



Towards an international legal definition of the notion of fisheries crime

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ABSTRACT

Over recent years, importance has been attributed to the application of criminal sanctions in the fight against IUU fishing due to the seriousness of the threat it represents for the conservation of marine living resources. This trend towards the criminalisation of certain activities related with IUU fishing has given rise to the appearance of the notion of fisheries crime, which is increasingly employed in certain international forums. However, from a legal point of view, this term does not define a new type of crime applicable to fisheries activity. Rather, it seeks to demonstrate that certain fishing-related offences are criminal in nature. Thus, it is important to define the scope of this notion of fisheries crime in order to determine what criminal offences are included within this category. Depending on its degree of connection with fisheries activity, fisheries crime covers three separate categories of crimes: the crime of illegal fishing, illicit fisheries-related crimes and crimes committed in the context of the fisheries sector.

1. Introduction

The serious threat of illegal, unreported, and unregulated (IUU) fishing for the sustainable management of marine living resources and the clear connections of this illicit activity with organised transnational crime have contributed towards the criminalisation of certain predatory fisheries practices [1]. This characterisation, based on the nature and *modus operandi* of those involved in IUU fishing, shows the growing involvement of criminal networks in illegal fisheries activities, which are perceived to be an extremely lucrative and low-risk business.

This repressive approach is a response to the ineffectiveness of the mechanisms put into action by States and Regional Fisheries Management Organisations (RFMOs) in order to enforce international and national fisheries legislation, and the insufficiency of the sanctions imposed on offenders. The inability of certain countries to establish effective monitoring, surveillance and control mechanisms and dissuasive sanctions for the violation of fisheries management regulations reduces to the minimum the risks assumed by people and entities participating in these activities in some shape or form. This situation has created a favourable environment for IUU fishing as it permits operators involved in such activities to enjoy a *de facto* impunity, implying a significant incentive for IUU fishing.

However, the imposition of criminal sanctions requires respect for certain principles and guarantees specific to criminal law, such as the strict definition by law of illegal fishing as a criminal offence and the

attribution of jurisdiction to State courts in the extraterritorial persecution of these crimes. The experience of Spain in the *Vidal Armadores* case, following the Judgement of the Supreme Court of 23 December 2016 [2], demonstrates the importance of the respect for these principles and guarantees. Among them, this paper will focus on the need for a law that defines which illegal fishing activities are considered crimes under domestic law. In relation to this aspect, three interrelated issues should be addressed: if fisheries crime exists; if this concept respects the demands of the principle of legality in criminal law; and what its scope is.

2. Criminal sanctions for IUU fishing and fisheries crime

In recent years, the international community has been particular attentive to the prosecution and punishment of individuals and entities involved in IUU fishing [3]. Different international forums and inter-governmental organisations have considered that illicit fisheries activities are deserving of criminal sanctions, as IUU fishing is now conceived to be a criminal phenomenon rather than a mere problem of fisheries management [4]. The United Nations Office on Drugs and Crime (UNODC), INTERPOL (*Fisheries Crime Working Group*) and the Nordic Council [5] have all highlighted the connections between IUU fishing operations and transnational organised crime, which has given rise to the commission of different crimes along the fisheries value chain [6]. This approach reflects a trend towards the criminalisation of illicit

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fisheries activities, which is not shared by all States. In this context, the notion of fisheries crime has been used to refer to crimes committed in the fisheries sector [7]. However, the appearance of this notion leads us to ask whether a new type of crime has arisen (which some authors include among environment crimes [8]) and what the scope of this notion is. The definition of this supposedly new criminal offence is relevant due to the fact that the application of criminal law to fisheries infractions demands that they be defined as crimes in domestic law. This is a necessary condition for exercising criminal jurisdiction on the basis of the principle of legality [7].

Illegal fisheries activities have been criminalised in the legislation of certain States for some time. However, the concept of fisheries crime is relatively new and its specific profiles are not clearly defined. The heterogeneity of State legislations in this field and the inexistence of an international legal instrument containing a legal definition of fisheries crime contribute to the lack of definition surrounding this concept.¹

In an initial approach, fisheries crime has been defined as all criminal offences defined as such in domestic law committed within the fisheries sector [10]. INTERPOL uses fisheries crime as “an umbrella term to describe crime in the entire fisheries sector” [11]. This approach does not identify fisheries crime with a specific criminal offence, but uses it as a “label” to indicate that certain illicit activities related with the fisheries sector may have a criminal nature. Therefore, more than fisheries crime, crime in the fisheries sector or crime in the fisheries value chain could be spoken of [12]. According to this generic definition, the notion of fisheries crime does not fulfil the demands derived from the principle of legality in criminal law and, therefore, is not configured as a new crime applicable to the fisheries context, still less as a new international crime.

This generic term of fisheries crime encompasses a set of crimes with the common denominator that they are committed along the fisheries value chain, which extends from the preparation of fisheries operations (vessel registration), through harvesting activity, to the unloading, sale, transport, and arrival of fish to the market [13]. Thus, IUU fishing operations will inevitably lead to several different crimes being committing, both at sea and on land, without which these operations could not be carried out. This does not mean that this activity can be considered to be a crime in itself. A sample of the diversity of crimes which can be committed in the context of IUU fishing can be found in the *Vidal Armadores* case, as the Spanish citizens detained and imprisoned in Operation *Yuyus*, carried out by the Spanish police against IUU fishing [14], were accused of several crimes contained in the Criminal Code [15] including a crime against the protection of fauna (Articles 335.1 and 4 and 336), along with other crimes of belonging to a criminal organisation (Articles 570 ter.1 and 570 quáter.2 and 3), money laundering (Article 301) and forgery (Articles 390 and 392), derived from the initial crime [16].

¹ No provision of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) expressly refers to the criminalization of IUU fishing, nor to the notion of fisheries crime. UNCLOS does not prohibit the imposition of criminal sanctions, as the broad wording of Article 73 (1) allows the coastal State to initiate criminal proceedings in the national courts for fisheries infractions committed in the exclusive economic zone. The only safeguard is contained in Article 73 (3), which restricts the penalties that these States can impose for violations of the fisheries legislation [9]. But these restrictions do not apply to the flag State or the State of nationality of the persons involved in IUU fishing [51]. These States have the responsibility to ensure that vessels flying their flag or their nationals do not conduct IUU fishing activities in the exclusive economic zone (para. 123–124) [24]. Similarly, the 1995 United Nations Fish Stock Agreement [49] does not refer to the notion of fisheries crime. According to Article 19 (2) the sanctions will be adequate in severity for effectively securing compliance with conservation measures, deterring their violation and depriving offenders of the benefits of illegal fishing activities; but it does not clarify whether these sanctions should be criminal or not.

3. Scope of the notion of fisheries crime

The general definition of fisheries crime encompasses a broad range of crimes which can be committed in the context of IUU fishing, ranging from illegal fishing to the forgery of documents, fraud, labour exploitation and the illegal trafficking of drugs or human trafficking and migrant smuggling. In the light of the heterogeneous nature of these criminal offences, it is necessary to define the crimes which can be included within this notion.

These crimes could be grouped into three categories according to their degree of connection with fisheries activity. First of all, reference can be made to the existence of a *crime of illegal fishing*. Many States criminalise this activity when it contravenes international or national fisheries legislation. This crime would be the hard core of fisheries crime, as it implies attributing a criminal nature to certain illicit fisheries practices. Secondly, IUU fishing operations may lead to the commission of *illicit fisheries-related crimes*, i.e., crimes closely linked to illegal fisheries activities [17]. These crimes have a broader scope and may be committed outside of the fisheries context, although the organisation and execution of this type of fisheries operations goes hand in hand with committing all or some of these crimes. Thirdly, it is possible to speak of *crimes committed in the context of the fisheries sector*. This refers to crimes which are not necessarily linked to fishing, in which criminal organisations make use of the transnational nature of fisheries operations as a cover for committing crimes which have little or no relation with fishing activities [18].

3.1. Fisheries crime as a crime of illegal fishing

In a strict sense, fisheries crime could be equated to a crime of illegal fishing. Thus, anyone fishing illegally would be committing a fisheries crime. In some State legislations, illegal fishing is classified (in some cases along with illicit hunting) as a crime and has criminal sanctions. However, this approach to fisheries crime is still extremely generic and requires a more accurate definition in order to respect the principle of legality.

If fisheries crime is conceived as a crime of illegal fishing, there is the risk of equating it with IUU fishing, which would not be correct, although both notions are related. Any criminal prosecution of this crime should be based on a fishing infraction. Although IUU fishing in itself may not be a crime, it may point towards other crimes committed throughout the fisheries value chain.

On the one hand, the term IUU fishing is not a legal concept, but an extremely broad expression which encompasses a wide variety of fisheries activities which violate international, regional or national legislation and erode the efforts made by States and international organisations to guarantee the conservation and management of marine living resources under the triple denomination of “illegal fishing”, “unreported fishing” and “unregulated fishing”. This expression, included in the IPOA-IUU [19], does not serve as a legal definition of this phenomenon, but is merely descriptive or explanatory in nature [20]. For the purposes of criminal law, the amplitude and all-encompassing character of this notion does not respect the principle of legality [7], which “implies a *mandate of certainty and clearness* in the definition of criminal offences (*lex certa*)” [21]. The requirement of certainty demands that criminal behaviour be defined by law both clearly and precisely.

On the other hand, the crime of illegal fishing cannot be equated with IUU fishing because this notion does not encompass all criminal behaviour which can be committed throughout the fisheries value chain. Furthermore, not all illicit fisheries activities are criminal in nature, with most being subject to administrative sanctions due to their violation of fisheries legislation. By virtue of the ultima ratio principle, criminal sanctions are limited to illicit conduct which more seriously damages legal assets considered to be essential by State societies or by the international community (such as marine biodiversity) and when other

legal remedies for protecting these legal assets have failed or are inadequate [22].

According to this principle, the majority of fisheries infractions should be the object of administrative sanctions and only in particularly serious cases is resort to criminal law justified. Of the three categories mentioned by the IPOA-IUU, that which is most likely to include criminal behaviour is “illegal fishing”, while the other two seem to be more prone to administrative sanctions [23]. Some of these activities, particularly “unregulated fishing”, may not even be necessarily illicit in all cases. It is the responsibility of each State to define whether an illicit fisheries activity constitutes a crime, an administrative infraction or whether it can be classified in both ways [24,50].²

In any case, the crime of illegal fishing should be defined in the most precise way possible and should be differentiated from administrative infractions. If it is defined in an excessively broad way, it could undermine the *ultima ratio* principle and prove ineffective for sanctioning certain serious behaviours in the field of illegal fishing. In order to avoid this consequence, attention should be paid to the risk to the survival of marine species represented by the illicit fishing activity. On the basis of this criteria, which has been followed in Spanish jurisprudence [25], a criminal nature should only be attributed to fisheries infractions which seriously endanger the conservation and sustainable management of marine living resources [26,50]. When small-scale IUU fishing is carried out by artisanal fishermen in ignorance of the law, out of necessity or in an opportunistic way, it is more likely to be classified as an administrative infraction, although this does not exclude the fact that certain forms of poaching can be considered to be crimes, as is the case in Spain (Article 335.2 of the Criminal Code) [27]. By contrast, the criminal nature of illegal fishing becomes clearer when fisheries operations are transnational and are carried out systematically and deliberately on a large scale.

These problems in the definition of the crime of illegal fishing are approached in Spain in relation to Article 335.1 of the Criminal Code, which, at first sight, is the most appropriate provision to be applied to IUU fishing operations. The individuals involved in Operation *Yuyus* were accused of illegal fishing under this provision, which sanctions the fishing of unthreatened marine species when it is expressly prohibited by the specific rules which regulate fisheries activity. This crime is defined by the legal technique of “blanket criminal clauses” because it does not specify when illegal fishing is a crime, referring instead to administrative legislation, including international rules (particularly RFMO conservation and management measures) and those of the European Union, to determine when the fishing of a marine species is expressly prohibited. This global remission to administrative fishing laws leads to doubts on their compatibility with the principle of legality. In addition, it becomes necessary to determine criteria for differentiating between criminal offences and merely administrative infractions.

Traditionally, Spanish jurisprudence has interpreted this crime in a restrictive way. Therefore, it has made a distinction between species whose harvesting is prohibited and species with regulated catch, although it may be subject to certain prohibitions or limitations. Based on this distinction, Article 335.1 is not applied to cases in which there is no express and permanent prohibition on the fishing of a specific species. If fishing is authorised due to the species being of commercial interest, catches which do not respect the established limits and restrictions for legal fishing are classified as administrative infractions and not criminal offences [28]. In the light of this interpretation of jurisprudence, it does not appear that Article 335.1 makes it possible to

sanction IUU fishing as, in most cases, except when the total closure of a fishing ground is declared due to its situation, the harvesting of fish species which are the object of commercial interest is not totally prohibited, but rather subjected to a series of quantitative, temporal and geographical restrictions and limitations in order to guarantee their conservation and avoid overexploitation. Along the same lines of jurisprudence, the majority of illegal fishing activities would be classified as administrative infractions and not as crimes. However, the Supreme Court, in a judgement of 3 November 2020, changed this approach, thus making it possible to state that the hunting (or fishing) of a species when prohibited, as is the case in the closed season, could be considered as a crime when it implies a risk for the conservation of said species [29].

However, the notion of fisheries crime considered as a crime of illegal fishing is excessively restrictive, as this criminal behaviour is limited in certain countries only to harvesting activity, as is the case of Article 335 of the Spanish Criminal Code. In line with the *modus operandi* of the perpetrators of IUU fishing, it does not seem reasonable that criminal responsibility should fundamentally fall on those who physically carry out the activity, who are often the weakest part of such operations, ignoring the actions of those who promote and benefit from these activities. Therefore, this criminal character should be extended to other “fishing-related activities” without which IUU fishing could not be carried out, provided that international, regional or national fisheries legislation is contravened. This expression includes “any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea” [30].

3.2. Fisheries crime considered in a broad sense: Illegal fishing-related crimes

This strict interpretation of fisheries crime as a crime of illegal fishing proves to be insufficient as it does not encompass all of the criminal behaviour carried out throughout the fisheries value chain [31]. A broader approach to this concept should be adopted which includes other categories of crimes: *illicit fisheries-related crimes* and *crimes committed in the context of the fisheries sector*.

The first category, which UNODC denominates “*crimes in the fisheries value chain*”, refers to a series of crimes which can be committed throughout the fisheries value chain, but without being specific to fisheries activity in itself. These are crimes with a wider scope which can be committed outside of the fisheries context, but which are so closely linked to IUU fishing that such operations could not be carried out without committing all or some of these crimes (fraud, document forgery, money laundering, corruption, labour exploitation and tax crimes) [32].

Among these crimes, which facilitate the planning and execution of IUU fishing operations and which contribute towards increasing the economic benefits derived from this activity, can be included fraud and document forgery. Fraud consists of deceiving another in the pursuit of profit, encouraging him/her to carry out an act of disposition to his/her own detriment or to that of another person. In the context of IUU fishing, this crime is committed when the illegally-caught fish are sold to third parties of good faith by way of deceit, hiding their irregular origin or any other incident deriving from this circumstance. In Spain, the Provincial Court (Audiencia Provincial) of Las Palmas, in a judgement of 2 November 2011 [33] (confirmed by a judgement of the Supreme Court of 25 January 2013 [34]), condemned a Galician shipowner (known for his involvement in IUU fishing) for fraud in the sale of 242 kg of toothfish, as he had concealed the fact that the catch had been confiscated by the Korean port authorities for having been illegally harvested in the Antarctic Ocean.

Document forgery is often linked to fraud. It facilitates the deceit which constitutes the essential element of the fraud, as it contributes to giving the appearance of legality to fisheries operations. In the

² In the case of the European Union, see *Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing*. OJ L 286, 29.10.2008 (Article 44); *Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy*. OJ L 343, 22.12.2009 (Article 89).

judgement of the Provincial Court of A Coruña of 4 December 2015 [35], the accusation focused on the lack of validity of the *Dissostichus* Catch Document (DCD). This document is essential for the sale of fish as it certifies its legal origin and is, therefore, necessary for commercialising these fisheries products. When the buyer sought to export the fish to the USA, the National Oceanic and Atmospheric Administration (NOAA) denied the import due to the fact that the DCD did not fulfil Conservation Measure 10–05 of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the load was confiscated. The defendant was finally acquitted of the crime of fraud because it could not be proven that the DCD had been falsified and he could not be charged for the formal defects in the document. In spite of the fact that there was no conviction, this case demonstrates the criminal relevance of the falsification of such an important document as the DCD in the commercialisation of fish.

However, document forgery is not always linked to fraud. This crime can be committed throughout the fisheries value chain in order to conceal the illegal origin of fisheries products, to circumvent the control of fisheries authorities and to facilitate the commercialisation of the products. Forgery often affects documents relating to the registration of vessels and its links with the practice of “flag hopping” cannot be ignored. By constantly changing registration, IUU fishing operators seek to hide the true identity of their vessels and hinder the investigation of their illegal operations [36]. Forgery can also affect other documents which are more directly related with fisheries activity and with the commercialisation of fisheries products, such as fishing licences, catch records, catch certificates, and fish labelling [37]. In Spain, the deliberate falsification of Atlantic bluefin tuna labelling to facilitate its commercialisation at a time when its sale was prohibited has been classified as a crime of forgery of a business document [38]. Likewise, the falsification of the Bluefin Tuna Catch Document (BCD) of the International Commission for the Conservation of Atlantic Tunas (ICCAT) has been considered as a crime of forgery of an official document [39].

Other crimes closely linked with IUU fishing are those related to corruption. These crimes are essentially committed when these fisheries operations are carried out as they facilitate different crimes along the fisheries value chain [12]. Corruption has many dimensions and can be carried out in extremely different ways (bribery, embezzlement, influence peddling or trading in influence and the abuse of functions), both on land and at sea, and involves different actors (politicians, civil servants, business owners and fishermen) [36]. The corrupt behaviour of State authorities makes it possible for companies involved in IUU fishing to operate with impunity, as it facilitates the fraudulent registration of vessels and the concession of a flag. Fishing licences and other documents or certificates for unloading and commercialising fish can often be obtained *via* the payment of bribes or other types of economic compensation [12]. Bribery of fisheries inspectors and other government agents, either given voluntarily or requested by these public officials, makes it possible to circumvent measures of control on the safety of the vessel, the working conditions of its crew, the catches made and the fish unloaded in the port [40]. These crimes associated to corruption have the aim of concealing the illicit nature of fisheries operations and fraudulently increasing the economic profits they generate.

Corruption also makes it possible for IUU fishing operators to violate labour legislation and commit serious abuses, such as forced labour and exploitation, child labour, sexual abuse, and human trafficking (particularly when migrant fishermen in an irregular situation are involved) [41]. These deplorable working conditions in the fishing industry seriously violate human rights, as has been recognised by the Inter-American Court of Human Rights [42], and may lead to the commission of various crimes against workers' rights. In the case of the European Union, these crimes have been harmonised by Directive 2009/52 [43] and have been incorporated into Spanish law in Articles 311–318 of the Criminal Code. These crimes, which can be applied in the fishing sector, include the imposition of illegal conditions at work (especially when the health and safety of workers are put at risk), the

illegal hiring of foreign workers and the illegal trafficking of labour [44].

According to Spanish courts, the protection of workers' rights requires that the hiring of foreign workers to work on Spanish-flagged fishing vessels operating in international waters without making stops in Spanish territory should respect Spanish labour laws (including those regarding immigration), based on the exclusive jurisdiction of the flag State. This principle “guarantees that workers on board vessels flying the Spanish flag enjoy the rights regarding occupational safety, both in terms of contracts and services, which correspond to the flag State under which they operate” [45]. The violation of these regulations could lead to administrative sanctions or the commission of a crime. This obligation to respect Spanish law is in force even when the workers are hired in other States to provide services in international waters.

3.3. Fisheries crime and crimes committed in the context of the fisheries sector

Last of all, the notion of fisheries crime in a broad sense could encompass a third category of crimes committed in the context of the fisheries sector, referred to by the UNODC as “*crimes associated with the fisheries sector*” [32]. It is true that these crimes have an extremely distant or, in some cases, non-existent link with fishing activity. In spite of this, the reality demonstrates that the fishing industry is vulnerable to other forms of maritime crime. Criminal networks make use of the transnational character of fisheries operations and of the knowledge of the marine environment of the people involved in these activities to commit these types of crimes. In this way, fishing vessels and their crews have been used for drug trafficking, human trafficking and migrant smuggling or arms trafficking [46]. Likewise, these types of vessels have also been used to commit acts of terrorism and piracy [36]. Such crimes are not linked to fishing, but the use of fishing vessels to commit them may give rise to different legal consequences.

In Spain, the use of vessels for drug trafficking is considered by the Criminal Code to be a criminal offence against public health of extreme seriousness (Article 370.3). Indeed, Spanish courts have condemned crew members of fishing vessels dedicated to the transport of cannabis resin, cocaine and other similar substances on the basis of this crime [47]. However, the use of a fishing vessel to commit a crime such as those mentioned above does not only bring about criminal but also fishing consequences, as it can give rise to the commission of an administrative offence punishable by the prohibition to fish for a period of ten years, in accordance with Law 3/2001, of 26 March on Maritime Fishing of the State (Article 105.4) [48].

4. Conclusion

The term fisheries crime is a new concept which has been used to highlight the importance of applying criminal sanctions to fisheries activities which seriously threaten the conservation of marine living resources. It is a consequence of the connections between IUU fishing and organised transnational crime. However, from the legal point of view, it does not define a new type of crime applicable to fishing activity, nor even a new international crime. It seeks to demonstrate that throughout the fisheries value chain a wide range of crimes are committed, which are connected, to a greater or lesser degree, with fishing. Even from this perspective, the notion of fisheries crime is not irrelevant. It makes it possible to observe the impact of crime in the fishing sector, a problem which often remains hidden due to the lack of transparency which surrounds this activity and the nature and characteristics of those involved in IUU fishing. In this regard, the identification of the main criminal actions related with fishing makes it possible to increase the awareness of State authorities (particularly the courts) regarding the seriousness of the threat represented by IUU fishing, which often does not receive the attention it deserves, unlike cases of other forms of maritime crime.

As it is a new concept, the profiles of fisheries crime are still unclear

and require more accurate definition. The generic notion encompasses a broad and varied range of crimes which can be committed throughout the fisheries value chain, both on land and at sea. This definition is made based on the identification of three categories of crimes in accordance with their greater or lesser degree of connection with IUU fishing operations.

Thus, first of all, the notion of fisheries crime implies that a crime of illegal fishing is committed. Fisheries infractions are considered to be crimes in Spain and in many other State legislations. However, this does not mean that any fisheries infraction is a crime, nor that a criminal nature is attributed to IUU fishing. Therefore, this crime should remain limited to those fisheries infractions which more seriously threaten the conservation of marine living resources. Furthermore, criminal behaviour should be described more clearly and accurately in order to respect the principles of legality and ultima ratio of criminal law.

Fisheries crime should be defined in a broader way. The crime of illegal fishing criminalises certain particularly serious illicit fisheries activities, but does not encompass all of the crimes committed in the context of IUU fishing. Therefore, secondly, a series of crimes related with illegal fishing (*illicit fisheries-related crimes*) should be included within this notion, including fraud, forgery of documents, corruption, labour exploitation and tax crimes, among others. The commission of these crimes is often essential for the planning and carrying out of fisheries operations, as they make it possible to conceal the illicit nature of these activities and to increase their economic profits.

Thirdly, the notion of fisheries crime should include a category of crimes committed in the context of the fisheries sector (*crimes associated with the fisheries sector*). In this case, connection with fisheries activity is distant or non-existent but its inclusion within the broad notion of fisheries crime serves to demonstrate the vulnerability of the fishing industry to other forms of maritime crime and the connections of this sector with organised transnational crime.

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Declarations of Competing Interest

None.

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