AEL 2022/16
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WORKING PAPER

Fish-food for thought: the contribution of international courts and tribunals towards a new human-oriented paradigm of illegal fishing

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European University Institute

Academy of European Law

European Society of International Law
Research Forum, Glasgow, March 2022

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ISSN 1831-4066

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Published in November 2022 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

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With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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Abstract

Recent data from the Food and Agriculture Organization (FAO) shows that fish stocks around the world are increasingly overexploited, if not already depleted, constituting a major threat to the sustainability of marine environment and ecosystems. Among the primary causes of overfishing and fish-stocks depletion, Illegal, Unreported and Unregulated fishing (IUU fishing) has serious implications for the conservation and management of marine living resources, as well as for the food security and economies of several States, particularly developing States and coastal communities. Yet, the scope of IUU fishing has been subject of debate: whilst it is fundamentally understood as an environmental threat to marine ecosystems, the most recent literature has shed some light on the phenomenon implications on the paradigm of global security, especially declined in its human dimension. Indeed, environmental problems are just the most visible part of numerous crimes and illicit activities connected to a varying degree to the fisheries sector and ranging from forced labour on board vessels to fraud and money laundering along the supply chain.

Against this background, the present work calls for and discusses the integration of the human element into the paradigm of illegal fishing by drawing lessons from the jurisprudence of three international courts and tribunals. First, it highlights the human security dimension of fishing activities, shedding light over the connection between IUU fishing and the various forms of unlawful behaviours and illegalities within the fishery sector and underlining the inadequacy of the former paradigm to address them. Second, the work investigates the possibility of seeking protection for human rights violations connected to fisheries activities before international courts and tribunals, including – but not limited to – the tribunals envisaged under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS). As a matter of fact, whereas the jurisdiction of UNCLOS tribunals is limited *ratione materiae*, nonetheless they have been fundamental in the advancement of the protection of individuals at sea. Likewise, the European Court of Human Rights and the EU Court of Justice have recently adjudicated cases relating to human rights violations and illegalities in the context of fishing activities, highlighting the urgency to further investigate the human rights dimension of fisheries. These three jurisdictions are set to provide guidance for future IUU fishing litigations, potentially contributing to shape a new holistic and human rights-oriented strategy to address the multifaceted nature of the broader phenomenon of illegalities within the fishery sector.

Keywords

IUU fishing - human security - law of the sea - human rights - fishery sector - UNCLOS - European Convention on Human Rights - Court of Justice of the EU

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1. Introduction

Fish stocks around the world are increasingly overexploited, if not already depleted, constituting a major threat to the sustainability of marine environment and ecosystems. Overfishing seriously endangers the livelihood of million people whose existence is largely dependent on fish and fish-related activities. Among its primary causes, Illegal, Unreported and Unregulated fishing (IUU fishing)[1] has serious implications for the conservation and management of marine living resources, as well as for the food security and economies of several States, particularly developing States and coastal communities.[2] This three-fold notion consists of violations of and contraventions with international, regional and national rules and regulations related to the management and conservation of natural living resources, both on the high seas and within national maritime zones. Yet, the scope of IUU fishing has been subject of debate especially in light of the lack of an international binding source of law providing with a definition of this phenomenon.[3] On the one hand, as it emerges from the

[1] For a definition of IUU fishing, see the 2001 FAO International Plan of Action against IUU fishing (IPOA-IUU), which has since then constituted the main source – though of non-binding nature – explaining this phenomenon. Numerous authors have actually argued that the IPOA-IUU fishing contains a description of the phenomenon rather than a definition of it. See *inter alia* EDESON "The International Plan of Action on Illegal Unreported and Unregulated Fishing: the Legal Context of a Non-Legally Binding Instruments", The International Journal of Marine and Coastal Law, vol 16 no. 4 Kluwer Law International (2001). See also PALMA, TSAMENYI, and EDESON, "Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing" (2010).

[2] UN GA Res 71/123 of 2017, § 64.

[3] See EDESON, *supra* note 1; cfr SERDY, "Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal", Ocean Development & International Law, vol. 48, Taylor & Francis (2017); THEILEN, "What's in a Name?

International Plan of Action Against IUU Fishing (IPOA-IUU) and the subsequent legal instruments that address this phenomenon,[4] IUU fishing is fundamentally understood as an environmental threat to marine ecosystems. On the other, as it emerges from the most recent literature,[5] it has clear implications for the broader paradigm of global security, especially for its human dimension.[6]

Fish is amongst the most traded commodities around the world[7] and, consequently, the fishing sector attracts huge flows of money and profit-driven behaviours. Thus, environmental problems are just "the tip of the iceberg"[8] of all crimes connected to the fisheries sector: the whole fishing industry provides fertile grounds for various criminal activities and illegalities, from forced labour and inhuman working practices on board vessels to fraud and money laundering along the supply chain.[9] In this regard, already in 2009 the UN General Assembly acknowledged the connection between IUU fishing and international organized crime.[10] Likewise, even the INTERPOL set up a Working Group addressing transnational crimes across the entire fisheries sector – referred to as fisheries crimes[11] – acknowledging the threat they pose to fish stocks, national economies and vulnerable communities and, more in general, to food security.[12] In addition, some authors have already called for the redefinition of the IUU fishing paradigm in light of its enhanced status as "serious international crime affecting the international community as a whole",[13] while others have suggested that law-makers and government officials should use the lens of human rights treaties in order to determine the scope and content of unregulated fishing.[14] Finally, redefining the IUU fishing paradigm may

The Illegality of Illegal, Unreported and Unregulated Fishing, The International Journal of Marine and Coastal Law 28 (2013).

[4] Such as, *inter alia*, the 2009 Port State Measures Agreement.

[5] VAN DER MAREL, "Problems and Progress in Combating IUU Fishing", in CADDELL and MOLENAAR (eds.), *Strengthening International Fisheries Law in an Era of Changing Oceans*, Oxford, Hart Publishing (2019); FITZMAURICE and ROSELLO, "IUU Fishing as a Disputed Concept and Its Application to Vulnerable Groups: A Case Study on Arctic Fisheries", International Community Law Review 22 (2020); ORAL, "Reflections on the Past, Present, and Future of IUU Fishing under International Law", International Community Law Review 22 (2020).

[6] The concept of human security moves from the traditional concept of security. For further information, see Human Development Report, 1994, available at www.hdr.undp.org/en.

[7] FAO State Of World Fisheries and Aquaculture (SOFIA) 2020.

[8] CADDELL et al. "Emerging Regulatory Responses to IUU Fishing" in CADDELL and MOLENAAR, *supra* note 5, p. 393.

[9] See, *inter alia*, the FAO explanatory page on "Links between IUU Fishing and other crimes", available at http://www.fao.org/iuu-fishing/background/links-between-iuu-fishing-and-other-crimes/en/. See also UN Office on Drugs and Crime, "Transnational Organized Crime in the Fishing Industry", Issue Paper (2011); cfr. TELESTSKY, "Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime", Ecology Law Quarterly, vol. 41, no. 4 (2014).

[10] UN GA Res 64/72 of 2009, § 61.

[11] INTERPOL, Environmental Security Programme, "Strengthening Law Enforcement Cooperation Against Fisheries Crime" (March 2021), p. 4

[12] See, *inter alia*, North Atlantic Fisheries Intelligence Group and INTERPOL, "Chasing Red Herrings: Flags of Convenience and the Impact on Fisheries Crimes law Enforcement" (2017); see also INTERPOL, Environmental Security Programme, "Strengthening Law Enforcement Cooperation Against Fisheries Crime" (March 2021).

[13] ORAL, *supra* note 5.

[14] FITZMAURICE and ROSELLO, *supra* note 5.

be desirable also in light of the 2015 UN Sustainable Development Goals[15] as well as with a view to integrating climate change considerations.[16]

Against this backdrop, connecting human rights with the call for sustainable fisheries and the broader human security paradigm is not as odd as it may seem; in fact, the human rights dimension of fishing is gaining momentum, ultimately rendering the protection of human rights in fisheries a matter of global security that deserves both scholars' and policy-makers' attention. In this regard, this paper adopts a broader definition of illegal fishing that integrates human rights concerns with the environmental aspects traditionally falling under the scope of IUU fishing, with a view to better addressing the global security concerns threatening the sustainable conservation and management of marine living resources. In particular, the paper explores the contribution that international courts and tribunals may give to the protection of the human dimension of security as linked to illegal fishing, assessing their role as guardian of global security. A special attention will be given to the United Nations Convention on the Law of the Sea (UNCLOS) disputes settlement mechanisms, in light of both their growing jurisprudence on illegal fishing matters, and the consolidated literature on the protection of the individual at sea (Section 2). In particular, this section explores two mechanisms that may in the future provide guidance to enhance the protection of human rights in law of the sea disputes, including with regard to illegal fishing: Article 293(1) UNCLOS on the applicable law and the rule of reference technique as employed in Article 94 UNCLOS. In addition to UNCLOS mechanisms, the article will also take the opportunity to explore and assess the role that other jurisdictions may play in protecting the human dimension of security as connected to illegal fishing (Sections 3 and 4). In this regard, the European Court of Human Rights (ECtHR)[17] and the Court of Justice of the EU (CJEU)[18] have recently adjudicated cases relating to human rights violations and illegalities in the context of fishing activities. Finally, some conclusive reflections will be drawn based on the foreground sections, assessing the different courts' role in the protection of the individual in fishing activities and contributing to future research into a new holistic and human rights-oriented strategy to address the multifaceted nature of illegal fishing at the international and regional level.

2. The disputes settlement mechanisms under UNCLOS Part XV

Numerous incidents resulting in fatalities at sea in the last decades have brought to the forefront the law of the sea shortcomings with respect to the protection of human rights.[19] In fact, the UNCLOS is not a human rights treaty – though some of its provisions certainly

[15] UN Sustainable Development Goals, available at https://sdgs.un.org/goals.

[16] VOIGT, "Oceans, IUU Fishing, and Climate Change: Implications for International Law", International Community Law Review 22 (2020).

[17] European Court of Human Rights, Application no. 64863/13, *Yaşar v. Romania*, Judgment of 26 November 2019.

[18] See, *inter alia*, Joint Cases T-344/19 and T-356/19, *Front Polisario v Council*, Judgment of 29 September 2021, ECLI:EU:T:2021:640.

[19] Nowadays talks about the Convention's role in a fast-developing world are more and more common. Scholars and lawmakers have started questioning whether today the UNCLOS is still fit for purpose, especially in light of crucially important developments that require thorough understanding and quick action. For further reference, see the evidence submitted on occasion of the UK Parliament inquiry, available at https://committees.parliament.uk/work/1557/unclos-fit-for-purpose-in-the-21st-century/.

enshrine the interests of individuals.[20] Nonetheless, whereas the literature on the interplay between the law of the sea and human rights is growing rapidly in recent years,[21] both the International Tribunal for the Law of the Sea (ITLOS) and the Annex VII Arbitral Tribunals under UNCLOS Part XV have dealt with the rights of individuals in the context of law of the sea disputes, including in relation to illegal fishing.[22] Accordingly, this first section addresses the potential contribution that UNCLOS Part XV mechanisms may give to enhancing the protection of human security in the context of illegal fishing.

Some preliminary remarks are worth. First, UNCLOS Part XV provides for an essentially inter-State mechanism, since access to UNCLOS tribunals[23] is limited to States Parties to the Convention – with the exception of International Organizations in accordance with UNCLOS Annex IX[24] and of other territories and self-governing associated States.[25] Accordingly, individual victims of human rights violations occurring at sea are required to pursue diplomatic protection or invoke their rights elsewhere. Thus, no individual is entitled to submit a direct application to UNCLOS courts or tribunals, but only States seeking protection for their nationals may do so.[26]

In addition, the latter's jurisdiction is limited *ratione materiae*: under Article 288(1) UNCLOS, only disputes concerning the interpretation or application of a provision of the Convention may be submitted to UNCLOS tribunals.[27] Looking at this from a different perspective, it means that the protection of human rights must be sought indirectly in the context of a dispute grounded on a provision of the Convention – i.e. an UNCLOS dispute – for UNCLOS tribunals may only entertain and adjudicate such disputes. In other words, no claim concerning the interpretation and application of human rights instruments or norms may be submitted to UNCLOS tribunals as such; however, the protection of the individual may arise in the context of an UNCLOS dispute. This would not necessarily constitute a breach of the tribunals' *ratione materiae* jurisdiction. After all, the law of the sea is not a self-contained regime, which implies that disputes brought to UNCLOS tribunals may easily relate to issues beyond the scope of the law

[20] OXMAN, "Human Rights and the United Nations Convention on the Law of the Sea", 36 Columbia Journal of Transnational Law (1997).

[21] OXMAN, *ibidem*; cfr. *inter alia*, TREVES, "Human Rights and the Law of the Sea", Berkeley Journal of International Law (2010); PAPANICOLOPULU, "International Law and the Protection of People at Sea", Oxford University Press (2018).

[22] See, *inter alia*, *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10; *South China Sea Arbitration (Philippines v. People's Republic of China)* (Jurisdiction and Admissibility), Award on Jurisdiction of 29 October 2015.

[23] For the purpose of this research, the term "UNCLOS tribunals" will be used to refer to the four different choices of procedures envisaged under Article 287 UNCLOS: a) the International Tribunal for the Law Of the Sea (ITLOS), the International Court of Justice (ICJ), Annex VII Arbitral Tribunal and the Special Arbitral Tribunal under Annex VIII[23].

[24] To date, the European Union is the only one to have done so.

[25] Article 305(1) UNCLOS.

[26] There exist two relevant exceptions that are worth mentioning in this respect: the first consists of a mechanisms under Article 187 of Part XI UNCLOS that has not come to existence yet in practice, which foresees that "[…], the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b)" may have access to the Seabed Disputes Chamber for the settlement of contentious matters. In addition, article 292(2) UNCLOS on the prompt release proceedings also lays down the possibility for such proceeding to be submitted "on behalf" of States Parties to the Convention, thus leaving the door opened to entities other than States to be procedurally involved before the ITLOS.

[27] Article 288(1) UNCLOS. Alternatively, see also Article 288(2).

of the sea Convention.[28] In this regard, the case law shows the existence of two mechanisms under the Convention system which could arguably be triggered to foster the general protection of human rights in law of the sea disputes, including in relation to fishing activities: first, the provision on applicable law laid down in Article 293(1) UNCLOS; second, the rule of reference technique used in numerous provisions under the Convention. The remainder of this section is therefore devoted to exploring these two mechanisms in relation to the protection of victims of human rights violations committed in the context of fishing activities.

2.1. Article 293(1) UNCLOS on the applicable law

Article 293(1) UNCLOS reflects the understanding of the law of the sea as part of the broader system of public international law, allowing UNCLOS judges to apply "other rules of international law not incompatible with this Convention."[29] Numerous commentators agree that this provision does not extend the *ratione materiae* jurisdiction of UNCLOS tribunals.[30] While jurisdiction is defined as the court's power to entertain and adjudicate a given case,[31] applicable law refers to the legal norms and principles to be applied by courts and, in fact, logically presupposes the court's jurisdiction over that case.[32] Thus, Article 293(1) cannot extend the jurisdiction of UNCLOS tribunals beyond the bounds of the Convention; yet, it may allow them to apply certain norms of general international law not incompatible with the Convention, provided that they first establish their jurisdiction over the dispute.

Accordingly, it is submitted that Article 293(1) UNCLOS may serve the purpose of protecting individuals in the context of an UNCLOS dispute via the application of norms other than those laid down in the Convention itself. For instance, in its first case on the merits, the ITLOS adjudicated upon the legality of the use of force used by a Guinean patrol boat in the arrest of a vessel flying the flag of Saint Vincent and the Grenadines and allegedly carrying out illegal bunkering operations – a fish-related activity[33] – in favour of fishing vessels off the coast of Guinea.[34] Saint Vincent submitted that Guinea failed to have due regard to the duties of "other States" as laid down in Articles 56(2) and 58 UNCLOS. Upon establishing its jurisdiction over the case,[35] the Tribunal held that, despite the lack of provisions on the use of force at sea in

[28] See Chagos Archipelago Arbitration paras 220-221.

[29] Article 293(1) UNCLOS.

[30] Sir Michael Wood held that "the reference to law other than the Convention in Article 293, paragraph 1, cannot be used to extend the jurisdiction conferred on the court or tribunal by the Convention". In WOOD, "The International Tribunal for the Law of the Sea and General International Law" (2007), International Journal of Marine and Coastal Law, p. 357; cfr. OXMAN, "Courts and Tribunals: the ICJ, ITLOS, and Arbitral Tribunals", in ROTHWELL et al. (eds.), The Oxford Handbook of the Law of the Sea (2015), p. 414; see *contra*, PARLETT, "Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals", Ocean Development & International Law (2017).

[31] RAO and GAUTIER, "The International Tribunal for the Law of the Sea – Law, Practice and Procedure", Elgar International (2018), p. 80; cfr. ROSENNE, "International Court and Tribunals, Jurisdiction and Admissibility of Inter-State Application", in WOLFRUM (ed.), The Max Planck Encyclopedia of Public International Law, OUP (2006); HARRISON, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", Ocean Development & International Law (2017).

[32] RAO and GAUTIER, *ibid*., p. 166.

[33] *M/V "Virginia G" (Panama/Guinea-Bissau),* Judgment, ITLOS Reports 2014, p. 69, paras. 215 and 216.

[34] M/V "SAIGA" (No. 2), supra note 22.

[35] *Ibid*., paras. 40-45.

the Convention, Article 293 UNCLOS required that "elementary considerations of humanity must apply in the law of the sea, as they do in other areas of international law."[36] Likewise, in subsequent cases UNCLOS tribunals have repeatedly made use of Article 293(1) UNCLOS with a view to applying rules or principles not expressly provided for in the Convention.[37] However, these judgments and awards have generated two rather opposing interpretations of its function: an expansive one allowing them to hold States responsible for breaches of norms outside the Convention,[38] thereby *de facto* extending UNCLOS tribunals' jurisdiction;[39] a more restrictive one, which instead emphasizes the "cardinal distinction" between the scope of UNCLOS tribunals' jurisdiction and the law to be applied pursuant to Article 293(1) UNCLOS, thus clarifying that claims anchored to legal instruments other than the Convention may be dismissed.[40] In particular, the latter interpretation was elaborated in the *Arctic Sunrise Arbitration*, where the Annex VII Arbitral tribunal dismissed the Netherland's "invitation"[41] to apply the International Covenant on Civil and Political Rights[42] and identified two functions for Article 293(1) UNCLOS: first, the possibility for an UNCLOS tribunal "to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility"; second, the possibility for it to interpret and apply general provisions laid down in the Convention by relying on "primary rules of international law other than the Convention."[43] In light of the foreground considerations, Article 293(1) UNCLOS may trigger the protection of victims in the context of illegal fishing too, as long as claims of human rights violations arise before UNCLOS tribunals in the context of a broader dispute anchored to the Convention. In particular, it would not be unreasonable to foresee future disputes grounded on, e.g. Articles 56(2) and 58 UNCLOS, or on Article 73 UNCLOS, whereby the flag State defended the lawfulness of its conduct while also alleging the coastal State's breach of the fundamental rights of the persons on board in the context of the latter's law enforcement operations. Accordingly, UNCLOS tribunals would not be called upon to apply other norms of international law not incompatible with the Convention as such; yet, they may resort to norms or principles of general international law[44] in order to assist the interpretation and application of the provisions under the Convention and address human rights issues, without necessarily breaching the limits to UNCLOS tribunals' jurisdiction laid down in Article 288(1) of the Convention.

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[36] *Ibid*., para. 155. It is worth recalling that Articles 56(2) and 58 UNCLOS served as legal bases for Saint Vincent's claim that Guinea violated its duties to have due regard to the rights of other States.

[37] See, *inter alia*, *Guyana v. Suriname,* award of 17 September 2007; *MOX Plant Case (Ireland v. United Kingdom),* Order no. 3 of 24 June 2003; *The Arctic Sunrise Arbitration (Netherlands v. Russia),* award of 10 July 2017.

[38] Besides the *M/V SAIGA* case recalled above, in the *Guyana v. Suriname* case the arbitral tribunal found that Suriname had violated the UN Charter and general international law by threatening the use of force, para. 488(2).

[39] TZENG, "Jurisdiction and Applicable Law under UNCLOS", The Yale Law Journal (2016).

[40] *MOX Plant*, *supra* note 37, para. 19.

[41] *Arctic Sunrise Arbitration*, *supra* note 37, para 193.

[42] *Ibid*., para. 198

[43] *Ibid*., paras. 190-191. Cfr. *Duzgit Integrity Arbitration (Malta v. Sao Tome and Principe)*, Award of 24 August 2015, "[The Tribunal] may have regard to other rules of international law in order to assist in the interpretation and application of provisions of the LOSC concerning the arrest or detention of a vessel or persons" and that Article 293(1) is meant to ensure "that a tribunal can give full effect to the provisions of the Convention". Paras. 207-208.

[44] Such as the prohibition on the use of force or the elementary considerations of humanity. See, *inter alia*, *M/V Saiga* case, *supra* note 22.

2.2. Article 94 UNCLOS and the rule of reference technique in the UNCLOS system

The rule of reference – or "*renvoi*" in French – is a law-making technique that allows the incorporation of the external sources into the broader legal instrument.[45] The UNCLOS encompasses numerous *renvois* to "generally accepted rules and standards",[46] as well as to "applicable regulations, procedures and practices",[47] especially in part XII on the protection and preservation of the marine environment.[48] Three considerations are noteworthy: first, through the rule of reference the drafters of the Convention were able to incorporate into it not only primary sources of international law binding upon States – i.e. treaty and customary law – but also standards, procedures and practices that do not have binding force.[49] Second, strictly connected to the first point, the rule of reference technique calls into question one of the cardinal principles of international law, namely that of "*pacta tertiis nec nocent nec prosunt*" (*pacta tertiis* principle or principle of States consent). As a matter of fact, the incorporation of external binding rules and standards into the Convention means that States that are not Parties to the instrument containing those rules and standards will automatically be bound by them by virtue of their status as Parties to UNCLOS.[50] In other words, States will have to meet those rules and standards "not because they are legally binding as either treaty or custom but because they are incorporated into the Convention through the rule of reference".[51] Third, the rule of reference is an instrument of change: through the incorporation of external rules and standards, it opens the UNCLOS to new developments in the law of the sea and in the broader international law.[52]

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[45] On the rule of reference, see VAN REENEN, "Rules of Reference in the new Convention on the Law of the Sea in particular connection with pollution of the sea by oil from tankers", XII Netherlands Yearbook of International Law (1981); VUKAS, "Generally Accepted International Rules and Standards", in SOONS (ed.), Implementation of the Law of the Sea Convention through International Institutions (Law of the Sea Institute, 1990); OXMAN, "The Duty to Respect Generally Accepted International Standards", 24 New York University Journal of International Law & Politics (1991); FORTEAU, "Les renvois inter-conventionnels", Annuaire français de droit international, volume 49 (2003); REDGWELL, "Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the Offshore Energy Sector", The International Journal of Marine and Coastal Law 29 (2014); NGUYEN, "Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits", Ocean Development & International Law (2022).

[46] See, *inter alia*, Article 60(3, 5, 6) UNCLOS.

[47] See, *inter alia*, Article 39(2)(a-b) UNCLOS.

[48] The lack of uniform formulations and terms employed has raised doubts as to the different scope and reach of each *renvoi* laid down in UNCLOS. However, some of the Convention drafters questioned the relevance of investigating the precise meaning of each term. OXMAN (1991), *supra* note 45, p. 131; cfr. VUKAS (1990), *supra* note 45, p. 407.

[49] NGUYEN(2022), *supra* note 45, p. 5.

[50] OXMAN (1991), *supra* note 45, p. 144; REDGWELL (2014), *supra* note 45, p. 610.

[51] Judge PAIK, Separate Opinion to the ITLOS Advisory Opinion, para. 23. VAN REENAN (1981), *supra* note 45, pp. 13-16. In this regard, a distinction must be drawn between binding and non-binding standards. More precisely, it is suggested that the latter do not bind the States by virtue of their incorporation into the Convention, but rather inform the meaning and content of the obligation laid down in the provision containing the *renvoi*.

[52] See TAN, "Vessel Source Marine Pollution: The Law and Politics of International Regulation", Cambridge University Press (2006), p. 229; POSNER and SYKES, "The Economic Foundations of the Law of the Sea", 104 American Journal of International Law (2010). See also REDGWELL (2014), *supra* note 45, p. 605.

Against this background, it is submitted that the rule of reference technique may be instrumental for enhancing the protection of victims of human rights violations under the Convention system. The multiple *renvois* contained in Article 94 UNCLOS are particularly relevant with regard to illegal fishing activities. This provision lays down the flag State's duty to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag, reflecting the States' concern to regulate activities carried out by private actors, who are not traditionally bound by international law.[53] In particular, paragraphs 3, 4 and 5 further highlight the due diligence nature of such a duty[54] and clarify its scope: ensuring safety at sea ultimately means undertaking an effort to adopt certain measures in respect to, *inter alia*, vessels seaworthiness and labour conditions on board, also "taking into account the applicable international instruments".[55] Also, States must ensure that "the master, officers and […] the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea […]."[56] Finally, Article 94(5) UNCLOS further clarifies that when taking the measures provided for in the previous paragraphs, States are "required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."[57] Thus, Article 94 UNCLOS lays down States' due diligence obligation to ensure that private actors under their control – i.e. vessels flying their flags – respect international standards and rules concerning safety at sea contained in sources outside the Convention and incorporated into it via the rules of references.

Thus, the question remains as to which standards may be incorporated into the Convention via the *renvois* in Article 94 UNCLOS with a view to fostering the protection of human rights victims in the context of illegal fishing. It is acknowledged that Article 94 UNCLOS may be instrumental for the fight against IUU fishing within coastal States' Exclusive Economic Zone (EEZ)[58] and, consequently, it could contribute to improving the rights of coastal communities

[53] See *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para 112. See also the ILC Articles on State Responsibility, Commentary to article 8, para. 1. See also KÖNIG, "The Elaboration of Due Diligence Obligations as a Mechanism to Ensure Compliance with Internatioanl Legal Obligations by Private Actors", in International Tribunal for the Law of the Sea (ed.) The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996-2016, Brill/Nijhoff (2018), p. 86.

[54] For a general account on due diligence obligations, see PISILLO-MAZZESCHI, "Due Diligence e Responsabilità Internazionale degli Stati", Giuffré (1989); KRIEGER et al. "Due Diligence in International Law", OUP (2020) and OLLINO, "Due Diligence Obligations in International Law", CUP (2022). As for the case law, see ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, (ICJ, *Pulp Mills* case) para. 101, as well as *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports 2007, p. 43, para 430.. As far as it concerns due diligence obligations in the law of the sea, see KÖNIG (2018), *ibid*.; CARACCIOLO, "Due Diligence et Droit de la Mer", in CASSELLA (ed.), Le standard de due diligence et la responsabilité internationale, Pedone (2018); PAPANICOLOPULU, "Due Diligence in the law of the Sea", in KRIEGER et al. (eds.), *supra* this note. See also the Seabed Dispute Chamber Advisory Opinion (2011), *ibid*., paras. 117-120.

[55] Article 94(3) UNCLOS.

[56] Article 94(4)(c) UNCLOS.

[57] Article 94(5) UNCLOS.

[58] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.

heavily dependent on fish and fish-related activities.[59] Nonetheless, in light of the space constraints, the paragraphs below address the above question only with regard to the protection of people on board fishing vessels, identifying which instruments may be applied to improve their living and working conditions and eradicate certain widespread inhuman practices such as forced and child labour.[60]

Paragraphs 3-5 of Article 94 UNCLOS provide for differently formulated rules of reference.[61] They recall numerous instruments related to living and working conditions at sea and adopted under the auspices of both the International Maritime Organization (IMO)[62] and the International Labour Organization (ILO).[63] However, these treaties either do not apply to fishing vessels[64] or have not been ratified by a sufficient number of States so as to qualify as "generally accepted" and, consequently, cannot be said to be incorporated into the Convention system.[65] Therefore, one may ask whether Article 94 UNCLOS may be triggered with a view to incorporating the rules and standards contained in some of the more general instruments of international law that afford a degree of protection to individuals.

Amongst these, the Conventions and Protocols against forced labour[66] and child labour[67] are particularly relevant to the cases of fishers subject to modern forms of slavery on board vessels. Indeed, all these instruments set certain standards of human rights protection and

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[59] An interesting starting point could be Judge Paik's Separate Opinion to the ITLOS Advisory Opinion on IUU fishing, where he argues that the Tribunal should have relied upon the rules of reference in Article 94 to look into instruments outside the Convention with a view to substantiating the flag States' duties in relation to the fight against IUU fishing within coastal States' EEZ. PAIK, *supra* note 51; see *contra* NGUYEN, *supra* note 45.

[60] See, *inter alia*, the ILO report "Caught at Sea: Forced Labour and Trafficking in Fisheries", International Labour Office, Special Action Programme to Combat Forced Labour (DECLARATION/SAP-FL), Sectoral Activities Department (SECTOR). - Geneva: ILO, 2013.

[61] For further info on the different degrees of strength of the *renvois* formulations, see NGUYEN, *supra* note 45.

[62] For a complete list of IMO conventions recalled, see NORDQUIST et al. (eds.) "United Nations Convention on the Law of the Sea 1982: A Commentary", vol. III, pp. 142-143 and p. 148; see also GUILFOYLE, "Article 94", in PROELSS (ed.) *United Nations Convention on the Law of the Sea: A Commentary*, p. 713, and SOHN et al., "Cases and Materials on the Law of the Sea", Brill/Nijhoff (2014), pp. 153-154. Noteworthy, most of the IMO instruments enjoy a highly significant degree of participation of the international community, as they include over 160 State Parties amounting for approximately 98-99% of world tonnage. This view was also upheld in the *South China Sea Arbitration* Award, where the tribunal incorporated the standards included respectively in the COLREG. Para. 1063.

[63] This is indeed in line with Article 94(3)(b), which expressly refers to "labour conditions" as one of the aspects of safety at sea upon which States should act by adopting specific measures. In addition, the ILO has accepted to play "a role in setting standards in relation to article 94, paragraph 3(b)", and has since the end of the UNCLOS III Conference adopted multiple instruments in that regard. See NORDQUIST et al, *Ibid.* p. 147. These include, *inter alia*, the Maritime Labour Convention and the Work in Fishing Convention.

[64] The International Convention for the Safety of Life at Sea (SOLAS Convention) and the Maritime Labour Convention (MLC) both received sufficient endorsement worldwide and are therefore incorporated into the UNCLOS system; however, they expressly exclude fishing vessels from their scope of application. See Regulation 3(a)(i-vi) SOLAS and Article II(4) MLC.

[65] This is the case of the Safety of Fishing Vessels Convention (SFV) and of the Work in Fishing Convention (WFC).

[66] These are the 1930 Forced Labour Convention and its 2014 Protocol; the Abolition of Forced Labour Convention of 1957.

[67] The two Conventions on Child Labour, namely the Minimum Age (no. 138) and the Worst Forms of Child Labour (no. 182).

provide guidance to States in respect to the endeavours they have to undertake with a view to eradicating the various forms of forced labour and child labour. The same is true also for the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), containing *inter alia* provisions on the prohibition of torture and of inhuman and degrading treatments,[68] or on the prohibition of slavery,[69] as well as the minimum standards for decent work.[70] Finally, regard must be had to the United Nations Convention Against Transnational Organized Crime (UNCTOC) and to the Protocol to Prevent, Suppress and Punishing Trafficking in Persons, especially Women and Children. In particular, the latter contains rules and standards on the protection and assistance of victims of trafficking in persons,[71] whereby "trafficking in persons" is qualified by the "purpose of exploitation", including "at a minimum […] the exploitation of […] forced labour or services, slavery or practices similar to slavery".[72] Most importantly for the purpose of this work, all the above recalled instruments enjoy universal or quasi-universal ratification,[73] thereby qualifying as "generally accepted" rules and standard. Therefore, it is submitted that they are recalled and incorporated into the UNCLOS system by virtue of the rules of reference under Article 94 UNCLOS.[74]

In light of the foregoing considerations, the rule of reference constitutes a further mechanism under the Convention that may foster the protection of individuals at sea, including in fishing activities. Whilst at present the rules of reference under Article 94 UNCLOS allow for the incorporation of general standards protecting the individual by drawing them from labour law or human rights instruments, there is space to argue that, when the specific IMO and ILO instruments on living and working conditions applying to fishing vessels will receive sufficient endorsement worldwide, the rule of reference would allow their incorporation into the Convention, thus keeping the law of the sea regime up-to-date with time.[75]

3. Illegal fishing under the European Court of Human Rights

The attention for the protection of human rights at sea has grown fast in recent years, mainly due to geopolitical incidents and phenomena such as, to name a few, the pirates upsurge off the coast of Somalia or the migration flows in the Mediterranean Sea.[76] In addition, a number of judicial cases before international[77] and regional[78] courts, as well as before para-judicial

[68] Article 7 ICCPR.
[69] Article 8 ICCPR.
[70] Article 7 ICESCR.
[71] Article 6 of the Protocol.
[72] Article 3(a) of the Protocol.
[73] For the ratification status, see www.treaties.un.org.
[74] By the same token, one could argue in favour of the incorporation into UNCLOS of the standards under the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, as well as the 1984 Convention Against Torture.
[75] PAIK, *supra* note 51, para. 23.
[76] In addition, consider also the unveiling of the dramatic working conditions of workers on board fishing vessels in certain regions of the world and, more recently, the impact of the covid-19 pandemic on the seafarers.
[77] See, *inter alia*, *Arctic Sunrise Arbitration, supra* note 37, and the *Enrica Lexie* case *(Italy v India),* award of 21 May 2020.
[78] See, *inter alia*, *Medvedyev and Others v. France*, App. No. 3394/03 (ECtHR), 29 March 2010; *Hirsi Jamaa and others v. Italy*, App. no. 27765/09 (ECtHR), 23 February 2012.

organs[79], have drawn practitioners' and scholars' research onto the interplay between the law of the sea and human rights law, contributing to the emergence of an innovative and comprehensive field of study, arguably of a new legal regime.[80] Consequently, a number of inadequacies concerning the protection of individuals at sea have been uncovered, showing that the two branches of international law have for decades run parallel, with the law of the sea oddly putting aside the relevance of people for the sea and human rights law being entirely built upon the basis of land territory.[81]

This conclusion is particularly relevant to human rights protection at sea within the European Convention of Human Rights system (ECHR). This Convention does not make any express reference to maritime areas, however its application on the high seas was established and upheld multiple times in the case law of the European Court of Human Rights (ECtHR).[82] However, while the ECHR system is to be praised for its effectiveness in the protection of human rights in Europe, some authors have highlighted its shortcomings, namely the principle of prior exhaustion of domestic remedies, the lack of enforcement mechanisms and, last but not least, the notion of jurisdiction. While the first two are rather straightforward and will not be discussed in this paper,[83] the third deserves some clarification.

3.1. The notion of jurisdiction in human rights systems: an obstacle to effective protection?

The notion of jurisdiction in human rights treaties is not to be confused with that of court's jurisdiction analyzed *supra*: it refers to the "power that a state exercises over a territory, and […] over individuals" and "is a question of fact, of actual authority and control."[84] Article 1 ECHR provides that "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention".[85] In other words, ascertaining the State's jurisdiction over the individual whose rights are at stake logically precedes any

[79] Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3042/2017, CCPR/C/130/D/3042/2017.

[80] PAPANICOLOPULU, *supra* note 21.

[81] This is exemplified, on the one hand, by the absence of explicit human rights language in the Law of the Sea Convention and, on the other, by the lack of references to the protection of people at sea in human rights treaties, both international and regional ones. PAPANICOLOPULU, *supra* note 21, p. 33. With regard to international ones, a notable exception is provided by the Convention Against Torture, which in Article 5(1)(a) makes an explicit reference to offences committed on board ships.

[82] See, *inter alia*, *Rigopoulos v. Spain,* App. No. 37388/97 (ECtHR), 12 January 1999; *Medvedyev and Others v. France*, *supra* note 78; *Women on Waves and others v. Portugal*, App. No. 31276/05 (ECtHR), 13 January 2009.

[83] For a general account on the rule of prior exhaustion of local remedies, see *inter alia* CANÇADO TRINDADE, "The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights", Cambridge University Press (1983). See also PISILLO-MAZZESCHI, "Esaurimento dei Ricorsi Interni e Diritti Umani", Giappichelli Editore (2004); on the execution of the ECtHR judgments, see *inter alia* LAMBERT ABDELGAWAD, "The Execution of Judgments of the European Court of Human Rights, Council of Europe Publishing (2008). For an overview on admissibility criteria before the ECtHR, see European Court of Human Rights, "Practical Guide on Admissibility Criteria", Council of Europe (2021), available at https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

[84] MILANOVIC, "Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy", OUP (2011), p. 53.

[85] Article 1 ECHR (emphasis added).

further consideration on the case[86] and is seen as the *conditio sine qua non* "for people to have human rights enforceable against the State and for the State to have obligations towards those people":[87] the State's responsibility to comply with its human rights obligations may be engaged only when a person is subject to the State's jurisdiction.

Unless the alleged violation of human rights occurs within the State's territorial sea, the enforcement of human rights obligations at sea requires the prior finding of the State's extraterritorial jurisdiction.[88] In this regard, the Strasbourg Court has often oscillated between different concepts,[89] leading to confusion and critiques and generating an intense debate among scholars.[90] For the purpose of the present work, suffice it to recall that extraterritorial jurisdiction may be established where a State exercises effective control over a given area outside its national territory (so-called "spatial model") or where its agents exercise a degree of authority and control over the concerned person or human rights abuse (so-called "personal model").[91]

In particular, when it comes to human rights violations at sea – specifically in the context of illegal fishing – only the latter is relevant, thereby constituting a substantial obstacle for victims depending on the various circumstances of the case. Two main situations may be identified: first, that of crewmembers injured or detained in the context of a coastal State's law enforcement operations carried out against a foreign vessel on the grounds of its alleged IUU

[86] PAPASTAVRIDIS, "The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the law of the Sea Paradigm", German Law Journal 21 (2020), p. 419, 2020.

[87] GIUFFRÉ, "A Functional-Impact Model of Jurisdiction: Extraterritoriality Before of the European Court of Human Rights", QIL Zoom-in 82(2021), p. 54.

[88] The legal scholarship on extra-territorial jurisdiction in human rights law is vast. See, *inter alia*, DE SCHUTTER, "Globalization and Jurisdiction: Lessons from the European Convention on Human Rights£, 6 Baltic Yearbook of International Law 183 (2006); MILANOVIC (2011) *supra* note 84; BESSON, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", Leiden Journal of International Law 25 (2012); MALLORY, "Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Right", Hart Publishing (2020); RAIBLE, "Between Facts and Principles: Jurisdiction in International Human Rights Law", Jurisprudence, Vol. 13. No. 1 (2022).

[89] See, *inter alia*, *Banković and Others v. Belgium*, (ECtHR), App. No. 52297/99, 12 December, 2001; *Al-Skeini and others v. the United Kingdom* (ECtHR), App. No. 55721/07, 7 July 2011;.*Al-Saadoon and Mufdhi v. United Kingdom* (ECtHR), App. No. 61498/08, 30 June 2009. For a general overview, see European Court of Human Rights, Guide on Article 1 of the European Convention on Human Rights 12 (2019).

[90] Borrowing from CANNIZZARO, "The logic of fundamental human rights is not to accord to individuals selective protection, *ratione loci*, but rather to reduce the unfettered discretion of public authority. Limiting their effect to a definite geographical space, or to pre-determined conditions of application, would subvert the logic and the very raison d'être of the sphere of fundamental rights pertaining to individuals", CANNIZZARO, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels", 25 European Journal of International Law 1094 (2014). See also WILDE, "Compliance with Human Rights Norms Extraterritorially: Human Rights Imperialism?" in BOISSON DE CHAZOURNES and KOHEN (eds.), International Law and the Quest for Its Implementation 319 (2010), p. 324; cfr. MALLORY, "A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?" (2021) 81 QIL-Questions of International Law 33. Judge Pinto De Albuquerque has even questioned the Court's role as human rights guardian in Europe, holding that it is indirectly promoting fragmentation in international law, but also pushing [itself] to an extremely isolated position worldwide. In *Georgia v Russia,* App. no. 38263/08 (ECtHR), 21 January 2021, Partly Dissenting Opinion, para. 2.

[91] For an overview on these two models, see BESSON (2012), *supra* note 88. See also *Al-Skeini and Others v the UK* case, *supra* note 89, paras. 130-142.

fishing activities. In such a situation, the case law shows that the coastal State's jurisdiction may be easily established whereby its police authorities boarded and inspected the vessel, as well as if they took the crewmembers to the State's judicial authorities[92]. In fact, the mere interception without boarding would be sufficient to bring the ECHR into application extraterritorially.[93] Second, human rights abuses committed on board private fishing vessels flying the flag of a State Party to the ECHR. In this regard, ascertaining the flag State's jurisdiction under the ECHR may prove particularly difficult. The question of human rights jurisdiction here overlaps with that of regulating private entities' conduct,[94] leading to conflation of the two different meanings of jurisdiction as employed in the law of the sea and in human rights law.

To the best knowledge of the author, to date there is no ECtHR case law specifically addressing the latter situation. However, the progressive development of due diligence obligations has the potential to trigger State responsibility for human rights violations linked to the latter's failure to discharge its duty to exercise effective control over ships flying its flag.[95] In this regard, it is worth mentioning also the groundbreaking reasoning by the Human Rights Committee (HRC) in its January 2021 Views relating to Italy's responsibility *vis-à-vis* the failure to fulfill its obligations to save life at sea.[96] The HRC established Italy's responsibility on the basis of its "special relationship of dependency", a notion that some authors saw as potentially contributing to the ascertainment of State's extraterritorial jurisdiction with regard to the conduct of its nationals at sea[97] – e.g. the vessel master or owner subjecting crewmembers to inhuman treatments and forced labour – while others firmly criticized as conflating the finding of jurisdiction with the determination of the content of human rights obligations.[98]

Thus, whereas resorting to the ECtHR may turn feasible for individuals on board vessels who came under the direct or indirect control of State authorities, the same does not hold true for other categories of human rights victims in the context of illegal fishing. Unfortunately, while cases before the ECtHR involving law enforcement operations at sea are numerous, only one concerns illegal fishing activities.[99] The remaining of this section will be devoted to briefly describing this case and exploring the potential contribution of the ECtHR to the enhancement of the protection of the human security dimension of illegal fishing.

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[92] *Medvedyev* case, *supra* note 78.

[93] *Women on Waves* case, supra note 82.

[94] It is worth recalling the so-called "impact-approach" adopted by the Human Rights Committee in its General Comment 36, para. 63. Also, in this regard, it would be interesting to further explore the relation between the flag State's due diligence obligation under Article 94 UNCLOS and its positive obligations under certain human rights norms in the ECHR – for instance, the coastal communities' right to private life enshrined under Article 8 ECHR.

[95] See for instance the abuses on board Spanish vessels reported on Twitter by the International Transport Workers' Federation, available on https://twitter.com/ITFglobalunion/status/1486054327781408768?t=WKhUPmUaa1Jb6zY-kK2Weg&s=03 access 25 January 2022.

[96] HRC Views of 27 January 2021, *supra* note 79.

[97] See *inter alia* GIUFFRÉ, (2021), *supra* note 87.

[98] See, *inter alia*, OLLINO, "The 'Capacity-Impact' model of jurisdiction and its implications for States' Positive Human Rights Obligations", Questions of International Law, Zoom-In 82 (2021); RAIBLE, "Extraterritoriality Between a Rock and Hard Place", Questions of International Law, Zoom-In 82 (2021).

[99] Besides the *Yaşar v. Romania* case to be illustrated below, it is worth mentioning also the *Drieman* case, which however concerns more specifically the attempt by some Greenpeace activists to preclude Norway's whale hunting. *Drieman and Others v Norway* (ECtHR), App. No. 33678/96, 4 May 2000.

3.2. Illegal fishing under the scrutiny of the ECtHR: the Yaşar v. Romania case

The *Yaşar v. Romania* case[100] was lodged by a Turkish national, owner of a vessel seized and confiscated by Romanian authorities while conducting allegedly illegal fishing operations in the Romanian EEZ. More precisely, the coastguard found the vessel in breach of the statutory fishing requirements in force in the country[101] and illegally displaying the Romanian flag, while being officially registered in Turkey. The case is particularly remarkable because it concerns the confiscation of an instrument of crime belonging to a party other than the direct perpetrator of the offence, thus considered as a deprivation of possession used unlawfully.[102] The Applicant contended the infringement of his own right to property as enshrined in Article 1 of Protocol 1 to the ECHR,[103] but failed to prove his good faith in relation to the criminal conduct carried out by the vessel commander and crewmembers. Accordingly, the Strasbourg Court found the interference of the right to property in the case at hand to be lawful[104] and proportionate;[105] most interestingly, it was considered legitimate, for it served the general interest of "preventing offences relating to illegal fishing in the Black Sea", thereby protecting the marine environment and the biological resources therein.[106]

The *Yaşar v. Romania* case allows two significant reflections, one specifically related to one of the functions of human rights adjudication, while the other concerning the very Court's assessment in the present case. Concerning the first, from the facts of the case[107] and the overall assessment carried out by the Romanian national courts,[108] it seems clear that Mr. Yaşar was to a certain extent involved in the criminal activities carried out by the vessel commander.[109] Accordingly, qualifying him as a victim of human rights violation in the context of illegal fishing does not seem fully appropriate. In fact, his case may constitute a quite straightforward example of forum shopping as well as of instrumentalization of human rights adjudication.

Concerning the second, the ECtHR's findings show that economic operators' rights to conduct their activities are contingent to the respect of primary collective interests such as the protection of marine environment and ecosystem. As a matter of fact, in the present case the ECtHR was called upon to strike a fair balance between the human right to property and the protection of the marine environment, that is, between an individual interest and a collective general interest. In light of the circumstances of the case – where the person alleging the infringement of his individual right is possibly also among the perpetrators of a far bigger offence – the ECtHR chose to safeguard the general interest, thus contributing to the overall fight against IUU fishing.

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[100] Yaşar v. Romania, supra note 17.
[101] *Ibid*., para. 8.
[102] *Ibid*., para. 48.
[103] Article 1 of Protocol 1 to the ECHR.
[104] *Yaşar v. Romania* case*, supra* note 17, paras. 52-58.
[105] *Ibid*., paras. 60-66.
[106] *Ibid*., para. 59.
[107] *Ibid*., para. 61 and para. 63.
[108] *Ibid*., para. 37.
[109] *Ibid*., para 63.

4. The Court of Justice of the EU

The Court of Justice of the European Union (CJEU) is the principal judicial organ of the European Union (EU), tasked with the interpretation and application of the EU Treaties,[110] that is, the founding texts upon which the entire EU legal system is built.[111] Accordingly, it is the "guardian of the constitutionality of EU acts", thereby asserting its authority over EU institutions and interacting with Member States, third States and international organizations."[112] In addition, following the adoption of the Lisbon Treaty in 2009, the European Union Charter of Fundamental Rights (EUCFR) acquired status of primary source of law, thus becoming directly enforceable before the CJEU. As a consequence, the Court's role has evolved with time: from being "primarily concerned with economic matters", its jurisdiction has extended so as to include also human rights enforcement.[113] However, despite its role in building up and consolidating the protection of the core democratic principles and values at the heart of the Union, the CJEU cannot be defined *stricto sensu* a human rights court. On the one hand, the Court retains its function as the ultimate guardian of the autonomy of the EU legal order from international law, including from the ECHR system.[114] On the other, the Court's enhanced role as fundamental rights protector should be rather viewed in light of the "continued expansion of the scope of EU law and policy",[115] which also reflects the overall construction of the EU normative power and identity worldwide.[116]

As far as it concerns law of the sea issues before the CJEU, the UNCLOS forms an integral part of the EU legal order.[117] In view of its status as international agreement,[118] the Convention is binding upon the Union and the Member States[119] and has influenced in a substantial manner several instruments of secondary legislation, especially with respect to the conservation of fisheries resources and to the protection and preservation of the marine environment.[120] As a consequence, the CJEU has made multiple references to the Convention provisions in its case law, even asserting the customary law status of some of them prior to its

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[110] Article 19 Treaty of the EU (TEU) provides that "It shall ensure that in the interpretation and application of the Treaties the law is observed."

[111] These are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

[112] DE BÚRCA, "The Evolution of EU Human Rights Law", in CRAIG and DE BÚRCA (eds.) "The Evolution of EU Law" (2011), Oxford University Press, p. 479.

[113] DE BÚRCA, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" (2013), 20 MJ 2, p. 171.

[114] Court of Justice of the EU, *Opinion 2/13* (Full Court), 18 December 2014, ECLI:EU:C:2014:2454.

[115] DE BÚRCA, *supra* note 114, p. 169.

[116] MANNERS, "Normative Power Europe: The International Role of the EU", European Community Studies Association, Biennial Conference, USA (2001). In fact, such an identity appears stronger if supported by Union's judicial powers. See also KASSOTI, "Between Völkerrechtsfreundlichkeit and Realpolitik: the EU and Trade Agreements Covering Occupied Territories" (2016), Italian Yearbook of International Law, Vol. 26, p. 140.

[117] Court of Justice of the EU, case C-459/03, *Commission v Ireland*, judgment of 30 May 2006, ECLI:EU:C:2006:345, para. 82.

[118] The Convention is considered a "mixed" agreement, since both the EU and the 27 Member States have become Parties to it on their own right; in particular, at the time of its accession, the Union has deposited a Declaration clarifying the distribution of competences between itself and the EU Member States, though emphasizing the ambulatory nature of the EU competences.

[119] Article 216(2) TFEU.

[120] LONG, "The European Union and the Law of the Sea Convention at the Age of 30", *International Journal of Marine and Coastal Law 27 (2012)*, p. 713.

entry into force.[121] On the other hand, sea-related disputes have provided the Court with the opportunity to hand down some landmark decisions clarifying certain aspects of EU law, including its own exclusive jurisdiction in regard to the resolution of disputes between Member States concerning the interpretation and application of the EU law,[122] and private parties' rights to challenge EU law based on the Convention.[123]

In light of the foregoing considerations, in the future the CJEU is expected to not only consolidate the autonomy of the EU legal order, but also contribute to the interpretation and the enforcement of the Convention provisions within the EU and beyond.[124] The analysis below briefly highlights some aspects of the EU judicial system and its potential contribution to the protection of human rights, to then draw some conclusive remarks from two judgments delivered in the context of disputes involving unlawful fishing activities.

4.1 Litigating illegal fishing and human rights issues before the CJEU

As far as it concerns the CJEU's contribution to the protection of victims of human rights, natural and legal persons may resort to two direct actions to the Court: first, the action for annulment,[125] directed against a piece of EU legislation with a view to challenging its legality and erasing it from the EU legal order; second, the action for damages,[126] meant to provide "every person"[127] with compensation for damages caused by an EU institution or its servants. In addition, the protection of fundamental rights may be addressed by the CJEU in the context of the so-called preliminary reference procedure,[128] through which national courts refer to it questions on the interpretation or validity of EU law, thereby ensuring its uniform application across the Union. However, commentators have highlighted that, in practice, the very high threshold for the legal standing in the action for annulment[129] and the requirement of the proof of the fault in the action for damages[130] considerably undermine the successfulness of these two actions.[131] Likewise, victims seeking justice before national judges may only indirectly influence the latter's decision to refer preliminary questions to the CJEU, thereby leaving doubts about the effectiveness of these procedures for the protection of human rights.

Despite these substantial and procedural hurdles, both the preliminary reference and the action for annulment have recently shown their potential to enforce human rights standards in the fishery sector. Interestingly, this has occurred in the context of the EU trade deal with the Kingdom of Morocco and its *de facto* application to Western Sahara, a non-self governing

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[121] Court of Justice of the EU, Case C-405/92, *Armand Mondiet v Armement Islais*, judgment of 24 November 1993, ECLI:EU:C:1993:906 para. 13.
[122] *Commission v Ireland*, *supra* note 118, para. 123.
[123] Court of Justice of the EU, case C-308/06, *Intertanko and Others*, judgment of 3 June 2008, ECLI:EU:C:2008:312.
[124] LONG, "Law of the Sea Dispute Settlement and the European Union" (2016) p. 422.
[125] Article 263 TFEU.
[126] Articles 268 and 340(2-3) TFEU.
[127] See also Article 41(3) EUCFR.
[128] Article 267 TFEU.
[129] Court of Justice of the EU, case 25-62, *Plaumann v Commission of the EEC*, judgment of 15 July 1963, ECLI:EU:C:1963:17.
[130] ANTONIOLI, "Community Liability" in KOZIOL and SCHULZE (eds.), Tort Law of the EC, Springer (2008), p. 222.
[131] See, *inter alia*, MAŃKO, "Action for Damages against the EU", European Parliament Research Service – Briefing "Court of Justice at Work", December 2018.

territory formally independent from Morocco but partially occupied by it.[132] Without dwelling upon the entire *Front Polisario* judicial saga, suffice it to recall that in 2016 the CJEU asserted the right of self-determination of the Sahrawi people,[133] clarifying that Western Sahara is "separate and distinct" from the territory of Morocco[134] and that, accordingly, the consent of the Sahrawi people is required for the implementation of the EU-Morocco Liberalization Agreement to Western Sahara.[135]

Against this background, the Court delivered two further judgments specifically concerning EU-Morocco relations in the fisheries sector. The first arose out of a preliminary reference procedure brought by a United Kingdom administrative judge.[136] It concerned the applicability of the Sustainable Fisheries Partnership Agreement (SFPA) with Morocco and of its 2013 Protocol to the waters adjacent to Western Sahara, thereby addressing the validity of the EU act approving the conclusion of that international agreement.[137] The second was delivered in September 2021 by the General Court of the EU (GCEU) – i.e. the EU court of first instance in annulment actions – and concerned the annulment of the Council Decision relating to the conclusion of the new SFPA with Morocco and of its Implementing Protocol.[138] Also in this case, the General Court relied on the 2016 decision and ruled in favor of the Front Polisario.

Even though the latter decision is not a definitive one,[139] a few preliminary considerations may be already drawn from the two judgments. First and foremost, it is submitted that the factual circumstances giving rise to the two distinct actions reflect instances of illegal fishing, for they involve violations of both international and EU law. As a matter of fact, the waters adjacent to the Western Saharan coast is separate and distinct from the territory of Morocco and, according to the consolidated case law of the CJEU[140] – which is grounded on principles of international law such as the relative effect of treaties – any dealing concerning such an area would require the Sahrawi's consent.[141] Accordingly, any fishing activities carried out in those areas pursuant to the SFPA and in the absence of such consent would be in breach of both

[132] For an account of Moroccan-Western Sahara dispute, see ALLAN and OJEDA-GARCÍA, "Natural Resource Exploitation in Western Sahara: New Research Directions", The Journal of North African Studies (2021).

[133] In this respect, it is worth mentioning the recent decision of the African Court on Human and Peoples' Rights (ACtHPR), which upheld the Saharawi's right to self-determination and observed that all States "have the responsibility under international law […] to ensure the enjoyment of the inalienable right to self-determination of the Sahrawi people and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right." *Bernard Anbaatayela Mornah v Republic of Benin and Others* (ACtHPR), Application N° 028/2018, judgment of 22 September 2022, para. 323.

[134] Court of Justice of the EU, case C-104/16 P, *Council v Front Polisario*, judgment of 21 December 2016 (Grand Chamber), ECLI:EU:C:2016:973, paras 90-92.

[135] *Ibid*., para 106.

[136] Court of Justice of the EU, Case C-266/16, *Western Sahara Campaign UK*, judgment of 27 February 2018, ECLI:EU:C:2018:118.

[137] *Ibid*., para 50.

[138] *Front Polisario v Council*, *supra* note 18.

[139] Both the EU Council and the Commission filed a separate appeal against it. For further info, see www.curia.europa.eu.

[140] See *Front Polisario* case *supra* note 135; see also Court of Justice of the EU, C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, judgment of 25 February 2010, ECLI:EU:C:2010:91.

[141] See *Front Polisario* case *Ibid.* See also *Western Sahara Campaign UK*, *supra* note 137.

international and EU law, notwithstanding the text of the latest version of the Agreement that expressly incorporates Western Saharan waters into its geographical scope.[142]

Second, both the CJEU and the GCEU made explicit references to certain UNCLOS provisions, re-asserting that the Convention is binding on the Union besides being specifically recalled in the preamble of the SFPA.[143] In particular, the General Court made a very intriguing argument asserting that, in cases concerning non-self governing territories, the Convention provisions establishing rights for coastal States should be considered as "applying by analogy also to the rights and interests of the people of the non autonomous territories".[144] If confirmed by the CJEU, such a statement could have considerable implications for the rights of the Sahrawi people. More broadly, it would be interesting to see how such a finding may factor into the broader question of individuals' access to dispute settlements mechanisms in the law of the sea, thereby contributing to the progressive development of international law.

Third, the definition of the victims of illegal fishing in these cases should be framed in a rather broad manner. In fact, it ought to include not only the indigenous communities living along the coast of Western Sahara and heavily dependent on fish food and fish activities, but more generally the entire Sahrawi people, whose right of self-determination is compromised by the EU-Morocco economic dealings. Such a definition is coherent with the pleas in law filed by the lawyer representing Front Polisario, whereby he contends that the contested Decision "organises, without consent of the Sahrawi people, the exploitation of its fishery resources by Union vessels", thereby breaching its right of self-determination and of free disposal of its natural resources.[145]

Finally, the cases show that non-EU nationals may be given effective protection under EU judicial remedies. This holds true both for the action of annulment, where they may have access to the Court as direct applicants,[146] and for the preliminary reference proceedings, where instead their rights may be represented by the EU natural or legal person party to the judicial procedure before the national judge of a EU Member State. Thus, the cases shed some light on what is arguably a very high standard of protection for the rights of individuals, showing the Court's openness to engage with questions of international law bearing implications far beyond the territory of the Union.

5. Conclusion

Overall, the case law of the three jurisdictions presented in this paper has contributed to identify at least three different categories of people affected to a varying degree by fishing activities: 1. Crewmembers in the context States' law-enforcement operations and inspections against

[142] Sustainable Fisheries Partnership Agreement Between the European Union and the Kingdom of Morocco, Official Journal of the EU, L 77/8, 20.3.2019.

[143] *Western Sahara UK Campaign*, *supra* note 137 para. 53.

[144] *Front Polisario*, *supra* note 18, para. 222 Translated from the French, "applicables par analogies aux droits et aux intérêts des peuples des territoires non autonomes".

[145] Application (OJ) – Action brought on 10 June 2019 – *Polisario Front v Council* (Case T-344/19), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=216893&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1850753.

[146] It should be noticed, however, that the CJEU in 2016 found Front Polisario not to have met the legal standing requirement necessary for private individuals' lodge of actions of annulment. This notwithstanding, in its decision the Court emphasized the separate and distinct status of Western Sahara as well as the consent doctrine highlighted in the text *supra*, which remained a substantial victory for the Front Polisario, thereby enhancing the proteciton of its rights.

illegal fishing; 2. Economic operators such as vessel owners, whose economic rights may be undermined due to law enforcement measures – e.g. vessel confiscation or crew detention; 3. The coastal communities and indigenous populations that are heavily dependent on fish food and fish-related activities such as artisanal and subsistence fishing.

Concerning the first category, vessels crewmembers injured or detained in the context of law enforcement operations are likely to obtain a degree of protection under the UNCLOS and the ECtHR systems, in light of the direct link established between themselves and the State conducting the military operation. As a matter of fact, such a link triggers the human rights jurisdiction of the State, bringing the ECHR into play; also, it allows flag States willing to protect their fishing interests before UNCLOS tribunals to allege the violations of international standards regulating the use of force as well as of the elementary considerations of humanity, thus pursuing the protection of human rights violations in the context of law of the sea disputes via the gate of Article 293 UNCLOS.

As far as it concerns economic operators, the case law shows that law enforcement operations may interfere with their enjoyment of economic rights such as the right to property or the freedom to conduct a business. However, a case-by-case analysis is needed with a view to discerning the cases of clear violations of fundamental rights from those in which the economic operators are rightfully prosecuted for their unlawful conducts. Whilst in some cases the line between these two situations is blur and highly dependent on the domestic law, in other cases judges will easily strike a balance between the general interest and the private interest at stake, distinguishing the individual situations deserving protection from those that need to be contrasted.

Concerning the third category, coastal state communities do not have direct access to the UNCLOS Part XV disputes settlement mechanisms, whose jurisdiction is limited to the interpretation and application of provisions of the Convention. Although the analysis of both Article 293(1) UNCLOS and of the rule of reference technique as employed in the context of Article 94 UNCLOS leave the doors open for the progressive enhancement of the standards of protection for this category of victims, in practice to date they are still far from receiving effective protection under the Convention. By contrast, the analysis of the *Front Polisario* cases shows that the CJEU is willing to assert its role as international adjudicator, thereby being open to engaging with questions of extraterritorial scope including the protection of fundamental rights in the context of the EU Common Fisheries Policy. Arguably, the CJEU's engagement with the provisions of the law of the sea Convention is a positive development for both EU and international law, as well as for individuals whose rights are undermined in connection with the implementation of the Union's fisheries policy. This trend is likely to increase in the future, especially given both the obstacles to seeking protection under the UNCLOS and the ECHR systems and the significantly vast scope of EU legislation relating to law of the sea matters – including, but not limited to, fisheries –, which may trigger protection under the CJEU. Hence, this Court may in the future provide significant opportunities to the protection of victims of human rights violations in the context of illegal fishing, thereby asserting its role in the protection of fundamental rights in the EU Common Fisheries Policy and, more generally, within the fishery sector.

Notably, two further categories of victims of human rights violations connected to the fishery sector do not seem to find protection before international courts or tribunals: first, fishers and crewmembers on board fishing vessels who, in certain regions of the world, are subject to inhuman working conditions arguably amounting to forced labour, torture and slavery

practices;[147] second, fishery observers, whose role as independent "watchdogs" on board vessels put them at serious risk of physical violence and abuses on the part of the crewmembers.[148] In this regard, the State's jurisdictional threshold in the ECHR system, in connection to the issue of regulating private vessels' conduct, constitutes a substantive obstacle to the access of such victims to the ECtHR system of protection. This factor significantly undermines the protection of human rights through international adjudicatory bodies worldwide, *de facto* leaving a number of individuals without effective protection. Ultimately, this may offer the ECtHR with the opportunity to further develop the rules on jurisdiction by drawing from other approaches currently being put forward elsewhere – e.g. under the HRC – with a view to overcoming the legal loopholes and affording a degree of protection to these categories of individuals working on the high seas.

Last, but not least, the foregoing analysis highlights that the connection between IUU fishing and human rights is gaining momentum and requires serious action from the international community. Growing evidence put forward by international and non-governmental organizations shows that IUU fishing is far from being a "merely" environmental threat. In fact, it has clear human security implications that need to be addressed urgently. Hence, the international community may start rethinking its approach to the broader phenomenon of illegalities within the fishery sector and move its focus from the narrow environment-oriented notion of IUU fishing onto a broader and multifaceted notion of illegal fishing. In this regard, international courts and tribunals' jurisprudence are likely to give a relevant contribution in the near future.

[147] See, *inter alia*, the ILO report recalled *supra* note 60.

[148] See, *inter alia*, Human Rights at Sea, "Fisheries Observer Deaths at Sea, Human Rights & the Role & Responsibilities of Fisheries Organisations" (July 2020).