

# The roles of nongovernmental actors in improving compliance with fisheries regulations

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Nongovernmental actors play several important roles in promoting compliance with international fisheries regulations. These roles consist on the one hand in monitoring, investigating and reporting occurrences of illegal, unreported and unregulated fishing, and, on the other hand, in direct actions in coastal States' exclusive economic zones and on the high seas. Some of these actions, in particular data gathering and sharing, fall squarely within the existing regime of the law of the sea. Other actions, such as some types of direct actions on the high seas, may be legally more questionable. In any case, the nongovernmental nature of the actors raises issues of efficiency, accountability, authority and allocation of responsibility. Notwithstanding expected resistance to reform from States and non-State actors, there is a clear need to adapt and clarify the legal regime, at the risk otherwise of undermining the rule of law.

## 1 | INTRODUCTION

The status of marine living resources is extremely concerning in terms of environmental conservation, with most fish stocks being fully exploited or suffering from over-exploitation.<sup>1</sup> This is also a human development problem, since fish products represent a crucial source of protein for the world's population<sup>2</sup> and are, for developing countries, the most valuable agricultural commodity to be traded internationally.<sup>3</sup> Overfishing, caused by excessive – and yet often disregarded – quotas, is aggravated by illegal, unreported and unregulated (IUU) fishing.<sup>4</sup> Adequate conservation and management measures (CMMs) are necessary for the long-term sustainability of such marine resources, but they are insufficient if vessels and States do not respect their obligations.

States play different roles in relation to fishing activities and have, accordingly, different duties. Central to the regulatory regime is that the flag State must control its vessels and ensure that they respect the applicable CMMs. The obligation is provided for in the United Nations Convention on the Law of the Sea (UNCLOS) in Article 94<sup>5</sup> and further elaborated, in relation to the fisheries sector, in other treaties.<sup>6</sup> Flag State jurisdiction is necessary to ensure that, at all times, a State has jurisdiction over vessels, hence ensuring order on the high seas,<sup>7</sup> which is the area beyond the national jurisdiction of any State.<sup>8</sup> This obligation of due diligence does not imply that a flag State will be held responsible for each violation of

<sup>1</sup>Over 33 percent of stocks are overfished, nearly 60 percent are fully fished and only about 7 percent currently remain underfished. Food and Agriculture Organization of the United Nations (FAO), 'The State of the World Fisheries and Aquaculture' (FAO 2018) 6.

<sup>2</sup>ibid 4.

<sup>3</sup>T Bostock and S Walmsley, 'Enough to Eat? Fisheries and Food Security' in R Bourne and M Collins (eds), *From Hook to Plate: The State of Marine Fisheries – A Commonwealth Perspective* (Commonwealth Foundation 2009) 105, 107; see also FAO, 'The State of the World Fisheries and Aquaculture' (FAO 2016) 7.

<sup>4</sup>UNGA 'Sustainable Fisheries Resolution of 7 December 2016' UN Doc A/RES/71/123 (13 February 2017) preamble.

<sup>5</sup>United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

<sup>6</sup>Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered into force 24 April 2003) 2221 UNTS 120 (Compliance Agreement); 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 into force 11 December 2001) 2167 UNTS 88 (UNFSA). However, these treaties are not ratified as widely as UNCLOS (there were 42 parties to the Compliance Agreement and 89 parties to UNFSA as of March 2019).

<sup>7</sup>See Articles Concerning the Law of the Sea with Commentaries in International Law Commission, 'Yearbook of The International Law Commission, Vol. II' UN Doc A/CN.4/SER.A/1956/Add.1 (1956) 265, 279.

<sup>8</sup>UNCLOS (n 5) art 86.

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applicable rules by one of its vessels, but that it must 'take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag'.<sup>9</sup> Coastal States must ensure that the resources under their jurisdictions are not over-exploited<sup>10</sup> and grant access to other States to any surplus in their exclusive economic zones (EEZs).<sup>11</sup> The EEZ is the area beyond the territorial sea and up to 200 nautical miles from a country's coast<sup>12</sup> where the coastal State enjoys sovereign rights for the purpose of exploring and exploiting natural resources.<sup>13</sup> It can enforce its laws and regulations related to fishing towards vessels flying other flags.<sup>14</sup> In that maritime zone, it must nevertheless give due regard to other States' rights when exercising its rights.<sup>15</sup> Both coastal States – when dealing with fish stocks not exclusively located in their waters – and the flag States of vessels active on the high seas are under an obligation to cooperate in the conservation of marine living resources.<sup>16</sup> UNCLOS does not state which form such cooperation should take, but States have, in practice, generally entered into agreements setting up regional fishery bodies. Some of them, the regional fisheries management organizations (RFMOs), adopt binding CMMs. The United Nations Fish Stocks Agreement (UNFSA) recognizes RFMOs as the vehicle for cooperative management of straddling and highly migratory stocks.<sup>17</sup> As to States whose ports are used to support fishing activities, they are not under any general obligation under UNCLOS, but parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) must deny entry into port to vessels involved in IUU fishing, or inspect vessels entering their ports and, if they determine that relevant CMMs were violated, deny the use of port services to such vessels.<sup>18</sup>

The traditional regime regulating fisheries has difficulty in ensuring high levels of compliance with the applicable rules. Many States indeed are not willing or able to respect international fisheries law. This leads to a double issue of compliance, where vessels may be fishing in breach of the applicable CMMs and States may also be failing their international obligations, as flag States, to control such vessels or, as coastal States, to sustainably manage the resources

under their jurisdiction. In the absence of a well-established and intergovernmental compliance mechanism to verify, independently, whether States are respecting their obligations, nongovernmental actors have important roles to play to ensure compliance and accountability.

'Nongovernmental actors' is a label which can be attached to a variety of groups, with the only requirement being that they do not fall within the organizational structure of a State. This category can encompass nongovernmental organizations (NGOs), companies or still looser networks and partnerships. The focus of the present article is on not-for-profit actors; consequently, the role of the fishing industry will not be examined. The present article also limits itself to nongovernmental actors with a transnational aspect, hence leaving aside those which act purely within the boundaries of one State.

This article analyses two types of activities undertaken by nongovernmental actors in promoting compliance with the relevant measures and obligations under the international law of fisheries. It presents the involvement of nongovernmental actors in information gathering and sharing, and then considers direct actions in EEZs and on the high seas. For both types of activities, this article examines the nature of nongovernmental contribution and gives examples, discusses potential issues in having non-State actors involved and proposes suggestions to improve the situation. This article builds on earlier scholarship on the role of nongovernmental actors in environmental law and the law of the sea in general,<sup>19</sup> as well as in the field of fisheries more particularly.<sup>20</sup>

## 2 | INFORMATION GATHERING AND SHARING

### 2.1 | Information gathering

An important role of nongovernmental actors in the area of compliance is related to monitoring, control and surveillance. Nongovernmental actors regularly identify fishing vessels involved

<sup>9</sup>Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC) (Advisory Opinion) [2015] ITLOS Rep 4 para 129. On the duty of due diligence, see also D French (chair) and T Stephens (rapporteur), *First Report of the ILA Study Group on Due Diligence in International Law* (7 March 2014) 29–31.

<sup>10</sup>UNCLOS (n 5) art 61(2). Although no similar article is to be found for the territorial sea, the coastal State is under a general obligation to protect the marine environment in all the areas it controls (art 192), an obligation which includes 'the conservation of the living resources of the sea' (*Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures) [1999] ITLOS Rep 280 para 70).

<sup>11</sup>UNCLOS (n 5) art 62(2).

<sup>12</sup>ibid art 57.

<sup>13</sup>ibid art 56(1)(a).

<sup>14</sup>ibid art 73.

<sup>15</sup>ibid art 56(2); see also art 58.

<sup>16</sup>ibid arts 63–64, 118.

<sup>17</sup>UNFSA (n 6) art 8.

<sup>18</sup>Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, entered into force 5 June 2016) <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/O37t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/O37t-e.pdf)> (PSMA) arts 9 and 11.

<sup>19</sup>See, e.g., KM Crosman, 'The Roles of Non-governmental Organizations in Marine Conservation' (Master's Thesis, University of Michigan, August 2013) <[https://deepblue.lib.umich.edu/bitstream/handle/2027.42/99557/Crosman\\_Roles\\_of\\_NGOs\\_in\\_Marine\\_Conservation\\_Final.pdf?sequence=1](https://deepblue.lib.umich.edu/bitstream/handle/2027.42/99557/Crosman_Roles_of_NGOs_in_Marine_Conservation_Final.pdf?sequence=1)>; B Gemmill and A Bamidele-Izu, 'The Role of NGOs and Civil Society in Global Environmental Governance' in DC Esty and MH Ivanova (eds), *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry and Environmental Studies 2002) 1; GJ Hewison, 'The Role of Environmental Nongovernmental Organizations in Ocean Governance' (1996) 12 *Ocean Yearbook* 32, 40–48; R Parmentier, 'Role and Impact of NGOs in Global Environmental Governance' (2012) 26 *Ocean Yearbook* 209; F Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities' (2001) 10 *Review of European, Comparative and International Environmental Law* 149, 153–161.

<sup>20</sup>See, e.g., M Costantini, 'The Role of Environmental Non-governmental Organizations in Fisheries: Scientific Knowledge, its Value in Fisheries, and its Underestimation in Debates Aimed at Solving Contingent Issues' (2012) 11 *Journal of Science Communication* 1; M Eilstrup-Sangiovanni and TN Phelps Bondaroff, 'From Advocacy to Confrontation: Direct Enforcement by Environmental NGOs' (2014) 58 *International Studies Quarterly* 348; V Schatz, 'Marine Fisheries Law Enforcement Partnerships in Waters under National Jurisdiction: The Legal Framework for Inter-State Cooperation and Public-Private Partnerships with Non-governmental Organizations and Private Security Companies' (2018) 32 *Ocean Yearbook* 329.

in illegal activities through monitoring-at-sea programmes, desk studies or a combination of both. In terms of monitoring at sea, for example, the Environmental Justice Foundation patrolled, on its own, the waters of Sierra Leone between 2010 and 2012.<sup>21</sup> Greenpeace did the same in 2017 in Mauritania.<sup>22</sup> The missions of these NGO boats were limited to taking pictures and making observations, so this is different from the inspections at sea that will be discussed in Section 3 on direct actions in EEZs. Such monitoring, whether it is undertaken by States or non-State actors, only results in a small proportion of illegal acts at sea being spotted, as it is dependent on being in the right place at the right time.

Another source of information may help address this issue: desk studies are increasingly made possible by the use of automatic identification system (AIS) data for monitoring purposes. AIS is a tracking system originally intended to avoid collisions at sea.<sup>23</sup> Raw data (i.e. a vessel's latitude, longitude, speed, direction and identity) can serve to detect illegal behaviour at sea, either in real time or after the fact. Without having to rely on propriety data such as vessel monitoring system (VMS), States and non-State actors can verify where vessels are, and, depending on which CMMs are applicable in these areas,<sup>24</sup> whether their actions are legal. Large-scale data analysis is also possible, through the use of algorithms that automatically identify fishing (as opposed to non-fishing) vessels, determine the likelihood that certain activities, such as trans-shipment, are taking place and then highlight the instances that require further investigation.

Nongovernmental actors have been at the forefront of this major paradigm shift in technology and monitoring. In particular, Global Fishing Watch is an initiative founded by Oceana, Skytruth and Google, with the platform launched in 2015 and made widely available to the public in 2018.<sup>25</sup> Other partnerships involving NGOs and relying on AIS include Project Eyes on the Sea, put together by Pew and the Satellite Applications Catapult;<sup>26</sup> and the Smart Fishing Initiative, put together by WWF and Navama. This last partnership, launched in 2012, was in fact the first AIS-based initiative for fisheries monitoring.<sup>27</sup>

Having identified occurrences of non-compliance through monitoring at sea or desk-based studies, nongovernmental actors often

publicize the information through networks or on the Internet. For example, in the past Greenpeace has published reports about IUU fishing occurrences, with its findings based on at sea surveillance.<sup>28</sup> Recently, Oceana released a report, using raw AIS data, on potential IUU fishing in the Mediterranean Sea. That report provided information on the questionable fishing activities of 20 Italian vessels in areas where they should not have been and/or with gear not allowed under the applicable rules of the RFMO.<sup>29</sup> The Ocean Friends Against Driftnets used Global Fishing Watch to monitor fishing activity in the North Pacific and identified vessels probably using driftnets, which are not legal.<sup>30</sup>

Most reports focus on issues related to specific vessels, but some also show patterns that can be used – or sometimes explicitly are used – to question a flag State's respect of its obligations.<sup>31</sup> However, one must note a certain reluctance among most NGOs to directly question a State's track record.<sup>32</sup> This is probably a calculated decision, since the backlash from States may be counterproductive.<sup>33</sup> In any case, this restraint impairs real accountability.

The aim of NGOs' investigative work is that the information publicized on the Internet or circulated through the NGO's network will put pressure on the actors involved to change their behaviour, serve to name and shame, or still be picked up by governmental authorities for formal inspections or judicial procedures. Another more general purpose is to encourage a change in the legal and management regimes, using non-compliance occurrences as examples of the issues to be rectified,<sup>34</sup> rather than simply to address individual violations.

There are several issues raised by the use of AIS as a fishing monitoring tool. Many of them are not specifically due to the fact that nongovernmental actors are leading this technological advance.

<sup>21</sup>Environmental Justice Foundation (EJF), 'Pirate Fishing Exposed: The Fight Against Illegal Fishing in West Africa and the EU' (2012) <<https://ejfoundation.org/resources/downloads/Pirate-Fishing-Exposed.pdf>> 9–10.

<sup>22</sup>Greenpeace, 'The Cost of Destruction: Report from Greenpeace Ship Tour of West African Fisheries 2017' (2017) <<https://www.greenpeace.org/africa/en/publications/531/the-cost-of-ocean-destruction/>> 9; Greenpeace, 'Hope in West Africa Ship Tour, 2017: Summary of Findings' (2017) (on file with author).

<sup>23</sup>Stop Illegal Fishing, 'The Potential Use of "Automatic Identification Systems – AIS" as a Fisheries Monitoring Tool' (2018) 4.

<sup>24</sup>States and non-State actors wanting to verify the legality of vessels' actions may use the FAOLEX database (<<http://www.fao.org/faolex/en/>>) or verify directly the relevant RFMOs' websites and, for domestic measures, contact relevant coastal States.

<sup>25</sup><<http://globalfishingwatch.org/>>.

<sup>26</sup>Pew Charitable Trusts, 'Project Eyes on the Seas' (March 2015) <[http://www.pewtrusts.org/-/media/assets/2015/03/eyes-on-the-seas-brief\\_web.pdf](http://www.pewtrusts.org/-/media/assets/2015/03/eyes-on-the-seas-brief_web.pdf)>.

<sup>27</sup>WWF, 'Transparency at Sea' <[https://www.wwf.panda.org/our\\_work/oceans/smart\\_fishing/how\\_we\\_do\\_this/good\\_governance2/transparent\\_seas\\_/satellite\\_tracking\\_via\\_ais\\_/](https://www.wwf.panda.org/our_work/oceans/smart_fishing/how_we_do_this/good_governance2/transparent_seas_/satellite_tracking_via_ais_/)>; WWF, 'WWF: New Approach to Fight Illegal, Unreported and Unregulated Fishing' (26 September 2012) <<http://www.panda.org/?206301/WWF-new-approach-to-fight-illegal-unreported-and-unregulated-fishing>>.

<sup>28</sup>Greenpeace, 'Case Study on IUU Fishing #3: Caught, RED-handed: Daylight Robbery on the High Seas' <<https://www.greenpeace.org/russia/PageFiles/142610/caught-red-handed.pdf>>.

<sup>29</sup>General Fisheries Commission for the Mediterranean (GFCM), 'Building a GFCM Framework to Combat IUU Fishing: Oceana Case Studies and Recommendations' (July 2018) <<https://eu.oceana.org/en/publications/reports/building-gfcm-frame-work-combat-iuu-fishing>>.

<sup>30</sup>Ocean Friends Against Driftnets, 'Report of Suspected IUU Driftnet Fleet in the North Pacific, 2017', Western and Central Pacific Fisheries Commission (WCPFC) 14-2017-OP15 (5 December 2017).

<sup>31</sup>Implicitly, see, e.g., GFCM (n 29); explicitly, see, e.g., EJF (n 21) 30.

<sup>32</sup>Exceptions are mainly EJF and ClientEarth, but generally not on issues related to flag State control of their vessels regarding sustainability. Thailand was called out for the human trafficking aspect of its fisheries; see EJF, 'Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans' (February 2015) <<https://ejfoundation.org/reports/pirates-and-slaves-how-overfishing-in-thailand-fuels-human-trafficking-and-the-plundering-of-our-oceans>>. Several EU countries were also criticized for their failure to respect the Control Regulation; see ClientEarth, 'Slipping through the Net: The Control and Enforcement of Fisheries in France, Ireland, the Netherlands, Poland, Spain and the UK (England)' (September 2017) <<https://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-france-ireland-the-netherlands-poland-spain-and-the-uk-england/>>.

<sup>33</sup>For example, the Greenpeace report 'Misery at Sea' triggered a very negative response from the Taiwanese Fisheries Agency; see JY Chiao Lee, S Croft and T McKinnel, 'Misery at Sea' (Greenpeace 2018) <<https://drive.google.com/file/d/1t34Yxi0dXAFsdu-41Vk6PcbiyGvPHbA/view>>; FiskerForum, 'Taiwan Brands Greenpeace Report a Smear Campaign' (30 May 2018) <<http://www.fiskerforum.dk/en/news/b/taiwan-brands-greenpeace-report-a-smear-campaign>>.

<sup>34</sup>See, e.g., EJF (n 21) 32–34; GFCM (n 29) 12.

These issues remain worth mentioning since small changes could actually make a large difference. First, there is a problem of coverage, which is far from universal. Beyond regulations from the International Maritime Organization (IMO) for vessels above 300 gross tons<sup>35</sup> and some national legislation,<sup>36</sup> it is not compulsory for many fishing vessels to use AIS transponders. Moreover, even when there is an obligation for the fishing vessel to transmit AIS data, turning it off is generally considered a minor offence.<sup>37</sup> It remains to be seen whether the widespread use of AIS as a monitoring tool will create distorted incentives for vessels that were voluntarily using AIS to stop doing so or to turn the data off when they want to go invisible, with the risk of collision which it implies. Cases of potential AIS avoidance have recently been identified by Oceana.<sup>38</sup>

To address this issue, Global Fishing Watch is attempting to detect some non-transmitting vessels by monitoring fishing vessels active at night, which are brightly lit and hence visible from space.<sup>39</sup> Additionally, two simple steps could be taken to make best use of AIS data in the fisheries field. First, States could pass legislation to make it compulsory for all fishing vessels – or those above a certain size – flying their flag to transmit AIS data. Through RFMOs, States could also put a similar requirement on vessels fishing in the areas that the RFMOs regulate. While these steps would represent an improvement for AIS coverage, they would not lead to a full coverage as the requirement would still be applicable only to the relevant flag States and members or cooperating States of RFMOs. By contrast, were the IMO to require that fishing vessels above a certain size (but smaller than 300 gross tons) install and use AIS transponders, the change would be globally applicable. Second, under the domestic law of States requiring their fishing vessels to transmit AIS data and/or under relevant RFMO rules, turning the transponder off should become a serious offence punished by more than a low fine. Making the violation of the AIS-related obligation as serious as breaches of the substantive rules which AIS data may reveal is necessary to avoid the creation of incentives to go invisible. These two legal changes would ensure a more comprehensive coverage of vessels and avoid incentives to go off-radar rather than being found in violation of CMMs.

<sup>35</sup>According to the International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS) Chapter V, regulation 19, para 2.4 (as revised), vessels above 300 gross tons are obliged, by IMO regulations, to have such system on board; see also IMO, 'Guidelines for the Installation of a Shipborne Automatic Identification System (AIS)' SN/Circ.227 (6 January 2003); IMO, 'AIS Transponders' <<http://www.imo.org/en/OurWork/Safety/Navigation/Pages/AIS.aspx>>.

<sup>36</sup>Some flag States require their vessels, fishing vessels included, to do so. For example, the EU puts such a requirement on vessels over 15 metres; see Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [2009] OJ L343/1 art 10. For other States, see Stop Illegal Fishing (n 23) 7.

<sup>37</sup>CFFA et al, 'Joint NGO Priorities on the Revision of the EU Fisheries Control System' (June 2018) <<http://our.fish/wp-content/uploads/2018/06/2018-06-18-joint-ngo-priorities-on-the-revision-of-the-eu-fisheries-control-system-coll-en.pdf>> 4.

<sup>38</sup>L Malarky and B Lowell, 'Avoiding Detection: Global Case Studies of Possible AIS Avoidance' (March 2018) <<https://oceana.org/publications/reports/avoiding-detection-global-case-studies-possible-ais-avoidance>>.

<sup>39</sup>Global Fishing Watch, 'Our Map' <<http://globalfishingwatch.org/our-map/>>.

A second issue worth noting is that AIS data may not be sufficient as sole evidentiary proof in court. Indeed, it tracks fishing vessels' movement, but it cannot actually prove what they were doing. It can also be imprecise and is susceptible to being tampered with, with vessel identification and location changed.<sup>40</sup> Moreover, AIS data has to be analysed to be useful, hence relying on human interpretation and/or algorithms, either of which can lead to incorrect results. Being identified as a vessel suspected of involvement in illegal activities may have important reputational repercussions, and possibly financial ones,<sup>41</sup> well before a formal legal determination is made. If nongovernmental actors are responsible for making such allegations, vessel owners wanting redress may have to consider suing for defamation, with all the associated costs and complex legal questions of such a procedure, including the determination of the applicable law, the choice of legal forum or the burden of evidence. It is worth noting that most NGOs are careful in their choice of terms, more often than not refraining from explicitly stating that a vessel is engaged in IUU fishing<sup>42</sup> or avoiding to provide specific vessels' names.<sup>43</sup>

While AIS-based data is imperfect, it still serves several purposes. It can be, and has been, the basis of out-of-court settlements.<sup>44</sup> It can also be used as evidence together with other pieces of information, for example VMS, logbooks, observer reports, or the results of inspections at sea or in port.<sup>45</sup> Hence, it should as much as possible be paired with other sources of information, as is done by both Global Fishing Watch and Project Eyes on the Sea. In any case, AIS-based data can make inspections at sea or in port more efficient, through its near real-time function: States may use this data to identify where suspicious vessels are, in order to send government vessels for inspections, or to improve the screening of vessels wishing to enter into their ports.<sup>46</sup>

A third issue is related to the fact that AIS was originally meant for safety at sea. Vessel operators were not aware that this would become a tracking tool. One could argue that those who do nothing wrong should not fear transparency. However, there are also genuine commercial interests which could dictate caution as to having one's location too clearly displayed for the whole world – and in particular competitors – to see. Additionally, having all this data in the open or in the hands of nongovernmental actors could raise issues of legitimacy. There is currently some

<sup>40</sup>Stop Illegal Fishing (n 23) 11.

<sup>41</sup>See, e.g., I López, Chair of the Long-distance Fleet Advisory Council, 'Letter of 5 December 2017' <<http://ldac.eu/download-doc/182187>>. Reputational damage could lead to financial damage, for example if a vessel, identified as potentially involved in IUU fishing, is denied entry into port or even simply subjected to more frequent inspections in port, which cause delays and hence additional operational costs.

<sup>42</sup>See, e.g., GFCM (n 29) 8 ('potentially operating in the FRA without being on the authorized vessels list' or 'apparent fishing activities').

<sup>43</sup>See, e.g., Ocean Friends Against Driftnets (n 30).

<sup>44</sup>For example, a fishing vessel active in the Phoenix Island Protected Area, the *Marshall 203*, ended up settling with Kiribati; see Google, 'Oceans of Data: Tracking Illegal Fishing over 1.4 Billion Square Miles' <<https://sustainability.google/projects/fishing-watch/>>.

<sup>45</sup>Stop Illegal Fishing (n 23) 12–13.

<sup>46</sup>*ibid* 13–14.

push-back from vessel owners at the European Union (EU) level, who apparently lobby to remove reference to AIS from the revised Control Regulation as they argue that AIS should not be used for control purposes.<sup>47</sup> While this change may not pass, it shows a level of reluctance from the industry, which is probably linked to the public availability of AIS data on Global Fishing Watch.

The availability and analysis of AIS data are changing the paradigm of 'what happens at sea stays at sea' through increased levels of transparency. For the first time, thanks to an innovative use of technology, it is possible to globally identify potential violations at sea, instead of relying on chance encounters or addressing only the most obvious occurrences of illegal fishing. However, one can wonder both about the adequacy – in terms of accountability and push-back from the industry – of nongovernmental actors leading the way with large-scale analysis of AIS data for monitoring of fishing activities and about the lack of initiative of States in that respect.

## 2.2 | Sharing data with States and/or RFMOs

In addition to putting information in the open, nongovernmental actors often directly inform the relevant authorities, usually the flag and coastal States involved as well as the relevant RFMOs. For sanctions to be applied, nongovernmental actors must indeed refer cases to entities with governmental powers. There exist different types of relationships between nongovernmental actors and States or international organizations, through which the former provide relevant data to the latter.

First, nongovernmental actors may share data with the competent authorities, without being asked to do so within a formal partnership, with or without otherwise publicizing it. On the one hand, many non-State entities notify governments<sup>48</sup> and RFMOs<sup>49</sup> of identified cases of suspected IUU fishing, while also making such information publicly available. In general, information is transmitted to the relevant flag State, RFMO and sometimes also to market States, which may apply sanctions against third States.<sup>50</sup> On the other hand, Project Eyes on the Sea, which analyses various streams of data, including AIS, to detect illegal fishing activity, solely

provides its findings to governments.<sup>51</sup> It gives official enforcement personnel 'a "case package" with evidence for authorities to review', without publicizing the data.<sup>52</sup> There most certainly are many data-sharing occurrences between nongovernmental actors and governmental services which remain outside of the public domain, in particular since naming and shaming is usually a last resort strategy. However, the secret nature of such contacts makes them difficult to report on.

Second, there are official partnerships between nongovernmental actors and governmental entities. For example, FISH-i Africa is a network of law enforcement officials from eight countries in East Africa that was created and is supported by an NGO, Stop Illegal Fishing, and is funded by Pew Charitable Trusts.<sup>53</sup> Through information and intelligence sharing, AIS analysis and actual inspections, this network has successfully worked together on many investigations since it was created in 2012.<sup>54</sup> Also, information sharing goes both ways: Indonesia and recently Peru have shared their VMS data with Global Fishing Watch to be publicized, hence strengthening the robustness of the initiative.<sup>55</sup> In return, Global Fishing Watch provides those States with analyses of their fisheries and trains the relevant personnel to manage the data within the system.<sup>56</sup> The South Pacific RFMO (SPRFMO) considered using AIS data for surveillance purposes, potentially through a collaboration with Project Eyes on the Sea, but, with some members expressing concerns (the nature of which was unspecified in the report), the proposal was not successful.<sup>57</sup>

Outside of these specific partnerships, there are some problems with the current reporting system. This is in particular due to the fact that nongovernmental actors are not on an equal footing with States but are the source of large amounts of relevant information regarding vessels' behaviour. It has been suggested that States prefer keeping NGOs' role informal to avoid building a confrontational culture in compliance committees and to avoid an overload of work for these bodies.<sup>58</sup>

A first issue which arises out of the provision of data to (inter)governmental institutions lies in the rarity of formal conduits through which nongovernmental actors can inform States or RFMOs of their findings. It is true that NGOs can participate as observers in RFMO meetings and usually circulate documents, which may include evidence

<sup>47</sup>North Western Waters Advisory Council (NWWAC), 'Opinion: Specific Issues Relating to the Implementation of the Control Regulation (EU 1224/2009)' (7 April 2017) <[http://www.nwwac.org/\\_fileupload/Opinions%20and%20Advice/Year%2012/FINAL\\_NWWAC\\_Opinion\\_APR\\_2017\\_EN.pdf](http://www.nwwac.org/_fileupload/Opinions%20and%20Advice/Year%2012/FINAL_NWWAC_Opinion_APR_2017_EN.pdf)>.

<sup>48</sup>See for example Greenpeace, which shared its findings with Denmark; EU Reporter Correspondent, 'Danish Fishing Vessels from #Gilleleje Caught Trawling in the Sound' (20 March 2018) <<https://www.eureporter.co/frontpage/2018/03/20/danish-fishing-vessels-from-gilleleje-caught-trawling-in-the-sound/>>.

<sup>49</sup>See for example Oceana, which shared its findings with the GFCM; 'Oceana uncovers dozens of illegal fishing in protected areas in the Mediterranean' (12 July 2018) <<https://eu.oceana.org/en/press-center/press-releases/oceana-uncovers-dozens-cases-illegal-fishing-protected-areas>>. Oceans Friends Against Driftnets (n 30) shared its findings with WCPFC.

<sup>50</sup>For example, EJF has provided information to the European Commission on several States which have ended up pre-identified or identified as not cooperating in the fight against IUU; EJF, 'Driving Unprecedented Action to Tackle Illegal Fishing' <<https://ejf.org/ndation.org/what-we-do/oceans/ending-pirate-fishing>>.

<sup>51</sup>Pew Charitable Trusts (n 26).

<sup>52</sup>ibid.

<sup>53</sup>FISH-i Africa, 'Our Partners' <<https://fish-i-africa.org/about/our-partners/>>.

<sup>54</sup>Stop Illegal Fishing, 'FISH-i Africa: Issues/Investigations/Impacts' (2016) <[https://fish-i-africa.org/wp-content/uploads/2016/07/FISH-i\\_Impacts\\_report\\_second\\_edit\\_on\\_20022017\\_COMPLETE\\_WEB-1.pdf](https://fish-i-africa.org/wp-content/uploads/2016/07/FISH-i_Impacts_report_second_edit_on_20022017_COMPLETE_WEB-1.pdf)>.

<sup>55</sup>Global Fishing Watch, 'Indonesia VMS' <<http://globalfishingwatch.org/initiatives/indonesia-vms/>>.

<sup>56</sup>ibid.

<sup>57</sup>South Pacific Regional Fisheries Management Organisation (SPRFMO), 'Using AIS Data for Surveillance Purposes in the SPRFMO Area' CTC-02-25 (30–31 January 2015); SPRFMO, 'Report of the 2nd Compliance & Technical Committee (CTC) Meeting' (30–31 January 2015) para 7.2.

<sup>58</sup>C Pitea, 'The Legal Status of NGOs in Environmental Non-compliance Procedures: An Assessment of Law and Practice' in PM Dupuy and L Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2008) 181, 183.

of violations.<sup>59</sup> NGOs may also provide data through member or cooperating States. Moreover, information to identify IUU vessels, in several RFMOs, is based on data from States, international organizations and 'other documented information ... collected in fishing grounds [that is suitably documented]'.<sup>60</sup> This open formulation implies that information from nongovernmental sources may serve as trigger for non-compliance actions. However, RFMOs usually do not give NGOs an explicit role in compliance mechanisms, such as suggesting the inclusion of a vessel into an IUU list, or providing information on a State's behaviour.<sup>61</sup> While there are occurrences of explicit acknowledgment of the nongovernmental source of information on potential violations,<sup>62</sup> most States appear to be wary of explicitly acknowledging NGOs' role and contribution and hence may prefer to rely on generic statements to justify findings of non-compliance.<sup>63</sup> When forwarding information to States, nongovernmental actors' reporting is even more based on informal conduits.

The reliance on informal processes leads to some governance problems. It creates legal uncertainty as to nongovernmental actors' rights and powers,<sup>64</sup> and potentially decreases the actual impact of nongovernmental actors' findings. These groups invest resources to heighten the risk that entities operating in violation of their obligations get caught, and to provide States with useful evidence, but such information may never reach the intended recipient or be acted upon. If one considers the amount of information coming from nongovernmental actors, which are investigating not only in parallel to States but also sometimes instead of States that choose not to monitor their fleets, this situation is lacking in efficiency. The way forward would be to grant a formal role to NGOs in regional compliance procedures such as exist under the International Commission for the Conservation of Atlantic Tuna (ICCAT) and SPRFMO. ICCAT, in its Recommendation to Establish a Process for the Review and Reporting of Compliance Information, provides that:

<sup>59</sup>C Wold and L Mering, 'Transparency and Observer Participation in International Agreements' (14 November 2016) <<https://www.wcpfc.int/node/28533>> 13–14. See, e.g., Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR), 'Rules of Procedure of the Commission' <<https://www.ccamlr.org/en/document/publications/rules-procedure-commission>> rule 35; Northwest Atlantic Fisheries Organization (NAFO), 'Rules of Procedure for Observers to NAFO Meetings (Commission and Scientific Council)' (2018) <<https://www.nafo.int/Portals/0/PDFs/key-publications/Rules-Finance-2018.pdf>> Rule 6(d).

<sup>60</sup>See, e.g., CCAMLR, 'Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures' CMM 10-06 (2016) para 2; Inter-American Tropical Tuna Commission (IATTC), 'Amendment to Resolution C-05-07 on Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean' Resolution C-15-01 (2015) para 2; SPRFMO, 'Conservation and Management Measure Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the SPRFMO Convention Area' CMM04-2017 (2017) para 2.

<sup>61</sup>See below for the explicit role of NGOs in ICCAT and SPRFMO.

<sup>62</sup>GFCM, 'Report of the Twelfth Session of the Compliance Committee' (5–6 July 2018) paras 30–31.

<sup>63</sup>In CCAMLR, 'Report of the Meeting of the Standing Committee on Implementation and Compliance (SCIC)' (22–26 October 2018), compare the formulation in paras 76, 82 and 83, where the source of the report is not named, to para 73 where the governmental source (New Zealand patrol) is explicitly mentioned (report annexed to CCAMLR, 'Report of the Thirty-seventh Meeting of the Commission' (22 October–2 November 2018) Annex 6).

<sup>64</sup>Pitea (n 58) 188, 192–193.

*Non-governmental organizations may submit reports on non-compliance with ICCAT conservation and management measures to the Secretariat at least 120 days before the annual meeting for circulation to the CPCs [Contracting Parties, Cooperating non-Contracting Parties, Entities or Fishing Entities]. Organizations submitting reports may request to present such reports to the Compliance Committee and the Permanent Working Group. In adopting the Agendas for meetings of the respective bodies CPCs shall determine if such presentations can be accommodated.*<sup>65</sup>

Within SPRFMO, the Conservation and Management Measure for the Establishment of a Compliance and Monitoring Scheme in the SPRFMO Convention Area provides that:

*At its annual meeting, the CTC [Compliance and Technical Committee] shall consider the Draft Compliance Report, and may take into account any additional information provided during the meeting of the CTC by Members, CNCPs [Cooperating non-Contracting Parties] and other observers, including non-governmental organisations and other organisations concerned with matters relevant to the implementation of the Convention.*<sup>66</sup>

Hence, NGOs can be the source of non-compliance information and have a formal role at the stage of reviewing the draft compliance report. These types of provisions are particularly noteworthy in that they concern compliance procedures against member and cooperating non-contracting party States instead of vessels.<sup>67</sup> Interestingly, however, neither of these RFMOs gives NGOs an explicit right to submit information regarding the listing of vessels on the IUU lists. In that respect, it is worth noting that the EU explicitly envisages that the European Commission or another entrusted body will 'examine suitably documented information regarding sighted fishing vessels submitted by citizens, civil society organisations, including environmental organisations, as well as representatives of fisheries or fish trade stakeholder interests'.<sup>68</sup>

<sup>65</sup>ICCAT, 'Recommendation to Establish a Process for the Review and Reporting of Compliance Information' CMM08-09 (2009) para 5.

<sup>66</sup>SPRFMO, 'Conservation and Management Measure for the Establishment of a Compliance and Monitoring Scheme in the SPRFMO Convention Area' CMM 10-2018 (2018) para 11.

<sup>67</sup>ICCAT and SPRFMO also have CMMs in place in relation to lists of IUU vessels, which include (sometimes exclusively) vessels of non-members. However, these CMMs do not mention NGOs as having a formal role in the process. See ICCAT, 'Recommendation by ICCAT Further Amending Recommendation 09-10 Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area' CMM 11-18 (2012); SPRFMO, 'Conservation and Management Measure Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the SPRFMO Convention Area' CMM 04-2017 (2017).

<sup>68</sup>Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L286/1 art 49(2).

A second issue is that, under the international law of fisheries, most States that have received information about alleged violations have no explicit obligation to report back to nongovernmental actors, a silence which is in contrast to the requirement to provide feedback when the information comes from other States. Indeed, under UNCLOS, as was interpreted by the International Tribunal for the Law of the Sea (ITLOS), 'the flag State is under the obligation to inform the reporting State about the action taken'.<sup>69</sup> Under other treaties related to fisheries, it is also provided that when a flag State has been informed of a potential violation by one of its vessels through the channel of another State, it must investigate and report back: according to the UNFSA for example, '[i]nformation on the progress and outcome of the investigations shall be provided to all States *having an interest in, or affected by, the alleged violation*'.<sup>70</sup> Also, in a State-to-State relationship, a level of equality and cooperation may be expected, with channels of communication in place to request information. It seems that some States do report back to nongovernmental actors that share their findings, but it remains at their discretion. Even in the partnership between Greenpeace and West African countries, in the waters of which the NGO vessel was active with State officials on board, it proved difficult for this NGO to get follow-up information on what happened to the arrested vessels.<sup>71</sup> While States are obliged to investigate reports of violations wherever they originate from and even if the violation has taken place in another State's EEZ,<sup>72</sup> the absence of an obligation to provide feedback to the reports' source is a major problem of accountability, especially when there may be a systemic issue at play. It must be noted that many RFMOs demand that States report their actions *vis-à-vis* alleged violations by their vessels to the relevant RFMOs' Commissions.<sup>73</sup> This may provide nongovernmental actors with sufficient information, as made available in meetings that they

attend as observers, to determine whether an investigation has taken place.

To address this shortcoming, States should be encouraged to create official complaint procedures which include an obligation to answer to the complainant at the national level and/or through RFMOs. There exists a procedure to submit a complaint to the European Commission for alleged violations of EU law by Member States.<sup>74</sup> Anyone can inform the European Commission of alleged breaches and the Commission will decide whether to open a formal infringement procedure against the relevant Member State. The European Commission must inform the complainant of its decisions throughout the procedure.<sup>75</sup> Whereas this procedure should be replicated because it creates a formal conduit for private persons to report illegal activities and applies some level of transparency, it is true that there is no obligation in this case for the European Commission to investigate.

Inspiration can also be drawn from other regimes.<sup>76</sup> The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for example, gives a formal role to NGOs and greatly benefits from their contributions. According to this Convention, the Secretariat 'may be assisted by suitable inter-governmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora'.<sup>77</sup> In particular, the Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC) has been a long-term partner, providing analysis of trade data as well as findings on infractions by States to the Secretariat.<sup>78</sup> While it is mainly focused on capacity building, the existence of a Memorandum of Understanding between TRAFFIC and the Secretariat is noteworthy.<sup>79</sup> Beyond this special relationship, CITES provides a framework for the assistance from NGOs, the private sector and other special interest groups, acknowledging their contribution while also clarifying that they are not allowed to 'undertake activities that rest more properly with government agencies, e.g. covert operations or the maintenance of databases on crime and criminals'.<sup>80</sup>

<sup>69</sup>Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC) (n 9) para 118 (about UNCLOS (n 5) art 94(6)).

<sup>70</sup>UNFSA (n 6) art 20(3) (emphasis added). See also PSMA (n 18) art 20(5); Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (adopted 27 June 2003, entered into force 27 August 2010) <[https://www.iattc.org/PDFFiles/IATTC-Instruments/\\_English/Antigua\\_Convention\\_Jun\\_2003.pdf](https://www.iattc.org/PDFFiles/IATTC-Instruments/_English/Antigua_Convention_Jun_2003.pdf)> art 18(7).

<sup>71</sup>Greenpeace, 'Urgent Action Needed to Solve West African Food Security Threat' (21 November 2017) <<https://www.greenpeace.org/international/press-release/11674/urgent-action-needed-to-solve-west-african-food-security-threat/>>. Greenpeace also notified Mauritania, as the coastal State, and Norway, as the flag State, of fishing activities that the NGO could not confirm were legal; Greenpeace, 'Report from Greenpeace Ship Tour of West African Fisheries 2017' (n 22) 10.

<sup>72</sup>UNCLOS (n 5) art 94(6), as interpreted by ITLOS (*Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC)* (n 9) para 118); UNFSA (n 6) art 19(1)(b); PSMA (n 18) art 20(2).

<sup>73</sup>See, e.g., Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (adopted 14 November 2009, entered into force 24 August 2012) <<https://www.sprfmo.int/assets/Basic-Documents/Convention-web-12-Feb-2018.pdf>> art 25(3)(c); Convention on Cooperation in the Northwest Atlantic Fisheries (adopted 24 October 1978, entered into force 1 January 1979) <<https://www.nafo.int/Home/NAFO-Governance>> art XI(2)(d); and NAFO, 'Conservation and Enforcement Measures' (2018) <<https://www.nafo.int/Portals/O/PDFs/COM/2018/CEM-2018-web.pdf>> art 40; Convention for the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 48 art XXIV(2)(a).

<sup>74</sup>European Commission, 'Complaint Form for Breaches of EU Law' <[https://ec.europa.eu/assets/sg/report-a-breach/complaints\\_en/](https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/)>.

<sup>75</sup>Commission (EU), 'EU Law: Better Results through Better Application' (Communication), C(2016) 8600 final, 21 December 2016.

<sup>76</sup>For the role of NGOs in compliance procedures in international environmental law more generally, see Pitea (n 58).

<sup>77</sup>Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES) art XII(1).

<sup>78</sup>TRAFFIC was established in 1976 and is a joint programme of the World Conservation Union and WWF. On this, see, e.g., D Bodansky, 'The Role of Reporting in International Environmental Treaties: Lessons for Human Rights Supervision' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 361, 371; see also 374–375; BK Woodward, 'Non-State Actor Responsibilities: Obligations, Monitoring and Compliance' in N Gal-Or, C Ryngeart and M Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Brill/Nijhoff 2015) 29, 44.

<sup>79</sup>'TRAFFIC–CITES Secretariat MOU' (1999) <<https://www.cites.org/sites/default/files/common/disc/sec/CITES-TRAFFIC.pdf>>.

<sup>80</sup>CITES, 'Compliance and Enforcement' Resolution Conf. 11.3 (Rev. CoP17) Annex 3.

### 3 | DIRECT ACTIONS

In addition to being the provider of information on the basis of which States or international organizations can decide to act, some non-governmental actors take matters into their own hands in terms of enforcement. These actors can be NGOs, which will be examined here, or for-profit companies, such as private security firms.<sup>81</sup> Such activities can take place within the scope of a partnership with the relevant governmental entity or independently of it. Both types of enforcement actions are known to have taken place and raise several questions.

#### 3.1 | Direct actions in EEZs with coastal States

Some NGOs act together with coastal States to patrol these States' EEZs. In practice, this means that the NGOs provide vessels and crew and that, with officials from the coastal State on board, inspections of fishing vessels are undertaken, leading in certain cases to arrests.<sup>82</sup> There are two main examples of these activities, which are only possible for larger NGOs, as having a vessel is costly. Mostly between 2000 and 2012, Sea Shepherd has provided support to several coastal States around the world in the policing of their marine protected areas, marine reserves or national parks, where fishing is generally not allowed.<sup>83</sup> Beyond these preservation-oriented partnerships, quite typical of an organization focused on marine wildlife protection, Sea Shepherd has been active since 2016 in several East and West African countries' coastal waters for general fisheries management purposes – this article will focus on these more recent and less conservationist activities. The operations in Gabon and São Tomé and Príncipe, Tanzania and Liberia led to several dozen inspections and arrests.<sup>84</sup> Greenpeace also has conducted joint surveillance activities with fisheries inspectors in the waters of Guinea Bissau, Guinea, Sierra Leone and Senegal in 2017.<sup>85</sup> During these activities, 37 fishing vessels were boarded and on 13 vessels serious infringements were found.<sup>86</sup>

These are relatively recent developments, and a number of legal questions arise out of this type of partnership. First, one must determine whether the NGOs' vessels are indeed entitled, under international law, to support governmental enforcement at sea.<sup>87</sup> As

presented on Sea Shepherd's website, its vessels are 'civilian off-shore patrol vessel[s]'.<sup>88</sup> UNCLOS remains silent as to whether enforcement activities with regard to fisheries in the EEZ are reserved to governmental vessels. Article 73, which focuses on the EEZ, only states that:

*[t]he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.*<sup>89</sup>

The words of 'such measures, including ... as may be necessary' seems to support an expansive approach to enforcement.<sup>90</sup> General principles of enforcement at sea have been recalled by ITLOS, but in a case which did not involve the issue of nongovernmental actors' involvement:

*[G]eneral international law established clear requirements that must be complied with by all States during enforcement operations, including those carried out pursuant to [Article 73(1) of UNCLOS]. These requirements provide, in particular, that enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State and that their vessels must be clearly marked as being on government service.*<sup>91</sup>

ITLOS hence made clear that duly authorized coastal State officials must carry out the enforcement and that their vessels must be clearly marked. It did not, however, explicitly state whether NGO vessels could be used. As mentioned, Article 73 is silent on this specific question but there is potential for an expansive interpretation. Other UNCLOS provisions related to hot pursuit, the right of visit and the pursuit of pirate ships explicitly authorize vessels other than warships to undertake enforcement activities.<sup>92</sup> The requirements are that such vessels be clearly marked as on government service and duly authorized. Hence, under UNCLOS, non-warship vessels can undertake enforcement in situations that are exceptions to the exclusive flag State jurisdiction on the high seas. It is reasonable to expect that

<sup>81</sup>On this, see Schatz (n 20) 335–339.

<sup>82</sup>Sea Shepherd, 'IUU Campaigns' <<https://seashepherd.org/campaigns/iuu-fishing/iuu-campaigns/>>.

<sup>83</sup>On this, see Schatz (n 20) 341–343. For older actions by Sea Shepherd and Greenpeace related to fisheries (but not always within the framework of a partnership), see G Plant, 'International Law and Direct Action Protests at Sea: Twenty Years On' (2002) 33 *Netherlands Yearbook of International Law* 75, 81 fn 26, 114–115.

<sup>84</sup>Sea Shepherd (n 82).

<sup>85</sup>Greenpeace, 'The Cost of Destruction: Report from Greenpeace Ship Tour of West African Fisheries 2017' (n 22).

<sup>86</sup>ibid.

<sup>87</sup>While specific laws at the domestic level are also necessary to allow such activities, the domestic requirements are not examined here.

<sup>88</sup>Sea Shepherd, 'Operation Sola Stella' <<https://seashepherd.org/campaigns/iuu-fishing/iuu-campaigns/sola-stella/>>; Sea Shepherd, 'Operation Albacore' <<https://seashepherd.org/campaigns/iuu-fishing/iuu-campaigns/operation-albacore/>>.

<sup>89</sup>UNCLOS (n 5) art 73(1). On this, see Schatz (n 20) 348–365.

<sup>90</sup>J Harrison, 'Commentary on Article 73 UNCLOS' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck, Hart and Nomos 2017) 556, 558.

<sup>91</sup>The *M/V 'Virginia G' case (Panama/Guinea-Bissau)* (Judgment) [2014] ITLOS Rep 97 para 342.

<sup>92</sup>UNCLOS (n 5) arts 107, 110(5), 111(5) (see also similar wording in art 224, although it relates to enforcement measures concerning the protection of the marine environment in one's EEZ and not to exceptions to flag State jurisdiction on the high seas); on this see Schatz (n 20) 349–351 and 360–361, who concludes that these articles cannot be used directly to infer what is allowed in fisheries enforcement, but that they may reflect general principles of international law applicable here.



the type of vessels allowed for such enforcement operations is more strictly regulated than in case of enforcement by a coastal State in its waters. It thus appears likely that using NGO vessels as support to official law enforcement activities in one's EEZ can respect international law.<sup>93</sup>

If one uses these other provisions of UNCLOS as indicators of the requirements to be met, a key general principle applicable to enforcement at sea is that the vessel must be duly authorized by the relevant State.<sup>94</sup> This condition appears fulfilled by the contracts entered into by the coastal State with Sea Shepherd or, arguably, by the mere placement of coastal State officials on board.<sup>95</sup> Another important issue is related to the identifiability of vessels, which must be clearly marked as being on government services. Although it has been argued that there may be more flexibility *vis-à-vis* this condition for the enforcement of fisheries regulations in the EEZ,<sup>96</sup> this conclusion can be questioned on the basis of the clear wording of ITLOS quoted here above, which is applicable to such law enforcement in one's EEZ. Moreover, in terms of policy, bearing clear markings is particularly useful when dealing with NGO vessels, as, even if the relevant partnerships with the coastal States have been duly publicized, the fishing vessels need to be able to recognize Sea Shepherd vessels as on government duty. In the operations by Sea Shepherd in African waters, there appears to be little evidence that any visual marking was available, which could prove problematic.<sup>97</sup>

Additionally, ITLOS makes it clear that the inspections themselves must be carried out by officials from the coastal State – which members of the NGOs arguably could be if they are under a contract with the coastal State. However, if they are not acting as officials of the coastal State, they remain private citizens and have no right of boarding or inspection. In practice here, members of the NGOs seem to accompany the inspectors on board the fishing vessels,<sup>98</sup> which some fishing vessels' owners have complained about, as this put the number of inspectors above the numbers agreed in fisheries access agreements.<sup>99</sup>

Another potential issue is related to international responsibility. It is unclear how responsibility would be attributed or shared between the coastal State and the flag State of the NGO vessel,<sup>100</sup> should anything go wrong during an inspection. In practice, inspections are not always conducted without problems. For example, EU fishing vessel owners brought the issue of the increased number of

inspections by Sea Shepherd vessels to the attention of the European Commission. Vessel owners have complained of inspections which are not pursued according to the rules, are conducted by armed inspectors and have involved their vessels' crews being subjected to intimidation techniques.<sup>101</sup> The European Commission contacted the coastal States regarding what they describe as 'blatant cases of abuse of authority'.<sup>102</sup>

International responsibility of a State arises if an act was committed that violates the State's international obligations and that can be attributed to that State.<sup>103</sup> The division or attribution of responsibility here would probably depend on the identity of the people responsible for the specific actions and on who exercises effective control over them. Violations of international law by inspectors from the coastal State, who are organs of that State, would clearly trigger its responsibility.<sup>104</sup> For illegal actions by the civilian captain and crew of the vessel, one would have to determine whether they acted under the direction or control of the coastal State,<sup>105</sup> or as agents of that State,<sup>106</sup> and whether the flag State of the NGO vessel has failed to take remedial measures.<sup>107</sup> In theory, the division of authority and powers on these vessels seems to be that the Sea Shepherd crew falls under the authority of a Sea Shepherd captain while the law enforcement members of the coastal State follow their own official chain of command.<sup>108</sup> In practice, each combination of partnership, laws of the coastal State and action at sea will be unique. The coexisting, but not necessarily fully like-minded, sources of authority on board may also cause policy issues related to how fishing vessels are chosen for inspection; the objectives that coastal States and NGOs hope to fulfil through the partnership may indeed differ. Another important factor in attributing responsibility would be the content of potential agreements entered into for the partnerships; in particular, if the NGO is hired to perform governmental actions (in the same way as a private security firm would be), the coastal State's responsibility would arise for the crew's action – although that would not necessarily free the flag State from its own obligations. Contracts between NGOs and coastal States are generally not public and hence one cannot ascertain what they contain.

<sup>101</sup>López (n 41).

<sup>102</sup>J Aguiar Machado, Director General of DG MARE, 'Letter of 21 December 2017' <<http://dac.eu/download-doc/227997>>.

<sup>103</sup>UNGA 'Responsibility of States for International Wrongful Acts' UN Doc A/Res/56/83 (12 December 2001) Annex (ARSIWA), art 4. These articles on the Responsibility of States for International Wrongful Acts are not binding but reflect, at least in relation to the issues of interest here, the customary international law rules applicable; JR Crawford, 'State Responsibility' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 31.

<sup>104</sup>ARSIWA (n 103) art 4.

<sup>105</sup>ibid art 8.

<sup>106</sup>ibid art 5.

<sup>107</sup>As flag State, a State is responsible to control its vessels; UNCLOS (n 5) art 94; see also *Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC)* (n 9) paras 116–120. Its international responsibility can consequently be invoked if it fails to fulfil that international obligation directly binding it; ibid para 146.

<sup>108</sup>Sea Shepherd, 'Operation Sola Stella' (n 88); Sea Shepherd, 'Operation Albacore' (n 88).

<sup>93</sup>Schatz (n 20) 365–366.

<sup>94</sup>ibid 352–355.

<sup>95</sup>ibid 353.

<sup>96</sup>ibid 361–365.

<sup>97</sup>ibid 365.

<sup>98</sup>See for example video excerpt of Sea Shepherd, 'Operation Sola Stella' (n 88); video excerpt of Greenpeace, 'Hope in West Africa Tour: Greenpeace Exposes Illegal Fishing' <<https://www.youtube.com/watch?v=tG8egViZN4s>>.

<sup>99</sup>López (n 41).

<sup>100</sup>Schatz discusses the attribution of responsibility to the coastal State, but does not address the question of the potential responsibility of the NGO vessel's flag State; see Schatz (n 20) 370–373.

This issue of international responsibility could be resolved by establishing a clearer legal framework for such partnerships. Whilst they are not instruments of public international law, the contracts between the coastal States and NGOs may *de facto* affect the attribution of responsibility in so far as they authorize private actors to exercise State authority or in so far as the contracts clarify the respective roles of private and governmental personnel. Hence, the contracts could formally endorse the NGO staff as agents of the State. The other option would be to include a provision stating that inspectors – hence the coastal State – are in charge and responsible for issues during an inspection, while the NGO vessel – hence, ultimately, its flag State – is in control and responsible for safety at sea. Such a division of responsibility is for example provided for in the chartering tenders used by the European Fisheries Control Agency to contract a chartered offshore patrol vessel.<sup>109</sup> It has the benefit of clarity and creates legal security. While it is possible that agreements between coastal States and NGOs already include such a provision, the absence of transparency in that regard makes it impossible to confirm.

### 3.2 | Independent direct actions on the high seas

There have also been occurrences where NGOs have taken action on the high seas, directed at fishing vessels, and without the formal endorsement of a State. The most famous example of such direct action is the long chase of the IUU fishing vessel *Thunder* by Sea Shepherd in 2014–2015.<sup>110</sup> For nearly four months, the Sea Shepherd vessels *Bob Barker* and *Sam Simon* pursued the *Thunder* from the Southern Ocean, where it was fishing illegally, to the coast of West Africa where it sank. Along the way, the NGO vessels recovered fishing nets to be used as evidence and the *Thunder*, through its own dangerous manoeuvring, nearly collided with one of the Sea Shepherd vessels. The *Thunder* was a well-known poaching vessel, for which an Interpol Purple Notice (i.e. an arrest warrant for vessels) had been issued and which was on relevant IUU lists. Flagged in Nigeria at the beginning of the chase, it was subsequently removed from that registry and hence stateless. Although informed along the way, no State sent official governmental ships to apprehend the *Thunder*, even when it was stateless. After years of investigations, including by journalists, the owner of the *Thunder* has been fined €8.2 million.<sup>111</sup>

Different kinds of NGO actions may happen at sea, raising a wide array of legal issues. First, following a vessel to gather visual

evidence, put pressure by one's simple presence in order to stop it from fishing, or bring evidence to the port it will ultimately enter, is not illegal under international law. This practice is known in the fight against whaling as 'bearing witness'.<sup>112</sup> NGO vessels enjoy the freedoms of the high seas, including the freedom of navigation,<sup>113</sup> as much as any other vessel. Their actions are fine as long as they do not consist in an unjustifiable interference with other States' enjoyment of their rights at sea under international law,<sup>114</sup> risk collisions<sup>115</sup> or otherwise endanger safe navigation.<sup>116</sup> Moreover, peaceful demonstration and confrontation at sea are rights reaffirmed by the IMO.<sup>117</sup>

Second, the attempt to gather physical evidence for later prosecution is rather more complicated. Sea Shepherd recovered some of the *Thunder's* fishing nets. Fishing gear is private property and confiscation without law enforcement authority could possibly be construed as theft. However, it is unclear which regime of property and/or criminal law would apply. This is problematic as such a determination would be necessary to ascertain under what conditions a net would be considered abandoned property or what legal consequences flow from the nets being outlawed – a moratorium on the use of large-scale pelagic driftnets was recommended in a Resolution of the United Nations General Assembly (UNGA) which, although non-binding by nature,<sup>118</sup> has since been argued to reflect customary international law.<sup>119</sup>

Third, direct actions with assumed governmental functions would be difficult to reconcile with international law. Under the rule of exclusive flag State jurisdiction and implied in the article on the right of visit on the high seas,<sup>120</sup> official inspection of a private vessel on the high sea (here a fishing vessel), and even more so arrest, are reserved to governmental – or otherwise duly authorized – vessels of its flag State. One of the Sea Shepherd vessels at first radioed the

<sup>112</sup>J Teulings, 'Peaceful Protests against Whaling on the High Seas: A Human-rights Based Approach' in CR Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) 221, 223–225.

<sup>113</sup>UNCLOS (n 5) art 87(1)(a).

<sup>114</sup>ibid art 87(2); Plant (n 83) 86–87.

<sup>115</sup>Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16; Plant (n 83) 86–87.

<sup>116</sup>Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 (SUA Convention) art 3.

<sup>117</sup>IMO 'Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas' Resolution MSC.303(87) (17 May 2010) preamble. On the right to protest at sea, see, e.g., R Caddell, 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea' (2014) 45 *Netherlands Yearbook of International Law* 359; MC Noto, 'The Arctic Sunrise Arbitration and Acts of Protest at Sea' (2016) 2 *Maritime Safety and Security Law Journal* 36.

<sup>118</sup>UNGA, 'Large-scale Pelagic Drift-net Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas' UN Doc A/Res/44/225 (22 December 1989); see also UNGA 'Large-scale Pelagic Drift-net Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas' UN Doc A/Res/46/215 (20 December 1991). They were adopted by consensus.

<sup>119</sup>GJ Hewison, 'The Legally Binding Nature of the Moratorium on Large-scale High Seas Driftnet Fishing' (1994) 25 *Journal of Maritime Law and Commerce* 557; see also WT Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press 1994) 107.

<sup>120</sup>UNCLOS (n 5) arts 92 and 110.

<sup>109</sup>European Fisheries Control Agency (EFCA), 'Tender Specifications Chartering of an Offshore Fisheries Patrol Vessel', Internal Reference EFCA/2017/OP/02 (2017) 11, 13; EFCA, 'EFCA Charters a EU Fisheries Patrol Vessel' (7 December 2017) <[https://www.efca.europa.eu/sites/default/files/file/EN\\_pressrelease-LundySentinel-January2018.pdf](https://www.efca.europa.eu/sites/default/files/file/EN_pressrelease-LundySentinel-January2018.pdf)>.

<sup>110</sup>For all factual aspects of the chase, see I Urbina, 'A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes' (New York Times, 28 July 2015); E Engdal and K Saeter, *Catching Thunder: The Story of the World's Longest Sea Chase* (Zed Books 2018).

<sup>111</sup>J Holland, 'Spanish Tycoon Hit with USD 10 Million Fine for Illegal Fishing' (24 April 2018) <<https://www.seafoodsource.com/news/environment-sustainability/spanish-tycoon-hit-with-usd-10-million-fine-for-illegal-fishing>>.

*Thunder* and declared that it was 'placing it under arrest' and was going to bring it to port. As correctly responded by the captain of the IUU vessel,<sup>121</sup> in terms of international law, Sea Shepherd had no authority to do so on the high seas, as a nongovernmental vessel and not being authorized by the flag State of the fishing vessel. Article 110 of UNCLOS, on the right of visit on the high seas, provides a limited number of exceptions to the principle of exclusive jurisdiction of the flag State. None of these exceptions relates to fisheries and the right of visit can only be used by warships and 'any other duly authorized ships or aircraft clearly marked and identifiable as being on government services'.<sup>122</sup> As to the justification that Sea Shepherd used in the past – and still publicizes on its website<sup>123</sup> – that the World Charter for Nature mandates NGOs to '[s]afeguard and conserve nature in areas beyond national jurisdiction',<sup>124</sup> it misconstrues and misreads a non-legally binding document, and was repeatedly proven unconvincing.<sup>125</sup>

Another potential issue is that direct action involving contact between private vessels on the high seas could be construed as piracy.<sup>126</sup> As provided for in Article 101 of UNCLOS, piracy consists of

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; ...<sup>127</sup>

In the case of the *Thunder*, the chase by Sea Shepherd vessels seems to have been mostly above board in legal terms since there was no direct confrontation between the vessels, at least none that was initiated by the NGO. To fall under the definition of piracy, UNCLOS requires acts of violence against a vessel, which were absent in the scenario examined. Detention or depredation of fishing gears and buoys is

not *stricto sensu* an action against the vessel here, since these objects were detached from the vessel before Sea Shepherd caught them; Article 101 refers to 'property on board such ship', which implies that it does not apply to items located away from a vessel. Whether buoys or fishing gear at sea could be considered 'property in a place outside the jurisdiction of any State' remains an open question and would, at least in part, depend on whether these pieces of gear had actually been abandoned by the fishing vessel.

However, the Sea Shepherd captains clearly expressed that they could consider other means of action.<sup>128</sup> Also, in the past, Sea Shepherd has been criticized – and even condemned in a United States Court<sup>129</sup> – as having been involved in piracy in its anti-whaling campaigns.<sup>130</sup> The crux of the legal determination of direct actions on the high seas depends on how one defines the terms 'for private ends' in the piracy definition, a question which has been discussed at length.<sup>131</sup> On the one hand, it is argued that private ends are opposed to governmental authority,<sup>132</sup> in which case direct confrontation undertaken by an NGO vessel against another vessel on the high seas would be construed as piracy. On the other hand, it is argued that private ends are opposed to public interest,<sup>133</sup> in which case direct confrontation undertaken by an NGO for the public good rather than private gain would be not construed as piracy. At present, the debate has not been settled and NGO actions remain in a legal grey area.

Even if not qualified as piratical acts, direct action can nevertheless put life at sea at risk, and hence contravene the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).<sup>134</sup> Indeed, according to Article 3(1) of that treaty:

Any person commits an offence if that person unlawfully and intentionally:

1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

<sup>121</sup>Engdal and Saeter (n 110) 26

<sup>122</sup>UNCLOS (n 5) art 110(5).

<sup>123</sup>Sea Shepherd, 'Mandate' <<https://seashepherd.org/mandate/>>; Sea Shepherd, 'Laws and Charters' <<https://seashepherd.org/laws-and-charters/>>.

<sup>124</sup>UNGA 'World Charter for Nature' UN Doc A/Res/37/7 (28 October 1982) para 21(e).

<sup>125</sup>DK Anton, 'Protecting Whales by Hue and Cry: Is there a Role for Non-State Actors in the Enforcement of International Law?' (2011) 14 Journal of International Wildlife Law and Policy 137, 137–138; S Dominelli, 'Evolutionary Trends in Maritime Piracy: A Possible Assessment of Eco-activists' Conduct' (2014) 21 Australian International Law Journal 41, 43–44.

<sup>126</sup>By virtue of Article 58(2) of UNCLOS, the following discussion is, *mutatis mutandis*, also applicable to activities in EEZs; UNCLOS (n 5) art 58(2); see D Guilfoyle, 'Commentary on Article 101 UNCLOS' in Proelss (n 90) 737. However, the NGOs' actions in EEZs that are examined in this article are undertaken together with the coastal State and, it is argued, legal because duly authorized; see Schatz (n 20) 353–355. They are consequently not committed for private ends, a central criterion to piracy, and hence cannot be construed as piracy (see below for a discussion on private ends and piracy).

<sup>127</sup>UNCLOS (n 5) art 101.

<sup>128</sup>Engdal and Saeter (n 110) 27, 95.

<sup>129</sup>*Institute of Cetacean Research and Others v Sea Shepherd Conservation Society and Watson*, 9th Cir., 725 F.3d 940, 2013.

<sup>130</sup>See also the Belgian Court of Cassation decision in the *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*, 77 ILR 537; for comments, see E David, 'Greenpeace: Des Pirates!' (1989) 2 Revue Belge de Droit International 295; SP Menefee, 'The Case of Castle John, or Greenpeace the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 California Western International Law Journal 7.

<sup>131</sup>For a review of arguments and positions, see, e.g., Dominelli (n 125) 46–50; A Honniball, 'Anti-whaling Activism in the Southern Ocean and the International Law on Piracy: An Evaluation of the Requirement to Act for "Private Ends" and its Applicability to Sea Shepherd Conservation Society' (Master's Thesis, Utrecht University, 19 August 2013).

<sup>132</sup>In particular, see D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 37.

<sup>133</sup>See, e.g., D Rothwell and T Stephens, *The International Law of the Sea* (2nd edn, Hart 2016) 171; JL Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 The International Journal of Marine and Coastal Law 363, 378.

<sup>134</sup>SUA Convention (n 116).

2. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

3. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; ...<sup>135</sup>

A second set of legal questions revolves around issues of potential abuse and redress. If an NGO vessel acts at sea in a way that does not respect applicable rules of international law, by attempting to use governmental authority it does not possess, by causing damage to another vessel, by endangering safety at sea or by impairing the legal use of the high seas by the vessels of other States, it could be expected, in theory, that its flag State will apply adequate sanctions. In addition to the general obligation of due diligence under the law of the sea,<sup>136</sup> this duty of the flag State is explicitly required under the SUA Convention and further noted in an IMO Resolution.<sup>137</sup> NGO vessels, as private vessels, are under the jurisdiction of their respective flag States, which are responsible for controlling them.<sup>138</sup> Should the NGO vessel's flag State not take adequate measures, it could potentially see its international responsibility invoked by the flag State of the other vessel in question.

In practice, it is rather unlikely both that the NGO vessel's flag State will apply sanctions and that the fishing vessel's flag State will invoke the other State's international responsibility. Indeed, environmental activist NGOs choose the flags of their vessels with care and most are flagged to countries sympathetic to their causes, such as the Netherlands, Australia or New Zealand.<sup>139</sup> Moreover, for these cases where NGOs have taken measures against vessels already identified as (repeatedly) IUU fishing and/or under an international warrant, it seems improbable that the fishing vessel's flag State would defend it on the international scene, risking being identified as a flag of non-compliance at the same time.<sup>140</sup> For IUU fishing vessels that are stateless – either for the whole duration of their activities or following a removal from their flag State's registry – the flag State of the NGO vessel would, in practice, face little risk of being called out on its absence of sanctioning.

However, this situation where NGOs can only hope that their flag State will not take measures against them is far from ideal. First, political pressures are such that the wind can turn. For example, the vessel *Aquarius*, which was rescuing migrants at sea in the Mediterranean Sea, has lost, within a month, its Gibraltar and then Panama flags, probably following pressure from Italy.<sup>141</sup> Moreover,

the reliance on flag States potentially not applying the law towards NGO vessels flying their flags, while understandable at some policy level, may prove dangerous for the rule of law.

Currently, there appears to be a misalignment between the identity of some of the actors active at sea, attempting to ensure the application of international and regional fisheries regulations, and the entities empowered in the legal framework to do so. States could take several measures to improve the situation. Flag States could eradicate the problem of flags of convenience, actually control their vessels and hence also eliminate the need for NGOs to fill in enforcement gaps – together with the policy of tolerance towards such private actions. However, the long history of flags of convenience and the relative passivity with which the international community has met that practice implies that this is unlikely to happen in the near future. NGOs willing to take direct action on their own, such as Sea Shepherd, hence will continue to have a role to play, filling in some of the vacuum left by States *vis-à-vis* monitoring and enforcement.

Under such circumstances, States could create a framework to grant NGO vessels some legal status under international law and to clarify that nongovernmental actors must nevertheless respect certain rules. Adapting the multilateral legal framework would ensure a level of recognition of the important work done by NGOs, put an end to a certain level of current disconnect between the rules and their application, and ensure NGOs' accountability for their actions if they were to fall outside of their newly entrusted rights.

Alternatively, States could unilaterally revive a century-old legal practice through which official powers were granted to private vessels. Letters of marque and reprisal, quite common in the past, mainly consisted in the commission given to private ships to allow them to take part in naval warfare on behalf of one's country.<sup>142</sup> The rationale was generally that States did not have enough warships to wage war and were able to take advantage of civilian vessels when needed.<sup>143</sup> These vessels of privateers were not financed by the State and cruised for their own profit since they were entitled, within certain limits, to keep valuables prized at sea.<sup>144</sup> Letters of marque were originally also envisioned as an authorization for private vessels to obtain relief by themselves for past offences by seizing the property of wrongdoers in times of peace.<sup>145</sup> So, while this practice mainly focused on commercial war, it can also be relevant to peacetime law enforcement as a framework granting private vessels some governmental authority. Using letters of marque for war was outlawed in 1856 by the Declaration of Paris,<sup>146</sup> but the present

<sup>135</sup> *ibid* art 3(1).

<sup>136</sup> UNCLOS (n 5) art 94; *Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC)* (n 9) para 129.

<sup>137</sup> SUA Convention (n 116) art 6(1)(1); IMO (n 117).

<sup>138</sup> UNCLOS (n 5) art 94.

<sup>139</sup> Caddell (n 117) 361–362; Eilstrup-Sangiovanni and Phelps Bondaroff (n 20) 351.

<sup>140</sup> Eilstrup-Sangiovanni and Phelps Bondaroff (n 20) 351.

<sup>141</sup> C Heffron, 'Rescue Ship *Aquarius* Stripped of its Registration' (24 September 2018) <<https://www.euronews.com/2018/09/24/rescue-ship-aquarius-stripped-of-its-registration>>; M Agius, 'Updated: *Aquarius* Risks Losing Flag; 11 Rescuees on Board' (22 September 2018) <<https://www.newsbook.com.mt/artikli/2018/09/22/aquarius-resumes-active-search-with-11-rescued-on-board/?lang=en>>.

<sup>142</sup> *Encyclopaedia Britannica*, 'Letter of Marque' <<https://www.britannica.com/topic/letter-of-marque>>.

<sup>143</sup> *ibid*.

<sup>144</sup> *ibid*.

<sup>145</sup> TM Cooperstein, 'Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering' (2009) 40 *Journal of Maritime Law and Commerce* 221, 222–223; AE Hindmarsh, *Force in Peace: Force Short of War in International Relations* (Harvard University Press 1943) 49; TT Richard, 'Reconsidering the Letter of Marque: Utilizing Private Security Providers against Piracy' (2010) 39 *American Bar Association* 411, 422–424.

<sup>146</sup> Declaration Respecting Maritime Law, Paris (16 April 1856) 15 *Martens Nouveau Recueil* 791, reprinted in (1907) 89 *American Journal of International Law – Supplement*.

situation would be one of peacetime law enforcement, which is not covered by that instrument.<sup>147</sup> The revival of letters of marque, which are generally considered to be consistent with UNCLOS,<sup>148</sup> has been promoted – albeit unsuccessfully – in the late twentieth century with regard to the fight against piracy,<sup>149</sup> and could equally help fighting other crimes at sea which benefit from impunity.

From a policy perspective, whether such a solution could move forward remains to be seen. States and NGOs may, for different reasons, both be reluctant to change the *status quo*. For flag States, a major downside is that, once they have issued a letter of marque, their international responsibility can directly be engaged for actions by such private vessel,<sup>150</sup> even if it acts in excess of its authority or contravenes instructions.<sup>151</sup> This is quite different from potentially seeing one's responsibility engaged for failing to meet the duty of due diligence if private actors flying one's flag breach the rules. As to NGOs, their credibility depends, to some extent, on their independence from States; they could lose parts of their constituency if they were to officially become arms of the State. Moreover, NGOs could arguably be deprived of the margin of manoeuvre they currently benefit from as a result of acting in a fashion that is in any way legally questionable. If their high seas patrolling actions were backed by a letter of marque from their flag State and they were consequently exercising governmental authority, they would clearly be limited to taking measures against fishing vessels flying the same flag as them.

This limitation, not specific to enforcement by NGO vessels, results from the concept of exclusive flag State jurisdiction: States are simply not authorized to exercise jurisdiction over high seas violations by vessels not flying their flag.<sup>152</sup> This limitation may also be one of the reasons why some NGOs rhetorically refer to IUU fishing as 'pirate fishing'.<sup>153</sup> If the legal equation of IUU fishing with piracy were to become generally accepted, significantly wider avenues for enforcement would be opened, in so far as piracy is subject to universal jurisdiction and not subject to flag State limitations.<sup>154</sup> Despite

NGO rhetoric, there is no evidence that States have accepted this expansion of the piracy definition.

## 4 | CONCLUSION

Nongovernmental actors play several important roles in promoting compliance with international fisheries regulations. These roles consist on the one hand in monitoring, investigating and reporting occurrences of IUU fishing, and, on the other hand, in direct actions in coastal States' EEZs and on the high seas. Some of these actions, in particular data gathering and sharing, fall squarely within the existing legal regime, even if the nongovernmental nature of the actors involved causes issues of efficiency, transparency and accountability. Other actions may be legally more questionable. While providing a vessel to be used as base for inspectors of a coastal State is most probably allowed under the law of the sea, the manner in which some inspections are taking place raises questions. Moreover, the unclear division of authority could lead to problems if international responsibility had to be attributed. As to direct actions on the high seas, they can remain absolutely within the bounds of the law if NGO vessels act in a manner which avoids unjustifiable interference with other States' rights at sea and which respects rules of navigational safety. However, any confrontation instigated by an NGO vessel on the high seas could cause legal issues, arguably being construed as piracy, or breaching SUA obligations.

States could improve the current situation by providing nongovernmental actors with a more formal position in fisheries compliance processes. For data gathering and sharing, this would consist in establishing formal conduits for nongovernmental actors to transmit their findings; creating an obligation to follow up with the source of reports, whether State or non-State actor; and maybe even entering into formal partnerships – as has been done in other regimes and even considered within one RFMO. With regard to direct actions, NGOs are already formal partners of the coastal States for patrolling EEZs, but the same cannot be said about actions on the high seas. There, States could grant an NGO vessel a letter of marque to perform official functions against vessels flying their flags.

All these changes would benefit the efficiency of the fisheries governance regime, as well as strengthen the rule of law by ensuring that actions, authority to take action and responsibility for such actions are better lined up. However, it seems improbable that States will agree to treat nongovernmental actors as their quasi-equals. Acknowledging the need for nongovernmental actors' involvement in compliance processes implies that States cannot or are not willing to respect and enforce international law. States may be particularly reluctant to make changes with regard to direct action by NGOs on the high seas, but it is likely that NGOs would equally not want to be given an official endorsement by States when it comes to such direct actions.

NGOs' involvement in fisheries governance cannot only improve efficiency in detecting cases on potential IUU fishing, but

<sup>147</sup>Richard (n 145) 438.

<sup>148</sup>On this, see Schatz (n 20) 359 and fn 160.

<sup>149</sup>Richard (n 145) 411–464; see also Cooperstein (n 145) 252; DJ Staub, 'Letters of Marque: A Short-term Solution to an Age Old Problem' (2009) 40 *Journal of Maritime Law and Commerce* 261, 268–269.

<sup>150</sup>ARSIWA (n 103) 5.

<sup>151</sup>*ibid* art 7.

<sup>152</sup>UNCLOS (n 5) art 92(1). It has been suggested that one could avoid exclusive flag State jurisdiction on the high seas if one enters the regime of countermeasures; R Rayfuse, 'Countermeasures and High-seas Fisheries Enforcement' (2004) 51 *Netherlands International Law Review* 41, 59. However, countermeasures in the public interest are not generally considered legal under current international law as countermeasures are reserved to injured States; ARSIWA (n 103) art 22; see also Guilfoyle (n 132) 167.

<sup>153</sup>See, e.g., Oceana, 'Oceana Calls for Pirate Fishing to be Made an Environmental Crime' (5 June 2018) <<https://eu.oceana.org/en/press-center/press-releases/oceana-calls-pirate-fishing-be-made-environmental-crime>>; Greenpeace, 'Pirate Fishing' <<http://www.greenpeace.org/eastasia/campaigns/oceans/problems/pirate-fishing/>>; WWF, 'Why We Need to Act' <[http://wwf.panda.org/our\\_work/oceans/smart\\_fishing/why\\_we\\_need\\_to\\_act\\_/](http://wwf.panda.org/our_work/oceans/smart_fishing/why_we_need_to_act_/)>.

<sup>154</sup>UNCLOS (n 5) art 105. Seizure can only be carried out by warships or other ships fulfilling the marking, identifiability, government services and authorization conditions (*ibid* art 107).

also raise awareness both on the structural issues at stake and on the lack of governmental initiatives to solve the problem. Focusing on structural legal or management changes is, in the mid and long term, more efficient and promising than monitoring every vessel. Even more so, to improve the current crisis in the field, it is necessary to tackle States' relative passivity towards fisheries issues. NGOs, through their promotion of transparency and accountability, are playing key roles in that respect. In particular, their role in compliance processes against States, such as within RFMOs, can be very valuable. NGOs' direct actions at sea also painfully show the shortcomings of some flag States' enforcement activities, encouraging them to reassert their sovereign control.<sup>155</sup> Nevertheless, however valuable NGOs can be, checks and balances are required towards them as well as any other entities. Needless to say, NGOs must act within the bounds of the law if they want to be convincing law enforcement actors. Consequently, States and NGOs alike should work together to improve fisheries governance, as well as to ensure a continued respect for the rule of law.

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<sup>155</sup> Eilstrup-Sangiovanni and Phelps Bondaroff (n 20) 351–352.