as explained in Chapter 6. However, in recent years, there has been a growing trend in the Southeast Asian states to ratify a regional legal instrument on issues that are considered as threats to the region; one of the examples of this is the establishment and ratification of the ACTIP.⁷² The problem of trafficking in persons in the region has urged Southeast Asian states to establish a legally-binding regional convention that covers, amongst other things, the criminalisation of trafficking in persons and the provision of international cooperation tools for states. This growing trend to ratify a regional legal instrument inclination is also

⁷² Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2018) 8 *Asian Journal of International Law* 258, 258-92.

supported by the Kuala Lumpur Declaration⁷³ and the ASEAN Plan of Action in Combating Transnational Crime (2016-2025) by opening up the possibility of the expansion of the concept of transnational crime and the inclusion of IUU fishing as a transnational crime. Against this background, the establishment of a regional suppression convention becomes more likely if states can agree that IUU fishing is a significant threat to the region.

7.3.5.3.3. Operationality

In terms of operationality, both alternatives are likely to experience potentially ineffective operation. For the integration alternative, examples of potentially ineffective operation can be inferred from the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain where there are no provisions on how the Guidelines can be implemented or on the availability of institutional support. Furthermore, in the RPOA-IUU, although a Secretariat has been established, it is acknowledged that the inactivity of members has caused challenges for the operation of the Secretariat.⁷⁴ For the regional stand-alone convention alternative, one can look at the ACTIP which has support from the ASEAN Secretariat for supervising and coordination its implementation.⁷⁵ If a regional convention against IUU fishing were to be established, the ASEAN Secretariat is likely to be tasked with supporting the convention, as is the case with the ACTIP.⁷⁶

⁷³ 'Kuala Lumpur Declaration in Combating Transnational Crime' (Kuala Lumpur, 30 December 2015).

⁷⁴ RPOA-IUU, 'Summary Report of the 11th Coordination Committee Meeting on the Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region' (Yogyakarta, 13-14 November 2018) s 3.1

⁷⁵ ACTIP, art 24(2).

⁷⁶ For the role of the ASEAN Secretariat see Patharapong Rattanaseevee, 'Towards Institutionalised Regionalism: the Role of Institutions and Prospects for Institutionalisation in ASEAN' (2014) 3 (1) SpringerPlus 556; Avery Pool, 'Ambitions Versus Capacity: The Role of Institutions in ASEAN in Annika Björkdahl, Natalia Chaban, John Leslie, Annick Masselot (eds) *Importing EU Norms. Conceptual Framework and Empirical Findings* (Springer 2015); Deepak Nair, 'A Strong Secretariat, a Strong ASEAN? A Re-evaluation' (2016) 8 ISEAS Yusof Ishak Institute Perspective.

7.3.5.4. Recommendations

Based on the strong and weak points elaborated above, this study recommends the establishment of a regional stand-alone convention against IUU fishing as the more suitable option compared with the integration of suppression provisions into the regional fisheries instruments. In terms of the scope of application, the regional convention option has more flexibility than the integration option since states have the freedom to frame the convention according to their needs, whereas with the integration option states are somewhat confined within the boundaries of the existing conservation and management measures. In terms of feasibility, the establishment of a regional stand-alone convention could become part of a growing trend of the establishment and ratification of regional legal instruments against common threats to the region. In terms of operationality, the regional convention option is likely to have the support of the ASEAN Secretariat.

In the future, the implementation of a regional stand-alone convention will, ideally, take place within the mechanism of ASEAN. Using the establishment of the ACTIP as an example, the initiative of a regional convention could come from the establishment of a working group on a regional convention against IUU fishing, formed by the SOMTC.⁷⁷ The working group would then formulate the provisions of the convention in several meetings. The AMMTC then endorsed the draft Convention at its meeting⁷⁸ for the adoption by ASEAN Leaders.

7.4. Final Remarks

This dissertation has shown that IUU fishing causes significant economic, environmental, social and legal order harms. Moreover, in many cases, OCGs' involvement in IUU fishing is evident and could magnify the harms caused by IUU fishing. This study has proven that the international and national fisheries instruments have two

⁷⁷ Naparat Kranrattanasuit, *Asean and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam* (International Studies in Human Rights volume 109, Brill Nijhoff 2014) 62.

⁷⁸ 'Joint Statement of the Tenth ASEAN Ministerial Meeting on Transnational Crime (10th AMMTC)' (Kuala Lumpur, 29 September 2015) para 6.

main deficits. Firstly, the instruments do not provide clear preference and guidance on regulations and enforcement systems against IUU fishing actors, including OCGs. Thus, the instruments give states wide discretion in formulating and implementing its regulations and enforcement systems. The wide discretion caused regulations and enforcement inconsistencies among states which can be exploited by OCGs as they will find and operate in states with lax regulations and enforcement. Secondly, the international and national fisheries instruments do not provide any solution in its provisions for addressing. The provisions in the existing international fisheries instruments are directed more towards the “regular” actors of IUU fishing and do not consider the involvement of OCGs. This would mean that when OCGs are caught in conducting IUU fishing, they would be considered as “regular” actors and as a consequence only liable to the “regular” regulations and enforcement as provided by the international and national instruments. The lack of preference and the fact that the international and national instruments do not address OCGs involvement in IUU fishing are considered as deficits in this dissertation.

Considering the magnified harms caused by OCGs, the “regular” regulations and enforcement, this dissertation argues that there should be a clear and harmonised regulations and enforcement against OCGs’ involvement in IUU fishing, which can be done through criminal regulations and enforcement under suppression conventions. In doing so, this dissertation offers two solutions, i.e. criminalisation of IUU fishing through suppression conventions at global and/or regional levels. At a global level, it is argued that criminalisation of IUU fishing is best implemented through the UNTOC with the establishment of an additional Protocol. At a regional level (Southeast Asia), it is argued that the most suitable means to pursue criminalisation is through the establishment of a regional stand-alone convention.

In achieving greater success, regional criminalisation could be connected to global criminalisation. Regional criminalisation could serve as a complementary solution to the global criminalisation of IUU fishing. However, it should also be acknowledged that there is a possibility that global criminalisation cannot be realised and thus regional criminalisation of IUU fishing is the only option. In such a

case, the absence of global criminalisation would not reduce the value of regional criminalisation. Regional criminalisation would still be of significant value without the presence of any global criminalisation instrument in the background.

Both global and regional criminalisation would not replace or undermine the existing fisheries instruments. Rather, they would act as complementary instruments to the fisheries instruments by providing criminal regulations and enforcement systems that previously were not available to tackle the involvement of OCGs in IUU fishing. The criminalisation under suppression conventions framework would harmonise legal frameworks among states, provide a wide range of international cooperation tools, and send a strong signal to the international community that IUU fishing is a serious threat and that the conducting of such activity will lead to serious consequences. Suppression conventions, both at global and regional levels, need to make strong joint efforts with fisheries instruments in terms of expertise and tools to mutually strengthen their implementation. By having both criminalisation and conservation and management instruments on the same wavelength, it is to be hoped that the involvement of OCGs could be addressed more effectively and, at the same time, that fisheries conservation and management measures could still be pursued.

SAMENVATTING

Vissen naar oplossingen: Criminalisering van IOO-visserij door middel van bestrijdingsverdragen op mondiaal en regionaal niveau

Illegale, ongemelde en ongereguleerde (IOO-) visserij betreft alle visserij-activiteiten die nationale, regionale en internationale regelgeving inzake visserij schenden of ondermijnen, met inbegrip van de door de regionale organisaties voor visserijbeheer (*Regional Fisheries Management Organisations, RFMO's*) vastgestelde maatregelen. IOO-visserij is een mondiaal fenomeen, waarbij maatregelen tot visserijbehoud en -beheer worden genegeerd en hiaten in de regelgeving en bij de rechtshandhaving worden benut. In de literatuur over IOO-visserij ligt het accent vooral op de IOO-visserij als een probleem van visserijbehoud en -beheer en veel minder op de criminele dimensie van IOO-visserij en de betrokkenheid van georganiseerde criminele groepen (*Organised Criminal Groups, OCG's*) (d.w.z. “een gestructureerde groep bestaande uit drie of meer personen, die gedurende enige tijd bestaat en gezamenlijk optreedt met het doel een of meer ernstige misdrijven of ... strafbaar gestelde feiten te plegen, teneinde, direct of indirect, een financieel of ander materieel voordeel te verkrijgen” (artikel 2 sub a van het VN Verdrag tegen grensoverschrijdende georganiseerde misdaad, *UNTOC*). Dit onderzoek daarentegen heeft tot doel een bijdrage te leveren aan de literatuur over de betrokkenheid van georganiseerde criminele groepen bij de IOO-visserij door een onderzoek van het fenomeen en door het aandragen van mogelijke oplossingen in de vorm van regelgeving ter bestrijding ervan op mondiaal en regionaal niveau. De voor dit onderzoek gehanteerde methode is een studie van de

juridische doctrine. De juridische doctrine wordt onderzocht, via de interpretatie en bestudering van bestaande regelingen en via literatuuronderzoek, ter beantwoording van de hoofdvraag: Hoe kan strafbaarstelling van de IOO-visserij in verdragen ter bestrijding ervan de op internationaal en nationaal niveau aanwezige hiaten in de regelgeving en in de handhaving aanpakken? In deze studie worden vervolgens twee oplossingen aangedragen voor de strafbaarstelling van de IOO-visserij in de desbetreffende verdragen, namelijk op mondiaal en op regionaal niveau.

Hoofdstuk 1 begint met een korte uitleg van het probleem van de IOO-visserij en van de ermee gepaard gaande nadelen en dimensies van transnationale georganiseerde misdaad (*Transnational Organised Crime, TOC*). In dit hoofdstuk worden twee hypothesen van deze studie gepresenteerd, nl. i) de internationale visserij-instrumenten (bijv. UNCLOS, de FAO-nalevingsovereenkomst, het UNFSA, het IPOA-IUU en de PSMA) bieden aan landen een ruime discretionaire bevoegdheid bij het ontwerpen en toepassen van hun regelgeving en handhavingssystemen ter bestrijding van de IOO-visserij, en ii) de internationale visserij-instrumenten voorzien in hun bepalingen niet in een oplossing die zich direct en specifiek richt op de betrokkenheid van georganiseerde criminele groepen bij de IOO-visserij. Beide hypothesen worden tevens onderzocht op het nationale vlak. In dit hoofdstuk komen tevens de onderzoeksvragen, de terminologie en de beperking hiervan, de methodiek en structuur van het onderzoek aan de orde.

In hoofdstuk 2 wordt gesteld dat de grootschalige IOO-visserij een nationaal, regionaal en mondiaal probleem is geworden, dat aanzienlijke schade berokkent aan de economie, het milieu en de sociale en juridische orde. Deze reeds aanzienlijke schade wordt nog vergroot door de dimensie van de transnationale georganiseerde misdaad bij de IOO-visserij. In hoofdstuk 2 wordt uitgelegd dat de transnationale dimensie niet alleen betrekking heeft op de fysieke beweging van vaartuigen, maar ook op andere aspecten van de toeleveringsketen, met inbegrip van weloverwogen strategieën van bedrijvers van de IOO-visserij voor het opsporen van aantrekkelijke kansen, de voorbereiding, uitvoering en controle tot en met de verkoop van illegale vangsten en het witwassen van de opbrengsten waarbij verschillende jurisdicties betrokken zijn. De dimensie van

georganiseerde misdaad via de betrokkenheid van georganiseerde criminele groepen bij grootschalige IOO-visserijactiviteiten is in het bijzonder zichtbaar bij de hoogwaardige visproducten, zoals zeeoor, haaienvinnen, steur en kaviaar. De transnationale dimensie en de dimensie van georganiseerde misdaad vergroten de reeds aanzienlijke schade veroorzaakt door de IOO-visserij en vormen derhalve een belangrijke uitdaging voor landen, regionale gemeenschappen en de internationale gemeenschap bij het veiligstellen van visgronden en -bestanden.

In hoofdstuk 3 wordt gesteld dat de twee in hoofdstuk 1 gepresenteerde hypothesen de belangrijkste hiaten van het huidige juridische kader aangeven. Wat betreft het eerste hiaat: de ruime discretionaire bevoegdheid die in de internationale visserij instrumenten aan landen wordt verleend maakt het mogelijk dat deze verschillende regelgevings- en handhavingsmaatregelen treffen, die bestaan uit administratieve, civielrechtelijke of strafrechtelijke maatregelen, of een combinatie hiervan. Deze ruime discretionaire bevoegdheid draagt bij aan een gebrek aan uniformiteit bij de regelgeving en handhaving tussen landen. De bedrijven van IOO-visserijactiviteiten, met inbegrip van de georganiseerde criminele groepen, kunnen dit uitbuiten door in jurisdicties met een minder strenge regelgeving en handhaving te opereren. Wat betreft het tweede hiaat: de voorschriften in de bestaande internationale visserij-instrumenten betreffen vooral de ‘reguliere’ bedrijven van IOO-visserij en laten de betrokkenheid van georganiseerde criminele groepen buiten beschouwing. Aangezien georganiseerde groepen grootschaliger opereren dan de reguliere bedrijven van IOO-visserij qua bereik, hulpbronnen en vangsten, is de door de georganiseerde criminele groepen veroorzaakte schade ook beduidend groter. Bijgevolg zouden de internationale instrumenten idealiter rekening dienen te houden met deze betrokkenheid. Helaas wordt de betrokkenheid van georganiseerde criminele groepen in de voorschriften van de internationale instrumenten niet aan de orde gesteld. Dit wordt in deze dissertatie beschouwd als een hiaat.

Beide hiaten komen ook voor op nationaal niveau. Dit blijkt in hoofdstuk 4 uit het onderzoek van de casestudy’s Indonesië en Vietnam. De verscheidenheid in regelgevings- en handhavingsvoorschriften tussen de beide landen ligt in het verlengde van de ruime discretionaire

bevoegdheid die in de internationale visserij-instrumenten aan landen wordt verleend. Bovendien lijkt men in geen van beide landen rekening te houden met de betrokkenheid van georganiseerde criminele groepen bij de IOO-visserij, omdat er in de wetgeving van beide landen geen specifieke bepalingen of handhavingspraktijken voorkomen met betrekking tot de betrokkenheid van georganiseerde criminele groepen. Uit beide casestudy's blijkt daarom dat er hiaten zijn in de regelgevende en handhavende bepalingen met betrekking tot de betrokkenheid van georganiseerde criminele groepen.

De stelling in deze dissertatie luidt dat deze hiaten kunnen worden gedicht door middel van verdragen ter bestrijding van de IOO-visserij op mondiaal en regionaal niveau. Uit hoofdstuk 5 volgt dat een van de voornaamste doelen van de verdragen ter bestrijding van IOO-visserij de strafbaarstelling van bepaald schadelijk transnationaal gedrag is. De beslissing of een specifiek transnationaal gedrag een bepaalde mate van schadelijkheid heeft bereikt en daarom conform een verdrag ter bestrijding van IOO-visserij strafbaar gesteld dient te worden, wordt genomen door gelijkgestemde landen. Desalniettemin wordt in dit onderzoek betoogd dat er bij de vaststelling van de strafbaarheid van gedrag conform een verdrag ter bestrijding van de IOO-visserij, enkele algemene factoren in aanmerking kunnen worden genomen, namelijk de dimensies van aanzienlijke schade en van transnationale en georganiseerde misdaad. Betoogd wordt dat de IOO-visserij voldoet aan de criteria voor strafbaarstelling uit hoofde van de verdragen ter bestrijding ervan. Deze strafbaarstelling kan zowel op mondiaal als op regionaal niveau gelden ter beperking van de activiteiten van de georganiseerde criminele groepen in de IOO-visserij.

In hoofdstuk 5 worden drie opties gepresenteerd voor strafbaarstelling van de IOO-visserij uit hoofde van verdragen ter bestrijding van de IOO-visserij op mondiaal niveau. De eerste optie betreft strafbaarstelling van de IOO-visserij uit hoofde van het VN-Verdrag tegen transnationale georganiseerde misdaad (*United Nations Convention against Transnational Organized Crime, UNTOC*). Dit kan op twee manieren, te weten door het categoriseren van de IOO-visserij als een ernstig misdrijf of door het opstellen van een aanvullend UNTOC Protocol tegen de IOO-visserij. De tweede optie voor strafbaarstelling van de IOO-visserij betreft het vaststellen door

gelijkgestemde landen van een zelfstandig verdrag ter bestrijding van de IOO-visserij. De derde optie betreft de integratie van voorschriften ter bestrijding van IOO-visserij in de bestaande internationale visserij-instrumenten. In hoofdstuk 6 worden twee opties gepresenteerd voor strafbaarstelling van de IOO-visserij uit hoofde van verdragen ter bestrijding van de IOO-visserij op regionaal niveau (Zuidoost-Azië), te weten de vaststelling van een zelfstandig regionaal verdrag ter bestrijding van de IOO-visserij en de integratie van voorschriften ter bestrijding van IOO-visserij in regionale visserij-instrumenten.

In hoofdstuk 7 worden de meest passende oplossingen voor strafbaarstelling van de IOO-visserij uit hoofde van verdragen ter bestrijding van de IOO-visserij op mondiaal en regionaal niveau gepresenteerd. Op mondiaal niveau wordt strafbaarstelling van de IOO-visserij uit hoofde van de UNTOC het meest geschikt geacht, vergeleken met de beide andere opties; deze opvatting is gebaseerd op drie criteria: werkingsgebied, haalbaarheid en operationaliteit. Ten aanzien van het werkingsgebied hebben de lidstaten van UNTOC reeds overeenstemming bereikt over de beperking conform artikel 3 van UNTOC, dat betrokkenheid van georganiseerde criminele groepen en het element van transnationaliteit bij het feit vereist. Deze overeengekomen beperking zorgt ervoor dat landen het tijdrovende proces van discussiëren en onderhandelen over het onderwerp kunnen overslaan. Landen kunnen zich zo richten op andere inhoudelijke aspecten van de IOO-visserij, zoals het vaststellen welke feiten strafbaar gesteld dienen te worden, de vraag van de jurisdictie in diverse gebieden (bijv. binnenwateren en territoriale wateren, EEZ's, op zee en in havens) en de extra opsporingsmiddelen (bijv. luchtverkenning). Ten aanzien van de haalbaarheid heeft UNTOC tevens als voordeel dat landen kunnen voortbouwen op de bestaande inhoudelijke basis en mechanismen en niet volledig van nul af aan hoeven te beginnen, zoals bij de tweede optie (een zelfstandig verdrag), of een compromis moeten proberen te vinden met voorschriften ter visserijbehoud en -beheer zoals in de derde optie (integratie van bepalingen ter bestrijding van de IOO-visserij). Ten aanzien van de operationaliteit zou het UNTOC een beter alternatief kunnen vormen vanwege het feit dat hier reeds institutionele ondersteuning aanwezig is, namelijk het Bureau voor Drugs en Criminaliteit van de Verenigde Naties (UNDOC), dat idealiter hulpmiddelen in de vorm van expertise

en financiering ter beschikking zou kunnen stellen. Het UNODC zou ter aanvulling van haar gebrek aan kennis op visserijgebied ook kunnen samenwerken met in aanmerking komende instellingen, met inbegrip van de Voedsel- en Landbouworganisatie van de Verenigde Naties (*FAO*). De reeds aanwezige, door het UNODC verleende institutionele ondersteuning vormt een pre dat bij de beide andere opties ontbreekt. De in deze studie uitgesproken voorkeur voor het UNTOC sluit de twee andere opties niet volledig uit.

Voor het regionale niveau wordt in hoofdstuk 7 het opstellen van een regionaal zelfstandig verdrag tegen de IOO-visserij gepresenteerd als een geschiktere optie dan het integreren van voorschriften ter bestrijding van de IOO-visserij in de regionale visserij-instrumenten op basis van drie criteria: werkingsgebied, haalbaarheid en operationaliteit. Ten aanzien van het werkingsgebied biedt de optie van een regionaal verdrag meer flexibiliteit dan de integratie-optie, omdat landen de vrijheid hebben om het verdrag overeenkomstig hun behoeften in te richten, terwijl landen bij de integratie-optie enigermate gebonden zijn aan de grenzen van de bestaande maatregelen tot behoud en beheer. Wat het aspect van de haalbaarheid betreft, zou het opstellen van een regionaal zelfstandig verdrag kunnen aansluiten bij een groeiende trend tot opstelling en ratificatie van regionale juridische instrumenten tegen gemeenschappelijke dreigingen, zoals bijv. het ASEAN-Verdrag tegen mensenhandel (*ACTIP*). Deze groeiende trend tot ratificatie van regionale juridische instrumenten wordt ook ondersteund door de Verklaring van Kuala Lumpur en het ASEAN Actieplan ter bestrijding van grensoverschrijdende criminaliteit (2016-2025), die de mogelijkheid bieden tot verruiming van het concept van transnationale misdaad en tot opname van de IOO-visserij als een transnationale misdaad. Wat het aspect van de operationaliteit betreft, is er bij de optie van een regionaal verdrag een grote kans op ondersteuning door het ASEAN-Secretariaat. Dit is ook het geval bij ACTIP, welk verdrag in artikel 24 lid 2 de ondersteuning door het ASEAN-Secretariaat vermeldt bij het toezicht op en de coördinatie van de implementatie ervan. Indien een regionaal verdrag tegen de IOO-visserij in het leven zou worden geroepen, zou het Secretariaat van ASEAN waarschijnlijk worden belast met de ondersteuning van het verdrag.

Het ligt niet in de lijn der verwachting dat mondiale en regionale strafbaarstelling de bestaande visserij-instrumenten vervangen of ondermijnen. Deze vormen veeleer instrumenten die complementair zijn aan de visserij-instrumenten, doordat wordt voorzien in strafrechtelijke regelgevings- en handhavingssystemen voor het aanpakken van de betrokkenheid van georganiseerde criminele groepen in de IOO-visserij, die voorheen niet ter beschikking stonden. De strafbaarstelling uit hoofde van verdragen ter bestrijding van de IOO-visserij zal leiden tot harmonisatie van de juridische kaders tussen landen, het ter beschikking stellen van een breed scala aan internationale samenwerkingstools en het afgeven van een duidelijk signaal aan de internationale gemeenschap dat de IOO-visserij een ernstige bedreiging vormt en dat het bedrijven ervan tot ernstige consequenties zal leiden. Een sterke wisselwerking tussen verdragen ter bestrijding van de IOO-visserij, zowel op mondiaal als op regionaal niveau, en de visserij-instrumenten wat betreft expertise en tools is noodzakelijk ter wederzijdse versterking van de implementatie ervan. Het onder één noemer brengen van zowel de strafbaarstelling als de instrumenten tot behoud en beheer zou landen de mogelijkheid bieden tot een effectievere aanpak van de betrokkenheid van georganiseerde criminele groepen terwijl zij tegelijkertijd de maatregelen tot visserijbehoud en -beheer handhaven.

BIBLIOGRAPHY

BOOKS

- Aas KF, *Globalization and Crime* (Sage Publications 2007).
- Albrecht HJ and Fijnaut C (eds), *The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000* (Max-Planck-Institut für Ausländisches und Internationales Strafrecht 2002).
- Ashworth A and Horder J, *Principles of Criminal Law* (7th edn, Oxford University Press 2013).
- Baird RJ, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer 2006).
- Bassiouni MC (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).
- Bassiouni MC (ed), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Brill 2008).
- Björkdahl A, Chaban N, Leslie J, Masselot A (eds) *Importing EU Norms. Conceptual Framework and Empirical Findings* (Springer 2015).
- Boister B, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018).
- Boister N and Currie RJ (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).
- Börzel TA and Risse T (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press 2016).
- Caddel R and Molenaar EJ (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019).
- Cochrane KL and Garcia (eds) *Fishery Manager's Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009).
- Cryer R, Friman H, Robinson D, and Wilmschurst E, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010).

- Currie RJ and Rikhof J, *International and Transnational Criminal Law* (2nd edn, Irwin Law 2013).
- Dahmani M, *The Fisheries Regime of the Exclusive Economic Zone* (Martinus Nijhoff Publishers 1987).
- David Freestone (ed), *Conserving Biodiversity in Areas beyond National Jurisdiction* (Brill Nijhoff 2019).
- De la Cuesta JL, Quackelbeen L, Persak N and Vermeulen G (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).
- Dorr O and Schmalenbach K, *Vienna Convention on the Law of Treaties. A Commentary* (2nd edn, Springer 2018).
- Elferink AGO and Rothwell DR (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004).
- Engdal E and Sæter K, *Catching Thunder. The True Story of the World's Longest Sea Chase* (Zed Books 2018).
- Fitzmaurice M, Elias O and Merkouris P (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers 2010).
- Gardiner RK, *Treaty Interpretation* (2nd edn, Oxford University Press 2015).
- Hey E (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).
- Joseph Nye, *International Regionalism* (Little, Brown & Company 1968).
- Klein N, *Maritime Security and the Law of the Sea* (Oxford University Press 2011).
- Kranrattanasuit N, *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam* (International Studies in Human Rights Volume 109, Brill Nijhoff 2014).
- Letschert R and van Dijk J (eds), *The new faces of Victimhood. Globalisation, Transnational Crimes and Victim Rights* (Springer 2011).
- Liddick D, *Crimes Against Nature: Illegal Industries and the Global Environment* (ABC-CLIO 2011).
- Lo C-F, *Treaty Interpretation under the Vienna Convention on the Law of Treaties. A New Round of Codification* (Springer 2017).
- McCleaun D, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007).

- Meltzer E, *The Quest for Sustainable International: Regional Efforts to Implement the 1995 United Nations Fish Stocks Agreement: An Overview for the May 2006 Review Conference* (NRC Research Press 2009).
- MMAF, *Laut Masa Depan Bangsa. Kedaulatan, Keberlanjutan, Kesejahteraan* [Sea Future of the Nation, Sovereignty, Sustainability, Prosperity] (MMAF 2017).
- Molenaar EJ, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998).
- Molenaar EJ, Elferink AOG and Rothwell DR (eds) *Interactions between Global and Regional Regimes* (Brill Nijhoff 2013).
- Nasution A, Mugiyati and Sutriya, *Analisis Dan Evaluasi Hukum Tentang Pengadilan Perikanan* [Analysis and Evaluation of Law of Fisheries Court] (Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM 2007).
- Nordquist MH and Moore JN (eds), *Current Fisheries and the Food and Agriculture Organization of the United Nations* (Martinus Nijhoff Publishers 2000).
- Nordquist MH, Moore JN and Long R, *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (Centre for Oceans Law and Policy Volume 19, Brill Nijhoff 2016).
- Pereira RM, *Environmental Criminal Liability and Enforcement in European and International Law* (Koninklijke Brill 2015).
- Peršak N, *Legitimacy and Trust in Criminal Law, Policy, and Justice: Norms, Procedures, Outcomes* (Routledge 2014).
- Petrosian GA, *The Last Fish Swimming: The Global Crime of Illegal Fishing* (ABC-CLIO 2019).
- Pierre H and Sven P (eds), *International Law and Transnational Organised Crime* (1st edn, Oxford University Press 2016).
- Poulantzas NM, *The Right of Hot Pursuit in International Law* (2nd edn, Martinus Nijhoff Publishers 2002).
- Reichel P and Albanese J (eds), *Handbook of Transnational Crime and Justice*, (2nd edn, Sage Publications 2014).
- Reichel P and Randa R (eds), *Transnational Crime and Global Security* (Praeger 2018).
- Reisman WM, *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment* (Brill Nijhoff 2013).

- Ribeiro MC (ed), *30 Years After the Signature of the United Nations Convention on the Law of the Sea: the Protection of the Environment and the Future of the Law of the Sea* (Coimbra Editora 2014).
- Riberior MC, Bastos FL and Henriksen T (eds), *Global Challenges and the Law of the Sea* (Springer 2020).
- Ringbom H (ed) *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015).
- Rothwell D, Elferink AO, Scott K and Stephens T (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).
- Rothwell D and Stephens T, *The International Law of the Sea* (2nd edn, Hart Publishing 2016).
- Russel DA and Van der Zwaag DL (eds), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives* (Martinus Nijhoff Publishers 2010).
- Ryngaert C, *Jurisdiction in International Law* (2nd edn, Oxford University Press).
- (Schloenhardt A, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (Brill 2010).
- Schofield CH, Yi S and Kwon M-S, *The Limits of Maritime Jurisdiction* (Koninklijke Brill NV 2014).
- Serdy A, *The New Entrants Problem in International Law* (Cambridge University Press 2016).
- Shaw TM, Grant JA and Cornelissen S (eds), *The Ashgate Research Companion to Regionalisms* (Ashgate Publishing 2011).
- Tyler TR, *Why People Obey the Law* (Yale University Press 1990).
- Van den Brink T, Luchtman M and Scholten M (eds), *Sovereignty in the Shared Legal Order in the EU: Core Values of Regulation and Enforcement* (Intersentia 2015).
- Van der Wilt H and Paulussen C (eds), *Legal Responses to Transnational and International Crimes. Towards an Integrative Approach* (Edward Elgar Publishing 2017).
- Van Uhm DP, *The Illegal Wildlife Trade: Inside the World of Poachers, Smugglers and Traders* (Springer 2016).
- Vicuna FO, *The Changing International Law of High Seas Fisheries* (Cambridge University Press 1999).

Vidas D (ed), *Protecting the Polar Marine Environment* (Cambridge University Press 2000).

Villiger ME, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill (2009).

Vlassis D and Williams P, *Combating Transnational Crime: Concepts, Activities and Responses* (Routledge 2013).

Warner R and Kaye S (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016).

Winter G (ed), *Towards Sustainable Fisheries Law. A Comparative Analysis* (IUCN 2009).

BOOK CONTRIBUTIONS, JOURNAL ARTICLES AND RESEARCH PAPERS

Afriansyah A, 'Indonesia's Practice in Combatting Illegal Fishing: 2015-2016' in Lee S and Lee HE (eds), *Asian Yearbook of International Law*, Volume 22 (Brill Nijhoff 2016).

Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, Beddington JR, and Pitcher TJ, 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4(2) PLoS ONE 1.

Aji SP, Iskandar BH and Purwangka F, '*Intensitas Kerja Pengawas Perikanan Pada Aktivitas Patroli Laut Pngawasan Sumber Daya Kelautan Dan Perikanan di Jakarta*' [Work Intensity of Fisheries Inspector on Marine and Fisheries Surveillance Patrols in Jakarta] (2017) 7(2) Jurnal Teknologi Perikanan dan Kelautan 163.

Allen CH, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20(4) *Ocean Development and International Law* 309.

Applebaum B and Donohue A, 'The Role of Regional Fisheries Management Organisations' in Hey E (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).

Ariadno MK, Afriansyah A and Dewi YK, 'Port Readiness in Facing Globalization' (2014) 2 *Indonesia Law Review* 297.

Ásmundsson S, 'Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)' in Nordquist MH, Moore JN and Long R, *Challenges of the Changing Arctic*:

Continental Shelf, Navigation, and Fisheries (Centre for Oceans Law and Policy Volume 19, Brill Nijhoff 2016).

- Ásmundsson S, 'Regional Fisheries Management Organizations (RFMOs): Who Are They, What Is Their Geographic Coverage on the High Seas and Which Ones Should Be Considered as General RFMOs, Tuna RFMOs, and Specialized RFMOs?' (Sustainable Ocean Initiative Global Dialogue with Regional Seas Organizations and Regional Fisheries Bodies on Accelerating Progress Towards the Aichi Biodiversity Targets, Seoul, 26-29 September 2016) <https://www.cbd.int/meetings/SOIOM-2016-01> accessed 20 October 2018.
- Babu RR, 'State Responsibility for Illegal, Unreported and Unrelated Fishing and Sustainable Fisheries in the EEZ: Some Reflections on the ITLOS Advisory Opinion of 2015' (2015) 55 *Indian Journal of International Law* 239.
- Baird R, 'Arrests in a Cold Climate (Part 2) – Shaping Hot Pursuit through State practice' (2009) 13 *Antarctic and Southern Ocean Law and Policy Occasional Papers* 1.
- Baird R, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Illegal, Economic and Historical Factors Relevant to Its Development and Persistence' (2004) 5 (2) *Melbourne Journal of International Law* 299.
- Balton DA, 'The Compliance Agreement' in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).
- Barret B, 'Illegal Fishing in Zones Subject to National Jurisdiction' (1998) 5 *James Cook University Law Review* 1.
- Bassiouni MC, 'International Crimes: The Rationae Materiae of International Criminal Law' in Bassiouni MC (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).
- Bassiouni MC, 'The Modalities of International Cooperation in Penal Matters' in Bassiouni MC (ed), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Brill 2008).
- Becker GS, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169.
- Becker MA, 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC)' (2015) 109(4) *American Journal of International Law* 851.
- Beckman R and Davenport T, 'The EEZ Regime: Reflections after 30 Years' (LOSC Conference Papers, Law of the Sea Institute, UC

- Berkeley-Korea Institute of Ocean Science and Technology, Seoul, 21-24 May 2012) 7 < <https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf>> accessed 11 October 2017.
- Beke M, Ackermann R and Blomeyer R, 'The Common Fisheries Policy-Infringement Procedures and Imposed Sanctions Throughout the European Union' (Director-General for Internal Policies, European Parliament 2014) IP/B/PECH/I/2013-135.
- Bergth PE and Davies S, 'Fishery Monitoring, Control and Surveillance' in Cochrane KL and Garcia (eds) *Fishery Manager's Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009).
- Blakesley CL, 'Extraterritorial Jurisdiction' in M. Cherif Bassiouni (ed), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Brill 2008).
- Boerder K, Miller NA and Worm B, 'Global Hot Spots of Transshipment of Fish Catch at Sea' (2018) 4(7) *Science Advances* 1.
- Boister B, "'Transnational Criminal Law"?' (2003) 14(5) *European Journal of International Law* 953.
- Boister B, 'Human Rights Protections in the Suppression Conventions' (2002) 2(2) *Human Rights Law Review* 199.
- Boister N, 'Responding to Transnational Crime: The Distinguishing Features of Transnational Criminal Law' in Van der Wilt H and Paulussen C (eds), *Legal Responses to Transnational and International Crimes. Towards an Integrative Approach* (Edward Elgar Publishing 2017).
- Boister N, 'The Concept and Nature of Transnational Criminal Law' in Boister N and Currie RJ (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).
- Boister N, 'The UN Convention against Transnational Organised Crime 2000' in Pierre H and Sven P (eds), *International Law and Transnational Organised Crime* (1st edn, Oxford University Press 2016).
- Boyle A, 'Globalism and Regionalism in the Protection of the Marine Environment' in Vidas D (ed), *Protecting the Polar Marine Environment* (Cambridge University Press 2000).
- Brooks C, Weller JB, Gjerde K, Sumaila UR, Ardrón J, Ban NC, Freestone D, Seto K, Unger S, Costa DP, Fisher K, Crowder L, Halpin P and Boustany A, 'Challenging the Right to Fish in a Fast-Changing Ocean' (2014) 33(3) *Stanford Environmental Law Journal* 289.

- Brunnschweiler CN, 'The Curse Revisited and Revised: A Tale of Paradoxes and Red Herrings,' (2008) 55 (3) *Journal of Environmental Economics and Management* 248.
- Bulmer-Thomas V, 'Regional Integration in Latin America and the Caribbean' (2001) 20(3) *Bulletin of Latin American Research* 360.
- Busro ZM, 'Burning and/or Sinking Foreign Fishing Vessels Conducting Illegal Fishing in Indonesia. Some Obligations and Loopholes' (2017) 2(1) *Asia-Pacific Journal of Ocean Law and Policy* 174.
- Cabral RB, Mayorga J, Clemence M, Lynham J, Koeshendrajana S, Muawanah U, Nugroho D, Anna Z, Mira, Ghofar A, Zulfainarni N, Gaines SD and Costello C, 'Rapid and Lasting Gains from Solving Illegal Fishing' (2018) 2 *Nature Ecology & Evolution* 650.
- Charles AT, Mazani RL and Cross ML, 'The economics of Illegal Fishing: A Behavioral Model' (1999) 14(2) *Marine Resource Economics* 95.
- Churchill R, 'Fisheries and Their Impact on the Marine Environment: UNCLOS and Beyond' in Ribeiro MC (ed), *30 Years After the Signature of the United Nations Convention on the Law of the Sea: the Protection of the Environment and the Future of the Law of the Sea* (Coimbra Editora 2014).
- Clark RS, 'Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus' (2011) 22 *Criminal Law Forum* 519.
- Clark RS, 'The United Nations Convention against Transnational Organized Crime' (2004) 50(1) *Wayne Law Review* 161.
- Copes P, 'The Impact of UNCLOS III on Management of the World's Fisheries' (1981) 5(3) *Marine Policy* 217.
- Dandurand Y and Chin V, 'Implementation of Transnational Criminal Law' in Boister N and Currie RJ (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).
- David Tickler, Meeuwig JJ, Bryant K, David F, Forrest JAH, Gordon E, Larsen JJ, Oh B, Pauly D, Smaila UR and Zeller D, 'Modern Slavery and the Race to Fish' (2018) 9 *Natural Communication* 1.
- De Coning E and Witbooi E, 'Towards a New 'Fisheries Crime' Paradigm: South Africa as an Illustrative Example' (2015) 60 *Marine Policy* 208.
- De la Cuesta JL, 'Protection of the Environment through Criminal Law: Final Recommendations' in De la Cuesta JL, Quackelbeen L, Persak N and Vermeulen G (eds), *Protection of the Environment through Criminal Law*

- (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).
- Doulman DJ, 'Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.
- Edeson W, 'The International Plan of Action on Illegal, Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument' (2001) 16(4) *The International Journal of Marine and Coastal Law* 603.
- El-Dawla AS, 'Effects of Contemporary International Obligations for Combating the Financing of Terrorism on Interstate Cooperation in Criminal Matters' in Bassiouni MC (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).
- Elferink AGO, 'Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction' (2019) 28(3) *RECIEL* 236.
- Elferink AOG, Molenaar EJ and Rothwell DR, 'The Regional Implementation of the Law of the Sea and the Polar Region' in Molenaar EJ, Elferink AOG and Rothwell DR (eds) *Interactions between Global and Regional Regimes* (Brill Nijhoff 2013).
- Emmers R, 'ASEAN and the Securitization of Transnational Crime in Southeast Asia' (2003) 16(3) *The Pacific Review* 419.
- Faure M and Gouritin A, 'Blurring Boundaries between Administrative and Criminal Enforcement of Environmental Law' in Francesca Galli and Anne Weyembergh (eds), *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* (Editions de l'Université de Bruxelles 2014).
- Faure M, 'Limits and Challenges of Criminal Justice Systems in Addressing Environmental Crime' in De la Cuesta JL, Quackelbeen L, Persak N and Vermeulen G (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).
- Fawcett L, 'Exploring Regional Domains: A Comparative History of Regionalism' (2013) 80(3) *International Affairs* (Royal Institute of International Affairs) 429.
- Fickenauer JO, 'Problems of Definition: What is Organized Crime?' (2005) 8 *Trends in Organized Crime* 63.

- Fitzgerald BF, 'Port State Jurisdiction and Marine Pollution under UNCLOS III' (1995) 11 *Journal of the Maritime Law Association of Australia and New Zealand* 29.
- Freestone D, 'The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges' in Freestone D (ed), *Conserving Biodiversity in Areas beyond National Jurisdiction* (Brill Nijhoff 2019).
- Gao J, 'The ITLOS Advisory Opinion for the SRFC' (2015) 14(4) *Chinese Journal of International Law* 735.
- Supramono G, *Hukum Acara Pidana & Hukum Pidana di Bidang Perikanan* [Criminal Procedure Law and Criminal Law in the Field of Fisheries] (Rineka Cipta 2011) 168.
- Gavouneli M, 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (ITLOS)' (2015) 54(5) *International Legal Materials* 890.
- Goñi R, 'Fisheries Effects on Ecosystems' in Sheppard CRC (ed.), *Seas at the Millennium: An Environmental Evaluation* (Vol III: Global Issues and Processes, Pergamon Elsevier Science, 2000).
- Goodman C, 'The Regime for Flag State Responsibility in International Fisheries Law - Effective Fact, Creative Fiction or Further Work Required?' (2009) 23 *Australian and New Zealand Maritime Law Journal* 157.
- Haenlein C, 'Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens Our Security' (Royal United Service Institute for Defense and Security Studies, 2017) <<https://rusi.org/publication/occasional-papers/below-surface-how-illegal-unreported-and-unregulated-fishing-threatens>> accessed 2 January 2018.
- Haenlein C, 'Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens Our Security' (Royal United Service Institute for Defense and Security Studies, 2017).
- Harrington J, 'Extradition of Transnational Criminals' in Boister N and Currie RJ (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).
- Hayashi M, 'The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention' 29 (1-3) *Ocean & Coastal Management* 51.

- Hayashi M, 'The Straddling and Highly Migratory Fish Stocks Agreement' in Hey E (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).
- Hey E, 'The Fisheries Provisions of the LOS Convention' in Hey E (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999).
- Hidayatulloh A, 'Third World Approach to International Law Analysis on Law Enforcement Against Illegal, Unreported and Unregulated Fishing in Indonesia' (Master Thesis, Flinders University 2019) 57.
- Hikmawati P, '*Permasalahan Hukum dalam Penyidikan Tindak Pidana di Bidang Perikanan*' [Legal Issues in the Investigation of Criminal Offenses in the Field of Fishery] (2016) 3(1) *Negara Hukum* 77.
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.
- Jillions A, 'Commanding the Commons: Constitutional Enforcement and the Law of the Sea', (2012) 1(3) *Global Constitutionalism* 429.
- Jimly Asshiddiqie, '*Pengadilan Khusus*' [Special Court] in Hermansyah, and others (eds), *Putih Hitam Pengadilan Khusus [White and Black of Special Courts]* (Sekretariat Jenderal Komisi Yudisial Republik Indonesia 2013).
- Kaye S, 'A Zonal Approach to Maritime Regulation and Enforcement' in Warner R and Kaye S (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016).
- Kilchling M, 'Substantive Aspects of the U.N. Convention Against Transnational Organized Crime: A Step Towards an "Organized Crime Code"?' in Albrecht HJ and Fijnaut C (eds), *The containment of transnational organized crime: comments on the UN convention of December 2000* (Max-Planck-Institut für Ausländisches und Internationales Strafrecht 2002).
- Kopela S, 'Port State Jurisdiction, Extraterritoriality and the Protection of Global Commons' (2016) 47 (2) *Ocean Development and International Law* 89.
- Kuemplangan B and Press M, 'Preventing, Deterring and Eliminating IUU Fishing. Port State Measures' (2010) 40(6) *Environmental Policy and Law* 262.
- Kuemplangan B, 'Chapter 5. Legal Aspects' in Cochrane KL and Serge M. Garcia A (eds) *Fishery Manager's Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009).

- Kuperan K and Sutinen JG ‘Blue water crime: Deterrence, Legitimacy and Compliance in Fisheries’ (1998) 32(2) *Law and Society Review* 309.
- Kusumawardhani I and Afiansyah A, ‘*Kebijakan Kelautan Indonesia dan Diplomasi Maritim*’ [Indonesia’s Ocean Policy and Maritime Diplomacy] (2019) 41(3) *Jurnal Kertha Patrika* 251.
- Lachs M, ‘Some Reflections on the Contribution of the International Court of Justice to the Development of International Law’ (1983) 10(2) *Syracuse Journal of International Law and Commerce* 239.
- Lando M, ‘The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission’ (2016) 29(2) *Leiden Journal of International Law* 441.
- Liddick D, ‘The Dimensions of a Transnational Crime Problem: The Case of IUU Fishing’ (2014) 17 *Trends in Organized Crime* 290.
- Liliansa D, ‘The Necessity of Indonesia’s Measures to Sink Vessels for IUU fishing in the Exclusive Economic Zone’ (2020) 10(1) *Asian Journal of International Law* 125.
- Luchtman M, ‘Inter-state Cooperation at the Interface of Administrative and Criminal Law’ in Francesca Galli and Anne Weyembergh (eds), *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* (Editions de l’Université de Bruxelles 2014).
- Luchtman M, ‘Procedural Safeguards and the Interaction between Administrative and Penal Enforcement’ in De la Cuesta JL, Quackelbeen L, Persak N and Vermeulen G (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).
- Luchtman M and Vervaele JAE, ‘Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?’ (2014) 5(2) *New Journal of European Criminal Law* 192
- Mansfield ED and Milner HV, ‘The New Wave of Regionalism’ (1999) 53(3) *International Organization* 589.
- Martin B, ‘Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation’ in Ringbom H (ed) *Jurisdiction over Ships. Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015).

- May C, 'Transnational Crime and the Developing World' (Global Financial Integrity, 2017) < http://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf> accessed 20 June 2017.
- McCaffrey SC, 'Criminalization of Environmental Protection' in Bassiouni MC (ed), *International Criminal Law, Volume 1: Sources, Subjects and Contents* (3rd edn, Brill 2008).
- Meere F and Delpuech Claire, 'The Challenge of Combating Illegal, Unreported and Unregulated (IUU) Fishing' in FAO/OECD, 'Fishing for Development' (2015) FAO Fisheries and Aquaculture Proceedings No. 36.
- Meere F, 'The Role of Regional Fisheries Management Organisations' in FAO/OECD, 'Fishing for Development' (2015) FAO Fisheries and Aquaculture Proceedings No. 36.
- Missbach A, 'People Smuggling in Indonesia: Complexities, (Mis)conceptions and Their Consequences for Sentencing' (2016) 17(2) *Australian Journal of Asian Law* 1.
- Missbach A, 'Perilous Waters: People Smuggling, Fishermen, and Hyper-precarious Livelihoods on Rote Island, Eastern Indonesia' (2016) 89(4) *Pacific Affairs* 749.
- Molenaar EJ, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi' (2004) 19(1) *The International Journal of Marine and Coastal Law* 19.
- Molenaar EJ, 'Port and Coastal States' in Rothwell D, Elferink AO, Scott K and Stephens Tim (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).
- Molenaar EJ, 'Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement' in Russel DA and Van der Zwaag DL (eds), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives* (Martinus Nijhoff Publishers 2010).
- Molenaar EJ, 'Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage' (2007) 38 (1-2) *Ocean Development & International Law* 225.
- Molenaar EJ, 'Port State Jurisdiction' in Rudiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

- Molenaar EJ, 'Regional Fisheries Management Organizations' in Riberior MC, Bastos FL and Henriksen T (eds), *Global Challenges and the Law of the Sea* (Springer 2020).
- Monteith C and Pereira PG, 'Asset Recovery' in Boister N and Currie RJ (eds), *Routledge Handbook of Tansnational Criminal Law* (Routledge 2015).
- Moore G, 'The FAO Compliance Agreement' in Nordquist MH and Moore JN (eds), *Current Fisheries and the Food and Agriculture Organization of the United Nations* (Martinus Nijhoff Publishers 2000).
- Nadelmann EA, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44(4) *International Organization* 479.
- Nainggolan PP, '*Kebijakan Poros Maritim Dunia Joko Widodo dan Implikasi Internasionalnya*' [Joko Widodo's Maritime Axis Policy and its International Implications] (2015) 6 *Jurnal Politica* 180.
- Nair D, 'A Strong Secretariat, a Strong ASEAN? A Re-evaluation' (2016) 8 *ISEAS Yusof Ishak Institute Perspective*.
- Nguyen ND, Ola F and Le KL, 'Government Support and Profitability Effects – Vietnamese Offshore Fisheries' (2015) 61 *Marine Policy* 77.
- Nguyen ND, Ola F, Nguyen TKA and Quach TKN, 'Open-Access Fishing Rent and Efficiency—The Case of Gillnet Vessels in Nha Trang, Vietnam' (2012) 127-128 *Fisheries Research* 98.
- Nguyen TV, Nguyen MH and Van QL, 'Is Green Growth Possible in Vietnam? The Case of Marine Capture Fisheries' (2018) 3 *BioPhysical Economics and Resource Quality* 9.
- Nurcahyawan T and Saputra L, '*Penegakan Hukum Dan Peneggelaman Kapal Asing (Study Kasus Tindak Pidana Pelaku Illegal Fishing)*' [Law Enforcement and the Sinking of Foreign Vessels (Case Study of Illegal Fishing Criminal Offence) (2017) 2 *Era Hukum* 344.
- Oanta GA, 'Illegal Fishing as Criminal Act at Sea' in Papastavridis ED and Trapp KN (eds), *Crimes at Sea/ La criminalité en mer* (Martinus Nijhoff Publishers 2014).
- Oda S, Fisheries under the United Nations Convention on the Law of the Sea (1983) 77(4) *American Journal of International Law* 739.
- Oellers-Frahm K, 'Lawmaking through Advisory Opinion' (2011) 12(5) *German Law Journal* 1033.
- Palma MA, Tsamenyi M and Edeson W, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers 2010).

- Palma-Robles MA, 'Fisheries Enforcement and the Concepts of Compliance and Monitoring, Control and Surveillance' in Warner R and Kaye S (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016).
- Pellet A, 'Decisions of the ICJ as Sources of International Law?' in Decisions of the ICJ as Sources of International Law? (Gaetano Morelli Lecture Series, Vol 2, International and European Papers Publishing 2018).
- Peršak N, 'Norms, Harms and Disorder at the Border; The Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory in Peršak N, Legitimacy and Trust in Criminal Law, Policy, and Justice: Norms, Procedures, Outcomes (Routledge 2014).
- Petrossian GA, 'Preventing Illegal, Unreported and Unregulated (IUU) Fishing: A Situational Approach' (2015) 189 *Biological Conservation* 39.
- Poernomo A, Purwanto and Ahmadi, 'Combating Illegal, Unreported and Unregulated (IUU) Fishing to Attain Food Security and Alleviate Poverty: Initiative of Indonesia' (2011) 9(2) *Fish for People* <http://repository.seafdec.org/bitstream/handle/20.500.12066/860/sp9-2_combating_iuu.pdf?sequence=1> accessed 18 June 2018.
- Pomeroy R, Nguyen KAT and Thong HX, 'Small-Scale Marine Fisheries Policy in Vietnam' (2009) 33(2) *Marine Policy* 419.
- Pomeroy R, Parks J Courtney K and Mattich N, 'Improving Marine Fisheries Management in Southeast Asia: Results of a Regional Fisheries Stakeholder Analysis' (2016) 65 *Marine Policy* 20, 20.
- Pool A, 'Ambitions Versus Capacity: The Role of Institutions in ASEAN in Björkdahl A, Chaban N, Leslie J, Masselot A (eds) *Importing EU Norms. Conceptual Framework and Empirical Findings* (Springer 2015).
- Power ME, Tilman D, Estes JA, Menge BA, Bond WJ, Mills LS, Daily G, Castilla JC, Lubchenco J and Paine RT, 'Challenges in the Quest for Keystones: Identifying Keystone Species is Difficult but Essential to Understanding How Loss of Species Will Affect Ecosystems' (1996) 46(8) *Bioscience* 609.
- Pramod G, Nakamura K, Pitcher TJ and Delagran L, 'Estimates of Illegal and Unreported Fish in Seafood Imports to the USA' (2014) 48 *Marine Policy* 102.
- Qiao G and Oishi N, 'Policy Transfer from the UN to ASEAN: The Case of Trafficking in Persons' (2018) 40(2) *Policy Studies* 131.

- Ram C, 'The United Nations Convention against Transnational Organized Crime and Its Protocols' (2001) 1(2) *Forum on Crime and Society* 135.
- Ramcharan R, 'ASEAN and Non-Interference: A Principle Maintained' (2000) 22(1) *Contemporary Southeast Asia* 60.
- Rattanaseeve P, 'Towards Institutionalised Regionalism: the Role of Institutions and Prospects for Institutionalisation in ASEAN' (2014) 3 (1) *SpringerPlus* 556.
- Rayfuse R, 'Regional Fisheries Management Organizations', in Rothwell D, Elferink AO, Scott K and Stephens Tim (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).
- Rayfuse R, 'The Role of Port States' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016).
- Resosudarmo BP, Napitupulu L and Campbell D, 'Illegal Fishing in the Arafura Sea' in Budi P. Resosudarmo and Frank Jotzo (eds), *Working with Nature against Poverty: Development, Resources and the Environment in Eastern Indonesia* (ISEAS-Yusof Ishak Institute) 2009) 185.
- Reuland RC, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33 *Virginia Journal of International Law* 557.
- Ricardo M Pereira, *Environmental Criminal Liability and Enforcement in European and International Law* (Queen Mary Studies in International Law Volume 21, Brill Nijhoff 2015).
- Rick Fawn, "Regions' and Their Study: Wherefrom, What for and Whereto?" (2009) 35 *Review of International Studies* 5, 13.
- Rochette J, Bille R, Molenaar EJ, Drankier P, and Chabason L, 'Regional Oceans Governance Mechanisms: A Review' (2015) 60 *Marine Policy* 9.
- Ryngaert C and Ringbom H, 'Port State Jurisdiction: Challenges and Potential' (2016) 31 *The International Journal of Marine and Coastal Law* 379.
- Ryngaert C and Vervaele JAE, 'Core Values Beyond Territories and Borders: the Internal and External Dimension of EU Regulation and Enforcement' in Van den Brink T, Luchtman M and Scholten M (eds), *Sovereignty in the Shared Legal Order in the EU: Core Values of Regulation and Enforcement* (Intersentia 2015).

- Sachs JD and Warner AM, 'The Curse of Natural Resources' (2001) 45 (4-6) *European Economic Review* 827.
- Sagita A and Sihombing YH, '*Optimalisasi Pengadilan Perikanan Dalam Penegakan Hukum Tindak Pidana Perikanan di Perairan Indonesia*' [The Optimisation of Fishery Court as Fishery Crimes Law Enforcement in Indonesia Territorial Sea] (2017) 6(2) *Hukum dan Peradilan* 213.
- Serdy A and Bliss M, 'Prompt Release of Fishing Vessels: State Practice in the Light of the Cases Before the International Tribunal for the Law of the Sea' in Elferink AGO and Rothwell DR (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004)
- Sharp A, 'The Effectiveness or Not of the New Port State Measures in the Battle to Control Illegal, Unregulated and Unreported Fishing' (2010) 9. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140528> accessed 21 December 2017.
- Shaver A and Yozell S, 'Casting a Wider Net. The Security Implications of Illegal, Unreported and Unregulated Fishing' (Stimson Center, 2018) <[https://www.stimson.org/sites/default/files/file-attachments/Casting a Wider Net Report.pdf](https://www.stimson.org/sites/default/files/file-attachments/Casting%20a%20Wider%20Net%20Report.pdf)> accessed 31 May 2018.
- Sodik DM, 'Non-Legally Binding International Fisheries and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australia International Law Journal* 129.
- Supriadi, '*Penetapan Tindak Pidana sebagai Kejahatan dan Pelanggaran dalam Undang-Undang Pidana Khusus*' [Determination of Criminal Acts as Crime and Violation in Special Criminal Laws] (2015) 27(3) *Mimbar Hukum*.
- Sutinen JG and Kuperan K, 'A socioeconomic theory of regulatory compliance in fisheries' (1999) 26 *International Journal of Social Economics* 174.
- Swan J, 'Port State Measures, from Residual Port State Jurisdiction to Global Standards' (2016) 31(3) *The International Journal of Marine and Coastal Law* 395.
- Syarif LM, 'Promotion and Management of Marine Fisheries in Indonesia' in Winter G (ed), *Towards Sustainable Fisheries Law. A Comparative Analysis* (IUCN 2009).
- Teh L, Zeller D, Zylich K, Nguyen G, and Harper S, 'Reconstructing Vietnam's Marine Fisheries Catch, 1950-2010' (2014) Fisheries Centre The University of British Columbia Working Paper Series #2014-17, 7<<http://www.seaaroundus.org/doc/publications/wp/2014/Teh-et-al-Vietnam.pdf>> accessed 4 September 2018.

- Telesetsky A, 'Laundering Fish in the Global Undercurrents: Illegal Unreported, and Unregulated Fishing and Transnational Organized Crime' (2015) 41(4) *Ecology Law Quarterly* 939.
- Tetzlaff K, 'The Role of Regional Organisations' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016).
- Theilen JT, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28(3) *The International Journal of Marine and Coastal Law* 533.
- Trevisanut S, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' (2017) 48 (3-4) *Ocean Development & International Law* 300.
- Trevisanut S, 'The Exercise of Administrative Functions by ITLOS: A Comment on Prompt Release Cases' in Boschiero N, Scovazzi T, Pitea C, and Ragni C (eds) *International Courts and the Development of International Law. Essay in Honour of Tullio Treves* (T.M.C. Asser Press 2013).
- Tsamenyi M and Hanich Q, 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States' (2012) 27 *The International Journal of Marine and Coastal Law* 783.
- U. R. Sumalia, J. Alder and H. Keith, 'Global Scope and Economics of Illegal Fishing', (2006) 30(6) *Marine Policy* 696.
- Van der Marel ER, 'An Opaque Blacklist: the Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation' in Lawrence Martin, Constantinos Salonidis and Christina Hioureas (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas Under National Jurisdiction and Beyond* (Juris, International Law Institute 2017).
- Van der Marel ER, 'Combating IUU Fishing' in Richard Caddel and Erik J. Molenaar (eds) *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019).
- Van der Ploeg F, 'Natural Resources: Curse or Blessing?' (2011) 49 (2) *Journal of Economic Literature* 366.
- Van Dijk J and Spapens T, 'Transnational Organized Crime Networks' in Reichel P and Albanese J (eds), *Handbook of Transnational Crime and Justice*, (2nd edn, Sage Publications 2014).

- Van Dijk J, 'Transnational Organized Crime, Civil Society and Victim Empowerment' in Letschert R and van Dijk J (eds), *The new faces of Victimhood. Globalisation, Transnational Crimes and Victim Rights* (Springer 2011).
- Van Uhm DP and Siegel D, 'The Illegal Trade in Black Caviar' (2016) 19 Trends in Organized Crime 67.
- Van Uhm DP, 'Wildlife and Security' in Reichel P and Randa R (eds), *Transnational Crime and Global Security* (Praeger 2018).
- Vervaele JAE, 'International Cooperation in the Investigation and Prosecution of Environmental Crime. Problems and Challenges for the Legislative and Judicial Authorities' in De la Cuesta JL, Quackelbeen L, Persak N and Vermeulen G (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).
- Vervaele JAE, 'Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality' in Boister N and Currie RJ (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).
- Wang K-H, 'In Combating and Deterring IUU Fishing: Do RFMOs Work?' in Schofield CH, Yi S and Kwon M-S, *The Limits of Maritime Jurisdiction* (Koninklijke Brill NV 2014).
- Wang X, Bai L, Chen Z, 'Challenge in Investigating and Prosecuting Environmental Crime in China' in De la Cuesta JL, Quackelbeen L, Persak N and Vermeulen G (eds), *Protection of the Environment through Criminal Law* (AIDP World Conference Bucharest, Romania, 18th-20th May 2016) (Maklu 2016).
- Wang X and Chen Z, 'Improvement of the Governance Mechanism against Wildlife Crime Linked to the Internet in China' (2019) 10 Beijing Law Review 1225.
- Warchol G and Harrington M, 'Exploring the Dynamics of South Africa's Illegal Abalone Trade via Routine Activities Theory' (2016) 19 Trends in Organized Crime 21.
- Warchol G and Harrington M, 'Exploring the Dynamics of South Africa's Illegal Abalone Trade via Routine Activities Theory' (2016) 19 Trends in Organized Crime 21.
- Warner R, Gjerde K and Freestone D, 'Regional Governance for Fisheries and Biodiversity' in Garcia SM, Rice J and Charles A (eds), *Governance of Marine Fisheries and Biodiversity Conservation* (1st edn, Wiley-Blackwell 2014).

- Wharton S, 'Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute' (2015) 52 *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 129.
- Williams P, 'Transnational Criminal Organisations and International Security' (1994) 36(1) *Global Politics and Strategy* 96.
- Williams, MJ, 'Will Multilateral Arrangements Help Southeast Asian States Solve Illegal Fishing?' (2013) 35 (2) *Contemporary Southeast Asia* 259.
- Witbooi E, 'Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context' (2014) 29(2) *The International Journal of Marine and Coastal Law* 290.
- Yuliantiningsih A, Hartiwiningsih, Suherman AM, Latifah E, 'From Illegal, Unreported and Unregulated Fishing to Transnational Organised Crime in Fishery from an Indonesian Perspective' (2018) 11(2) *Journal of East Asia and International Law* 335.
- Yusran R, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2018) 8 *Asian Journal of International Law* 258.
- Zhang H and Wu H, 'China's Marine Fishery and Global Ocean Governance' (2017) 8(2) *Global Policy* 216.
- Zwinge T, 'Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So' (2011) 10(2) *Journal of International Business and Law* 297.

REPORTS, STATEMENTS AND PRESS RELEASES

- 'Chairman's Statement of the 33rd ASEAN Summit' (Singapore, 13 November 2018).
- 'Chairman's Statement of the 34th ASEAN Summit' (Bangkok, 23 June 2019).
- 'Co-Chairs' Summary Report of ARF Workshop on Illegal, Unregulated and Unreported (IUU) Fishing' (Bali, 19-21 April 2016).
- 'Joint Communiqué of the 29th ASEAN Ministerial Meeting (AMM)' (Jakarta, 20-21 July 1996).
- 'Joint Communiqué on Voluntary International Cooperation to Combat IUU Fishing and to Promote Sustainable Fisheries Governance' (Hanoi, 11 September 2018).

- ‘Joint Statement of the Tenth ASEAN Ministerial Meeting on Transnational Crime (10th AMMTC)’ (Kuala Lumpur, 29 September 2015).
- ‘Joint Statement of the Thirteenth ASEAN Ministerial Meeting on Transnational Crime (13th AMMTC)’ (Bangkok, 27 November 2019).
- ‘Joint Statement Twelfth ASEAN Ministerial Meeting on Transnational Crime’ (Nay Pyi Taw, 31 October 2018).
- ‘Press Statement of the First Informal ASEAN Heads of Government Meeting,’ (Jakarta, 30 November 1996).
- ‘Report of the Twenty-Sixth Meeting of States Parties’ of United Nations Convention on the Law of the Sea (New York, 20-24 June 2016) (2 August 2016) UN Doc. SPLOS/303.
- ‘Summary of the Ninth Meeting of the UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea’ (23-27 June 2008) 25(55) Earth Negotiations Bulletin 11.
- ‘Summary Report of the 11th Coordination Committee Meeting on the Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region’ (Yogyakarta, 13-14 November 2018).
- ADB, ‘State of the Coral Triangle: Indonesia’ (ADB 2014).
- Agnew DJ and Barnes CT, ‘Economic Aspects and Drivers of IUU Fishing: Building a Framework’ in in OECD, *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004).
- APEC, ‘Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific’, (APEC, November 2008) APEC#208-FS-01.5.
- Aqorau T, ‘Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries’ in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.
- Asia-Pacific Economic Cooperation, ‘Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific’, (APEC, November 2008) APEC#208-FS-01.5.
- Bay of Bengal Large Marine Ecosystem, ‘Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries in Asia’ (FAO/BOBLME Secretariat, 2015) < <https://mrag.co.uk/>

experience/review-impacts-illegal-unreported-and-unregulated-fishing-developing-countries-asia> accessed 12 June 2017.

Blaħa F, 'Illegal Fishing in the Central and South Pacific' (2017) The Pacific Community (SPC) Fisheries Newsletter #151 <https://spccfpstore1.blob.core.windows.net/digitallibrary-docs/files/49/492a618ccacbf6f83dc33aba28777c7ee.pdf?sv=2015-12-11&sr=b&sig=KvapmgPF%2BQenFn7SOzD2r79OTYsPgeZ83elZK1XQDD4%3D&se=2021-05-11T20%3A21%3A09Z&sp=r&rsc=public%2C%20max-age%3D864000%2C%20max-stale%3D86400&rsc=application%2Fpdf&rsc=inline%3B%20filename%3D%22FishNews151_21_Blaħa.pdf%22> accessed 30 August 2018.

Bondaroff TNP, Tuesday T and van der Werf W, 'The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime' (The Global Initiative Against Transnational Organized Crime and The Black Fish, 2015) <<https://globalinitiative.net/wp-content/uploads/2015/04/the-illegal-fishing-and-organised-crime-nexus-1.pdf>> accessed 10 April 2017.

Brush A, 'Strings Attached, Exploring the Onshore Networks Behind Illegal, Unreported and Unregulated Fishing' (C4ADS, 2018) <<https://www.c4reports.org/strings-attached>> accessed 27 July 2020.

Cacaud P, Kuruc M and Spreij M, 'Administrative Sanctions in Fisheries Law' (FAO, 2003) FAO Legislative Study 82.

CCAMLR, 'Report of the Fifteenth Meeting of the Commission' (Hobart, Australia, 21 October-1 November 1996) CCAMLR-XV.

CCPCJ 'Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting, 24-26 February 2016, Vienna' (11 May 2016) UN Doc E/CN.15/2016/CRP.2.

CCPCJ, 'Report of the 25th Session of the Commission on Crime Prevention and Criminal Justice (11 December 2015 and 23-27 May 2016)' E/2016/30 and E/CN.15/2016/13, Chapter VII.

CCPCJ, 'Report on the 24th Session of the Commission on Crime Prevention and Criminal Justice (5 December 2014 and 18-22 May 2015)' E/2015/30 and E/CN.15/2015/19.

Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), 'Report of the Twenty-third Meeting of the Commission' (Hobart, Australia, 25 October-05 November 2004) CCAMLR-XXIII.

CTI-CFF, Workshop on Catch Documentation and Traceability System Design and Development based on Ecosystem Approach to Management of Fisheries (2019) <<http://www.coraltriangleinitiative.org/events/workshop-catch-documentation-and-traceability-cdt-system-design-and-development-based-ecosy-0>> accessed 20 September 2019.

Development Economics Research Group, University of Copenhagen and Central Institute for Economic Management, Ministry of Planning and Investment of Vietnam, 'The Fisheries Sector in Vietnam: A Strategic Economic Analysis' (2010) <<http://www.ciem.org.vn/Portals/1/CIEM/Publications/2010/FishReportUoCCIEEM.pdf>> accessed 28 August 2018.

Doulman DJ and Swan J, 'A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2012) FAO Fisheries and Aquaculture Circular No 1074. FIPI/ C1074.

Doulman DJ, 'Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.

EC, 'Commission Lifts "Yellow Card" from Thailand for Its Actions against Illegal Fishing' (8 January 2019) Press Release IP/19/61 <https://europa.eu/rapid/press-release_IP-19-61_en.htm> accessed 13 August 2019.

EC, 'EU Acts on Illegal Fishing: Yellow Card Issued to Thailand while South Korea & Philippines are Cleared' Press Release IP/15/4806 <https://europa.eu/rapid/press-release_IP-15-4806_en.htm> accessed 13 August 2019.

Edeson W, Freestone D and Gudmundsdottir E, '*Legislating for Sustainable Fisheries: A Guide to Implementing the 1993 FAO Compliance Agreement and 1995 Fish Stocks Agreement*' (The World Bank 2001) The World Bank Law Justice, and Development Series 23239.

Environmental Justice Foundation, 'Lowering the Flag. Ending the Use of Flags of Convenience by Pirate Fishing Vessels (EJF, 2009) <<https://ejfoundation.org/resources/downloads/Lowering-the-flag.pdf>> accessed 13 March 2018.

Environmental Justice Foundation, 'Thailand's Seafood Slaves. Human Trafficking, Slavery and Murder in Kantang's Fishing Industry' (EJF,

2015) <<https://ejfoundation.org/resources/downloads/EJF-Thailand-Seafood-Slaves-low-res.pdf>> accessed 30 July 2020.

Environmental Justice Foundation, 'Transshipment at Sea. The Need for a Ban in West Africa' (EJF, 2013) <https://ejfoundation.org/resources/downloads/ejf_transshipments_at_sea_web_0.pdf> accessed 30 July 2020.

Environmental Justice Foundation, Oceana, The Pew Charitable Trusts and WWF, 'Improving Performance in the Fight against Illegal, Unreported and Unregulated (IUU) Fishing. The EU IUU Regulation Carding Process: A Review of European Commission Carding Decisions' (Issue Brief April 2016) <https://ejfoundation.org/resources/downloads/IUU_Carding_Brief.pdf> accessed 12 September 2018.

FAO 'Report of the FAO/UNEP Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats' (Rome, 23-25 September 2009) FAO Fisheries and Aquaculture Report No. 932, FIRF/R932.

FAO, 'Council Report of the Hundred and Sixteenth Session' (Rome, 14-19 June 1999) CL 116/10.

FAO, 'Illegal, Unreported and Unregulated Fishing: Proposal for a Draft International Plan of Action' (Committee on Fisheries, Twenty-fourth Session, Rome, Italy, 26 February-2 March 2001) (FAO 2001) COFI 2001/7.

FAO, 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO, Implementation of the IPOA-IUU) (FAO 2002) FAO Technical Guidelines for Responsible Fisheries No. 9.

FAO, 'Report of the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15-19 May 2000' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.

FAO, 'Report of the First Meeting of the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing in Oslo, Norway, 29-31 May 2017' (FAO, 2017) FAO Fisheries and Aquaculture Report No. 1211, FIAP/R1211.

FAO, 'Report of the Second Meeting of the Parties to the Agreement on

- Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing in Santiago, Chile, 3-6 June 2019' (FAO, 2019) FAO Fisheries and Aquaculture Report No. 1211, FIAO/R1272.
- FAO, 'Report of the Workshop on Implementing the FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing in the Mediterranean and Black Sea in Albania, 29 February-4 March 2016' (FAO, 2016) FAO Fisheries and Aquaculture Report No. 1151, FIAP/R1151.
- FAO, 'The State of World Fisheries and Aquaculture 2014. Opportunities and Challenges' (FAO, 2014).
- FAO, 'The State of World Fisheries and Aquaculture 2018. Meeting the Sustainable Development Goals' (FAO, 2018).
- FAO, 'The State of World Fisheries and Aquaculture 2020. Sustainability in Action' (FAO 2020).
- Flewweling P, Cullinan C, Balton D, Sautter RP and Reynolds JE, 'Recent Trends in Monitoring, Control and Surveillance Systems for Capture Fisheries' (FAO, 2003) FAO Fisheries Technical Paper No. 415.
- High Seas Task Force, 'Closing the Net: Stopping Illegal Fishing on the High Seas (2006) < <https://www.wwf.eu/?62600/Closing-the-net-Stopping-illegal-fishing-on-the-high-seas>> accessed 28 November 2017
- Hoydal K, 'IUU Fishing in NEAFC: How Big is the Problem and What Have We Done?' in OECD, *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004).
- ILC, 'Final Report. Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) of its 66th Session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/CN.4/L.844.
- International Organization for Migration (IOM), Indonesian Ministry of Marine Affairs and Fisheries (KKP), and Coventry University, 'Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry' (IOM, 2016).
- INTERPOL, International Law Enforcement Cooperation in the Fisheries Sector. A Guide for Law Enforcement Practitioners (2018).
- Joint Association of Southeast Asian Nations (ASEAN)-Southeast Asian Fisheries Development Center (SEAFDEC) Declaration on Regional Cooperation for Combating Illegal, Unreported and Unregulated (IUU) Fishing and Enhancing the Competitiveness of ASEAN Fish and Fishery Products (Bangkok, 3 August 2016).

- Kevin Bray, 'A Global Review of Illegal, Unreported, and Unregulated Fishing' in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia 15-19 May 2000 (FAO, 2001) FAO Fisheries Report No. 666.
- Lodge WL, Anderson D, Løbach T, Munro G, Sainsbury K, and Willock A, 'Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations' (*Chatham House*, 2007) < <https://www.oecd.org/sd-roundtable/papersandpublications/39374297.pdf>> accessed 18 December 2017.
- Long Tri Duong, 'Vietnam Fisheries Report' (15th Standing Committee on Tuna and Billfish, Honolulu, 22-27 July 2002) 1 < https://spccfpstore1.blob.core.windows.net/digitallibrary-docs/files/4f/4fe153609058a46040879845b0f9ccb4.pdf?sv=2015-12-11&sr=b&sig=mGI177VglWHx%2FXc%2BLHKxITpL7pJ3W2e8an3LNtPSpOk%3D&se=2021-05-12T19%3A44%3A23Z&sp=r&rscd=public%2C%20max-age%3D864000%2C%20max-stale%3D86400&rsct=application%2Fpdf&rscd=inline%3B%20filename%3D%22nfr_vietnam.pdf%22> accessed 2 February 2019.
- Macfadyen G, Hosch G, Kaysser N and Tagziria L, 'The IUU Fishing Index' (*Poseidon Aquatic Resource Management Limited and the Global Initiative Against Transnational Organized Crime*, 2019) <<https://globalinitiative.net/wp-content/uploads/2019/02/IUU-Fishing-Index-Report-web-version.pdf>> accessed 31 March 2019.
- Marine Resources Assessment Group Ltd, 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries: Final Report' (MRAG, 2005) <<https://mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-iuu-fishing-developing-countries>> accessed 15 June 2017.
- Martini M, 'U4 Expert Answer: Illegal, Unreported and Unregulated Fishing and Corruption', (*Transparency International*, 2013) < https://www.transparency.org/files/content/corruptionqas/392_Illegal_unreported_and_unregulated_fishing_and_corruption.pdf> accessed 10 July 2017.
- Ministry of Planning and Investment, 'Viet Nam's Voluntary National Review Report on the Implementation of the Sustainable Development Goals' (June 2018) <<https://sustainabledevelopment.un.org/content/documents/16445JapanVNR2017.pdf>> accessed 14 November 2018.

- Nguyen L and Nguyen DD, 'Review of Vietnam's Legal, Policy and Institutional Arrangements in Light of WCPFC Requirements' (Ministry of Agriculture and Rural Development of Vietnam, 2010) <<https://www.wcpfc.int/system/files/PLI-VNM-01-%5BConsultancy-report-%28Y2%29-Review-PLI-Arrangement-Jun2010%5D.pdf>> accessed 2 October 2018.
- Pramod G, 'Vietnam-Country Report' in IUU Risk Intelligence, Policing the the Open Seas: Global Assessment of Fisheries Monitoring Control and Surveillance in 84 Countries (Policy Report No. 1 2017).
- Report of the Twenty-Eight Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 11-14 June 2018) (9 July 2018) UN Doc. SPLOS/324.
- Report of the Twenty-Fifth Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 8-12 June 2015) (13 July 2015) UN Doc. SPLOS/287.
- Report of the Twenty-Fourth Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 9-13 June 2014) (14 July 2014) UN Doc. SPLOS/277.
- Report of the Twenty-Ninth Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 17-19 June 2019) (8 July 2019) UN Doc. SPLOS/29/9.
- Report of the Twenty-Seventh Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 12-16 June 2017) (10 July 2017) UN Doc. SPLOS/316.
- Report of the Twenty-Sixth Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 20-24 June 2016) (2 August 2016) UN Doc. SPLOS/303.
- Report of the Twenty-Third Meeting of States Parties of United Nations Convention on the Law of the Sea (New York, 10-12 June 2013) (8 July 2013) UN Doc. SPLOS/263.
- Rose GL and Tsamenyi, 'Universalising Jurisdiction over Marine Living Resources Crime' (*WWF*, 2013) 56 <<http://ro.uow.edu.au/lhapapers/1256>> accessed 20 March 2018.
- RPOA-IUU, 'Summary Report of the 11th Coordination Committee Meeting on the Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region' (Yogyakarta, 13-14 November 2018).

- S. Rajaratnam School of International Studies, 'Event Report ASEAN Mechanisms on Maritime Security Cooperation' (Singapore, 26 September 2017) 16 <https://www.rsis.edu.sg/wp-content/uploads/2017/12/ER171212_ASEAN-Mechanisms-on-Maritime-Security-Cooperation_WEB.pdf> accessed 29 July 2018.
- Scientific Committee for the Conservation of Antarctic Marine Living Resources (SC-CCAMLR), 'Report of the Thirty-Fifth Meeting of the Scientific Committee' (Hobart, Australia, 17-21 October 2016) SC-CCAMLR-XXXV.
- Senate Standing Committee on Rural and Regional Affairs and Transport of Australia, 'Increasing Use of So-called Flag of Convenience Shipping in Australia' (2017).
- Stimson Center, 'New Illegal Fishing Database Details Environmental Security Threats' (*Stimson Center*, 2017) < <https://www.stimson.org/content/new-illegal-fishing-database-details-environmental-security-threats>> accessed 30 September 2017.
- Swan J, 'Fishing Vessels Operating under Open Registers and Exercise of Flag State Responsibilities: Information and Options' (FAO 2002) Fisheries Circular No. 980.
- The Pew Charitable Trusts, 'How to End Illegal Fishing' (The Pew Charitable Trusts, December 2013) <<https://www.pewtrusts.org/-/media/legacy/uploadedfiles/peg/publications/report/howtoendillegalfishingpdf.pdf>> accessed 15 June 2019.
- The Pew Charitable Trusts, 'The Costs of IUU Fishing to the EU' (The Pew Charitable Trusts, 2008) <<https://www.pewtrusts.org/~media/legacy/uploadedfiles/peg/publications/report/iuu20briefing20englishpdf.pdf>> accessed 10 June 2017.
- The United States Coast Guard, 'Illegal, Unreported, and Unregulated Fishing Strategic Outlook' (The United States Coast Guard, September 2020).
- Tsamenyi M, Kuemlangan B and Camilleri M, 'Defining Illegal, Unreported and Unregulated (IUU) Fishing' in FAO 'Expert Workshop to Estimate The Magnitude of Illegal, Unported and Unregulated Fishing Globally' (Rome, 2–4 February 2015) FAO Fisheries and Aquaculture Report FIRO/R1106.
- UN 'Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session, held in Vienna from 8 to 17 October 2008' (1 December 2008) UN Doc *CTOC/COP/2008/19*.

- UN ‘The Notion of Serious Crime in the United Nations Convention against Transnational Organized Crime’ Note by the Secretariat on the Conference of the Parties to the United Nations Convention Sixth Session held in Vienna on 15-19 October 2012 (20 September 2012) UN Doc *CTOC/COP/2012/CRP.4*.
- UN, ‘Implementation of the Provisions on International Cooperation of the United Nations Convention against Transnational Organised Crime’ Resolution 7/4 (Seventh Session of the Conference of the Parties of the UNTOC, Vienna 6-10 October 2014).
- UN, ‘Best Practices in Joint Investigations and Specialized Prosecution. Background Paper Prepared by the Secretariat’ The 10th Session of the Working Group on Trafficking in Persons in Vienna, 10 and 11 September 2020 (26 June 2020) UN Doc *CTOC/COP/WG.4/2020/3*.
- UN, ‘Use of the United Nations Convention against Transnational Organised Crime as a Legal Basis for International Cooperation against All Forms of Transnational Organised Crime’ The 6th Session of the Working Group on International Cooperation in Vienna, 27 and 28 October 2015 (18 August 2015) *CTOC/COP/WG.3/2015/3*.
- UN/DOALOS, ‘Review Conference on the 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 (New York, 22 to 26 May 2006, 24 to 28 May 2010 and 23 to 27 May 2016)’ (UN, last updated 23 September 2016) < http://www.un.org/depts/los/convention_agreements/review_conf_fish_stocks.htm > accessed 16 March 2018.
- UNAFEI, ‘Work Product of the 116th International Training Course “Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes”’ (UNAFEI, 2001) Resource Material Series No. 58 <https://www.unafei.or.jp/publications/pdf/RS_No58/No58_00All.pdf> accessed 11 June 2019.
- UNGA, ‘Discussion Panel A Responsible Fisheries and Illegal, Unregulated and Unreported Fisheries’ (United Nations Open-ended Informal Consultative Process on Ocean Affairs, First Meeting, 30 May-2 June 2000) (15 May 2000) UN Doc A/AC.259/1.
- UNGA ‘Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting’ (25 July 2008) UN Doc A/63/174.

- UNGA, 'Report Submitted to the Resumed Review Conference in Accordance with Paragraph 41 of General Assembly Resolution 69/109 to Assist it in Discharging its Mandate under Article 36 (2) of the Agreement' (1 March 2016) UN Doc A/CONF.210/2016/1.
- UNODC 'Transnational Organized Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking' (2011).
- UNODC, 'Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime' (United Nations Publication 2009).
- UNODC, 'Digest of Organized Crime Cases: A Compilation of Cases with Commentaries and Lessons Learned (UN 2012).
- UNODC, 'Manual on Mutual Legal Assistance and Extradition' (United Nations Publication 2012).
- UNODC, 'Maritime Crime: a Manual for Criminal Justice Practitioners, Second Edition' (UN 2019).
- UNODC, 'Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries' (UNODC 2002).
- UNODC, 'Trafficking in Persons & Smuggling of Migrants. Guidelines on International Cooperation' (UNDOC 2010).
- UNODC, 'Implementation of the United Nations Convention against Transnational Organized Crime: Needs Assessment Tools' (UN 2016).
- Widjaja S, Long T, Wirajuda H and others, 'Illegal, Unreported and Unregulated Fishing and Associated Drivers' (World Resources Institute, 2019) <<https://oceanpanel.org/sites/default/files/2020-02/HLP%20Blue%20Paper%20on%20IUU%20Fishing%20and%20Associated%20Drivers.pdf>> accessed 15 April 2020.
- WWF, 'Fishing for Proteins. How Marine Fisheries Impact on Global Food Security up to 2050. A Global Prognosis', (WWF, 2016) <<https://www.worldwildlife.org/publications/fishing-for-proteins-how-marine-fisheries-impact-global-food-security-up-to-2050>> accessed 30 August 2018.
- WWF, 'Living Blue Planet Report. Species, Habitats and Human Well-Being' (WWF, 2015) <<https://www.worldwildlife.org/publications/living-blue-planet-report-2015>> accessed 24 December 2019.

PHD DISSERTATIONS

Berg A, 'Implementing and Enforcing European Fisheries Law. The Implementation and the Enforcement of the Common Fisheries Policy in the Netherlands and in the United Kingdom' (PhD Thesis, Utrecht University 1999).

Honniball AN, 'Extraterritorial Port State Measures. The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing' (PhD Thesis, Utrecht University 2019).

Tan APH, 'Advancing International Criminal Justice in Southeast Asia through the Regionalisation of International Criminal Law' (PhD thesis, University of Nottingham 2014).

Tijhus AJG, 'Transnational Crime and the Interface between Legal and Illegal Actors. The Case of the Illicit Art and Antiquities Trade' (PhD thesis, Leiden University 2006).

ONLINE NEWS AND WEBSITES

'Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing in the Region' (RPOA-IUU), 'Who we are' (*RPOA-IUU*) <<http://www.rpoaiuu.org/>> accessed 19 September 2019.

ASEAN, 'ASEAN Ministerial Meeting on Agriculture and Forestry (AMAF)' (ASEAN) <<https://asean.org/asean-economic-community/asean-ministerial-meeting-on-agriculture-and-forestry-amaf/>> accessed 25 July 2019.

Atmanta D, 'Minister Susi Ups Ante in Fight against Fisheries Crime at UN' *The Jakarta Post* (24 May 2016) <<http://www.thejakartapost.com/news/2016/05/24/minister-susi-ups-ante-in-fight-against-fisheries-crime-at-un.html>> accessed 19 May 2018.

Bernama, 'MACC Nabs 22, Seizes RM1.9 Mil from Illegal Fishing Syndicate' *Free Malaysia Today* (6 November 2017) <<https://www.freemalaysiatoday.com/category/nation/2017/11/06/macc-nabs-22-seizes-rm1-9-mil-from-illegal-fishing-syndicate/>> accessed 2 October 2018.

Cabinet Secretariat of the Republic of Indonesia, 'Indonesia Sinks FV Viking' (*Setkab*, 14 March 2016) <<http://setkab.go.id/en/indonesia-sinks-fv-viking/>> accessed 18 May 2017.

Cabinet Secretariat of the Republic of Indonesia, 'Indonesia Sinks FV Viking' (*Setkab*, 14 March 2016) <<http://setkab.go.id/en/indonesia-sinks-fv-viking/>> accessed 18 May 2017.

- Carreon B, ‘The Blue Threat: Vietnamese Poachers Are Rocking The Boat In The Pacific’ *Pacific Note* (10 January 2017) <<https://www.pacificnote.com/single-post/2017/01/10/The-Blue-Threat-Vietnamese-Poachers-Are-Rocking-The-Boat-In-The-Pacific>> accessed 1 October 2018.
- Coordinating Ministry for Maritime Affairs of the Republic of Indonesia, ‘Indonesia Leads the Establishment of a Regional Cooperation to Combat Crimes in Fisheries Sector’ (*Ocean Conference*, 2017) <<https://oceanconference.un.org/commitments/?id=15127>> accessed 12 May 2018.
- EC, ‘Overview of the Existing Procedures as Regards Third Countries’ (EC) <https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf> accessed 30 August 2020.
- EC, ‘Overview of the Existing Procedures as Regards Third Countries’ (EC) <https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf> accessed 13 August 2019.
- FAO, ‘FAO Fishery Country Profile - The Socialist Republic of Vietnam’ (FAO, 2005) <<http://www.fao.org/fi/oldsite/FCP/en/VNM/profile.htm>> accessed 25 September 2018.
- FAO, ‘National Plans of Actions’ (FAO) <<http://www.fao.org/fishery/ipoa-iuu/npoa/en>> accessed 14 March 2018.
- FAO, ‘Port State Measures Agreement’ (FAO) <<http://www.fao.org/fishery/psm/agreement/en#Implementing>> accessed 14 December 2017.
- FAO, ‘Status of the Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO) <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf> accessed on 15 December 2017.
- FAO, ‘Status of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas’ (FAO) <http://www.fao.org/fileadmin/user_upload/legal/docs/012s-e.pdf> accessed 1 December 2017.
- Festiani S, ‘Ini Kendala Observer Transshipment’ [This is the Obstacles of Transshipment Observers] *Republika* (Jakarta, 18 February 2015) <<https://www.republika.co.id/berita/ekonomi/makro/15/02/18/njymau-ini-kendala-observer-transshipment>> accessed 18 June 2018.

- Indian Ocean Tuna Commission (IOTC), 'Basic Texts' (*IOTC*) <<https://iotc.org/about-iotc/basic-texts>> accessed on 29 September 2019
- INTERPOL, 'Countries Unite to Identify Illegal Fishing Vessel via Interpol' (*INTERPOL*, 5 December 2013) <<https://www.interpol.int/News-and-media/News/2013/PR152>> accessed 26 June 2017.
- INTERPOL, 'New Zealand requests INTERPOL Purple Notices to Identify Networks Behind Illegal Fishing' (*INTERPOL*, 15 January 2015) <<https://www.interpol.int/News-and-media/News/2015/N2015-003>> accessed 16 May 2017.
- INTERPOL, 'New Zealand Requests Interpol Purple Notices to Identify Networks behind Illegal Fishing' (*INTERPOL*, 15 January 2015) <<https://www.interpol.int/News-and-media/News/2015/N2015-003>> accessed 27 June 2017.
- INTERPOL, 'Notices' <<https://www.interpol.int/INTERPOL-expertise/Notices>> (INTERPOL) accessed 11 September 2017.
- INTERPOL, 'Spanish Operation Nets Suspects Behind Illegal Fishing' (*INTERPOL*, 18 March 2016) <<https://www.interpol.int/News-and-media/News/2016/N2016-030>> accessed 26 June 2017.
- Toyat J, 'Foreign Fishing Vessel, Crew Detained for Suspected Illegal Fishing' *The Borneo Post Online* (Sarawak, 16 August 2018) <<http://www.theborneopost.com/2018/08/16/foreign-fishing-vessel-crew-detained-for-suspected-illegal-fishing/>> accessed 3 September 2018.
- Kurtenbach E, 'Palau Burns Vietnamese Boats Caught Fishing Illegally' *The Associated Press* (Tokyo, 12 June 2015) <<https://apnews.com/3f6a26d1f5cf40a19c4996753c9d615f/palau-burns-vietnamese-boats-caught-fishing-illegally>> accessed 10 August 2020.
- Maronie S, 'Telaah Penegakan Hukum Tindak Pidana Perikanan Di Wilayah Perairan Zona Ekonomi Eksklusif Indonesia' [Analysis of Law Enforcement against Fisheries Criminal Offences in the Indonesian Exclusive Economic Zone] (KKP 2018) <[http://kkp.go.id/an-component/media/upload-gambar-pendukung/djpdpskp/Penegakan_Hukum_TPP_di_Wilayah_ZEEI_\(11_Mei_18\).pdf](http://kkp.go.id/an-component/media/upload-gambar-pendukung/djpdpskp/Penegakan_Hukum_TPP_di_Wilayah_ZEEI_(11_Mei_18).pdf)> accessed 19 June 2018.
- Maulana V, 'Media Thailand Protes Penenggelaman Kapal, Ini Reaksi RI' [Thailand Media Protests Vessel Sinking. This is Indonesia's Reaction] *Sindonews* (7 January 2015) <<https://international.sindonews.com/read/947375/40/media-thailand-protos-penenggelaman-kapal-ini-reaksi-ri-1420625646>> accessed 20 June 2018.

- Ministry of Marine and Fisheries Resources (MMAF), ‘FAQ Pengawasan Sumber Daya Kelautan dan Perikanan {PSDKP}’ [FAQ of Marine and Fisheries Resources Surveillance] (*MMAF*, 1 February 2018) <<http://kkp.go.id/artikel/1495-faq-pengawasan-sumber-daya-kelautan-dan-perikanan-psdkp>> accessed 9 March 2018.
- Ministry of Transportation, ‘Kemenhub Kirim Ahli Ukur Kapal Ikan Ke Pelabuhan Tegal’ [Ministry of Transportation sends Experts of Measuring Fishing Vessel to Tegal Port] Ministry of Transportation (*Ministry of Transportation*, 5 July 2017) <<http://www.dephub.go.id/post/read/kemenhub-kirim-ahli-ukur-kapal-ikan-ke-pelabuhan-tegal>> accessed 17 June 2018.
- MMAF, ‘Cegah IUU Fishing, KKP Butuh Banyak Syahbandar Perikanan’ [Prevent IUU Fishing, KKP needs more Fisheries Harbourmaster] (*KKP*, 17 March 2016) <<https://kkp.go.id/djpt/artikel/2768-cegah-iuu-fishing-kkp-butuh-banyak-syahbandar-perikanan>> accessed 22 June 2018.
- MMAF, ‘Kado Lebaran, KKP Tangkap Lagi 2 Kapal Illegal Fishing’ [Eid al-Fitr Gift, KKP Captured 2 Illegal Fishing Vessel] (*KKP News*, 20 May 2020) <<https://news.kkp.go.id/index.php/kado-lebaran-kkp-tangkap-lagi-2-kapal-illegal-fishing/>> accessed 28 May 2020.
- MMAF, ‘KKP Sederhanakan Proses Pendaftaran Kapal Perikanan’ [KKP simplifies Fishing Vessel Registration Process] (i,5 September 2016) <<http://news.kkp.go.id/index.php/kkp-sederhanakan-proses-pendaftaran-kapal-perikanan/>> accessed 16 June 2018.
- Musa Z, ‘MMEA Detains Vietnamese Boat for Illegal Fishing off Johor’ *The Star* (Kota Tinggi, 22 July 2018) <<https://www.thestar.com.my/news/nation/2018/07/22/mmea-detains-vietnamese-boat-for-illegal-fishing-off-johor/>> accessed 3 October 2018.
- Nguyen Q, ‘Indonesia Sinks 86 Vietnamese Fishing Boats’ *VnExpress International* (24 August 2018) <<https://e.vnexpress.net/news/news/indonesia-sinks-86-vietnamese-fishing-boats-3797210.html>> accessed 30 August 2018.
- Nguyen TU, ‘Fisheries Country Profile: Viet Nam’ (*SEAFDEC*, 2017) <<http://www.seafdec.org/fisheries-country-profile-viet-nam/>> accessed 28 August 2018.
- Nguyet N, ‘EC Will Review the “Yellow Card” for Vietnam in January 2019’ (*Directorate of Fisheries MARD*, 28 June 2018) <<https://tongcucthysan.gov.vn/en-us/capture-fisheries/doc-tin/010922/2018-07-02/ec-will-review-the-yellow-card-for-vietnam-in-january-2019>> accessed 12 September 2018.

- Nguyet N, 'Many Fishing Vessels Have Not yet Installed Satellite Positioning Equipment' (*Directorate of Fisheries MARD*, 29 August 2018) <<https://tongcucthuysan.gov.vn/en-us/capture-fisheries/doc-tin/011263/2018-08-29/many-fishing-vessels-have-not-yet-installed-satellite-positioning-equipment>> accessed 14 September 2018.
- Nguyet Nhu, 'Nghe An: IUU Has Not Been Thoroughly Dealt With' (*Directorate of Fisheries MARD*, 22 August 2018) <<https://tongcucthuysan.gov.vn/en-us/capture-fisheries/doc-tin/011258/2018-08-29/nghe-an-iuu-has-not-been-thoroughly-dealt-with>> accessed 14 September 2018.
- Pandaya, 'Finally, a Game Changer Against Illegal Fishing' *Jakarta Post* (Rome, 11 August 2016) < <https://www.thejakartapost.com/academia/2016/08/11/finally-a-game-changer-against-illegal-fishing.html>> accessed 17 June 2018.
- Parameswaran P, 'Vietnam "Deeply Concerned" by Indonesia's War on Illegal Fishing. Hanoi Registers its Concerns to Jakarta again Following a Mass Public Sinking' (*The Diplomat*, 21 August 2015) <<https://thediplomat.com/2015/08/vietnam-deeply-concerned-by-indonesias-war-on-illegal-fishing/>> accessed 27 August 2018.
- Radio New Zealand, 'New Caledonia Jails Vietnamese Poachers' *Radio New Zealand* (6 December 2017) <<https://www.radionz.co.nz/international/pacific-news/345578/new-caledonia-jails-vietnamese-poachers>> accessed 30 August 2018.
- Radio New Zealand, 'Vietnamese "Reef Robbers" Not Blue Boats' *Radio New Zealand* (31 March 2017) <<https://www.radionz.co.nz/international/programmes/datelinepacific/audio/201838723/vietnamese-'reef-robbers'-not-blue-boats-ffa>> accessed 30 August 2018.
- Rahadiana R, 'Indonesia Sinks 13 Vietnamese Boats in War on Illegal Fishing' *Bloomberg* (5 May 2019) <<https://www.bloomberg.com/news/articles/2019-05-05/indonesia-sinks-13-vietnamese-boats-in-war-on-illegal-fishing>> accessed 10 August 2020.
- Rusdi S, 'Why Boat-Sinking Policy is Controversial' *Jakarta Post* (Jakarta, 8 January 2018) < <https://www.thejakartapost.com/academia/2018/02/08/why-boat-sinking-policy-is-controversial.html>> accessed 19 July 2020.
- Salini C, 'Attempt to Burn Vietnamese Blue Boats Results in "Near-Death" Accident' *Solomon Islands Broadcasting Corporation* (14 December 2017) <<http://www.sibconline.com.sb/attempt-to-burn-vietnamese-blue-boats-results-in-near-death-accident/>> accessed 10 August 2020.

- Shah MF, 'Syndicate Uses "Mother Ship" and Disguised Fishing Boats to Slip through Dragnet' *The Star* (Kota Tinggi, 5 August 2017) <<https://www.thestar.com.my/news/nation/2017/08/05/viet-trawlers-stay-one-step-ahead-syndicate-uses-mother-ship-and-disguised-fishing-boats-to-slip-thr/>> accessed 2 October 2018.
- Subekti R, 'KKP Komit Permudah Pengurusan Dokumen Kapal Ikan' [KKP Commits to Ease Fishing Vessel Document] *Republika* (10 March 2018) <<https://www.republika.co.id/berita/nasional/daerah/18/03/10/p5c5cq313-kkp-komit-permudah-pengurusan-dokumen-kapal-ikan>> accessed 17 June 2018.
- Tempo, 'Susi Warns Countries That Illegal Fishing Is Transnational Crime' *Tempo* (18 September 2016) <<https://en.tempo.co/read/news/2016/09/18/055805139/Susi-Warns-Countries-That-Illegal-Fishing-is-Transnational-Crime>> accessed 18 May 2018.
- Thayer CA, 'Indonesia's Policy of Sinking Illegal Unreported Unregulated Fishing Boats' *Chennai Centre for China Studies* (26 June 2019) <<https://www.c3sindia.org/defence-security/indonesias-policy-of-sinking-illegal-unreported-unregulated-fishing-boats-by-carlyle-a-thayer/>> accessed 19 July 2020.
- The Maritime Executive, 'Viking Fishing Vessel Sunk by Indonesian Authorities' *The Maritime Executive* (14 March 2016) <<http://www.maritime-executive.com/article/viking-fishing-vessel-sunk-by-indonesian-authorities>> accessed 17 May 2017.
- The Strait Times, 'Vietnamese Boats Encroach Malaysian Waters in Search of Prized Sea Cucumber Loot' *The Strait Times* (4 August 2017) <<https://www.straitstimes.com/asia/se-asia/vietnamese-boats-encroach-malaysian-waters-in-search-of-prized-sea-cucumber-loot>> accessed 4 October 2018.
- Topsfield J and Rosa A, 'Notorious People-Smuggler Captain Bram Jailed for Six Years in Indonesia' *The Sydney Morning Herald* (16 March 2017) <<https://www.smh.com.au/world/notorious-peoplesmuggler-captain-bram-jailed-for-six-years-in-indonesia-20170316-guzywl.html>> accessed 11 December 2018;
- Tory T, 'Catch Me if You Can: The Global Pursuit of a Fugitive Ship' (*Hakai Magazine*, 3 March 2020) <<https://www.hakaimagazine.com/features/catch-me-if-you-can/>> accessed 28 May 2020.
- Tra Huong, 'The Vietnamese Government has Agreed to Accede to the Agreement on Port State Measure (PSMA) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Fishing)' (*Directorate of Fisheries MARD*, 12 July 2018) <<https://tongcuthuysan.com>>

gov.vn/en-us/capture-fisheries/doc-tin/011019/2018-07-20/the-vietnamese-government-has-agreed-to-accede-to-the-agreement-on-port-state-measure-psma-to-prevent-deter-and-eliminate-illegal-unreported-and-unregulated-fishing-iuu-fishin> accessed 15 September 2018.

UN, 'Overview of the United Nations 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 (in force as from 11 December 2001)' (UN) <http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm> accessed 18 October 2020.

UN/DOALOS, 'United Nations Convention on the Law of the Sea of 10 December 1982: Overview and full text' (UN, last updated 11/02/2020) <http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm> accessed 16 October 2020.

UNODC, 'Organized Crime Module 8 Key Issues: Special Investigative Techniques - Controlled Deliveries' (UNODC, 2018) <<https://www.unodc.org/e4j/en/organized-crime/module-8/key-issues/special-investigative-techniques/controlled-deliveries.html>> accessed 11 June 2019.

UNODC, 'Organized Crime Module 8 Key Issues: Special Investigative Techniques - Controlled Deliveries' (UNODC, 2018) <<https://www.unodc.org/e4j/en/organized-crime/module-8/key-issues/special-investigative-techniques/physical-and-electronic-surveillance.html>> accessed 11 June 2019.

UNTOCStatusofRatification<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en>.

Utrecht University, 'Vervaele in Madrid: "Protection of Environment through Criminal Law Needs Strengthening"' (Utrecht University, 5 December 2019) <<https://www.uu.nl/en/news/vervaele-in-madrid-protection-of-environment-through-criminal-law-needs-strengthening>> accessed 19 October 2020.

Vervaele JAE and Van Uhm DP, 'Criminal Justice and Environmental Crime – How to Tackle Organized Crime and Ecocide?' (RENFORCE Blog, 16 February 2017) <<http://blog.renforce.eu/index.php/en/2017/02/16/criminal-justice-and-environmental-crime-how-to-tackle-organized-crime-and-ecocide/>> accessed 24 January 2018.

Vietnam Government Portal, ‘Vietnam and Thailand have Issued Joint Press Statement on the Occasion of the Official Visit of His Excellency Mr. Nguyen Xuan Phuc, Prime Minister of the Socialist Republic of Viet Nam to the Kingdom of Thailand from August 17-19 (VGP, 19 August 2017) < <http://primeminister.chinhphu.vn/Home/VN-Thailand-issue-Joint-Press-Statement/20178/3500.vgp>> accessed 20 September 2019.

Vietnam News, ‘\$1.87 Billion Projected for Offshore Fishing Development’ *Vietnam News* (Hanoi, 29 September 2017) <<https://vietnamnews.vn/economy/394699/187-billion-projected-for-offshore-fishing-development.html#SPgw4kXLCSfAv6a3.97>> accessed 13 November 2018.

Vietnam News, ‘EC Recognises Vietnam Improvements in Combating IUU fishing’ *Vietnam News* (Hanoi, 27 December 2019) < <https://vietnamnews.vn/economy/570420/ec-recognises-viet-nams-improvements-in-combating-iuu-fishing.html>> accessed 28 May 2020.

Vietnam News, ‘Zero Cases of Illegal Fishing since 2018 Beginning’ *Vietnam News* (7 May 2018) <<https://vietnamnews.vn/economy/427519/zero-cases-of-illegal-fishing-since-2018-beginning.html#dcchP4W4F8qX8hr1.97>> accessed 3 September 2018.

Vietnam Plus, ‘EC to Review Yellow Card against Vietnamese Fisheries in Early 2019’ *Vietnam Plus* (27 June 2018) <<https://en.vietnamplus.vn/ec-to-review-yellow-card-against-vietnamese-fisheries-in-early-2019/133561.vnp>> accessed 12 September 2018.

Vietnam Plus, ‘Kien Giang Works towards Eliminating EC’s Fishing Yellow Card’ *Vietnam Plus* (27 August 2018) <<https://en.vietnamplus.vn/kien-giang-works-towards-eliminating-ecs-fishing-yellow-card/137150.vnp>> accessed 3 September 2018.

Vietnam Plus, ‘Provinces Ramp Up Installation of Systems to Fight Illegal Fishing’ *Vietnam Plus* (Hanoi, 12 May 2020) <<https://en.vietnamplus.vn/provinces-ramp-up-installation-of-systems-to-fight-illegal-fishing/173181.vnp>> accessed 28 May 2020.

Vietnamnet, ‘Seafood Exports Face Problems Ahead Due to EC’s IUU Fishing Warning’ *Vietnamnet* (24 August 2018) <<http://english.vietnamnet.vn/fms/business/207425/seafood-exports-face-problems-ahead-due-to-ec-s-iuu-fishing-warning.html>> accessed 30 August 2018.

Voice of Vietnam, ‘Ministry Urges Localities to Continue Fighting IUU Fishing’ *Voice of Vietnam* (4 July 2018) <<https://english.vov.vn/economy/ministry-urges-localities-to-continue-fighting-iuu-fishing-378282.vov>> accessed 12 September 2018.

Widakuswara, P ‘Indonesia Urges UN to Declare Fish Theft a Transnational Crime’ *VOAnews* (10 June 2017) <<https://www.voanews.com/a/indonesia-urges-united-nations-declare-fish-theft-transnational-crime/3895243.html>> accessed 18 May 2018.

MISCELLANEOUS

‘Concept Paper High-Level Side Event on Transnational Organized Crime in the Fisheries Industries (“Fisheries Crime”)’ (UN Ocean Conference, New York, 6 June 2017) <<http://ocean.kkp.go.id/files/concept.pdf>> accessed 20 May 2018.

‘Plan of Action for the Implementation of the Strategic Partnership between the Socialist Republic of Vietnam and the Republic of Indonesia (2019-2023)’ (Hanoi, 11 September 2018).

Direktorat Jenderal Pengawasan Sumber Daya Kelautan dan Perikanan (PSDKP), ‘*Produktivitas Perikanan Indonesia*’ [Indonesian Fisheries Productivity] (Forum Merdeka Barat 9 Kementerian Komunikasi dan Informatika, Jakarta, 19 January 2018) <<http://kkp.go.id/wp-content/uploads/2018/01/KKP-Dirjen-PDSPKP-FMB-Kominfo-19-Januari-2018.pdf>> accessed 20 April 2018.

Direktorat Jenderal PSDKP, ‘*Laporan Kinerja Ditjen PSDKP 2019*’ [Director General PSDKP Performance Report 2019] <<https://kkp.go.id/an-component/media/upload-gambar-pendukung/Ditjen%20PSDKP/Humas%20PSDKP/LAPORAN%20KINERJA%20DJPSDKP%20TAHUN%202019.pdf>> accessed 28 May 2020.

Direktorat Jenderal PSDKP, ‘Refleksi 2019 & Outlook 2020’ [Reflection 2019 & Outlook 2020] [MMAF 2020] <<https://kkp.go.id/an-component/media/upload-gambar-pendukung/Ditjen%20PSDKP/Humas%20PSDKP/Refleksi%202019%20Outlook%202020%20Diten%20PSDKP.pdf>> accessed 12 November 2020.

FAO, ‘Stopping Illegal, Unreported and Unregulated Fishing’ (FAO 2002).

Garner BA (editor in chief), *Black’s Law Dictionary* (9th edn, Thomson Reuter 2009).

- MMAF, 'Indonesia National Plan of Action to Prevent and to Combat Illegal, Unreported, and Unregulated Fishing' (adopted by Ministry of Marine Affairs and Fisheries Decree Number KEP.50/MEN/2012) (Indonesia NPOA-IUU) (2012) <<http://extwprlegs1.fao.org/docs/pdf/ins165159.pdf>> accessed 20 April 2018.
- MMAF, 'Laporan Kinerja 2017' [Performance Report 2017] (MMAF 2017) <[http://kkp.go.id/an-component/media/upload-gambar-dukung/kkp/LAPORAN/Laporan_Kinerja_KKP_2017_\(REV_4-\(28Maret\).pdf](http://kkp.go.id/an-component/media/upload-gambar-dukung/kkp/LAPORAN/Laporan_Kinerja_KKP_2017_(REV_4-(28Maret).pdf)> accessed 5 April 2018.
- Vietnam Association of Seafood Exporters and Producers, 'Whitebook on Combating IUU Fishing in Vietnam' (2018) <<http://seafood.vasep.com.vn/sach-trang-en.pdf>> accessed 11 July 2018.
- Wolfrum R, 'The potential of the International Tribunal for the Law of the Sea in the Management and Conservation of Marine Living Resources' (Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations in New York, 21 June 2007) < https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/friends_tribunal_210607_eng.pdf> accessed 22 November 2017.

TABLE OF CASES

International Courts and Tribunals

“Camouco” (Panama v France) (Prompt Release, Judgment, 7 February 2000) Case No. 5, ITLOS Reports 2000.

“Monte Confurco” (Seychelles v France) (Prompt Release, Judgment, 18 December 2000) Case No. 6, ITLOS Reports 2000.

“Volga” (Russian Federation v Australia) (Prompt Release, Judgment, 23 December 2002) Case No. 11, ITLOS Reports 2002.

Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (ITLOS Advisory Opinion) (Advisory Opinion, 2 April 2015) Case No. 21, ITLOS Reports 2015.

The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China) (Award, 12 July 2016) PCA Case No. 2013-19.

NATIONAL CASE LAW

Indonesia

Putusan Mahkamah Agung [Supreme Court Decision] No. 2563 K/Pid. Sus/2015.

Putusan Mahkamah Agung [Supreme Court Decision] No. 491 K/Pid. Sus/2015.

Putusan Pengadilan Negeri Sabang [Sabang Distric Court Decision] No. 21/Pid.Sus/2017/PN.Sab.

Putusan Pengadilan Negeri Sabang [Sabang Distric Court Decision] No. 17/Pid.Sus/2018/PN Sab

Putusan Pengadilan Negeri Tanjung Pinang (Tanjung Pinang District Court Decision) No. 17/Pid.Sus-PRK/2016/PN Tpg.

Putusan Pengadilan Tinggi Ambon (Ambon High Court Decision) No. 33/PID.SUS-PRK/2015/PT.AMB.

Putusan Mahkamah Agung (Supreme Court Decision) No. 40 K/Pid. Sus/2015.

TABLE OF LEGISLATION

International Instruments

African Charter on Maritime Security and Safety and Development in Africa (adopted 15 October 2016).

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 (adopted 4 August 1995, entered in force 11 December 2001) 2167 UNTS 3.

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁷ (opened for signature 22 November 2009, entered into force 5 June 2016) (PSMA).

Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered in force 24 April 2003) 2221 UNTS.

ASEAN Convention against Trafficking in Persons, Especially Women and Children (adopted 21 November 2015, entered into force 8 March 2016) (ACTIP).

Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter).

Convention for the Conservation of Southern Bluefin Tuna (adopted 10 May 1993, entered into force 20 May 1994) 1819 UNTS 360.

Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted 5 September 2000, entered into force 19 June 2004) 2275 UNTS 43.

Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC) (adopted 8 June 2012, entered into force 16 September 2012).

- Inter-American Convention against Corruption (adopted 29 March 1996, entered into force 6 March 1997) 35 ILM 724.
- International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.
- International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371.
- International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256.
- International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 20 November 1973, entered into force 18 July 1976) 1015 UNTS 243.
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005) 2326 UNTS 208.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.
- Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.
- The Treaty between the Kingdom of Spain and the Republic of Italy to Combat Illicit Drug Trafficking at Sea (signed 23 March 1990, entered into force on 7 May 1994) 1776 UNTS 230.
- Treaty of Amity, Commerce and Navigation between Great Britain and the United States of America (signed 19 November 1794) 52 CTS.
- United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UNCAC).

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (1998 Drugs Convention).

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 71.

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

European Union

Commission Decision of 23 October 2017 notifying the Socialist Republic of Vietnam of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing' [2017] OJ C364/3 (Commission Decision C 364/3 of 2017).

Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union [1997] OJ C195/2.

Convention on Offences relating to Cultural Property (opened for signature 19 May 2017) CETS No. 221.

Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health (opened for signature 28 October 2011, entered into force 1 January 2016) CETS No. 211.

Convention on the Protection of Environment through Criminal Law (opened for signature 4 November 1998) CETS No. 172.

Council Decision 2001/887/JHA of 6 December 2001 on the Protection of the Euro Against Counterfeiting [2001] OJ L329/1.

Council Decision 2010/765/CFSP of 2 December 2010 on EU Action to Counter the Illicit Trade of Small Arms and Light Weapons (SALW) by Air [2010] OJ L327/44.

Council Decision of 15 November 2012 on Notifying the Third Countries that the Commission Considers as Possible of Being Identified as Non-Cooperating Third Countries Pursuant to Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2012/C354/01) [2012] OJ C 354/1.

- Council Framework Decision 2001/413/JHA of 28 May 2001 on Combating Fraud and Counterfeiting of Non-Cash Means of Payment [2001] OJ L149/1.
- Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector [2003] OJ L192/54.
- Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime [2008] OJ L300/42.
- Council Implementing Decision of 24 March 2014 Establishing a List of Non-Cooperating Third Countries in Fighting IUU Fishing Pursuant to Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2014/170/EU) [2014] OJ L91/43.
- Criminal Law Convention on Corruption (opened for signature 27 January 1999, entered into force 1 July 2002) ETS No. 173.
- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing [2005] OJ L309/15.

Indonesia

- Keputusan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 50/KEPMEN-KP/2017 tentang Estimasi Potensi, Jumlah Tangkapan yang Diperbolehkan, dan Tingkat Pemanfaatan Sumber Daya Ikan di Wilayah Pengelolaan Perikanan Negara Republik Indonesia* [Unofficial: Ministry of Marine Affairs and Fisheries Decree Number 50/KEPMEN-KP/2017 on Estimated Potential, Allowed Capture Amount, and Utilisation Level of Fisheries Resources in the Republic of Indonesia Fisheries Management Area] (MMAF Decree No. 50/KEPMEN-KP/2017).
- Keputusan Presiden Republik Indonesia Nomor 15 Tahun 2010 tentang Pembentukan Pengadilan Perikanan pada Pengadilan Negeri Tanjung Pinang dan Pengadilan Negeri Ranai* [Unofficial: Presidential Decree No. 15 of 2010 on the Establishment of Fisheries Court in District Court of Tanjung Pinang and District Court of Ranai].
- Keputusan Presiden Republik Indonesia Nomor 6 Tahun 2014 tentang Pembentukan Pengadilan Perikanan pada Pengadilan Negeri Ambon, Pengadilan Negeri Sorong dan Pengadilan Negeri Merauke* [Unofficial: Presidential Decree No. 6 of 2014 on the Establishment of Fisheries Court in District Court of Ambon, District Court of Sorong and District Court of Merauke].

Peraturan Daerah Provinsi Nusa Tenggara Timur Nomor 3 Tahun 2011 tentang Pengendalian Usaha Perikanan [Unofficial: Regulation of the Province of Nusa Tenggara Barat No. 3 of 2011 on the Management of Fisheries Business].

Peraturan Direktur Jenderal Perikanan Tangkap Nomor 24/PER-DJPT/2017 tentang Mekanisme dan Prosedur Penerapan Sanksi Administratif Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia dan/atau Laut Lepas [Unofficial: Director General of Capture Fisheries Decision No. 24/PER-DJPT/2017 on the Mechanism and Procedure of the Implementation of Capture Fisheries Administrative Sanction in the Indonesian FMAs and/or High Seas].

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 18/PERMEN-KP/2014 tentang Wilayah Pengelolaan Perikanan Negara Republik Indonesia [Unofficial: Ministry of Marine Affairs and Fisheries Regulation Number 18/PERMEN-KP/2014 on Fisheries Management Areas of the Republic of Indonesia] (MMAF Regulation No. 18/PERMEN-KP/2014).

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 57/PERMEN-KP/2014 tentang Perubahan Kedua atas Peraturan Menteri Kelautan dan Perikanan Nomor PER.30/MEN/2012 tentang Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia [Unofficial: Ministry of Marine Affairs and Fisheries Regulation Number 57/PERMEN-KP/2014 on the Second Amendment on the Regulation of the Minister of Marine Affairs and Fisheries Number PER.30/MEN/2012 on Capture Fisheries Business in the Republic of Indonesia Fisheries Management Areas 2014] (MMAF Regulation No. 57/PERMEN-KP/2014).

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor PER.30/MEN/2012 tentang Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia [Unofficial: Ministry of Marine Affairs and Fisheries Number PER.30/MEN/2012 on Capture Fisheries Business in Fisheries Management Area of the Republic of Indonesia] (MMAF Regulation No. PER.30/MEN/2012) art 14(2).

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 42/PERMEN-KP/2015 tentang Sistem Pemantauan Kapal Perikanan [Unofficial: MMAF Regulation No. 41/PERMEN-KP/2015 on Fishing Vessel Monitoring System].

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 1/PERMEN-KP/2013 tentang Pemantau Kapal Penangkap Ikan dan Kapal Pengangkut Ikan [Unofficial: MMAF Regulation No. 1/PERMEN-

KP/2013 on the Observers of Fishing Vessel and Fishing Transport Vessel].

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 17/PERMEN-KP/2014 tentang Pelaksanaan Tugas Pengawas Perikanan [Unofficial: Ministry of Marine Affairs and Fisheries Regulation No. 17/PERMEN-KP/2014 on the Implementation of Fisheries Inspectors Duties].

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 26/PERMEN-KP/2013 tentang Perubahan atas Peraturan Menteri Kelautan dan Perikanan Nomor PER.30/MEN/2012 tentang Usaha Perikanan Tangkap di Wilayah Pengelolaan Perikanan Negara Republik Indonesia [Unofficial: Ministry of Marine Affairs and Fisheries Regulation Number 26/PERMEN-KP/2013 on the Amendment on the Regulation of the Minister of Marine Affairs and Fisheries Number PER.30/MEN/2012 on Capture Fisheries Business in the Republic of Indonesia Fisheries Management Areas 2014] (MMAF Regulation No. 26/PERMEN-KP/2013).

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 23/PERMEN-KP/2013 tentang Pendaftaran dan Penandaan Kapal Perikanan [Unofficial: Ministry of Marine Affairs and Fisheries Regulation No. 23/PERMEN-KP/2013 on Registration and Marking of Fishing Vessels] (MMAF Regulation No. 23/PERMEN-KP/2013).

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor PER.12/MEN/2012 tentang Usaha Perikanan Tangkap di Laut Lepas [Unofficial: MMAF Regulation No. PER.12/MEN/2012 on High Seas Fishing Business].

Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 3/PERMEN-KP/2013 tentang Kesyabbandaran di Pelabuhan Perikanan [Unofficial: Ministry of Marine Affairs and Fisheries No. 3/PERMEN-KP/2013 on Harbourmaster in Fisheries Ports].

Peraturan Presiden Nomor 43 Tahun 2016 tentang Pengesahan Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (Persetujuan tentang Ketentuan Negara Pelabuhan untuk Mencegah, Menghalangi dan Memberantas Penangkapan Ikan yang Ilegal, Tidak Dilaporkan dan Tidak Diatur [Unofficial: Presidential Regulation Number 43 of 2016 on the Ratification of the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing].

Peraturan Presiden Republik Indonesia Nomor 115 Tahun 2015 tentang Satuan Tugas Pemberantasan Penangkapan Ikan Secara Ilegal [Unofficial: President of the

- Republic of Indonesia Regulation Number 115 of 2015 on Task Force against Illegal Fishing] (Presidential Regulation Number 115 of 2015).
- Peraturan Presiden Republik Indonesia Nomor 44 Tahun 2016 tentang Daftar Bidang Usaha yang Tertutup dan Bidang Usaha yang Terbuka dengan Persyaratan di Bidang Penanaman Modal* [Unofficial: Presidential Regulation of the Republic of Indonesia Number 44 Year 2016 Concerning Lists of Business Fields that are Closed to and Business Fields that are Open with Conditions to Investment] Appendix III C (Marine Affairs and Fisheries Sector).
- Undang-Undang Republik Indonesia Nomor 17 Tahun 1985 tentang Pengesaban United Nations Convention on the Law of the Sea (Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut)* [Unofficial: Law Number 17 of 1985 on the Ratification of the United Nations Convention on the Law of the Sea].
- Undang-Undang Republik Indonesia Nomor 21 Tahun 2009 tentang Pengesaban 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 Stocks (Persetujuan Pelaksanaan Ketentuan-Ketentuan Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut tanggal 10 Desember 1982 yang Berkaitan dengan Konservasi dan Pengelolaan Sediaan Ikan yang Beruaya Terbatas dan Sediaan Ikan yang Beruaya Jauh)* [Unofficial: Law Number 21 of 2009 on the Ratification of the 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 Stocks].
- Undang-Undang Republik Indonesia Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan* [Unofficial: Law No. 30 of 2014 on Government Administration] art 76(3).
- Undang-Undang Republik Indonesia Nomor 31 Tahun 2004 tentang Perikanan* [Law No. 31 of 2004 on Fisheries] elucidation of art 69(4); *Surat Edaran Nomor 1 Tahun 2015 tentang Barang Bukti Kapal dalam Perkara Pidana Perikanan* [Unofficial: Supreme Court Circular Note Number 1 of 2015 on Vessel Evidence in Fisheries Criminal Cases].
- Undang-Undang Republik Indonesia Nomor 45 Tahun 2009 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 2009 tentang Perikanan* [Unofficial: Law No. 45 of 2009 on the Amendment of Law No. 31 of 2004 on Fisheries] (Law No. 45 of 2009).
- Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* [Unofficial: Law No. 8 of 1981 on Criminal Procedure Law]

New Zealand

Fisheries Act 1996 of New Zealand.

Vietnam

Government's Decree No. 102/2012/ND-CP of November 29, 2012, on the Organization and Operation of the Fisheries Resources Surveillance Force (29 November 2012).

Government's Decree No. 33/2010/ND-CP of March 31 on the Management of Fishing Activities in Sea Areas by Vietnamese Organisations and Individuals'.

Government's Decree No. 42/2019/ND-CP on Administrative Sanctions in the Fisheries Activities (16 May 2018).

Law No. 101/2015/QH13 on Criminal Procedure Code (27 November 2015).

Law No. 18/2017/QH14 on Fisheries (21 November 2017) (Law No. 18/2017/QH14).

Law No. 99/2015/QH13 on Organisation of Criminal Investigation Bodies (26 November 2015).

Prime Minister Decision No. 1445/QĐ-TTg of August 16, 2013, Approving the Master Plan on Fisheries Development through 2020 with a Vision toward 2030.

Prime Minister Decision No. 78/QĐ-TTg on National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing Up To 2025 (16 January 2018).

Prime Minister Directive No. 45/CT-TTg on A Number of Tasks and Solutions to Remove the Warning of the European Commission against Illegal, Unreported and Unregulated Fishing (IUU) (13 December 2017).

Prime Minister's Official Telegram No. 732/CD-TTg on Prevention, Reduction and Stopping of Infringements by Vietnamese Fishing Vessels and Fishermen regarding Illegal Fishing in Foreign Countries' Waters 2017.

The Government Decree No. 53/2012/ND-CP of June 20, 2012, Amending and Supplementing a Number of Articles of the Decrees of Fisheries (20 June 2012).

CURRICULUM VITAE

Andrea Albert Stefanus (1984) obtained his Bachelor of Laws from Parahyangan Catholic University, Indonesia (2007). He then obtained his Master of Laws in International Law from Transnational Law and Business University, South Korea (2009). Andrea conducted his doctoral research at the Willem Pompe Institute, Utrecht University, the Netherlands (2017-2021) with a scholarship from Indonesia Endowment Fund for Education (*Lembaga Pengelola Dana Pendidikan/LPDP*). During his PhD, he was active among others as the Vice Secretary-General of the Indonesian Students Association in the Netherlands (*Perhimpunan Pelajar Indonesia di Belanda/PPI Belanda*) (2017-2018) and a member of Indonesian Overseas Election Committee (Panitia Pemilihan Luar Negeri/PPLN) in the Netherlands (2018-2019). Andrea has been working as a diplomat at the Ministry of Foreign Affairs of the Republic of Indonesia since 2010 until now.