

Mending the Net

State Responsibility for Nationals Engaged in IUU Fishing?

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16.1 INTRODUCTION

Illegal, unreported and unregulated (IUU) fishing is a serious threat to the world's food resources, frustrates efforts to conserve and protect marine living resources and ecosystems, and threatens geopolitical stability.¹ The resources and economies of developing States, in particular, are badly affected by IUU fishing operations in their EEZs.² The purpose of this chapter is to consider whether it can be argued that States whose nationals are owners or operators of fishing vessels involved in IUU fishing activities have an obligation to act against those persons.³

Although a considerable number of international, governmental and non-governmental organisations are involved in the fight against IUU fishing, it still occurs on a large scale, and the rules, as currently applied, have for various reasons not proven to be very effective. For example, the UN Convention on the Law of the Sea (UNCLOS)⁴ imposes primary responsibility on coastal States to regulate fishing operations in their EEZ and to enforce such regulations. However, States, in particular developing States, may not have the resources and capacity to regulate fishing in their EEZ and to enforce such regulations meaningfully. Moreover,

¹ See for an explanation of the meaning of 'illegal', 'unreported' and 'unregulated' in the definition of IUU fishing, for example G. Oanta, 'Illegal fishing as a criminal act at sea', in Hague Academy of International Law, *The Centre for Studies and Research in International Law and International Relations* (Leiden/Boston: Brill Nijhoff, 2014), 157.

² The damaging impact of IUU fishing is for example described in M. Palma, M. Tsamenyi and W. Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden/Boston: Martinus Nijhoff, 2010), 9; and A. Shaver and S. Yozell, *Casting a Wider Net: The Security Implication of Illegal, Unreported and Unregulated Fishing* (Washington, DC: Stimson, 2018), 7, 11.

³ This question appears still unanswered. See V. Schatz, 'The contribution of fisheries access agreements to flag State responsibility' (2017) 84 *Marine Policy*, 318.

⁴ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

although international law gives flag States an important role in the fight against IUU fishing, not all flag States are willing to fulfil this task or capable of doing so. This is often the case with States that offer flags of convenience.⁵ However, there are also more established flag States whose vessels are regularly involved in IUU fishing, without the flag State appearing to take much visible action against such activities.⁶

A further reason, intertwined with the failure of coastal States and flag States to act against IUU fishing operations, is the relationship between these operations and the involvement of transnational corporations that are active ‘behind the scenes’, often as operators or beneficial owners of the vessels involved in these operations. Given the profits that can be made by engaging in IUU fishing, these corporations are willing to take considerable risks. Therefore, the sanctions that can be imposed by coastal States for IUU fishing infractions are not treated as a deterrent but as a cost of doing business.⁷ Often advantage is taken of weaknesses in the administrative and enforcement systems of coastal States and port States.⁸ The financial interests involved also result in the use of more sophisticated methods for circumventing applicable regulations, such as trans-shipment of fish from fishing vessels to refrigerated transport vessels or by reflagging vessels on a regular basis.⁹ Corporations that engage in IUU fishing are sometimes involved in other, related, criminal activities such as forced labour, corruption, human trafficking, smuggling or drug running.¹⁰

By prohibiting persons from being involved in IUU fishing activities, for example as operators or owners of vessels, and imposing appropriate sanctions in the case of breach of the prohibition, fewer incentives will exist for IUU fishing operations.

⁵ North Atlantic Fisheries Intelligence Group, *Chasing Red Herrings: Flags of Convenience and the Impact on Fisheries Crime Law Enforcement* (Copenhagen: The Nordic Council of Ministers, 2017); and UN Office on Drugs and Crime (UNODC), *Rotten Fish – A Guide to Addressing Corruption in the Fisheries Sector* (Vienna: United Nations, 2019).

⁶ Shaver and Yozell (n 2), 8.

⁷ See for example M. Beke, R. Ackermann and R. Blomeyer, *The Common Fisheries Policy: Infringement Procedures and Imposed Sanctions throughout the EU*, Committee on Fisheries (Brussels: European Parliament, 2014), 62.

⁸ A. Telesetsky, ‘Laundering fish in the global undercurrents: Illegal, unreported, and unregulated fishing and transnational organized crime’ (2014) 41(4) *Ecology Law Quarterly*, 939, 960; and M. Beseng, ‘Cameroon’s choppy waters: The anatomy of fisheries crime in the maritime fisheries sector’ (2019) 108 *Marine Policy*, 4.

⁹ V. Mundy, *The Impact of the EU IUU Regulation on Seafood Trade Flows: Identification of Intra-EU Shifts in Import Trends Related to the Catch Certification Scheme and Third Country Carding Process* (Brussels: Environmental Justice Foundation, Oceana, The Pew Charitable Trusts, WWF, 2018), 60.

¹⁰ For example: INTERPOL Environmental Security Directorate, *Study on Fisheries Crime in the West African Coastal Region* (Paris: INTERPOL, 2014), 21; and North Atlantic Fisheries Intelligence Group (n 5), 26.

16.2 IUU FISHING: CURRENT FRAMEWORK

16.2.1 UNCLOS

UNCLOS has created various maritime zones, each with distinct rights and responsibilities.¹¹ With regard to the EEZ, UNCLOS contains provisions that deal with fishing activities by vessels flying the flag of another State. Article 56(1)(a) UNCLOS grants sovereign rights to a coastal State for exploring and exploiting, conserving and managing marine resources in its EEZ. Paragraph (b) of the same provision grants a coastal State jurisdiction for protection and preservation of the marine environment. Article 62(4) UNCLOS describes, on a non-enumerative basis, the topics of the laws and regulations that a coastal State may impose in connection with fishing and related activities in its EEZ. Next to these rights, UNCLOS also imposes obligations on coastal States, requiring them to promote the objective of optimum utilisation of the living resources in their EEZ¹² and to apply proper conservation and management measures so that the living resources in their EEZ are not endangered by over-exploitation.¹³ A coastal State must also cooperate with other States for the conservation of marine species and stocks that are shared with such other States.¹⁴ Article 192 UNCLOS applies to all maritime zones created by UNCLOS, including the EEZ, and obligates States to protect and preserve the marine environment.¹⁵

Under Article 58(3) UNCLOS, for example, a State that exercises its rights in the EEZ of another State must comply with the laws and regulations adopted by that other State. Although this rule is addressed to States, it has been interpreted as an obligation on a State to ensure that its nationals, when fishing in the EEZ of another State, observe the regulations of the coastal State.¹⁶ Pursuant to Article 62(4) UNCLOS nationals of States fishing in the EEZ must comply with the conservation and other fisheries-related measures of the EEZ coastal State. If a vessel breaches the coastal State's fisheries regulations, that State can, pursuant to Article 73(1) UNCLOS, act against the relevant vessel and its crew, including boarding,

¹¹ See for a more detailed description: N. Matz-Lücke and J. Fuchs, 'Marine living resources', in D. Rothwell et al., *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), 497; and R. Churchill and A. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1999), 288.

¹² Art.62(1) UNCLOS.

¹³ Art.61(2) UNCLOS.

¹⁴ Arts. 63 to 67 UNCLOS.

¹⁵ For a more general discussion regarding this provision, see D. Czybulka, 'Article 192: General obligation', in A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Munich, Oxford and Baden-Baden: C.H. Beck/Hart/Nomos, 2017), para. 18; and J. Mossop, 'Can we make the oceans greener: The successes and failures of UNCLOS as an environmental treaty' (2018) 49(4) *Victoria University of Wellington Law Review*, 558.

¹⁶ A. Proelss, Article 58: Rights and duties of other States in the exclusive economic zone in Proelss, *UNCLOS Commentary* (n 15), para. 24.

inspection and arrest of the vessel and initiation of judicial proceedings.¹⁷ However, the arrested vessel and its crew must be promptly released upon the posting of a reasonable bond or other security.¹⁸ Sanctions imposed on crew members may not include imprisonment or any form of corporal punishment.¹⁹

16.2.2 ITLOS Advisory Opinion

Since UNCLOS contains no specific provisions about the responsibility of flag States for fishing in the EEZ of another State, the question arose whether a coastal State could hold a flag State liable for IUU fishing by vessels flying its flag in that coastal State's EEZ. The Sub-Regional Fisheries Commission, whose membership consists of a number of West African States that suffer from IUU fishing in their EEZs, requested the International Tribunal for the Law of the Sea (ITLOS) for an opinion on this question, which ITLOS provided in April 2015 (the ITLOS Advisory Opinion).²⁰ ITLOS stated therein that the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing in the EEZ rests with the EEZ coastal State.²¹ However, this primary responsibility does not release other States from their obligations in this respect.²² With regard to the role of flag States whose vessels conduct IUU fishing activities in the EEZ of another State, ITLOS observed that UNCLOS contains general obligations for the conservation and management of marine living resources, set out in its Articles 91, 92, 94, 192 and 193, which are to be met by flag States in all maritime areas regulated by UNCLOS, including the EEZ of another State. It also noted that Articles 58(3) and 62(4) contain specific obligations in this respect with regard to fishing activities conducted by nationals of a flag State in the EEZ of another State.²³

ITLOS held that a flag State must ensure compliance by its vessels with the relevant conservation measures enacted by a coastal State for its EEZ.²⁴ This is a due diligence obligation and not an obligation of result.²⁵ Accordingly, a flag State's liability under international law in connection with IUU fishing arises from its

¹⁷ The measures are described in more detail in Palma, Tsamenyi and Edeson (n 2), 147.

¹⁸ Art.73(2) UNCLOS.

¹⁹ Art.73(3) UNCLOS.

²⁰ ITLOS, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (2015) ITLOS Case No. 21. See for a critical analysis: V. Schatz, 'Fishing for interpretation: The ITLOS advisory opinion on flag state responsibility for illegal fishing in the EEZ' (2016) 47 *Ocean Development & International Law*, 327.

²¹ ITLOS Advisory Opinion (n 20), paras. 96 and 106.

²² *Ibid.*, para. 108.

²³ *Ibid.*, para. 111.

²⁴ *Ibid.*, para. 120.

²⁵ *Ibid.*, para. 129.

failure to comply with the due diligence obligation and, therefore, a flag State is not liable for IUU fishing in the EEZ of another State by vessels flying its flag if it has taken all necessary and appropriate measures to meet this obligation.²⁶

The ITLOS Advisory Opinion focuses on the obligation of vessels to comply with a coastal State's fisheries regulations. However, the vessel is generally not the addressee of such regulations. These are typically directed at persons who control the movements of the vessel and the activities in which the vessel is involved, such as the master, crew members, owner and operator of the vessel.²⁷ These persons are often not nationals of or resident in the flag State concerned. This means that, for enforcement of its regulations against foreign owners, operators and crew members of the vessel, a flag State will be dependent on cooperation from other States, which may not be forthcoming. It is not clear whether ITLOS considered this point when concluding that the flag State was responsible for IUU fishing activities conducted by vessels flying its flag as well as by its nationals.²⁸ There is no reference in the ITLOS Advisory Opinion to the responsibilities of states of which owners or operators of fishing vessels are nationals.

16.2.3 Other Instruments

Recognising that relying on flag and coastal States to fight IUU fishing may not be sufficient, other ways to act against IUU fishing must be considered. One could prohibit landing fish that originate from IUU fishing, which is the main purpose of the Agreement on Port State Measures (PSMA).²⁹ The PSMA allows, and in some cases requires, a State to refuse entry to its ports³⁰ or use of port services³¹ by a vessel that has been or is suspected to have been engaged in IUU fishing. Other measures, such as those adopted by the EU³² and the United States,³³ are market

²⁶ Ibid., paras. 146–148.

²⁷ For example, in a West African context the laws of Cameroon, Gambia, Ghana, Guinea Bissau, Liberia and Senegal impose vicarious liability on the owner of a vessel for breaches of its fisheries regulations. Operators of the vessel can be held liable under the laws of Cabo Verde, Gabon, Ghana, Guinea Bissau, Guinea Conakry, Liberia, Mauritania, Nigeria, Senegal and Sierra Leone.

²⁸ ITLOS Advisory Opinion (n 20), para. 124.

²⁹ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 22 November 2009, in force 5 June 2016, 55 ILM 1157.

³⁰ Ibid., Art. 9.

³¹ Ibid., Art. 11.

³² Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, OJ 2008 No L 286, 29 October 2008 (EU IUU Regulation).

³³ The Magnuson–Stevens Fishery Conservation and Management Act (16 U.S.C. 1801–1891(d)) (2014). See further A. Telesetsky, 'U.S. seafood traceability as food law and the future of marine fisheries' (2017) 47 *Environmental Law*, 765.

focused³⁴ and enable the competent authorities to restrict the import of fish that has been caught by vessels flagged to a State that condones IUU fishing activities.³⁵ However, the impact of EU and US measures appears to be limited as a result of a lack of implementation and application.³⁶

There have also been suggestions to characterise IUU fishing as organised crime under the United Nations Convention against Transnational Organized Crime (UNTOC).³⁷ If it is considered as a 'serious crime' under UNTOC, then a legal basis would exist for extradition, mutual legal assistance and law enforcement cooperation. However, since Article 73(3) UNCLOS prohibits imposition by a coastal State of prison sentences on crew members involved in IUU fishing, it is questionable whether a coastal State can qualify IUU fishing by foreign vessels in its EEZ as a form of organised crime as defined in UNTOC.³⁸

It has also been suggested that if it is not possible to act against IUU fishing activities themselves, one could consider prosecuting the offenders for other, related criminal activities, which may be easier to characterise as organised crime.³⁹ This alternative is, however, not so straightforward. First, there must have been such a related criminal activity. Second, a State should have regulatory and enforcement jurisdiction to prosecute the crime. If reliance is placed on the flag State of the vessel or the affected coastal State, similar capacity issues as mentioned earlier in the context of IUU fishing offences may arise.

³⁴ However, it is not clear to what extent these market restrictions are compatible with GATT/WTO rules. See for example, A. Telesetsky, 'Scuttling IUU fishing and rewarding sustainable fishing: Enhancing the effectiveness of the Port State Measures Agreement with trade-related measures' (2015) 38 *Seattle University Law Review*, 1267.

³⁵ K. Wyman, 'Unilateral steps to end high seas fishing' (2018) 6(1) *Texas A&M Law Review*, 259; and Palma, Tsamenyi and Edeson (n 2), 173.

³⁶ European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 768/2005, (EC) No 1967/2006, (EC) No 1005/2008, and Regulation (EU) No 2016/1139 of the European Parliament and of the Council as regards fisheries controls, SWD/2018/280 final, 30 May 2018; and Natural Resources Defense Council, 'On the Hook: How the United States Enables Illegal, Unreported, and Unregulated Fishing', January 2021, 14.

³⁷ United Nations Convention against Transnational Organized Crime, Palermo, 12 December 2000, in force 29 September 2003, 40 ILM 335 (2001).

³⁸ Art.2(b) UNTOC defines 'serious crime' as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'. However, other States, such as flag States, market States and States whose nationals are involved in IUU fishing, are not bound by the limitation of Art. 73(3) UNCLOS.

³⁹ See, for example, Telesetsky, 'Laundering fish' (n 8), 939; and P. Bondaroff, N. Teale et al., *The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime* (Geneva: The Global Initiative against Transnational Organized Crime and the Black Fish, 2015), 36.

16.3 CHALLENGING THE PERSONS BEHIND THE SCENES

16.3.1 Owners, Operators and Other Beneficiaries

It is recognised by law enforcement agencies and non-governmental organisations that if the international community wants to fight effectively against IUU fishing, action needs to be taken against the persons and organisations that operate behind the scenes of IUU fishing and on whose behalf their activities are undertaken, such as the operators and beneficial owners of vessels.⁴⁰ Various actions could be taken against these persons. More traditional criminal and administrative sanctions could be imposed.⁴¹ In particular, where financial sanctions are not substantial, these could be combined with confiscation of (estimated) profits.⁴² Alternative sanctions could include withdrawal of subsidies or tax benefits, tax increases,⁴³ revocation of licences,⁴⁴ restrictions on insurability or voidance of existing insurance policies.⁴⁵ These alternative sanctions can be useful in situations where the activities of the persons themselves are legitimate. As a result of these measures, their activities will become more expensive or riskier. They will, however, have limited impact on activities by criminal organisations that do not pay taxes or are not beneficiaries of subsidies.

The effectiveness and impact of sanctions is largely dependent on the ease with which sanctions can be imposed and the ability to enforce them effectively.⁴⁶ The owners and operators of vessels involved in IUU fishing may be located in States that are potentially in a better position in terms of capacity and experience to take enforcement action than the affected developing coastal or flag State.⁴⁷ From that perspective, it would be desirable if the State where the persons are located were able to exercise both regulatory and enforcement jurisdiction.

⁴⁰ Bondaroff et al. (n 39), 70; Shaver and Yozell, (n 2), 29; OECD Trade and Agriculture Directorate – Fisheries Committee, *Combatting Illegal, Unreported and Unregulated Fishing: Where Countries Stand and Where Efforts Should Concentrate in the Future* (Paris: OECD Secretariat, 2018), 12, 38, 42.

⁴¹ Art. 44 EU IUU Regulation (n 32). See also N. Noval, *The Spanish Legal Process for Prosecuting Illegal Fishing: A Story of Success?* (Madrid: ClientEarth, 2019).

⁴² See Arts. 44 and 46 EU IUU Regulation (n 32); Bondaroff et al., (n 40), 70.

⁴³ P. Bender and G. Lugten, 'Taxing illegal fishing (A proposal for using taxation law to reduce profiteering from IUU fishing offences)' (2007) 22(4) *The International Journal of Marine and Coastal Law*, 517.

⁴⁴ See Art. 45 EU IUU Regulation (n 32).

⁴⁵ D. Miller, 'Cutting a lifeline to maritime crime: Marine insurance and IUU fishing' (2016) 7 *Frontiers in Ecology and the Environment*, 357.

⁴⁶ Bondaroff et al. (n 40), 50.

⁴⁷ For the role of EU Member States as operators or beneficial owners of vessels engaged in IUU fishing see, for example: Environmental Justice Foundation, *Pirate Fishing Exposed: The Fight Against Illegal Fishing in West Africa and the EU* (London: Environmental Justice Foundation, 2012), 31.

It is acknowledged that transnational corporations involved in IUU fishing typically operate through a network of nominee companies, thereby making it more difficult to create a direct link between the registered owner of a vessel that is engaged in IUU fishing and its beneficial owner.⁴⁸ However, the use of 'big data', anti-tax evasion and anti-money laundering regulations make it easier nowadays to identify the beneficial owners of companies.⁴⁹

Furthermore, if being involved in IUU fishing as owners and operators of vessels is already sanctionable, it may not be necessary to prove a direct link between particular illegal fishing activities of a vessel in a State's EEZ (with an *in flagrante* arrest of the vessel), and other forms of evidence could be used, such as an involvement in the organisational or financial aspects of IUU fishing operations, the marketing of the resulting fish or fish products, or documentary inconsistencies. The State where the corporations are located could also treat their involvement in IUU fishing as a form of organised crime so that the cooperation arrangements of UNTOC would apply.⁵⁰

16.3.2 *Exercise of Jurisdiction*

A State whose nationals are involved in IUU fishing as owners or operators of a fishing vessel could have a meaningful role to fulfil in the fight against IUU fishing. What jurisdictional basis could it use for this purpose? First, it could do so by applying the so-called active personality principle.⁵¹ On the basis of this principle, a State can assert criminal jurisdiction over the conduct of its nationals abroad.⁵² This personality link could be extended from nationality to residence or domicile if the connection is strong enough to meet the jurisdictional purposes in question.⁵³ It may also be possible for a State to create jurisdiction over activities connected to IUU fishing that have taken place or are deemed to have taken place within its territory.⁵⁴ It could, for example, provide that it is illegal within its territory to organise, direct or finance activities that result in a breach of the

⁴⁸ Telesetsky, 'Laundering fish' (n 8), 989; North Atlantic Fisheries Intelligence Group (n 5), 24; and A. Brush, *Strings Attached: Exploring the Onshore Networks behind Illegal, Unreported, & Unregulated Fishing* (New York: C4ADS, 2019).

⁴⁹ See for example OECD, *Fighting Tax Crime: The Ten Global Principles* (Paris: OECD, 2017).

⁵⁰ Such state is not bound by the limitations that follow from Art. 73(3) UNCLOS.

⁵¹ Palma, Tsamenyi and Edeson (n 2), 102.

⁵² A. Mills, 'Rethinking jurisdiction in international law' (2014) 84(1) *British Yearbook of International Law*, 198.

⁵³ C. Blattner, 'The unexplored: Direct extraterritoriality', in Charlotte E. Blattner (ed.), *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford: Oxford University Press, 2019), 173.

⁵⁴ Mills (n 52), 196.

fishing laws of another State. This will create territorial jurisdiction of the State concerned.

A number of States already have legislation in place that addresses nationals who are involved in IUU fishing operations. For example, the EU IUU Regulation provides that nationals who are subject to the jurisdiction of a Member State should neither support nor engage in IUU fishing, including by engagement on board or as operators or beneficial owners of fishing vessels included in the EU IUU vessel list.⁵⁵ It also provides that Member States must take appropriate action with regard to nationals identified as supporting or engaged in IUU fishing.⁵⁶ Spain and Portugal have included provisions in their legislation that implement these obligations.⁵⁷ Other States, such as New Zealand and Australia, also prohibit the involvement of their nationals in IUU fishing.⁵⁸

Another interesting example is the US Lacey Act.⁵⁹ In the context of IUU fishing, this prohibits the import, export, transport, sale, receipt, acquisition or purchase in inter-state or foreign commerce of any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law.⁶⁰ It therefore targets US nationals involved in the supply chain of illegally caught fish. Since the Lacey Act refers to foreign law generally, it covers IUU fishing in another State's EEZ.⁶¹ It was applied in a case involving the import into the United States of lobster that was illegally caught in South Africa's territorial waters and EEZ. In 2017, after extended legal proceedings, the person who directed the illegal activities, a certain Mr Bengis, was given a prison sentence of 57 months. The courts also imposed a forfeiture order of USD 37 million. A substantial part of the funds recovered from Mr Bengis was handed over to South Africa as compensation for the losses that it suffered due to these illegal fishing activities.⁶²

⁵⁵ Art. 39(1) EU IUU Regulation (n 32).

⁵⁶ *Ibid.*, Art. 39(3).

⁵⁷ Spain: Art. 2 Royal Decree 1134/2002 of 31 October; and Art. 101(k) and (l) Law 3/2001 of 26 March; Portugal: Art. 9 Decree Law 35/19.

⁵⁸ New Zealand: Art. 113A(1) Fisheries Act 1996, Public Act 1996 No 88; Australia: Arts. 105F and 105FA Fisheries Management Act 1991, No. 162, 1991. See also G. Rose and M. Tsamenyi, *Universalizing Jurisdiction over Marine Living Resources Crimes* (Gland: World Wide Fund for Nature, 2013), 58.

⁵⁹ Lacey Act (18 USC 42-43; 16 USC 3371-3378). See also G. Arevalo, 'Free trade agreements and the Lacey Act: A carrot and stick approach to prevent and deter trade in IUU fisheries' (2015) 10 *Florida A & M University Law Review*, 349.

⁶⁰ 16 USC Section 3372(a)(2)(A).

⁶¹ The US courts interpret 'foreign law' quite broadly. See M. White, 'Overcriminalization based on Foreign Law: How the Lacey Act incorporates foreign law to overcriminalize importers and users of timber products' (2013) 12(2) *Washington University Global Studies Law Review*, 388.

⁶² See C. Dutot, 'Hout Bay and the illegal lobster trade: a case study in recovering illicit proceeds of IUU fishing and wildlife trafficking' (Basel: Basel Institute on Governance (Green Corruption Case Study), 2021). For a detailed description of the facts and the initial proceedings, see M. Asner, 'To catch a wildlife thief: Strategies and suggestions for the fight against illegal wildlife trafficking' (2016) 12 *University of Pennsylvania Asian Law Review*, 4.

16.4 OBLIGATION TO ACT AGAINST NATIONALS INVOLVED IN IUU FISHING?

16.4.1 UNCLOS and Responsibility for IUU Fishing Operations

States whose nationals (or residents) are engaged in IUU fishing operations can take measures against those persons. The next question is whether they have an obligation under international law to do so.⁶³ There are indeed grounds for arguing that there is such an obligation. It may in this context be useful to look at the provisions of UNCLOS that are relevant to fishing and the conservation of marine resources in a State's EEZ. As mentioned previously, Article 192 applies to all States that are a party to UNCLOS, Article 62(4) applies to the nationals of other States who are fishing in a coastal State's EEZ and Article 58(3) to all States with an activity or interest in the coastal State's EEZ. Therefore, although the ITLOS Advisory Opinion links the obligation to comply with conservation measures to flag States (also as a result of the questions that ITLOS was asked), the provisions to which it refers are not limited to flag States. Although applying to the high seas only, Article 117 UNCLOS is another provision with a reference to 'nationals'. It has been suggested that the term 'national' should extend to individuals and entities who operate behind the scenes, including by piercing the corporate veil.⁶⁴

Article 62(4) UNCLOS refers to nationals of other States fishing in another State's EEZ.⁶⁵ The question here is whether 'other States' refers only to vessels and nationals of the vessel's flag State or whether it could also include other States, for example the States of which the operators or owners of the vessel are nationals. As mentioned earlier, there are various States whose fisheries laws include provisions that apply to the owner or operator of a vessel or provide that an owner or operator can be held liable for breaches of its fisheries laws. The 'other States' to which Article 62(4) UNCLOS refers should therefore in my view also include the States of which such owners and operators are nationals.⁶⁶

⁶³ Although not possible to analyse it in this chapter, the 'no harm' principle (*sic utere tuo ut alienum non laedas*) could also support such an obligation on a more general basis.

⁶⁴ R. Rayfuse, 'Article 117: Duty of States to adopt with respect to their nationals measures for the conservation of living resources of the high seas', in Proelss, *UNCLOS Commentary* (n 15), para. 35.

⁶⁵ Its first sentence reads as follows: 'Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State'.

⁶⁶ Various examples of regulations that a coastal State can impose as listed in Art. 62(4) UNCLOS would typically be directed at the owners and operators of the vessel rather than the vessel itself or its crew.

16.4.2 *Obligation to Act against Nationals Involved in IUU Fishing?*

According to the ITLOS Advisory Opinion, Article 192 UNCLOS imposes on all States parties to UNCLOS an obligation to protect and preserve the marine environment. This applies to all maritime areas, including those encompassed by an EEZ.⁶⁷ This provision was also discussed in the South Chinese Sea Arbitration award,⁶⁸ where the arbitral tribunal considered it well established that Article 192 UNCLOS entails a positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, the negative obligation not to degrade the marine environment. The arbitral tribunal emphasised that Article 192 UNCLOS sets forth obligations not only in relation to activities directly undertaken by States and their organs but also obligations to ensure that activities within their jurisdiction and control do not harm the marine environment.⁶⁹ This could imply that a State is required to take action against persons (such as owners and operators of vessels involved in IUU fishing operations) under its jurisdiction who adversely affect the marine environment in an area under the control of another State, such as another State's EEZ.

The notion that States have a general obligation to ensure that their nationals are not involved in IUU fishing (and therefore not limited to vessels flying its flag) can further be found in paragraph 18 of the FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU), which provides policy guidance for States to support national efforts to combat IUU fishing.⁷⁰ This paragraph calls on all States to take measures or cooperate to ensure that their nationals do not support or engage in IUU fishing and to cooperate in identifying those nationals who are the operators or owners of vessels involved in IUU fishing. In its technical guidelines for the implementation of this paragraph, the FAO observes that the measures to be taken could include laws prohibiting nationals from engaging in IUU fishing, even if the activity in question takes place aboard a foreign vessel or in waters under the jurisdiction of another State.⁷¹

In line with the IPOA IUU, in the proceedings leading to the ITLOS Advisory Opinion, New Zealand argued that similar duties to those imposed on flag States may also fall on other States in certain circumstances. Such duties are then imposed in order to address evasion of legal responsibility by operators that deliberately

⁶⁷ ITLOS Advisory Opinion (n 20), para. 120.

⁶⁸ *South China Sea Arbitration, Philippines v. China*, Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12 July 2016, Permanent Court of Arbitration.

⁶⁹ *South China Sea Award*, *ibid.*, para. 944.

⁷⁰ FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by FAO's Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001.

⁷¹ FAO Fisheries Department, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. FAO Technical Guidelines for Responsible Fisheries*, No. 9 (Rome: FAO, 2002), 12.

choose to flag their vessels in States that fail to properly discharge their duty of effective control. New Zealand stated that in such circumstances, there is concurrent responsibility on the part of the State of nationality of those operating the vessel. It also held that States also have a responsibility to exercise effective control over their nationals, including the beneficial owners or operators of vessels, in order to prevent and deter them from engaging in IUU fishing.⁷²

Moreover, the UN General Assembly regularly adopts resolutions in relation to IUU fishing.⁷³ In its unanimously adopted resolution of 8 December 2020, it

[u]rges States to effectively exercise jurisdiction and control over their nationals, including beneficial owners, and vessels flying their flag, in order to prevent and deter them from engaging in illegal, unreported and unregulated fishing activities or supporting vessels engaging in illegal, unreported and unregulated fishing activities, including those vessels listed by regional fisheries management organisations or arrangements as engaged in those activities, and to facilitate mutual assistance to ensure that such actions can be investigated and proper sanctions imposed.⁷⁴

Although General Assembly resolutions are as such not considered to have binding effect, this resolution's unanimous adoption, the fact that it repeats the principles set out in previous resolutions and its translation into state practice as described earlier would suggest that it reflects at least the development of a norm.⁷⁵

16.5 CONCLUSION

The traditional approach of combating IUU fishing, with strong reliance on flag State enforcement, has proven not to be effective due to use of flags of convenience and stateless vessels and the involvement of internationally operating organisations with considerable financial interests in IUU fishing. This chapter suggests involving other States in the fight against IUU fishing, in particular those States in which owners and operators of vessels engaged in IUU fishing activities are located. Although the focus under UNCLOS for challenging IUU fishing in a State's EEZ

⁷² International Tribunal for the Law of the Sea (Case No. 21) (n 20), Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Written Statement of New Zealand, 27 November 2013, paras. 32 and 33.

⁷³ See for an overview: United Nations, 'Oceans and the Law of the Sea in the General Assembly of the United Nations, General Assembly resolutions and decisions', available at www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm (accessed on 3 June 2021).

⁷⁴ Resolution adopted by the General Assembly on 8 December 2020; A/RES/75/89 -Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, para. 83.

⁷⁵ S. Schwebel, 'The effect of resolutions of the U.N. General Assembly on Customary International Law' (1979) 73 *American Society of International Law Proceedings*, 305.

has been on coastal States and flag States, it can be argued that UNCLOS also obliges States whose nationals are directly or indirectly involved in the fisheries sector to ensure that those nationals do not engage in or support IUU fishing. Such obligations could be based on the ITLOS Advisory Opinion, that is, a due diligence obligation to ensure that a State's nationals refrain from being involved in IUU activities, including as operator or owner of a vessel engaged in fishing in the EEZ of another State, and to comply with the conservation measures applying to that EEZ.⁷⁶

⁷⁶ ITLOS Advisory Opinion (n 20), para. 131.