ISSN 2464-9724

Maritime Safety and Security Law Journal

2022

Issue 11

Maritime Safety and Security Law Journal

National Research Council of Italy
ISGI
Institute for International Legal Studies

Universität Basel

Maritime Safety and Security Law Journal

Advisory Board

Maritime Safety and Security Law Journal

Table of Contents

Maritime Safety and Security Law Journal

Fighting Fisheries Crime in Spain: A Critical Analysis from an International Law Perspective

*Victor Luis GUTIÉRREZ CASTILLO**

Abstract

Many governments face the problem of IUU fishing. Spain is a state party to the United Nations Convention on the Law of the Sea (UNCLOS) and has comprehensive spatial planning compatible with international norms. In its maritime territory, the penal code is applied according to the legal regime applicable the different areas and within limitations imposed by international law. Based on this scenario, the sanctioning of IUU fishing will be conditioned by material, spatial, national and jurisdictional aspects. The aim of this article is to study the criminal prosecution and sanctioning of IUU fishing in waters under Spanish sovereignty and/or jurisdiction from a critical perspective, in the light of public international law.

Keywords: IUU fishing, criminal system, sovereignty, jurisdiction, UNCLOS

First published online: 29 December 2022

1. Introduction

Illegal, unreported and unregulated (IUU) fishing accounts for up to one third of catches of certain species.[1] According to the FAO, IUU fishing is responsible for the loss of 11 to 26 million tons of fish,[2] which may account for 12 to 28% of the fishing volume of the world.[3] This type of activity generates significant social, economic and environmental costs and is one of the main obstacles to achieving sustainable fisheries. IUU fishing occurs mainly on the high seas and in the Exclusive Economic Zones of states that do not possess the resources to effectively control their waters. This type of behaviour also affects areas reserved for artisanal fishermen, with a detrimental impact on developing countries, endangering their food security.[4]

* Professor of International Public Law at the University of Jaén (Spain). Member of the Royal Academy of Jurisprudence and Legislation of Spain (vlguti@ujaen.es). This article is the result of the collaboration developed by the author within the framework of the research project 'The implementation of SDG 14 in Spain and the EU: regulatory challenges for international cooperation and maritime security (ESPODS14)' (PID2019-109680RB-I00), financed by the Spanish Research State Agency (AEI), Ministry of Science and Innovation (DOI: 10.13039/501100011033).

1 WWF, 'Facts Figures: The Cold Hard Facts about Overfishing' <www.fishforward.eu/en/topics/facts-figures/> accessed 25 October 2022.

2 FAO, 'International Day for the Fight Against Illegal, Unreported and Unregulated Fishing' <www.un.org/en/observances/end-illegal-fishing-day> accessed 25 October 2022.

3 See n 1.

4 IUU fishing is a major contributor to global overfishing, threatening food security, maritime livelihoods, and fisheries sustainability. See Daniel Pauly and others, 'Towards Sustainability in World Fisheries' (2002) 418 Nature 689. IUU fishing is widespread, comprising an estimated 20% of global fish catch with annual economic losses estimated between US$26-$50 billion. See David J. Agnew and others, 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4 Public Library of Science ONE, 1 and Ussif Rashid Sumaila and others., 'Illicit Trade in Marine Fish Catch and its Effects on Ecosystems and People Worldwide' (2020) 6 Science Advance 1.

In the field of maritime fisheries, there is no international convention requiring states to criminalise certain illegal fishing activities. States with fishing interests in a given area have formed regional fisheries management organisations to regulate this activity. The European Union (EU), now considered the fifth largest fishing power in the world,[5] is very active in some of these organisations. Within the European Community framework, the Spanish fishing fleet has great relevance and a significant influence on community fishing policies. The number of vessels or companies reported for practising or favouring IUU fishing has increased in recent years,[6] negatively affecting global food sovereignty and marine ecosystems. This type of activity is also linked to other forms of transnational organised crime, such as human trafficking (forced labour of crews), smuggling and document forgery.

The marine environment is the object of a significant economic activity marked by intense resource exploitation. IUU takes place both on the high seas and in areas within national jurisdiction and may be associated with organised crime. Therefore, governments are compelled to implement political and legal tools capable of guaranteeing a spatial and temporal distribution of human activities in the ocean in an organised and responsible manner. This is defined as marine spatial planning (MSP).[7] For this to be possible, states must enshrine in domestic legislation the sovereign and jurisdictional rights recognised by United Nations Convention on the Law of the Sea (UNCLOS).[8] This situation is not free of legal problems due to the very nature of the penal order. *Jus puniendi* arises from the sovereignty of each state. This explains why, by virtue of the principle of territoriality, criminal law governs within a state's own territory. Consequently, the fight against IUU fishing from a criminal point of view is strongly conditioned by the management of marine spaces and by the legal regime applicable to them under international and EU Legislation.[9] Spain adopted the Royal Decree 363/2017 of 8 April establishing a framework for marine spatial planning,[10] that transposes into Spanish legislation the

5 European Commission, European Market Observatory for Fisheries and Aquaculture Products. The EU Fish Market 2021 Edition,European Market Observatory for Fisheries and Aquaculture Products (2021) 20.

6 FAO, 'Global Action in Stepping up in the Fight Against Illegal, Unreported and Unregulated Fishing' <www.fao.org/news/story/en/item/1402822/icode/> accessed 25 October 2022.

7 UNESCO, 'Intergovenmental Oceanographic Commission' <https://ioc.unesco.org/our-work/marine-spatial-planning> accessed 25 October 2022. For more information about this subject see Kjell Grip and Sven Blomqvist, 'Marine Spatial Planning: Coordinating Divergent Marine Interests' (2021) Ambio, 1172, and Jacek Zaucha and Kira Gree (eds), *Maritime Spatial Planning* (Palgrave Macmillan 2019).

8 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). On this particular question, see Jose Juste Ruiz, 'La entrada en vigor del Convenio de Naciones Unidas sobre Derecho del Mar y los intereses españoles' (1996-1997) Anuario Argentino de Derecho Internacional vol 7, 167-184; Jose Antonio de Yturriaga Barberán, Ámbitos de Jurisdicción en la Convención de Naciones Unidas sobre el Derecho del Mar. Una perspectiva española (Ministerio de Asuntos Exteriores1995); Rosa Riquelme Cortado, *España ante la Convención sobre el Derecho del Mar. Las declaraciones formuladas* (Editum 1990).

9 Spain must comply with the EU environmental legislation and with environmental international treaties concerning maritime areas. Spain is bound to abide by the rules of the Common Fisheries Policy (CFP) based on the management of European fishing fleets and the conservation of fish stocks. EU law lays down general provisions concerning the authorisation of fishing in the waters of a third country under a fisheries bilateral and multilateral agreements, like the procedure and responsibilities of the Commission and Member states for the authorisation of fishing activities of EU fishing vessels. See Regulation (EU) No 1006/2008 on Authorisations for Fishing Activities of Community Fishing Vessels Outside Community Waters and the Access of Third Country Vessels to Community Waters [2008] OJ L286/33, amending Regulation 2847/93 and Regulation 1627/94, and repealing Regulation 3317/94.

10 Real Decreto 363/2017, de 8 de abril, por el que se establece un marco para la ordenación del espacio marítimo (BOE 86, 11 April 2017).

Directive 2014/89/EC of the European Parliament and of the Council of 23 July.[11] However, it should be noted that currently Spain has implemented no MSP.[12]

2. The fight against IUU fishing by Spain: jurisdictional and spatial aspects of the criminal system

With a coastline of nearly 8,000 kilometres, Spain borders open (the Atlantic Ocean) and semi-enclosed (the Mediterranean) seas. It is surrounded by States with adjacent or opposite coasts that can also extend their sovereignty and jurisdiction over the sea to the limits established by international law. Thus, both Spain's maritime space and that of its neighbouring countries are in a frontal, lateral, perpendicular or omnidirectional position, depending on the coastal features and their geographical location. Inevitably these potential claims overlap and the need arises to define boundaries through delimitation. Just like its neighbouring states, Spain is a party to UNCLOS[13] and, as such, it has claimed all internationally recognised ocean spaces. The outer limit of the Spanish internal waters is determined by the baselines from where the rest of the limits are measured. They are mostly determined by straight baselines unilaterally drawn by the Government along the whole coastline by virtue of Royal Decree 2510/1977 of August 5[14] Spain has internal waters (IW), a territorial sea (TS) of 12NM,[15] and a contiguous zone extending to 24 NM.[16] Furthermore, it has unilaterally declared an Exclusive Economic Zones (EEZ) in the Atlantic without specifying its delimitation (1978)[17] and the Mediterranean (2013),[18] establishing in this case the relevant geographical coordinates. Spain had

11 Council Directive 2014/89/EU establishing a Framework for Maritime Spatial Planning [2014], OJ L257/135, 2014.

12 Approval is expected before the end of 2022. The Draft Royal Decree (*Borrador del Real Decreto*) available on the Ministerio para la Transición Ecológica y el Reto Demográfico (MITECO) website <www.miteco.gob.es/en/costas/temas/proteccion-medio-marino/ordenacion-del-espacio-maritimo/default.aspx> accessed 24 October 2022.

13 See n 8.

14 Real Decreto 2510/1977 de 5 de agosto, sobre trazado de líneas de base rectas en desarrollo de la Ley 20/1967 de 8 de abril sobre extensión de las aguas jurisdiccionales españolas a 12 millas, a efectos de pesca (BOE 86, 11 April 2967 and BOE 234, 30 September 1977).

15 The breadth of Spain's territorial sea up to a limit not exceeding 12 miles was determined by Ley 10/1977, de 4 de enero sobre mar territorial (BOE 374, 8 January 1977).

16 Real Decreto Legislativo 2/2011 de 5 de septiembre (Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante) (BOE 253, 20 October 2011).

17 Ley 15/1978 de 20 de febrero sobre zona económica (BOE 46, 23 February 1978).

18 Real Decreto 236/2013 de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental (BOE 92, 17 April 2013).

previously declared a Fishery Protection Zone in the Mediterranean (1997)[19] of almost the same extension as the abovementioned EEZ. It also has a Continental Shelf (CS) around its whole coastline of a breadth in keeping with the provisions laid down in UNCLOS, considering that a nation's rights over this space are not contingent on any express declaration, according to Article 77 UNCLOS. Spain claims an extended CS in the Atlantic Ocean.

There is no doubt that any geographical feature of the Earth's surface can be taken into account to delimit and demarcate boundaries: a mountain range, a large lake or, even, a desert. They all can be used as legal boundaries for the purpose of separating territories or reinforcing a State's national security. However, it is not like that when it comes to the sea, where the unity of the physical medium, made of a continuous, uniform and homogeneous mass, makes the delimitation of boundaries more difficult. From a technical viewpoint, the determination of boundaries is carried out through an operation comprising two main stages: *a*) delimitation, a process to define spatial extensions in accordance with legal and political views, and *b*) demarcation, a technical operation by virtue of which the prior delimitation of the land is materially executed. Consequently, it is safe to say that to define a territory is to define its boundaries.

In light of the extension of its spaces and its geographical location, Spain has applied itself, together with its neighboring States, to the task of delimiting many spaces: with France, the TS, EEZ and CS in the Bay of Biscay and in the Mediterranean Sea[20] with Portugal, the TS, EEZ and CS in the mouth of the rivers Miño (Portuguese *Mihno*) and Guadiana (continental zone),[21] as well as the EEZ and CS

19 Real Decreto 1315/1997 de 1 de agosto, por el que se establece una zona de protección pesquera en el mar Mediterráneo (BOE 204, 26 August 1997) amended by the Real Decreto 431/2000, de 31 de marzo (BOE 79, 1 April 2000). See notably Dolores Blázquez Peinado, 'El Real Decreto 1315/1997, de 1 de agosto, por el que se establece una zona de protección pesquera en el Mar Mediterráneo' (1997) 49 Revista Española de Derecho Internacional 334, and Antonio Pastor Palomar, 'La Nueva Zona de Protección Pesquera de España en el Mar Mediterráneo' (1997) 1 Studia Carande 87; Víctor Luis Gutiérrez Castillo and Eva María Vázquez Gómez, 'La zone de protection établie par l'Espagne' (1999-2000) 13 Collection Espaces et Ressources Maritimes 207.

20 In 1974, Spain and France concluded two treaties establishing maritime boundaries in the Bay of Biscay (Atlantic). The first treaty delimits the territorial sea between the two States, on the basis of equidistance, extending from the land boundary to a location that is 12 M from the nearest points on the respective territorial sea baselines of the two States. The second treaty delimits the continental shelf between the two States, extending seaward from the terminus of the territorial sea boundary. See Convention between France and Spain on the Delimitation of the Territorial Sea and the Contiguous Zone in the Bay of Biscay (Paris, adopted 29 January 1974, entered into force 5 April 1975) and Convention between Government of the French Republic and the Government of the Spanish State on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay (Paris, adopted 29 January 1974, entered into force 5 April 1975. See Limits in the Seas 83 (1979).

21 In 1976, Spain and Portugal concluded two treaties delimiting the territorial sea, contiguous zone, and continental shelf between the two States in the Atlantic Ocean. However, these treaties have not entered into force. See Jonathan I. Charney and Lewis M. Alexander (eds) *International Maritime Boundaries vol III* (Martinus Nijhoff Publishers 1993) 1791 (stating that 'Portugal is now opposed to ratification and favors the equidistant line for both boundaries').

between Madeira and the Canary Islands;[22] with Italy, the EEZ and CS;[23] and with Morocco, the TS in the Strait of Gibraltar, the TS and CS in the Alboran Sea, and the EEZ and CS along the Atlantic coast, both in the Gulf of Cádiz and off the Canary Islands.[24] This considerable potential for conflict contrasts with the few delimitation agreements reached to date, which still remain in force.

The Spanish territorial model is not consistent with the scheme of a federal State such as, for instance, the United States, nor does it meet the requirements of a centralised State like France. Therefore, it is safe to say that it complies with a hybrid model of decentralisation: the state of autonomous communities. Article 2 of the Spanish Constitution of 1978 (SC) [25] 'recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all'. In this way, autonomous communities are governed according to the SC and their own organic laws, known as Statutes of Autonomy, which define the powers that they assume. The scope of powers varies for each community. The system of distribution of competences implemented in Spain falls within the so-called Germanic system, in which the constitutional text details, on one hand, the exclusive competences of the State, and on the other, those that decentralised entities may exercise. This distribution of competences is stipulated in Articles 148 and 149 of the SC.

In accordance with 149 SC, maritime fisheries fall under the exclusive jurisdiction of the State. Specifically, the scope of Law 3/2011, 20 March 2001, on State Maritime Fisheries,[26], amended by Law 33/2014,[27] which, in turn, repealed Law 71/1978, 26 December 1978, on Fisheries Development in the Canary Islands,[28] distinguishes between external waters (including the TS and EEZ) and internal ones, over which the autonomous communities have jurisdiction. In accordance with the provisions of Article 13 of the aforementioned Law 3/2001, the declaration by Ministerial Order, of fisheries protection zones to encourage the protection and regeneration of marine living resources also falls under the jurisdiction of what is today the Spanish Ministry of Agriculture and Fisheries, Food and the Environment.

---

22 Víctor Luis Gutiérrez Castillo, 'La delimitación de los espacios marinos entre España y Portugal' in Francisco Pereira Coutinho and Mateus Kowalski (eds), *As fronteiras Luso-espanholas. Das questoes de soberania aos fatores de Uniao* (Instituto Diplomático 2014).

23 In 1974, Spain and Italy concluded a treaty delimiting the continental shelf on the basis of equidistance between Minorca Island (Spain) and Sardinia (Italy) in the Mediterranean Sea. Convention between Spain and Italy on the Delimitation of the Continental Shelf between the two States (Madrid, adopted 19 February 1974, entered into force 16 November 1978). See Limits in the Seas (1980).

24 The issues of a markedly legal nature affecting the pending delimitation of Spain's maritime zones include those related to the drawing of baselines by the states involved in the delimitation and the extension of the application of a delimitation agreement signed with regard to a given maritime zone to another zone that did not exist at the time of its conclusion. With regard to the baselines, the discrepancies have to do with the drawing itself, as some of those established, especially by Morocco, are contrary to the rules provided for under the law of the sea. Furthermore, the establishment of baselines closing the perimeter of the Canary archipelago could also be an obstacle to reaching a delimitation agreement with Morocco. On this issue, see Esperanza Orihuela Calatayud, 'Pending delimitations' (2017) 21 Spanish Yearbook of International Law 301.

25 Constitución Española de 6 de diciembre 1978 (BOE 311, 29 December 1978).

26 Ley 3/2001, de 26 de marzo de pesca marítima del Estado (BOE 75, 28 March 2001).

27 Ley 33/2014, de 26 de diciembre, por la que se modifica la Ley 3/2001, de 26 de marzo, de Pesca Marítima del Estado (BOE 313, 27 December 2014).

28 Ley 71/1978, de 26 de diciembre, de desarrollo de la pesca en Canarias (BOE 9, 10 January 1974).

Criminal and penitentiary matters are within the competence of the state.[29] Under Spanish law, this principle is observed in numerous provisions, including in the Civil Code, Article 8(1) of which states that: 'criminal, police and public security laws are binding on all those who are in Spanish territory'.[30] Consequently, the fight against IUU fishing from a criminal point of view is strongly conditioned by the management of marine spaces and by the legal regime applicable to them under international law. However, such exclusivity is not recognised in matters of management and administration of fisheries. Article 149(1). SC establishes sea fishing as an exclusive competence of the state, without prejudice to the powers that the regulations governing this sector confer on the autonomous communities, whose competence in internal water fishing is expressly recognised.[31] Likewise, based on this constitutional prerogative, the autonomous communities with access to the sea such as Galicia, Andalusia have assumed competences in the said sector and approved specific regulations on the management of fishery resources. These autonomic regulations coexist with those established by the state. All these regulations are administrative in nature, whereas the criminal legislation does not provide for such duality.

As a starting point, in practice the competence of the Spanish authorities to combat IUU fishing from a criminal point of view depends on several circumstances: the proclamation of sovereign and jurisdictional rights over the marine areas, the nature and legal regime of the marine space in which the criminal conduct occurs, the flag of the fishing vessel and the existence or lack of international agreements allowing for the intervention of external state authorities. It is also important to highlight that, from a procedural point of view, the Spanish legal system applies the principle of *non bis in idem*, by virtue of which the same act cannot be punished more than once, by an administrative sanction and by a criminal punishment.

Environmental crime was not fully introduced into the Spanish Criminal Code (CC) until 1995.[32] Until then, offences and sanctions against illegal conduct in the field of fisheries had only an administrative response, except in the case of fishing with explosives.[33] As the doctrine states, 'It is particularly relevant to us that, once CC reforms in 2010 and 2015 amended the 1995 provisions, the criminal regulations currently in force largely constitute white criminal norms, which need to be incorporated into other different regulations'.[34] Thus, after the 2015 reform, fishing or trafficking in protected species falls under the criminal category of Article 334(1) CC, becoming qualified if

29 Article 149(1) SC 'The State holds exclusive competence over the following matters: […] 5. administration of Justice; 6. commercial, criminal and penitentiary legislation […]' [Original in Spanish: *El Estado tiene competencia exclusiva sobre las siguientes materias: 5. Administración de Justicia* […] *6. Legislación mercantil, penal y penitenciaria*].

30 Gaceta de Madrid 206, 27 July 1889.

31 Article 148(1)(11) SC 'The Autonomous Communities may assume competences over the following matters: […] in internal water fishing, the shellfish industry and aquaculture, shooting and river fishing'.

32 Ley Orgánica 10/1995, de 25 de enero del Código Penal (BOE No 281, 24 November 1995).

33 The 2010 amendment of the Criminal Code involved amongst other issues, the transposition of Council Directive 2008/99/EC on Protection of the Environment through Criminal Law [2008] OJ L328/2008, which extended the scope of legal protection for wildlife.

34 Xavier Pons Rafols, 'Spain and the fight against IUU fishing' (2017) Spanish Yearbook of International Law 435.

it is an endangered species.[35] Furthermore, fishing without administrative authorisation or fishing for a prohibited species is regulated by Article 335 CC. In addition to these criminal offences, there are others that are useful to combat these activities, including money laundering or documentary fraud. Finally, Article 336 CC sanctions the use of destructive and non-selective fishing methods.

Article 23(1) of Organic Law 6/85 of 1 July 1985 on the Judiciary (OLJ) empowers Spanish courts to hear crimes and misdemeanours committed in Spanish territory or on board Spanish ships or aircraft, 'without prejudice to the provisions of international treaties to which Spain is a party'. This circumstance is complicated, as we shall see, when the offences take place in maritime areas located outside national jursidiction. As far as maritime policing functions (surveillance, control and prosecution) are concerned, there is no single responsible agency. It could be said that the Spanish system is characterised by a certain dispersion of powers. In this regard, Article 223(2) of Royal Decree 876/2014, of 10 October, which approves the General Coastal Regulations, states that the functions of the General State Administration in IW, TS, EEZ and CS in matters of fishing and pollution control 'shall be exercised in the manner and by the Departments or bodies entrusted with them'. This dispersion of powers within the state itself (the different ministries) and the decentralised entities (autonomous communities and local entities) makes it difficult to effectively prosecute illegal fishing.

However, regardless of who is responsible for surveillance or control under a State's domestic law, international law requires that this function be carried out by vessels in the service of the government or authorised for this purpose. In the case of Spain, this function will be performed by government vessels assigned by law to the service of surveillance and repression of illicit activities: specifically, the ships of the Spanish Navy, those of the Customs Surveillance Service (auxiliary to the Navy)[36] and the Maritime Service of the Civil Guard (Spanish: *Guardia Civil*).[37] However, once again we note a certain dispersion of powers: not all of these vessels will be able to operate in all Spanish maritime areas. Under Spanish law, naval vessels and customs vessels may operate in the EEZ and waters beyond national maritime borders, and may not do so in TS.[38] The control and surveillance of this area is reserved to the services of the Civil Guard, which, exceptionally, may also operate outside the TS.[39]

35 Article 334(2). See n 32.

36 Decreto 1002/1961, de 22 de junio, por el que se regula la vigilancia marítima del Servicio Especial de Vigilancia Fiscal para la Represión del Contrabando (BOE 157, 3 July 1961).

37 The Civil Guard is the oldest law enforcement agency in Spain and is one of two national police forces. As a national gendarmerie force, it is military in nature and is responsible for civil policing under the authority of both the Ministry of the Interior and the Ministry of Defence. The role of the Ministry of Defence is limited except in times of war when the Ministry has exclusive authority. As part of its daily duties, the Civil Guard patrols and investigates crimes in rural areas, including highways and ports, whilst the *National Police* deals with safety in urban situations.

38 Isabel Lirola Delgado & Jorge Urbina, 'Police at Sea' (2017) 21 Spanish Yearbook of International Law 439.

39 Setencia del Tribunal Supremo n 1198/2010 [2010] ECLI: ES:TS:2010:1198 and Setencia del Tribunal Supremo n 2756/2008 [2008] ECLI: ES:TS:2008:2756.

3. The criminal prosecution and sanctioning of IUU fishing in marine areas under Spanish sovereignty and/or jurisdiction: a multilevel perspective

3.1 The application of criminal law in internal waters

UNCLOS defines IW as those located within the baseline used to measure the width of the TS. The Spanish legislator adopts this definition by including in its definition of Spanish waters 'ports and any other waters permanently connected to the sea up to where the effect of the tides is felt, as well as navigable stretches of rivers up to where there are ports of general interest [...]'.[40] The outer limit of these waters is determined in Spain by Royal Decree 2510/1977 of 5 August 1977, which establishes a mixed system of baselines, mostly straight baselines.[41]

These waters are subject to the sovereignty of the coastal state and have the same legal status as the land. In the absence of the right of innocent passage, foreign ships and aircraft may not enter or fly over these waters without the authorisation of the coastal state, except in exceptional situations provided for by international law.[42] In the case of Spanish IW, vessels must respect, *inter alia*, environmental and fisheries legislation, as well as the operating conditions established by the state authority. The state may also prohibit or condition the entry of foreign vessels into Spanish ports for reasons of repression of illegal fishing or environmental sustainability, in accordance with the provisions of Article 7(1) and (2) of Law 14/2014, of 24 July, on Maritime Navigation.[43] In line with UNCLOS, Law 14/2014 provides the application of the innocent passage regime in the territorial sea. It also specifies that such passage must be expeditious and uninterrupted, without threatening the peace, the good order or the safety of Spain.[44] Submarines and oth-

40 See n 16.

41 Real Decreto 2510/1997, currently in force, draws 123 straight baselines, most of which do not exceed 24 nautical miles. These lines, however, do not cover all Spanish coast, either because there are no geographical features allowing for it (for instance, in certain parts of the coast of the Balearic Islands), or for political reasons (in Algeciras Bay, bathing the territory of Gibraltar, and in Ceuta, Melilla and the Mediterranean islands, islets and island rocks close to the African coast). It is worth noting the drawing of straight baselines in river mouths without using the low-water points of riverbanks as reference, but also without deviating significantly from the rules later laid down in the 1982 UN Convention on the Law of the Sea. See Víctor Luis Gutiérrez Castillo, 'Análisis del sistema de líneas de base español a la luz de la Convención de Naciones Unidas sobre el Derecho del Mar de 1982' in José Manuel Sobrino Heredia (ed), *Mares y océanos en un mundo en cambio* (Tirant lo Blanch, 2007) 171.

42 Article 8 UNCLOS 'Where the establishment of a straight baseline in accordance with the method set forth in Article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters'. For further information, see Rainer Lagoni, 'Internal Watters' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* II (1995) 1036; Vladimir-Djuro Degan, 'Internal waters' (1986) 17 Netherlands Yearbook of International Law 3; Carlos F. Fernández Beistegui, 'El control de los buques por el estado del Puerto' (1993) 13 Anuario de Derecho Marítimo 141; Kare Bangert, 'Internal water' *Max Planck Encyclopedia of Public International* (2013) Law 1.

43 Ley 14/2014, de 24 de julio de navegación marítima (BOE 180, 25 May 2014).

44 Articles 37(1) and 37(2).

er underwater vessels are required to navigate on the surface and to show their flag.[45] With respect to overflight, aircraft passage may be allowed through a special permit or pursuant to the treaties to which Spain is party.[46] Reference is made to UNCLOS for navigation through the Strait of Gibraltar (which comprises the TS of both Spain and Morocco). Furthermore, Law 14/2014 requires all vessels navigating through Spanish maritime zones to be registered in only one state, to show their name and registration number, and, pursuant to maritime uses, to fly the Spanish flag along with theirs.[47]

The decentralisation of powers which characterises the Spanish legal system, reaches its maximum expression in the control, surveillance and management of internal and port waters: the competence for the regulation and control of fishing in internal waters will rest with the autonomous communities.[48] However, they must act within the framework of the basic state regulations on the management of the fisheries sector, which is the exclusive competence of the state.[49] While administrative sanctions will therefore be imposed by the regional authorities, the state authorities (criminal courts) will be responsible for hearing cases, offences and misdemeanours committed in them, as in other marine areas.[50]

In some geographical points of the Spanish coast, the legal IW regime presents complex profiles due to the international dimension that affects them. Consider, for example, the waters of the Bay of Hondarribia, where Spain and France maintain co-sovereignty over Pheasant Island,[51] or the legal regime of the Bay of Gibraltar (Spanish: *Bahía de Algeciras*). In the latter case, the legal status of these waters is closely linked to the Spanish-British dispute over the colony of Gibraltar, as well as to the interpretation of Article X of the Treaty of Utrecht of 1713.[52] The United Kingdom has interpreted it broadly, extending its sovereignty in the waters within the bay to 2NM. and around the Rock to 3NM. By contrast, Spain, on the basis of a literal interpretation of this article, has traditionally denied any British sovereignty beyond the harbour waters which was the only one expressly ceded in the 1713 treaty.[53] The waters of this bay are thus subject to a fragmented and controversial legal regime: the

45 Article 22(3).

46 Article 47.

47 Víctor Luis Gutiérrez Castillo and Juan J. García Blesa, 'Critical Analysis of the Law 14/2014 on Maritime Navigation' (2013-2014) 18 Spanish Yearbook of International Law 293.

48 Article 148(1) (11)(a) of the SC.

49 Article 149(1)(5) of the SC.

50 Article 1 Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE 157 2 July 1985).

51 The Pheasant Island (Spanish: *Isla de los Faisanes*) is an uninhabited river island in the Bidasoa river, located between France and Spain, whose administration alternates between both nations. The island is a, the world's smallest, under joint sovereignty of Spain and France, and for alternating periods of six months is officially under the governance of the naval commanders of Spain (1 February – 31 July) and of France (1 August – 31 January). In practice, it is administered respectively by the mayors of (in Irún, Spain) and (in Hendaye, France).

52 For further information, see Jesús Verdú Baeza, 'La controversia sobre las aguas de Gibraltar: el mito de la costa seca' (2014) 66 Revista Española de Derecho Internacional 81.

53 'There appear to be two separate issues here: first, whether article X (Treaty of Utrecht) is to be read as limiting the cession to the land and the harbour, and excluding any territorial sea; and second, whether there has been British encroachment on Spanish waters in the Bay of Algeciras', see James Fawcett, 'Gibraltar: The Legal Issues' (1967) 43 International Affairs 84.

waters of the port of Algeciras (under Spanish sovereignty) and the waters of the port of Gibraltar (under British sovereignty) will be considered IW. The rest of the waters beyond the port of Gibraltar would be TS. In this way, the United Kingdom has sovereignty over the waters adjacent to the Rock of Gibraltar up to 3NM to the south and the east, and to the west up to the middle line of the Bay of Gibraltar, which amounts to about 1.5 NM and a half. Moreover, the Gibraltarian authorities have declared a large part of these waters a natural protected space and placed limits on navigation and fishing in them through the Nature Protection Act of 1991.[54] Both Spanish and the British governments have stated their disagreement with this decision in domestic[55] and international forums.[56]

From the point of view of Spanish domestic law, the Spanish Government will be competent to apply the criminal law relating to the protection of marine flora and fauna, as well as to the control of all waters in the Bay of Gibraltar. So, it is enshrined in the domestic legislation, as evidenced by Royal Decree 1620/2012 of November 30, which declares the waters east of the Strait of Gibraltar 'Special Area of Conservation'. In this area, called 'Eastern Strait', the Spanish Government is taking conservation measures and regulating its use for activities (such as fishing, aquaculture), assuming the right to prosecute and punish the infringement thereof. The opposing positions on the waters have been the subject of many diplomatic disagreements,[57] which have damaged bilateral relations and have hindered the prosecution and fight against illicit activities.

3.2 The prosecution and punishment of IUU fishing and other fisheries crime in the TS

Articles 3 and 4 of Law 10/77 of 4 January, on the territorial sea, states that the sovereignty of the Spanish State extends outside its territory and its internal waters, to the TS adjacent to its coasts. The Spanish TS is

54 The latest delimitation of the boundaries of this zone was made under the Nature Protection Act of February 10, 2011. 'BGTW means British Gibraltar Territorial Waters which is the area of sea, the sea bed and subsoil within the seaward limits of the territorial sea adjacent to Gibraltar under British sovereignty and which, in accordance with the United Nations Convention on the Law of the Sea 1982, currently extends to three nautical miles and to the median line in the Bay of Gibraltar'. See Interpretation and General Clauses Act, Nature Protection Act 1991 (Amendment) Regulations 2011, Gibraltar Gazette No 12, 10 February 2011.

55 In the words of the Spanish government, 'as decolonisation has not yet taken place in accordance with the relevant UN Resolutions and due to differences of opinion as to the nature of the waters surrounding the Rock (apart from the legal status of the Isthmus), it does not seem appropriate to start delimitation negotiations. For the same reason, Spain has not established straight baselines in the Bay of Algeciras' (original version in Spanish). Answer given by the Spanish Government on 26 April 2017 to question 184/11793 submitted in writing in the Spanish Parliament by Micaela Navarro Garzón and Felipe Jesús Sicilia Álvarez.

56 Jamie Trinidad, 'The Disputed Waters Around Gibraltar' (2015) 86 British Yearbook of International Law 101; Gino J. Naldi, 'The Status of the Disputed Waters Surrounding Gibraltar' 4 (2013) International Journal of Marine and Coastal Law 701; Gerry O'Reilly, 'Disputed Territories in the Gibraltar Region: The Crown Colony of Gibraltar and the Spanish Sovereign Territories in North Africa' (1993) 1 Mediterranean Social Science Review 7.

57 These boundaries were the object of parliamentary debates: 'The Government responds to each unacceptable action by Spain with a proportionate diplomatic protest. These are usually delivered in the form of a written protest from the British Embassy in Madrid to the Spanish Government. Over the last two years, they have most commonly been used to protest about maritime incursions. The protests form an 'audit trail' demonstrating the continuous exercise of British sovereignty over BGTW, should the UK ever need to prove this in an international court'. HC. Foreign Affairs Committee, *Gibraltar: Time to get off the Fence* (Second Report of Session 2014-2015, 1 July 2015).

currently formed by a belt of waters surrounding all the Spanish coasts with an extension of up to 12NM. At certain geographical points, this belt is interrupted by the waters subject to the sovereignty of neighboring states. In these cases, Spanish law stipulates that its outer boundary will be determined by delimitation agreements or, failing that, by a median line.[58] In line with UNCLOS, the 14/2014 Act provides the application of the innocent passage regime in the TS (without it being subject to charges, except for the services provided during the passage.[59] It also specifies that such passage must be expeditious and uninterrupted, without threatening the peace, the good order or the safety of Spain.[60] Furthermore, all vessels navigating through Spanish zones must be registered in only one state, to show their name and registration number, and, pursuant to maritime uses, to fly the Spanish flag along with their own.[61]

The Spanish Government is competent to regulate the different activities in this area (public order, research, fishing, etc.) that derive from its sovereignty. Sovereignty, which, however, is conditioned by the provisions of Article 27 UNCLOS, regarding the scope of criminal jurisdiction on the occasion of the navigation of foreign vessels under the innocent passage regime.[62] In general, the state may not exercise its criminal jurisdiction on board such vessels during innocent passage, unless certain conditions are met. In particular, when the offence has repercussions that affect the coastal state, or when the intervention of the coastal state is requested by the flag state.[63] In the case of Spain, the intervention of the Spanish authorities would be justified in the case of criminal conduct relating to the protection of the marine environment included in the CC, such as the catching or the destruction of protected species. However, in accordance with Article 27(5) UNCLOS, Spain may not take criminal measures on board a foreign ship or take proceedings in connection with an offence, when the following circumstances are met: a) the offence was committed before entering its TS, b) the ship comes from a foreign port, and c) the ship passes through the TS without having entered Spanish IW. In contrast, the Spanish authorities may intervene when the foreign vessel comes from its internal waters and makes an innocent transverse passage through the TS.[64]

On the other hand, all vessels navigating in the TS, as well to pass through, enter or leave ports or coastal terminals are obliged to respect Spanish laws and regulations relating to the protection of the marine environment.[65] In all these areas, Spanish maritime authorities may condition, restrict or prohibit navigation in

58 Article 4.

59 Article 41.

60 Articles 37(1) and 37(2).

61 See also Orden ARM/2077/2010, de 27 de julio, para el control de acceso de buques de terceros países, operaciones de transito, transbordo, importación y exportación de productos de la pesca para prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada (BOE 185, 31 July 2010).

62 For further information, see Valentín Bou Franch, *La navegación por el mar territorial* (Iberoediciones, 1994); Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea: the Current Regimen of 'Free' Navigation in Coastal Waters of Third States* (Pinter, 1990).

63 Article 27(1)(c) UNCLOS.

64 Article 27(2) UNCLOS.

65 Article 38 Ley 14/2014.

certain places to prevent the carrying out of illegal activities or the exercise of prohibited traffic.[66] These provisions relating to the navigation are complemented by the regulations on State ports and the merchant navy. Thus, Royal Legislative Decree 2/2011, of 5 September,[67] which approves the Consolidated Text of the Law on State Ports and the Merchant Navy, establishes in its Article 301 'that the Government may prevent, restrict or condition the navigation of certain categories of civil vessels in internal waters, the territorial sea or the contiguous zone for the purpose of preventing unlawful activities or the exercise of any prohibited traffic.'[68]

As noted above, the surveillance and policing functions in the waters of this area are reserved by law to the Civil Guard. This is stipulated in Article 11(2)(b) of Organic Law 2/1986, of 13 March, on State Security Forces and Corps[69]. This attribution of powers has been confirmed by Royal Decree 246/1991, of 22 February,[70] which regulates the Maritime Service of the Civil Guard, Article 1 of which recognises this service the exercise of these functions up to the outer limit of the TS. Exceptionally, it will also be able to operate outside this area, since for the purposes of compliance with the criminal law it will be considered a 'State vessel'. This exception is stipulated in the Order of 26 July 1994 on the regime, flag and registration of vessels of the maritime service of the Civil Guard.[71]

3.3 The fight against IUU fishing in the Spanish EEZ

In its EEZ a coastal state exercises specific sovereign rights over activities set out in Article 56 UNCLOS. In this area, the rights and powers of the coastal state come together with the residual freedoms of the high seas from which other states benefit. In order to declare an EEZ, the State must take certain measures. In other words, this maritime space is not presumed but must be expressly proclaimed. According to Article 57 UNCLOS, the EEZ may extend up to 200NM from the same baselines from which the TS is measured. In the case of overlapping EEZs, States must delimit their respective boundaries. However, failure to reach an agreement shall not prevent the coastal State from exercising the rights it has recognised, in accordance with Article 56 UNCLOS.

Exclusivity means that only Spanish authorities may exercise rights with an economic purpose in the

66 Article 20(1) Ley 14/2014.

67 The basic foundational moment of current legal port regulations comes from Ley 27/1992, de 24 de noviembre, de Puertos del Estado y de la Marina Mercante, to which there have been different partial reforms through other laws: Ley 62/1997, de 26 de diciembre, de modificación de la Ley 27/1992, de 24 de noviembre, de Puertos del Estado y de la Marina Mercante; Ley 48/2003, de 26 de noviembre, de régimen económico y de prestación de servicios de los puertos de interés general and Ley 33/2010, de 5 de agosto, de modificación de la Ley 48/2003, de 26 de noviembre, de régimen económico y de prestación de servicios en los puertos de interés general. After this process of regulatory evolution, the regulation of the structure and management of the state port system is based on Real Decreto Legislativo 2/2011 de 5 de septiembre, texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante.

68 Original in Spanish: A los efectos de prevenir la realización de actividades ilícitas o el ejercicio de cualquier tráfico prohibido, el Gobierno podrá impedir, restringir o condicionar la navegación de determinadas categorías de buques civiles en las aguas interiores, el mar territorial o la zona contigua (BOE 253, 20 October 2011).

69 BOE 63, 14 March 1986.

70 BOE 52, 1 March 1991.

71Orden de 26 de julio de 1994 sobre el régimen, abanderamiento y matriculación de las embarcaciones del servicio marítimo de la Guardia Civil (BOE 181, 30 July 1994).

EEZ and, consequently, that other States need Spain's authorisation to act for such purposes in the zone. The coastal State authority can be exercised over the development of marine resources as well as over other economic exploitation and exploration of the zones (artificial islands, structures for economic purposes, scientific research), and over the preservation of the marine environment, including the adoption of sanctions. UNCLOS assigns rights and responsibilities to the coastal state. The regime of innocent passage is inapplicable in the EEZ, but there exist freedoms of navigation, overflight, cable-lying and pipeline-laying.[72]

The EEZ regime stipulated in UNCLOS is considered to have negative impact on powerful fishing fleets such as Spain's. Consequently, upon signature and ratification of UNCLOS Spain made a declaration with the following wording: 'arts. 69 and 70 of the Convention mean that access to fisheries in the EEZ of third states by the fleets of developed landlocked or geographically disadvantaged states shall depend on whether the relevant coastal states have previously granted access to the fleets of states which habitually fish in the relevant EEZ'. In the same vein, the declaration adds that 'arts. 56, 61 and 62 of the Convention do not allow of an interpretation whereby the rights of the coastal state to determine permissible catches, its capacity for exploitation and the allocation of surpluses to other States may be considered discretionary'.[73]

In this context, Spain unilaterally proclaimed an EEZ with an extension of 200 NM by Law 15/78 of 20 February 1978 on EEZs (Law 15/78).[74] The Spanish Government initially limited its rights to the Atlantic coasts,[75] subsequently extending them to its Mediterranean coasts, with the exception of those in the Alboran Sea[76] (Royal Decree 236/2013 of 5 April 2013).[77] France protested against the limits of Spain's FZ in the Mediterra-

72 For details, see Luis Ignacio Sánchez Rodríguez, *La Zona Exclusiva de Pesca en el Nuevo Derecho del Mar* (Universidad de Oviedo 1977); Benedetto Conforti (ed), *La Zona Económica Exclusiva* (Giuffré 1983); Shigeru Oda, 'Exclusive Economic Zone', in *Encyclopaedia of Public International Law* (Max Planck Institute 1989) 305; Francisco Orrego Vicuña, *La Zona Económica Exclusiva: Régimen y Naturaleza Jurídica en el Derecho Internacional* (Editorial Jurídica de Chile 1991); Erick Franck and Philippe Gautier (eds), *La Zone* Économique *Exclusive et la Convention des Nations Unies sur le Droit de la Mer 1982-2000: Un Premier Bilan de la Pratique des* États (Bruylant 2003); Gemma Andreone, 'The Exclusive Economic Zone', in Donald R. Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).

73 Division for Ocean Affairs and the Law of the Sea (DOALOS), Declarations made upon signature, ratification, accession or succession or anytime thereafter, as of 29 October 2013, Spain.

74 Ley 15/1978, 20 febrero, sobre zona económica exclusive (BOE 46, 23 February 1978).

75 The EEZ of Spain is established in the Atlantic coasts and the Cantabrian sea, including mainland and islands, as well as in the North-West Mediterranean 'from the outer limit of the TS to a point of geographical coordinates and heading towards the East using the equidistant line with the coastal states, drew in accordance with international law, up to the maritime border with France'.

76 The Alboran Sea is the westernmost portion of the Mediterranean Sea, lying between Spain on the north and Morocco and Algeria on the south. See Juan Luis Suárez de Vivero, Juan Rodríguez Mateos and Rabia M'Rabet Temsamani, 'Regional Context and Maritime Governance' in José Carlos Báez and others (eds), *Alboran Sea - Ecosystems and Marine Resources* (Springer 2021) 11.

77 Real Decreto 236/2013, de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental (BOE 92, 5 April 2013).

nean Sea facing the French coasts[78] and proclaimed such an area in the Gulf of Lion,[79] ignoring the limits of the Spanish fisheries protection zone existing at the time. Before the establishment of the EEZ, France had already set up the ecological protection zone (EPZ) in the Mediterranean with the Law 2002-346, 15 April 2003, and Decree 2004-33, 8 January 2004.[80] For this reason, the Spanish government lodged a formal protest. For Spain 'a line that is equidistant from the baselines form which the breadth of the territorial sea is measured would be the most just and equitable solution, and would be subject to modification only in the case of special or particular circumstances', therefore the French EEZ, which has boundaries that extent far beyond the equidistant line, 'contravene art. 74 of the LOSC'.[81] In 2018, Algeria also proclaimed an EEZ,[82] invading Spanish claimed waters (TS and EEZ) and Italian claimed waters in the Mediterranean.[83] This situation has given rise to another formal protest by the Spanish government[84] and the Italian government.[85]

---

78 It considered that 'the delimitation resulting from the line joining the points specified in the Spanish communication (to the UN Secretariat) cannot be invoked against it. The French government recalls on this occasion that under international public law, the delimitation of a boundary must take place by agreement. Moreover, in this specific case of a maritime boundary, such delimitation must result in an equitable solution, thus ruling out in this instance use of the equidistance line employed by the Spanish side'. The French protest can be found in 38 Law of the Sea Bulletin (1998) 54.

79 Décret no 2012-1148, 12 octobre 2012, portant creation d'une zone économique exclusive au large des côtes du territoire de la République en Méditerranée (Journal Officiel de la République Française [JORF], 14 octobre 2012). A study of the French EEZ claim in Víctor Luis Gutiérrez Castillo, 'La zona económica exclusiva francesa en el Mediterráneo: causas y consecuencias de su creación' in José Manuel Sobrino Heredia (ed) *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos* (Editoriale Scientifica 2014).

80 JORF n 1 16 April 2004 and n 10 January 2004.

81 In fact, in a verbal note of 23 October 2012, sent through diplomatic channels after the 2012 enactment of the French EEZ, Spain reacted to the establishment of the French EEZ by stating that the state's right to set an EEZ cannot be exercised in a unilateral manner but in accordance with article 74 of the UNCLOS 'in order to achieve an equitable solution'. For Spain 'a line that is equidistant from the baselines form which the breadth of the territorial sea is measured would be the most just and equitable solution, and would be subject to modification only in the case of special or particular circumstances', therefore the French EEZ, which has boundaries that extent far beyond the equidistant line, 'contravene article 74 of the LOSC'. Verbal note n 31661, 23 October 2012, from the Ministry of Foreign Affairs and Cooperation of Spain addressed to the Embassy of the Republic of France in Madrid.

82 Law of the Sea Bulletin (2019) 53-55. For further information see Didier Ortloland and Jean Pierre Pirat, 'Nouvelle ZEE algérienne' (2021) Africa Intelligence <www.africaintelligence.fr/afrique-du-nord_politique/2018/04/05/boutef--annexe-la-mediterranee,108304108-art> accessed 25 October 2022.

83 For further information, see Larbi Boukabene, 'The Algerian Exclusive Economic Zone and the Question of Maritime Boundaries with Neighboring States' (2021), 1 Revue de droit des transports et des activités portuaires 6.

84 Presidential Decree n 18/1996 establishing an Exclusive Economic Zone off the Coast of Algeria, 20 March 2018. Transmitted by Note Verbale 72/MR/18 dated 4 April 2018 from the Permanent Mission of Algeria to the United Nations, addressed to the Secretary-General. A list of geographical coordinates of points was deposited with the Secretary-General under article 75(2) of the Convention (see Maritime Zone Notification M.Z.N.135.2018.LOS of 17 April 2018). For further information Víctor Luis Gutiérrez Castillo, 'Ámbitos de soberanía y jurisdicción en el Mediterráneo: estudio de los nuevos procesos de territorialización a la luz del derecho internacional' (2022) 32 REIM 118 <https://revistas.uam.es/reim/article/view/reim2022_32_08> accessed 24 October 2022.

85 Italy objected the geographic coordinate points established by Algeria because the Algerian EZZ overlaps partly the Spanish-Italian continental shelf and the Italian Ecological Protection Zone, to the west of Sardinia, with the Algerian EZZ stretching north-westwards, in the gulf of Oristano, up to reaching the waters of Portovesme, Sant Antioco and Carloforte. For this reason the permanent representation of Italy to the United Nations addressed a communication on 28 th November 2018 to the Secretary General of the United Nations by which Italy expressed its opposition to the delimitation of the Algerian EZZ as indicated in Presidencial Decree no 18/1996 since it overlaps on zones of legitimate and exclusive national Italian interests< www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/2018_NV_Italy.pdf> accessed 25 October 2022.

In Atlantic waters, the situation is not much different. Spain has attempted to delimit its EEZ with Morocco on the Atlantic coast (off the Canary Islands),[86] coinciding with the granting of nine hydrocarbon exploration permits to REPSOL[87] in that area. There were nine rounds of negotiations between 2003 and 2007, in which, although Spain presented a delimitation proposal (equidistance line), in practice no agreement was reached. With Portugal, there are different situations. On the one hand, Spain, applying its own doctrine in relation to Alboran Island, does not recognise the EEZ or continental shelf of Selvagens Islands,[88] in accordance with the provisions of Article 121 UNCLOS. Nor is there any delimitation on the peninsula to date. The old Spanish-Portuguese agreements, which could have regulated the issue, are not in force today. Consider the exchange of notes of 1893, which expired in 1913, and the Guarda Agreements of 1976, which were not ratified by Portugal.[89]

From the perspective of Spanish law, there is no lack of arguments justifying the penal protection of the natural resources of the EEZ. Article 132 of the SC qualifies them as 'state public domain goods'.[90] This status is

86 Ley 44/2010, de 30 de diciembre, de aguas canarias (BOE 318, 31 December 2010).

87 REPSOL S.A. is a Spanish multinational energy and petrochemical company based in Madrid. It is engaged in worldwide upstream and downstream activities. In the 2021 Forbes Global 2000, Repsol was ranked as the 683rd-largest public company in the world. As of 2021, it has more than 24,000 employees worldwide. It is vertically integrated and operates in all areas of the oil and gas industry, including exploration and production, refining, distribution and marketing, petrochemicals, power generation and trading. The business strategy also includes a renewable energy division <www.repsol.com/en/about-us/history/index.cshtml> accessed 25 October 2022.

88 The Savage Islands (Portuguese: *Ilhas Selvagens*) are located between the Portuguese island of Madeira and the Spanish archipelago of the Canary Islands. Their sovereignty was the object of dispute between both countries for five centuries until 1938, when the Standing Committee on International Maritime Law issued a ruling in favor of Portugal, although Spain had no opportunity to defend its interests because it was immersed in the Spanish civil war. Spain refused to accept Portugal's sovereignty over the said islands until 1997, but it has never accepted the extension of an Exclusive Economic Zone around them. The Spanish Government holds that inhabited islands without any economic life should be classified as 'rocks', pursuant to Article 121(3) of UNCLOS, a stance they also adopt regarding its own insular territories, specifically Alboran Island. This entails difficulties to delimit sea spaces in the area.

89 The competent authorities of both States have signed memorandums of understanding about the conditions to engage in fishing activities in their waters. These agreements do not constitute delimitation treaties. Suffice it to mention, by way of example, the Agreement of June 18, 2018 between the Kingdom of Spain and the Republic of Portugal on the conditions to exercise this activity in the waters of both countries, and the Agreement of Cooperation that these two nations signed on May 9, 2012 about the establishment of the Tagus International Natural Park. The content of these memorandums is available for consultation in the official webpage of the Ministry of Fisheries of the Government of Spain. See Ministerio de Agricultura Pesca y Alimentación, Portugal - Memorandos de entendimiento y otros acuerdos <www.mapa.gob.es/es/ministerio/ministerio-exterior/europa/portugal/memorando/default.aspx> accessed 25 October 2022.

90 Article 132(2) Constitución Española reads as follows: 'Assets under the state's public property shall be those established by law and shall, in any case, include the foreshore beaches, territorial waters and the natural resources of the exclusive economic zone and the continental shelf' [Original in Spanish: *Son bienes de dominio público estatal los que determine la ley y, en todo caso, la zona marítimo-terrestre, las playas, el mar territorial y los recursos naturales de la zona económica y la plataforma continental*].

also recognised by Article 3 of the Coastal Law 22/88 of 28 July 1988[91] and Article 5 of Law 33/2003, of 3 November, on Public Administration Assets[92], which affirms its affectation to general use or public service. Similarly, Article 28 of Law 42/2007, of 13 December 2007, on Natural Heritage and Biodiversity (Law 42/2007), allows the waters of the EEZ to have special protection, and may be classified as 'protected natural spaces'.[93]

Law 42/2007 transposes EU directives on conservation of habitats and certain species. Article 5 lays down the duty of all public powers to secure the conservation and rational management of natural heritage. The General Administration of the State is the competent authority for the EEZ's natural heritage (Article 6). Spain implemented within this context the national legislation to carry out the EU Natura 2000. This is a network of protected areas in the 27 EU member states, aiming at ensuring the long-term survival of Europe's rare and most threatened species and habitats, listed under both the Birds Directive and the Habitats Directive.[94] According to art. 42 of the Law 42/2007, Natura 2000 is made up of Sites of Community Importance (SCI-LIC), which can be transformed into Special Areas of Conservation (SAC-ZEC), as well as of Special Protection Areas for Birds (SPAB-ZEPA). The LIC can be proposed by Spain and later be approved by the EU Commission in a TS, an EEZ or a CS (art. 43(2)). As a consequence, Spain's Administration shall declare a SAC-ZED in the area constituting a SCI-LIC (art. 43(3)). Similarly, the General Administration and the Autonomous Communities can declare the SPAB-ZEPA in the maritime zones of Spain (art. 44), without the need of a previous authorization of the EU Commission, which shall be informed after the declaration of an area (art. 45). As of September 2017, Spain has declared and brought into Natura 2000 a total of 40 areas.

Pursuant to Article 1 of Law 15/78, Spain may regulate the conservation, exploration and exploitation of the natural resources of the EEZ, as well as their preservation. In application of the provisions of Part V of UNCLOS, the Spanish Government may impose administrative and criminal penalties for infractions committed in the EEZ. However, Spanish courts may not apply custodial sentences in these cases, unless otherwise agreed with other States (Article 73 UNCLOS). Along the same lines, Article 24(3) of Law 14/2014 establishes that the Government shall ensure that foreign vessels (in this case fishing vessels) take due account of the rights of the Spanish State and comply with the provisions of Spanish fisheries regulations, in accordance with EU and international law.

91 The Spanish Coastal Law is the one that regulates the determination, protection, use and policing of the maritime-terrestrial public domain and especially of the maritime shore. Until 2013, Ley 22/1988, de 28 de julio, de Costas, which repealed the Ley de Costas de 26 abril de 1969, and was developed in the Regulations of the Coastal Law, approved in Real Decreto 1471/1989, de 1 de Diciembre, por el que se aprueba el Reglamento General del procedimiento para desarrollo y ejecución de la Ley 22/1988, de 28 de Julio, de Costas. This law was modified by Ley no 2/2013 de protección y uso sostenible del litoral and by modification of Law 22/1988, of July 28, on Coasts, currently in force. See BOE 181, 29 July 1988 and BOE 30 May 2013.

92 Ley 33/2003 de 3 de noviembre del Patrimonio de las Administraciones Públicas (BOE 264, 4 November 2003).

93 Ley 42/2007 de 13 de diciembre del Patrimonio Natural y de la Biodiversidad (BOE 299, 14 December 2007).

94 Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/1992.

4. Considerations on the fight against IUU fishing outside waters under Spanish sovereignty and jurisdiction

In the case of conduct criminalised in Spanish territory, but committed outside of it, the jurisdiction of the Spanish courts will be conditioned by the principle of extraterritoriality. This means that in the case of the commission of offences against the environment by illegal fishing, Spanish courts will only have jurisdiction on the basis of the personal principle (or nationality). Specifically, by virtue of this principle (Article 23(2) OLJ) the Spanish courts may intervene when the following circumstances concur: a) that the perpetrators are Spanish or foreigners who have acquired Spanish nationality after the offence was committed.; b) that the act is punishable in the place of execution (dual criminality requirement); c) that a complaint or accusation is lodged with the Spanish courts; and c) that the offender has not been acquitted, pardoned or convicted abroad or, if he has been, has not served the sentence imposed on him.

It does not appear, however, that Spanish courts can intervene outside these circumstances. The very nature of these offences excludes the possibility that they can be protected by the existence of a 'special interest of the State' (principle of protection of State interests). The offences against the environment for illegal fishing[95] do not seem to protect a legal asset of singular value for Spain, to the extent that it is justified to break the barriers imposed by the principle of territoriality. At least this can be inferred from recent Supreme Court case law. This circumstance explains why these criminal offences have not been preferred by the legislator in the closed list of Article 23(4)(d) of the OLJ. Neither do the Spanish courts have jurisdiction on the basis of the principle of universal justice. After the reform of Organic Law 1/2014, of 13 March, on universal jurisdiction,[96] this possibility has been severely limited. In fact, this jurisdiction can only be exercised in very specific circumstances and for the prosecution of certain crimes expressly set out in the criminal law (such as genocide, torture, trafficking in human beings, terrorism), which do not include the crimes dealt with in this article.

Special attention should be paid to the action of Spanish courts in areas subject to controversial legal regimes, such as the Antarctic and its surrounding waters (the so-called Convergence Zone). These waters are conditioned by the conventions of the Antarctic Treaty system, to which Spain is a consultative party. Jurisdictional issues are regularly discussed at Antarctic Treaty Consultative meetings and at the annual meetings of the Commission for the Conservation of Marine Living Species. The cases that have been raised on recognition of jurisdiction relate to the territorial claims of some countries, which are frozen by the Antarctic Treaty. Therefore, in practice, conduct related to IUU fishing has escaped the criminal jurisdiction of states. One example is the Spanish Supreme Court ruling of 23 September 2016. In this case, the Spanish high court made a restrictive interpretation of the rule and rejected the competence of Spanish courts to hear offences committed on the high seas against the environment (IUU fishing) by nationals on foreign-flagged vessels.

95 Articles 334, 335 and 336 Código Penal.

96 Ley Orgánica 1/2014 de 13 de marzo de modificación de la Ley Orgánica 6/1985 de 1 de julio del Poder Judicial relativa a la justicia (BOE 63, 14 March 2014).

As regards the inspection function of the Spanish authorities, this may be extended beyond Spanish territory in exceptional circumstances. It may be carried out in international waters, in the framework of internationally agreed commitments, or in waters under the jurisdiction of another EU Member State. The latter shall take place when acting in accordance with the framework for cooperation and coordination of fisheries control and inspection activities regulated in Regulation (EC) no 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy.[97]

Right of access to waters not subject to Spanish sovereignty or jurisdiction has not been specifically regulated in Spain. However, its content has been clarified by Spanish case law with regard to the exercise of extraterritorial police powers derived from Article 23(4)(d) OLJ. The Supreme Court has clarified that this provision 'confers jurisdiction on the Spanish authorities for the boarding, inspection, seizure of substances and detention of the crew of any vessel flying the flag of another State, provided that it obtains the authorisation of that State'.[98] Practice also confirms that the right of access may be exercised without authorisation in cases where the ship is sailing without an identifiable flag or is officially sailing without a flag and where the State, the apparent flag-holder, is itself disregarding the right of access.[99]

5. Conclusion

The imprecise nature of the very notion of IUU fishing, the absence of a common concept of fishing crime (which fluctuates from broad to very restrictive interpretations), the existence of limits to the imposition of certain criminal sanctions (such as imprisonment) derived from international law itself, or the problems linked to the exercise of criminal jurisdiction in marine areas not subject to state control, are some of the existing obstacles in the fight against IUU fishing. At the international level, UNCLOS calls on states to incorporate measures for the responsible management of fisheries resources, both in their EEZs and on the high seas, into domestic legislation. In this scenario, it is up to the EU to establish these measures within its competences, as well as to cooperate with third countries and international organisations with the aim of conserving and protecting the marine environment. In this context, the appropriate definition of marine areas through planning compatible with international standards is a useful and necessary instrument for combating fishing crime.

Spain is bound as a party to UNCLOS and a member of the EU to abide by the rules of the Common Fisheries Policy, based on the management of European fishing fleets and the conservation of fish stocks, the EU environmental legislation and with environmental international treaties concerning maritime areas. Therefore, the EU rules on the establishment of a system for fisheries control were im-

97 OJ L 354/22, 28 December 2013.

98 Setencia del Tribunal Supremo n 648/2016 [2016] ECLI:ES:TS:2016: 3581.

99 Setencia del Tribunal Supremo 2040/2008 [2008] ECLI: ES:TS: 2008:2040.

plemented by the Law 3/2001, 26 March 2001, on marine fishing, and by the Royal Decree 176/2003, 14 February 2003, regulating control and inspection functions of the fishing activities. Also, the access of the Spanish fleet to waters in third countries is set out in the Royal Decree 1549/2004, 25 June 2004 has comprehensive spatial planning that is compatible with international norms.

In Spanish domestic law, illegal fishing activities have traditionally been conceived as administrative offences. In fact, the administrative order has been the main channel for the fight against these activities. However, there is a growing debate on the opportunity to intensify the criminal prosecution of the most serious aspects of IUU fishing with an international component. In Spanish marine territory, the CC is applied according to the legal regime of the different areas and the limitations imposed by international law. Based on this scenario, the sanctioning of conduct related to IUU fishing in Spain will be conditioned by three aspects: material (object of protection), spatial (nature of the marine space in which the criminal conduct is committed), national (flag of the fishing vessel) and jurisdictional (application of the criminal or administrative order). In this way, the Spanish maritime authorities will be competent to condition, restrict and even prohibit navigation in certain places in Spanish maritime spaces in order to prevent the carrying out of illegal activities or the exercise of any prohibited traffic. However, the intervention of one or the other authority (state or regional) will depend on the maritime space in which the infringement has been committed, and on the police powers and jurisdiction legally attributed to it.

Maritime Safety and Security Law Journal

The European Union at the International Seabed Authority: A Question of Competence on the Brink of Deep-Sea Mining

*Giovanni ARDITO**

Abstract

After years of great uncertainty on the viability of deep-sea mining activities, the International Seabed Authority is currently negotiating the draft regulations on exploitation of mineral resources in the Area. In this context, the EU has recently come up with a Commission proposal for an EU Council decision on the position to be taken on behalf of the EU at the meetings of the ISA organs. The proposal claims an exclusive EU competence for the negotiation of the draft, based on article 3 (2) of the Treaty on the Functioning of the European Union. In the light of the recent case law of the ECJ, this paper aims to discuss whether the EU does enjoy competence in the field of protection of the marine environment from the harmful effects of mining operations in the Area and, if so, its exclusive or shared nature. While the analysis will conclude that the EU is not attributed exclusive competence in this field, the paper will also consider the scenario by which the Council nonetheless obtains the necessary majority to negotiate the draft alone. In this respect, the conduct required from EU Member States in pursuance of the duty of sincere cooperation, and with a view to ensure coherence and consistency of the EU action in other international fora, is also explored.

Keywords: European Union (EU), European Union competence, International Seabed Authority (ISA), protection of the marine environment, deep-sea mining, sincere cooperation

First published online: 17 March 2023, accepted on 15 December

1. Introduction

Over the last 25 years,[1]1 the International Seabed Authority (ISA) – the intergovernmental organization through which the parties to the United Nations Convention on the Law of the Sea (UN-

* Research fellow in international law at the Institute for International Legal Studies (ISGI) of the National Research Council (CNR). PhD in Public, Comparative and International Law, curriculum International Order and Human Rights, at Sapienza University of Rome. The author is grateful to Dr. Gemma Andreone for her insightful comments on a first draft of this paper and also wishes to thank the editors, anonymous reviewers and proof readers for their valuable work and comments.

1 Jean-Pierre Lévy, *International Seabed Authority: 20 years* (The International Seabed Authority 2014) 20-42; Michael Lodge, 'International Seabed Authority', *Max Planck Encyclopedia of Public International Law* (2020); María Esther Salamanca-Aguado, *The Development of the Deep Seabed Mining Regime by the International Seabed Authority: From Exploration to Exploitation* (working paper, AEL 2022/11); Richard Collins and Duncan French, 'A Guardian of Universal Interest or Increasingly Out of Its Depth?' [2020] 17 International Organizations Law Review 633.

CLOS)[2] organize and control the exploration[3] and exploitation[4] of mineral resources in the seabed and ocean floors beyond the limits of national jurisdiction (the Area)[5] – has concluded 31 contracts with more than 20 public and private entities for the exploration of polymetallic nodules, polymetallic sulphides and cobalt rich crusts, the most promising mineral deposits in the Area.

After years of great uncertainty on the viability of deep-sea mining activities due to various technical and technological gaps,[6] the Council of the ISA is currently negotiating the draft regulations on exploitation of mineral resources in the Area (Draft),[7] whose adoption is expected by July 2023.[8]

Before the concerns of some States and the European Union (EU) Parliament for the effective protection of the marine environment from harmful effects arising from deep-sea mining, the EU drafted a Commission proposal for an EU Council decision on the position to be taken on behalf of the EU at the meetings

2 United Nations Convention on the Law of the Sea [1982] 1833 UNTS 3 [UNCLOS], art 157.

3 According to ISA Council, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters [2013] ISBA/19/C/17, regulation 1, '"Exploration" means the searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the use and testing of recovery systems and equipment, processing facilities and transportation systems and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation'.

4 According to ISA Council, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters [2013] ISBA/19/C/17, regulation 1, '"Exploitation" means the recovery for commercial purposes of polymetallic nodules in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems, for the production and marketing of metals'.

5 UNCLOS, art 1(1)(1). The legal doctrine on the Area is vast; for some references see Michael Lodge, 'The Deep Seabed', in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 226-53; María Esther Salamanca-Aguado, *La zona internacional de los fondos marinos: patrimonio común de la humanidad* (Dykinson, 2003); Alexander Kiss, 'La Notion de Patrimoine Commun de l'Humanite', *Collected Courses of The Hague Academy of International Law* (Brill 1982); Giovanni Ardito, 'Encroaching the Common Heritage of Mankind: A Tale of a Double-Track Process in The International Seabed Area', in Piefrancesco Breccia and others (eds), *Liber Amicorum Sergio Marchisio: il diritto della comunità internazionale tra caratteristiche strutturali e tendenze innovative* (Editoriale Scientifica 2022) 696-697.

6 Marzia Rovere, 'The Common Heritage applied to the resources of the seabed. Lessons learnt from the exploration of deep sea minerals and comparison to marine genetic resources' (2018) 5 Maritime Safety and Security Law Journal 86-88.

7 ISA Council, 'Draft Regulations on Exploitation of Mineral Resources in the Area' (2019) ISBA/25/C/WP.1.

8 After the Republic of Nauru triggered Section 1, paragraph 15 of the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS (the Agreement), by which it requested the ISA Council to adopt within 2 years the regulations for the approval of the first deep-sea mining operation, the negotiations are expected to conclude by July 2023. In order to meet the established deadline, the Council has set out an intensive roadmap of meetings and intersessional work. Despite this, the negotiations of the environmental provisions of the Draft are revealing very intensive and time-consuming. This is mainly due to the mounting concerns about the physical impacts of the mining operations on the seafloor. They include the release of sediment plumes from seabed activities with a high density of small particles and of discharge material following preprocessing of the minerals, which may well lead to alterations in the seabed and water column communities and affect food availability. Indeed, the actual threats of deep-sea mining to ecosystems are difficult to predict fully because of the limited knowledge of the technology under development and of its impact on the geological and biological features of the deep-sea ecosystems. On the most recent developments at the ISA, see Pradeep Singh, 'The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications' [2022] The International Journal of Marine and Coastal Law 375; Giovanni Ardito and Marzia Rovere, 'Racing the Clock: Recent Developments and Open Environmental Regulatory Issues at the International Seabed Authority on the Eve of Deep-Sea Mining' [2022] 140 Marine Policy 105074.

of the ISA organs. The proposal claims an exclusive EU competence for the negotiation of the Draft, pursuant to article 3(2) of the Treaty on the Functioning of the European Union (TFEU).[9]

Building on the harsh reaction to the proposal by some EU Member States – especially those directly involved in activities in the Area[10], this paper aims to discuss whether the EU enjoys competence in the field of protection of the marine environment from the harmful effects of deep-sea mining and, if so, whether it is exclusive or shared in nature. To this end, it will first analyse the rules, conditions and limits under which the EU is granted accession to the UNCLOS. It will then focus on the EU membership to the ISA so as to clarify why it should be for the EU Member States represented at the ISA Council to uphold an eventual EU common position. Finally, a discussion of the EU competences in the field will be provided, taking into account the arguments made by the Commission in its proposal. While the analysis will conclude that the EU is not attributed with exclusive competence in this field, the paper will also consider the scenario by which the Council nonetheless obtains the necessary majority to negotiate the Draft alone. In this respect, the conduct required from EU Member States in pursuance of the duty of sincere cooperation, and with a view to ensure coherence and consistency of the EU action in other international fora, is also explored.

2. The Proposal for a Council Decision on the Position to be Taken on Behalf of the European Union at the Meetings of the International Seabed Authority Council and Assembly

The EU interest in the negotiations of the Draft arose following the results of a European project on the management of impacts of deep-sea mining.[11] The research suggests the delay of the exploitation of the resources of the Area – which the UNCLOS declares the common heritage of mankind[12] – until scientific gaps on deep-sea ecosystems are properly filled. In the light of the uncertain impacts of deep-sea

9 Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty), art 3(2).

10 Member States of the EU commented the EU Proposal in several COMAR Meetings. A list of these written comments is available at <https://data.consilium.europa.eu/doc/document/ST-5201-2022-INIT/en/pdf> (last accessed 22 December 2022). The negative reaction of EU Member States can also be inferred from the deadlock of the non-legislative procedure, which stopped in February 2021.

11 The project and its results can be found at <www.jpi-oceans.eu/en/miningimpact> (last accessed 22 December 2022).

12 UNCLOS article 136 declares the Area and its mineral resources the common heritage of mankind (CHMK), a *tertium genus* alternative to the traditional regimes of sovereignty and freedom of the high seas. As applied in Part XI UNCLOS, the CHMK is generally understood as made up of five constitutive elements. First, article 157 prohibits any claim or exercise of sovereignty over the Area and its resources, whose rights are vested in mankind. Second, under article 141, the Area shall only be used for peaceful purposes. Third, the Area and its resources shall be preserved in the interest of the present and future generations, consistently with the provisions of article 145. Fourth, all activities of exploration for and exploitation of mineral resources are to be carried out for the benefit of mankind and the revenues accruing therefrom ought to be shared among the international community. Finally, activities in the Area shall be managed through an *ad hoc* international mechanism embodied by the ISA. See Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' [1983] 42 Heidelberg Journal of International Law 312; Christopher Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' [1986] 35 International & Comparative Law Quarterly 190; Antonio Augusto Cançado Trinidade, 'International Law for Humankind: Towards a New *jus gentium*', *Collected Courses of The Hague Academy of International Law* (Brill 2006) 365-396. Christopher Pinto, 'The Common Heritage of Mankind: Then and Now', *Collected Courses of The Hague Academy of International Law* (Brill 2012); Ornella Ferrajolo, 'The Common Heritage of Mankind in International Law: A Great Past but No Future?' (2019) 5 Maritime Safety and Security Law Journal 114.

mining on the marine environment, in January 2018 the EU Parliament first requested Member States to support an international moratorium.[13] This was also echoed in a 2021 resolution on the EU Biodiversity Strategy, in which the EU Parliament called on 'the Commission and Member States to promote a moratorium, including at the [ISA], on deep-seabed mining until such time as the effects of deep-sea mining on the marine environment, biodiversity and human activities at sea have been studied and researched sufficiently and deep seabed mining can be managed to ensure no marine biodiversity loss nor degradation of marine ecosystems'.[14]

In January 2021, the EU Commission handed out its proposal for a Council decision on the position to be taken on behalf of the EU at the meetings of the ISA bodies – namely the Council and the Assembly – with respect to the adoption and implementation of the Draft and its related standards and guidelines (Proposal).[15]

The procedural legal basis identified by the Commission for the Proposal is to be found in article 218(9) of the TFEU, which requires the Council to adopt a decision 'establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects'.[16] The regulations of the ISA, together with its rules and procedures, are secondary law that bind all UNCLOS parties and operators without any possibility of opting out. They result from a specialized law-making process, aimed at adopting rules of a technical nature through procedures which are similar to those used in international conferences.[17] In this context, the Draft is among the acts for which a position to be adopted by the EU can be established under article 218(9). As for the substantial legal basis, the Proposal refers to article 191 of the TFEU, establishing the fundamentals of the environmental policy of the EU, which is based on 'the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'.[18]

---

13 European Parliament, resolution of 16 January 2018 on international ocean governance: an agenda for the future of our oceans in the context of the 2030 SDGs [2018] OJ C 458/9, para 19: 'Calls on the Commission to encourage Member States to cease subsidising licences for mining prospecting and extraction in areas beyond national jurisdiction'.

14 European Parliament, resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives [2021] OJ C 67/3, para 184.

15 European Commission, proposal for a Council decision on the position to be taken on behalf of the European Union at the meetings of the International Seabed Authority Council and Assembly [2021] COM (2021) 1 final.

16 Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty) OJ C 202, 7.6.2016 (TFEU) art 218 (9).

17 *Responsibilities and obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10, para 60; Satya Nandan, 'Legislative and Executive Powers of the International Seabed Authority for the Implementation of the Law of the Sea Convention', in Davor Vidas and Willy Østreng (eds), *Order for the Oceans at the Turn of the Century* (Brill 1999); Pradeep Singh, 'International Organisations and the Protection of the Marine environment', in Marta Chantal Ribeiro and others (eds), *Global Challenges and the Law of the Sea* (Springer 2020).

18 TFEU, art 191.

With regard to the content of the Proposal, the Commission envisages that the position the EU should take at the ISA is determined through a two-level approach.[19] The EU Council first has to define the guiding principles for building up a Union position. They are referred to in the Annex to the Proposal, and include compliance with articles 192[20] and 145[21] of the UNCLOS on the protection of the marine environment from the harmful effects arising from activities in the Area and the progress of knowledge on the possible impacts of deep-sea mining on the marine environment, to ensure that an assessment of the risks associated to such activity is rigorously undertaken. The Annex also recalls that the EU position should be consistent with the main principles underpinning the EU environmental policy, and in particular the principle of sustainable development, the precautionary principle and the ecosystem approach.[22] Moreover, according to the Proposal, ahead of any meeting of ISA organs, the Commission shall transmit to the EU Council or to the Council Working Party on the Law of the Sea (COMAR) a document specifying the position to be taken on EU's behalf on a specific matter.[23] The EU Council shall finally discuss and endorse the details of the position. According to article 2 of the Proposal, since, as a result of its observer status, the EU is prevented from autonomously express its position at the ISA Council, it is for EU Member States to uphold it.[24]

In advancing its Proposal, the Commission relies on an exclusive external competence for the negotiation of the Draft, in accordance with article 3(2) of the TFEU. It establishes that the EU enjoys exclusive external competence to undertake international commitments in three specific cases, i.e. a) whenever so provided in an EU legislative act; b) when necessary to enable the EU to exercise its internal competence; or c) when it may affect common rules or alter their scope. It is precisely this last scenario the Commission resorts to in its Proposal to claim its exclusive competence. However, surprisingly enough, the Commission does not clarify which EU *acquis* it considers altered by the Draft. Indeed, the Proposal does not provide specific arguments in support of the claim of exclusive competence. Actually, some of the arguments may have been presented in the Position paper on the competences of the EU with regard to matters governed by the Draft, a document presented by the Commission at the COMAR meetings, which is unfortunately not publicly available.[25] Despite this, according to the Commission, the EU acts mentioned in the Proposal would, 'justif[y] the content of the proposed position to be taken on the Union's behalf'.[26]

19 European Commission (n 5) Annexes 1 and 2.

20 Article 192 UNCLOS reads: 'States have the obligation to protect and preserve the marine environment'.

21 Article 145 UNCLOS reads: 'Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment'.

22 European Commission (n 15) Annex 1.

23 The Working party is made up of law of the sea experts from Member States and representative from the European Commission and the General Secretariat of the Council of the EU.

24 Treaty on European Union (Consolidated) OJ 2012/C326/01 (TEU) art 4 (3).

25 Reference to this document can however be found at Council of the European Union, List of WK documents distributed in the Law of the Sea Working Party during the first semester of 2021 [2021] 10384/21 COMAR 19.

26 European Commission (n 15) 7th recital.

In particular, the Proposal makes reference to the Marine Strategy Framework Directive (MSFD),[27] which aims to achieve or maintain good environmental status of the marine environment by addressing all human activities which potentially have an impact on it,[28] in pursuance of an ecosystem approach.[29] The same ecosystem approach is recalled in article 5 of the Directive 2014/89/EU establishing a framework for Maritime Spatial Planning (MSP),[30] which is also mentioned in the Proposal.

MSP is an integrative process through which Member States cope with the increasing demand for maritime space from traditional and emerging sectors while preserving the proper functioning of the marine ecosystems with a view to balance ecological, economic and social objectives. As a modern, holistic and integrated approach to the sustainable management of the sea, MSP can result in plans and administrative decisions on the spatial and temporal distribution of existing and future activities and uses in the marine waters.

None of the two directives contain a definition of an ecosystem approach, which is well established under international law, particularly in the field of watercourse law.[31] It can be interpreted as an integrated approach to managing human activities within ecologically meaningful boundaries seeking to manage the use of natural resources, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected.[32]

Based on the scientific evidence of an ecological connectivity between the maritime areas within and beyond national jurisdiction,[33] the MSFD comes into play to the extent that exploitation activities in the Area could affect the good environmental status of maritime areas within national jurisdiction and undermine the environmental targets established in Member States' marine waters in pursuance of an ecosystem

27 European Parliament and Council Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L 164.

28 ibid recital 3: 'The marine environment is a precious heritage that must be protected, preserved and, where practicable, restored with the ultimate aim of maintaining biodiversity and providing diverse and dynamic oceans and seas which are clean, healthy and productive. In that respect, this Directive should, inter alia, promote the integration of environmental considerations into all relevant policy areas and deliver the environmental pillar of the future maritime policy for the European Union'.

29 ibid recital 5: 'The development and implementation of the thematic strategy should be aimed at the conservation of the marine ecosystems. This approach should include protected areas and should address all human activities that have an impact on the marine environment'.

30 European Parliament and Council Directive 2014/89/EU establishing a framework for maritime spatial planning [2014] OJ L 257.

31 See, *inter alia*, Attila Tanzi and Maurizio Arcari, *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing* (Brill 2001); Ruby Moynihan, *Transboundary Freshwater Ecosystems in International Law* (Cambridge 2021); Vito De Lucia, *The 'Ecosystem Approach' in International Environmental Law* (Routledge 2019).

32 European Parliament and Council Regulation (EU) 1380/2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L 354, art 2(3).

33 Ekaterina Popova and others, 'Ecological connectivity between the areas beyond national jurisdiction and coastal waters: Safeguarding interests of coastal communities in developing countries' [2019] 104 Marine Policy 90.

approach. In achieving such targets, Member States are required to adopt and implement specific marine strategies. Under article 6 of the MSFD, they shall avail themselves of the existing regional institutional cooperation structures, including Regional Sea Conventions, i.e., treaties that engage neighbouring countries for the conservation and protection of their common marine environment from different sources of pollutions. They often provide for the adoption of measures to achieve or maintain good environmental status in pursuance of an ecosystem approach,[34] including marine protected areas (MPAs).

This is the case of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),[35] whose scope of application covers both areas within and beyond national jurisdiction, under which an ecologically coherent network of MPAs has been established.[36] Some of them are also associated to specific conservation objectives and management measures, which are binding on all the parties to the OSPAR Convention, including the EU.[37] Among them, the Milne Seamount Complex MPA was created in the water column and seabed beyond national jurisdiction to restore the integrity and quality of the ecosystems it hosts.[38] Although there is currently no express appetite for deep-sea mining in the region, the Milne Seamount Complex is located in an area rich in ferromanganese crusts, which could well become a target for exploitation in the future. This is an activity whose regulation falls outside the mandate of the OSPAR Convention for the purpose of the protection of the marine environment. By way of example, if deep-sea mining took place in this area, the conservation and management measures associated to the network of MPA should be revised accordingly. Such measures are binding on the EU and hence form part of the EU law. In the view of the Commission, before the risk of affectation of its *acquis*, the Union is thus entitled to exclusively negotiate the Draft under article 3 (2) TFEU.

The other ground which can be inferred from the Proposal for the exercise of exclusive external competence pursuant to article 3(2) of the TFEU is Regulation 1380/2013 on the Common Fisheries Policy (CFP),[39] an area in respect to which the EU enjoys exclusive competence for the conservation of marine biological resources.[40] The CFP aims to conserve fish stocks and reduce negative impacts of fishing activities on marine ecosystems, in pursuance of an ecosystem approach referred to in article 2(3). To this end, the EU also supports and contributes to the work of RFMOs and to the implementation of their conservation measures. In particular, the EU adopted *ad hoc* acts to comply with its commitments under the RFMOs

34 European Parliament and Council Directive (n 27) art 13.

35 Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force on 25 March 1998) 2354 UNTS 67.

36 The database of the OSPAR MPAs is available at <https://mpa.ospar.org/home_ospar> (last accessed 22 December 2022).

37 Council Decision 98/249/EC 7 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic [1998] OJ 104.

38 OSPAR Decision 2010/1 on the Establishment of the Milne Seamount Complex Marine Protected Area [2010] OSPAR 10/23/1-E, Annex 34.

39 European Parliament and Council Regulation (n 32).

40 TFEU, art 3(1).

to which it is a party and to enhance the conservation of certain marine ABNJ.[41] For instance, Regulation 734/2008[42] aims to protect vulnerable marine ecosystems (VME) in the high seas from the adverse effects of bottom trawling fishing through the identification of selected closure areas.

Reference to the CFP in the Proposal seems to support the notion that, in the Commission view, the unpredictable effects of deep-sea mining on the marine environment would undermine the EU's ability to ensure the effective conservation of fish stocks and the compliance with measures adopted in pursuance of the commitments undertaken within RFMOs. Indeed, should deep-sea mining proceed in high seas areas closed to certain fishing activities, this would hamper the protection afforded to VME, *inter alia*, under Regulation 734/2008. From this perspective, the EU participation in the negotiations of the Draft is again necessary to avoid the affectation of the EU *acquis*.

3. The EU Proposal: An Appraisal

3.1 The EU and the UNCLOS

As of November 2022, the UNCLOS has been ratified by 167 States and the EU.[43] At the Third Conference on the Law of the Sea, the then European Community participated in the negotiations of the UNCLOS in quality of observer and as a member of the special interest group which emerged during the treaty-making process.[44] Its presence, along with its Member States, was necessary because of the competence it was attributed in the field of conservation of fish resources, in respect to which they could not autonomously assume international obligations.

Non-members of the European Community were particularly reluctant to accept that international organisations could accede to the UNCLOS, *inter alia*, for the unforeseeable consequences it could entail with respect to the attribution of the international responsibility for breaches of obligations arising from the convention.[45] Despite this, the intense lobbying of the Member States of the European Community resulted in the adoption of Annex IX to the UNCLOS. It deals with the modalities of the participation of international organizations in the treaty and links the right of international organizations to sign and accede to the UNCLOS to the condition that the majority of its Member States are signatories or have deposited the instrument of ratification or accession.[46] Moreover, the participation of international organizations

41 European Parliament and Council Regulation (n 32) art 29-30; Gabriela Oanta, 'Las contribuciones de la Unión europea a los desarrollos normativos de la pesca en alta mar', in Rafael Casado Raigon and Enrique Jesús Martínez Pineda (eds), *La contribución de la Unión Europea a la protección de los recursos biológicos en espacios mariinos de interés internacional* (Tirant lo Blanch 2021).

42 Council Regulation (EC) 734/2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears [2008] OJ L 201.

43 Data can be accessed at the United Nations Treaty Collection website <https://treaties.un.org > follow > 22 December 2022.

44 Myron Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol.1 (Martinus Nijhoff 1985) 84.

45 ibid.

46 UNCLOS, Annex IX.

in the UNCLOS is limited to the subject matters in respect of which competence has been transferred by Member States.[47] Whenever a transfer of competence to the organization has not taken place, such competence is presumed to belong to Member States.

The EU, the only intergovernmental organization which joined the UNCLOS, signed the convention as soon as the majority of its Member States had become signatories, on 7 December 1984, and it also approved the UNCLOS and the Agreement by Council decision 98/392 of 23 March 1998 (Decision).[48] Pursuant to article 5 of Annex IX to the UNCLOS, the instrument of formal accession is complemented by a Declaration concerning the competence of the EU (Declaration),[49] whose content – despite the many changes the European Community underwent – was never revised.[50]

From an EU internal perspective, the UNCLOS is a mixed agreement. The formula refers to international agreements jointly concluded by the EU and its Member States when the former is not competent for all the matters covered by a certain treaty and, hence, cannot conclude the agreement alone.[51] Mixed treaties have the same status in the EU legal order as agreements concluded by the EU. From this perspective, the UNCLOS forms an integral part of the EU legal order and ranks immediately after the primary sources of EU law.[52]

3.2 The EU at the ISA

According to article 156 of the UNCLOS, every party to the convention is *ipso facto* a member of the ISA.[53] Hence, as a party to the UNCLOS, the EU is also an ISA member. However, the EU is not represented in both the main organs of the ISA, i.e., the Assembly and the Council.[54]

47 UNCLOS, Annex IX, art 8.

48 EC Council decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof [1998] OJ L 179.

49 Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention (7 December 1984), available at <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.> (last accessed 28 November 2022).

50 Andres Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base' [2012] 17 European Foreign Affairs Review 491.

51 Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals', in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (OUP 2018).

52 Ronán Long, 'The European Union and Law of the Sea Convention at the Age of 30', in David Freestone (ed), *The 1982 Law of the Sea Convention at 30* (Brill 2013).

53 While article 156 UNCLOS literarily refers to State Parties, it has always been interpreted as covering all subjects who, pursuant the relevant provisions of the UNCLOS, have consented to be bound by the convention. See Yoshifumi Tanaka, 'Article 1', in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea* (Hart 2017).

54 The Assembly is the supreme and plenary body of the ISA - where all its 168 members are represented - that establishes general policies on any matter within the competence of the ISA. The Council exercises the most sensitive and relevant functions entrusted to the ISA. As the executive body of the organization, it has a limited composition, restricted to 36 members. They are elected for a four-year term by the Assembly, through a sophisticated mechanism. Four members are selected from among those State parties which have either consumed or imported more than 2% of the total world consumption of the commodities produced from the minerals derived from the Area, including the State from the Eastern European region with the largest gross domestic product (GDP) and the State that, on the entry into force of the UNCLOS, had the largest GDP (Group A). Four members are from the eight larger investors in deep seabed mining (Group B). Four members are elected among the major net exporters of the minerals of the Area, including at least two developing countries (Group C). Six members come from developing countries representing special interests (Group D). The other 18 members are elected in such a way to ensure an equitable geographical distribution of seats in the Council as a whole (Group E). See articles 159-160 UNCLOS, and Rüdiger Wolfrum, 'The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for Other International Economic Organisations?', [1995] 55 Heidelberg Journal of International Law 310.

As of November 2022, six EU countries are members of the ISA Council: Italy, France, Germany, Czech Republic, the Netherlands and Poland.[55] Belgium and Spain enjoy observer status, meaning that they can participate in the ISA Council sessions, but without the right to vote.[56] However, with the last filling of vacancies decided by the Assembly, they will become members of the executive body in 2023.[57] Most of the EU States elected to the ISA Council currently sponsor or are engaged in one or more exploration activities in the Area and, for this reason, they are proactively drafting and negotiating the rules, regulations and procedures relating to activities in the Area.[58]

Contrary to the executive bodies of most international organizations, which only enjoy limited powers, the ISA Council has law-making, policy-making and inspection powers in any area of ISA competence. Indeed, it is the ISA Council who negotiates the rules, regulations and procedures for deep-sea mining, establishes any specific policy in pursuance of those decided by the Assembly and approves and monitors the compliance of the exploration and exploitation activities undertaken by public and private entities.[59]

While the EU is a full member of the Assembly, its limited competences and the peculiar composition of the ISA executive body do not allow the EU to be elected to the Council. Indeed, it only enjoys an observer status.[60] In accordance with the rules of procedure of the Assembly, any member of the ISA not represented in the Council can send a representative to attend its meetings but without voting rights.[61]

---

55 The current composition of the Council is available at <www.isa.org.jm/index.php/authority/council/members> (last accessed 28 November 2022).

56 ISA, Rules of procedure of the Council, rule 74.

57 ISA Assembly, 'Decision of the Assembly of the International Seabed Authority relating to the election to fill the vacancies on the Council of the Authority in accordance with article 161, paragraph 3, of the United Nations Convention on the Law of the Sea' [2022] ISBA/27/A/14.

58 In particular, France – among the pioneer investor in activities in the Area – has been among the first to sponsor an exploration license for polymetallic nodules. Its Institut français de recherche pour l'exploitation de la mer currently holds a license for polymetallic nodules in the Clarion Clipperton Fracture area and one for polymetallic sulphides in the Mid Atlantic Ridge. Likewise, Germany sponsors its Federal Institute for Geosciences and Natural Resources of Germany which holds two exploration licenses for polymetallic nodules and polymetallic sulphides. The Czech Republic is part of a State consortium, Interoceanmetal Joint Organisation, which since 2001 hold an exploration license in the Clarion Clipperton Fracture area. Belgium also sponsors Global Sea Mineral Resources NV, a company having a contract for exploration for polymetallic nodules in the Clarion Clipperton Fracture area. Poland has recently concluded an exploration contract with the ISA for polymetallic sulphides in the Mid Atlantic Ridge, in an area including the well-known Lost City Hydrothermal Complex. With specific regard to the exploration license granted to the Government of Poland in an area covering the Lost City Hydrothermal Complex, see Giovanni Ardito, Gemma Andreone, Marzia Rovere, 'Overlapping and Fragmentation in the Protection and Conservation of the Marine Environment in Areas Beyond National Jurisdiction' [accepted and forthcoming by 2022] Frontiers in Marine Science.

59 UNCLOS, art 162.

60 See, in this regard, ISA Assembly, 'Indicative List Of Member States Of The International Seabed Authority Which Would Fulfil The Criteria For Membership In The Various Groups Of States In The Council In Accordance With Section 3, Paragraph 15, Of The Annex To The Agreement For The Implementation Of Part Xi Of The United Nations Convention On The Law Of The Sea Of 10 December 1982' [2022] ISBA/27/A/CRP.2.

61 ISA (n 56).

The mixed membership of the EU and its Member States in an international organization can give rise to complex issues of participation in the organization's activities and decision-making processes. With a view to preventing them, article 2 of the Decision requires the EU and its Member States to coordinate their position in the bodies of the ISA within the COMAR. However, in almost 30 years, the agenda of the COMAR has hardly addressed items relating to the ISA and the EU participation to the ISA meetings has long been sporadic.[62]

3.3 What Competence Does the EU Enjoy for the Negotiation of the Draft Regulations on Exploitation of the Area's Mineral Resources?

The EU Council adoption of common positions to be taken at the meetings of international organization is a well-established practice at the EU level. However, in case of mixed participation, by the EU and its Member States, in such international organizations, their drafting is not without challenges as they deal with the exercise of competences which are not always clearly delimited. This is at the origin of the many frictions which often oppose the EU Council or Member States and the Commission.

In this context, the Proposal under analysis is part of a recent strategy pursued by the Commission, by which it claims the exercise of an exclusive external competence in the field of protection of the marine environment in international fora. This is confirmed by two recent cases the Commission lodged before the ECJ against the Council, respectively concerning a position to be taken at the Commission for the Conservation of Antarctic Marine Living Resources (*Weddell Sea* case)[63] and at the International Maritime Organisation (IMO). Just like in the case under review, in both proceedings the Commission relied on article 3(2) of the TFEU to claim its exclusive competence and, in particular, the risks of affectation of the EU *acquis*, a position that the ECJ has not supported.

From the outset, it is worth recalling that, contrary to its Member States, the EU is not an entity with general purposes and competences.[64] Indeed, under the principle of conferral, a foundation of the EU

62 Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea Implementing Global Obligations at the Regional Level* (Brill 2007) 166.

63 The *Weddell Sea* judgment is a landmark decision in this context. By its applications, the European Commission asked, *inter alia*, the ECJ to annul the decision of the EU Council of 10 October 2016 in so far as it approves the submission, on behalf of the EU and its Member States, to the Commission for the Conservation of Antarctic Marine Living Resources, of three proposals for the creation of marine protected areas and a proposal for the creation of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves. The Commission maintained that the envisaged measures fell within the area, referred to in Article 3(1)(d) TFEU, of exclusive EU competence regarding the conservation of marine biological resources, and that there was therefore no justification for submitting them on behalf of the European Union and its Member States. According to the ECJ and contrary to the Commission's submissions, fisheries constitute only an incidental purpose of the reflection paper and the envisaged measures. As protection of the environment is the main purpose and component of that paper and those measures, it must be held that the contested decisions do not fall within the exclusive competence of the EU laid down in Article 3 (1) (d) TFEU, but within the competence under Article4 (2) (e) TFEU regarding protection of the environment that it shares, in principle, with the Member States.

64 Luigi Daniele, *Diritto dell'Unione europea* (7th ed, Giuffre 2020) 446.

legal order currently enshrined in article 5 of the Treaty on the European Union (TEU), [65] the Union only has the competences Member States have decided to confer,[66] while those not conferred to the EU remain with Member States.[67] In particular, the fields in which the EU enjoys exclusive competence are clearly set out in article 3(1) TFEU, which includes competition rules for the functioning of the internal market, the monetary policy, the conservation of marine biological resources under the CFP and the common commercial policy.[68] The EU also enjoys shared competences with Member States, *inter alia*, in the areas of agriculture and fisheries and the protection of the environment. In these fields, Member States can exercise their competence to the extent that the EU has not exercised its own.[69] Finally, the EU is competent to support, coordinate or supplement the action of its Member States in areas like tourism, education and industry.[70]

Therefore, to understand whether the EU is entitled to exclusively negotiate the Draft, one should first scrutinize whether it enjoys any competence in the subject-matter. If so, it is in turn to be determined if such competence is exclusive or shared with Member States.[71] In order to address the first point, it is necessary to identify the subject matter of the Proposal. Unfortunately, this is not indicated in clear terms, as the Proposal only refers to the establishment of an EU position in relation to the rules, regulations and procedures of the ISA concerning 'prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority'.[72] Some clarity is found in the seventh recital and in the Annex to the Proposal, explicitly referring to article 191 TFEU, which sets out the aims of the EU environmental policy. It can, hence, be assumed that the Proposal only aims at establishing an EU position at the ISA organs for the parts of the Draft concerning the protection of the marine environment, and in particular on the provisions concerning environmental impact assessments and statements, environmental management and monitoring plans, management of waste and the creation and management of an environmental compensation fund.[73]

The protection of the marine environment falls under the competence attributed to the EU. In particular, pursuant to article 4(2)(e) of the TFEU, such competence is shared with its Member States.

---

65 TEU, art 5; Theodore Konstadinides, 'The Competences of the Union', in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (OUP 2018); Robert Schütze, '*An Introduction to European Law'* (OUP 2020) 61-76.

66 TEU, art 5.2.

67 ibid art 4.1.

68 TFEU, art 3(1).

69 ibid art 4.

70 ibid art 6.

71 *Commission v. Ireland* [2006] ECJ, ECLI:EU:C:2006:345, para 93.

72 European Commission (n 15) recitals 2 and 4.

73 In its last version, the Draft deals with fundamental policies and principles (Part I), the approval of plans of work for exploitation (Part II and V), the rights and obligations of contractors (Part III), the protection and preservation of the marine environment (Part IV), closure plans (Part VI), financial terms for exploitation (Part VII), annual, administrative and other fees (Part VIII), information gathering and handling (Part IX), standard and guidelines (Part X), inspection, compliance and enforcement (Part XI), dispute settlement (Part XII) and the review of the regulations (Part XIII) and is supplemented by several annexes, standards and guidelines.

This is also confirmed by the Declaration, according to which the EU enjoys exclusive competence only in the field of conservation and management of sea fishing resources and with respect to those provisions of the UNCLOS, particularly Part X and XI, relating to international trade.

With a view to safeguard the marine environment, the EU, just like any other party to the UNCLOS, is required to cooperate at a global and regional level including through competent international organisations.[74] This is also stated in article 191(4) of the UNCLOS, which acknowledges that the EU can conclude agreements with third parties or international organizations with a view to pursuing the aims of its environmental policy. Indeed, according to article 47 of the TFEU, the EU has legal personality[75] and, as a subject of international law, it carries out relations with other States and international organizations through diplomatic means and the conclusion of international agreements.[76]

The fact that the EU enjoys an external competence in the field of protection of the marine environment does not mean that such external competence is exclusive. Indeed, taking stock of the shared nature of the competence at stake, the same article 191 TFEU clarifies that the conclusion of international agreements in the field of protection of the marine environment shall be consistent with the respective sphere of competence of the EU and its Member States.[77] Despite this, in its Proposal, the Commission held that the EU has competence to negotiate the provisions of the Draft concerning the protection of the marine environment by virtue of article 3(2) of the TFEU. According to the ECJ, such provision shall be broadly interpreted and applies not only to international agreements but also to those measures adopted by a body established under the treaty for its implementation.[78] Relying on article 3(2) of the TFEU, the Commission claims that the external competence in the field of the protection of the environment has become exclusive because of the risk that certain Draft provisions might alter or affect the EU *acquis.*[79] For this reason, it would be for the EU alone to negotiate them in the ISA Council. [80]

The affectation risk referred to in article 3(2) of the TFEU reflects and codifies the well-known *ERTA* jurisprudence developed by the ECJ, according to which whenever the exercise of the internal competence could be affected by the conclusion of an international agreement, a derived exclusive external

74 Frank (n 62) 86.

75 TFEU, art 47.

76 Marise Cremona, 'Who can Make Treaties? The European Union' in Ducan Hollis (ed), *The Oxford Guide To Treaties* (2nd ed, OUP 2020); Rachek Frid, *The Relations between the EC and International Organizations—Legal Theory and Practice* (Kluwer 1995).

77 TFEU, art 191.

78 *Commission v Council (Antarctic MPAs)* [2018] ECJ, ECLI:EU:C:2018:925, para 112.

79 While article 216 TFEU deals with the hypothesis in which the external competence of the EU already exists, article 3 (2) TFEU aims to identify the main elements under which such competence qualifies as exclusive. See Fernando Castillo de la Torre, 'The Court of Justice and External Competence After Lisbon: Some Reflections on the Latest Case Law', in Piet Eeckhout and Manuel López-Escudero (eds), *The European Union's external Action in Times of Crisis* (Hart Publishing 2016).

80 Piet Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011) 113.

competence shall be presumed.[81] In all likelihood, the ECJ's concern was that Member States would be able to conclude international agreements capable of conflicting with or modifying EU obligations.[82]

In the view of the ECJ, there exists a risk that EU law is affected, or its scope altered, by commitments undertaken by Member States whenever they fall within the scope of such EU common rules.[83] In the assessment of this risk, a full coincidence between a given international commitment and the EU *acquis* is not necessary.[84] In fact, the scope of the EU rules can also be altered by international commitments falling in an area already largely, even though not specifically, covered by such rules.[85]

Such broad assessment shall not only relate to the scope of the rules under scrutiny, but also to their meaning and effectiveness, taking into account foreseeable future development at the time of the analysis.[86] There follows that a specific assessment of the comprehensive and detailed relationship between a certain international commitment and the EU norms shall be undertaken on a case-by-case basis.[87]

With a view to ascertain whether article 3(2) of the TFEU is applicable to the case under scrutiny, it shall first be underlined that the geographical scopes of application of the Draft and of the EU *acquis* mentioned in the Proposal do not coincide. Indeed, while the Draft applies to activities in the Area, and hence in ABNJ, the territorial scope of application of the EU funding treaties and of the EU law is defined in article 52 TEU and article 355 TFEU and, as a general rule, is limited to the territories of its Member States. As the EU law does not apply to the Area as such, it is hence difficult to conceive how the provisions of the Draft could affect the EU *acquis*.

This is a critical element to bear in mind when it comes to assess the alleged risk of affectation of the MSFD. Indeed, it expressly applies to the EU marine waters as defined in article 3(1), namely the water column, the seabed and subsoils extending to the outmost reach of the area where Member States exercise jurisdiction. The MSFD requires EU Member States to prevent and reduce pollution of the marine environment possibly resulting in significant impacts on marine biodiversity and marine ecosystems in pursuance of an ecosystem approach. To this end, the transboundary effects of any human endeavour at sea shall also be taken into account, as required under article 2(1) of the MSFD. However, the mere fact, that activities in the Area regulated under the Draft could possibly result in transboundary effects which EU Member States have to take into account when implementing the marine strategies under

81 *Commission of the European Communities v Council of the European Communities* [1971] ECJ, ECLI:EU:C:1971:32.

82 *Opinion 2/15* [2017] ECJ, ECLI:EU:C:2017:376, para 170.

83 *Opinion 1/13* [2014] ECJ, EU:C:2014):2151, para 71; *Opinion 3/15* [2017] ECJ, EU:C:2017:114, para 105.

84 *Opinion 1/13* (n 83) para 72; Opinion 3/15 (n 83) para 106.

85 *Opinion 1/13* (n 83) para 73; Opinion 3/15 (n 83) para 107.

86 *Opinion 1/03* [2006] ECJ, ECLI:EU:C:2006:81, para 124 '[the EU] enjoys only conferred powers and [...] any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules'.

87 *Commission v Council (Antarctic MPAs)* (n 78) para 115; *Opinion 1/03* (n 86) paras 124 and 133.

the MSFD, is not sufficient for the EU to assert an affectation of its *acquis*. After all, the same MSFD has cognizance of the variability of the stressors and of impacts of human activities at sea and requires EU Member States to update their strategies accordingly.[88] In other terms, deep-sea mining, should it ever take place, would represent just one of the many stressors Member States should consider when updating their MSFD strategies and no provision of the Draft prevents them from fulfilling such obligation.

Equally, the argument that the possible approval of a mining activity in an ABNJ currently covered by an area-based management tool or an MPA created within a regional framework to which the EU is a party would be contrary to the ecosystem-based approach pursued by the EU law and would require a modification of the EU rules and of the marine strategies of Member States does not appear in itself sufficient to recognize the exclusive competence of the EU in the negotiation and adoption of the Draft.

Indeed, the fact that the EU participates in the protection of certain MPA in ABNJ does not mean that it enjoys external competence to regulate any activity that could possibly endanger such protected sites. By way of example, for the recalled Milne Seamount, the same OSPAR Convention foresees a coordination mechanism with other international organisations managing activities in certain ABNJ protected by a MPA. In fact, there currently exists a Collective arrangement among the several competent international organisations – including a fisheries commission – in the area.[89] Its goal is to promote the exchange of information on each other's activities and achievements with a view to deliver a meaningful ecosystem approach to the management of all relevant human activities in the marine environment.[90]

In 2012, at the time when it was first proposed, the ISA considered the initiative too premature in the light of the only initial interest in exploitation activities.[91] Nonetheless, the ISA Secretariat regularly participates in the meeting of the arrangement as an observer. The very same status is also afforded to the OSPAR Commission within the organs of the ISA. This is pivotal in bringing any relevant issue pertaining to the conservation and management of the MPAs established under the OSPAR and in ABNJ, in applying an ecosystem approach, to the attention of its Member States and to avoid hampering the protection of such sites.

Moreover, with regard to the risk of affectation of the CFP, first of all, none of the objectives that the CFP pursues under article 39 TFEU – e.g., increasing productivity of fisheries and ensuring a fair standard of living for the fishing community - is related to the Draft, which instead aims at regulating the exploitation of the abiotic resources of the Area. This means that the provisions of the

88 European Parliament and Council Directive (n 27), recital 34.

89 ISA Council, 'Collective arrangement between competent international organizations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic' [2014] ISBA/20/C/15.

90 David Johnson, 'Can Competent Authorities Cooperate for the Common Good: Towards a Collective Arrangement in the North East Atlantic', in Paul Berkman and Alexander Vylegzhanin (eds.), *Environmental Security in the Arctic Ocean* (Springer 2012).

91 ISA Council, 'Status of consultations between the International Seabed Authority and the OSPAR Commission [2015] ISBA/21/C/9; ISA Council, Summary report of the President of the Council of the International Seabed Authority on the work of the Council during the twenty-first session' [2015] ISBA/21/C/21, para 28.

Draft cannot in principle alter any of the EU rules relating to the CFP. Under the CFP, the EU has adopted some measures to protect VME from the effects of certain harmful fishing practices, like bottom trawling.[92] While it is true that deep-sea mining could possibly have even more destructive consequences than bottom trawling, the mere fact that the EU has enacted *ad hoc* protection and conservation measures within its CFP does not automatically mean that it enjoys exclusive external competence in determining whether and under which conditions other anthropogenic activities in ABNJ should be allowed to proceed. This conclusion was reached by the ECJ in the *Weddell Sea* case, in which it rejected the view that the existence of EU *acquis* under the CFP which may have some links to the international act to be adopted would be sufficient to automatically infer an exclusive competence of the EU in the field covered by such international commitment.[93]

Finally, it is noteworthy that through constant jurisprudence, the ECJ has held that it is for the party claiming the exclusivity to give evidence in support of the nature of the competence it is asserting.[94] In the case under analysis, the Commission does not present arguments demonstrating that the Draft or some of its provisions could undermine the meaning, scope or effectiveness of its secondary law, nor does it clarify what the adverse effects would be.[95] It can hence be concluded that in the field of the protection of the environment, the EU still shares its competence with Member States.

4. The Duty of Sincere Cooperation in the Negotiation of the Draft Regulation on Exploitation of Mineral Resources in the Area

If it is true that the EU does not enjoy an exclusive competence for the negotiation of the environmental provisions of the Draft, this does not mean that it has no role to play at all. In fact, whenever a certain international commitment covers an area where the EU is attributed shared competence and it has not adopted common rules yet, nothing 'preclude[s] the possibility of the required majority being obtained within the Council for the [EU] to exercise that external competence alone'.[96] This is arguably a political choice the Council might also take in the circumstance under analysis. In this case, the conduct of EU Member States at the ISA would be regulated by the principle of sincere cooperation.[97]

Codified in article 4(3) of the TEU, it establishes that the EU and its Member States shall in full mutual respect assist each other in their respective tasks. As far as the EU external action is concerned, in the case *Commission v. Luxemburg* concerning the negotiation, conclusion and ratification of certain in-

92 Marta Chantal Ribeiro, 'The Protection of Biodiversity in the Framework of the Common Fisheries Policy: What Room for the Shared Competence?', in Gemma Andreone (ed), *The Future of the Law of the Sea* (Springer 2017).

93 *Commission v Council (Antarctic MPAs)* (n 78) para 100-101.

94 ibid para 115.

95 ibid para 123.

96 ibid para 126; *Opinion 2/15* (n 82) para 68.

97 Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

ternational agreements, the ECJ clarified that a concerted EU action at international level, 'requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation'. By the same rationale, a Council decision to adopt a position at the ISA Council on certain provisions of the Draft would entail that Member States represented at the ISA executive body could not autonomously act on the same subject matter without coordinating with the EU institutions.

The ECJ jurisprudence has gone even further in admitting that any unilateral intervention by Member States would amount to an interference with the EU external action – and hence a violation of the principle of sincere cooperation – irrespective of its practical implications. This was clearly underlined by the ECJ in a judgment rendered in 2010 relating to the implementation of the 2001 Convention on persistent organic pollutants. In particular, in the case *Commission v. Sweden*, the ECJ dealt with the Swedish unilateral decision to propose to the Secretariat of the convention the inclusion of a new organic pollutant in its annex. The decision was taken after the Council had been unable to find a common position on the topic. According to the Commission, the Sweden unilateral action was contrary to article 4(3) TEU. The ECJ confirmed that, in so doing, Sweden had acted in contrast with the common strategy developed at a supranational level and undermined the unity of the EU external representation, in clear violation of the principle of sincere cooperation. Hence, the conduct that, in such a circumstance, best flows from Member States' duty of sincere cooperation is to refrain from taking any stance on the subject matter covered by the EU position.[98]

The very same outcome would be expected from EU Member States at the ISA, especially from those elected at its Council and that are currently negotiating the Draft. This is particularly relevant if one takes into account the fact that the international rules governing the participation of international organisations to the ISA disable the EU from exercising its competences at the Council. In this circumstance, such competence should be exercised by Member States as 'trustees of the common interest'.[99] This formula was developed by the ECJ in the 1981 case *Commission v. United Kingdom* concerning the unilateral adoption of some conservation measures by the United Kingdom in the field of the fisheries policy, to support that 'Member States [have] not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission'.[100]

More recently, with respect to external relations, in the case *Commission v. Greece* concerning the latter's unilateral proposal to the IMO falling under the EU exclusive competence, the ECJ, with a slightly different language, held once again that the fact that the EU cannot directly participate in the work of

98 Federico Casolari, *Leale cooperazione tra Stati membri e Unione Europea,* (Editoriale Scientifica 2020); Peter Van Elsuwege, 'The duty of Sincere Cooperation (Art. 4(3) TEU) and its implications for the national interest of EU Member States in the Field of External Relations', in Marton Varju (ed), *Between Compliance and Particularism* (Springer 2019).

99 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1981] ECJ, ECLI:EU:C:1981:93, para 30.

100 ibid para 31.

an international organization, 'does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest'.[101] Hence, in the case under scrutiny, any position taken by Member States at the ISA should avoid hampering the Union strategy on the same subject matter.

Whether or not the Council will find the required majority for the EU to exercise its external competence in the negotiation of the Draft, in any case it is still for Member States to ensure coherence and consistency with the earlier and current EU action in other international fora. In particular, the EU is currently engaged in the negotiations of an international legally binding instrument for the conservation and sustainable use of biological diversity in marine areas beyond national jurisdiction (BBNJ agreement). The BBNJ agreement, which is the third agreement implementing the UNCLOS, addresses, together and as a whole, a package deal agreed upon by the General Assembly in 2011 and consisting of marine genetic resources, area-based management tools including marine protected areas, environmental impact assessment, capacity building and transfer of marine technology.[102]

Under resolution 72/249 – by which the UNGA convened an intergovernmental conference to conclude, as soon as possible, the BBNJ agreement – the EU was authorized to participate in the negotiations.[103] In 2018, the EU Council hence adopted a decision authorising the Commission to conduct the negotiations on behalf of the EU in matters falling within the Union's competence and in respect of which the Union has adopted rules.[104]

The subject matter of the negotiations falls within the competences of both the EU and its Member States and hence they shall cooperate with the Commission with a view to ensuring unity in the international representation. Both legal instruments are aimed at regulating activities taking place in marine areas beyond national jurisdiction and they both represent an implementation and further development of the rules contained in the UNCLOS. Moreover, some of the topics under negotiation at the intergovernmental conference, like environmental impact assessment and the creation of area-based management tools, are also dealt with in some environmental provisions of the Draft.

As a consequence, if the EU Council considered that the achievement of the aims it set for the BBNJ agreement would be facilitated by also having an EU position on some environmental provisions of the Draft, it could establish such a position for the sake of coherence and consistency of the EU action.[105]

---

101 ibid See also *European Commission v Council of the European Union* [2022] ECJ, ECLI:EU:C:2022:260, para 59.

102 UNGA Res 66/231 (2012) A/RES/66/231.

103 UNGA Res 72/249 (2018) A/RES/72/249.

104 The relevant document is not public. However, in <https://data.consilium.europa.eu/doc/document/ST-6841-2018-INIT/en/pdf> (last accessed 22 December 2022) the COMAR adopted a recommendation, available at <https://data.consilium.europa.eu/doc/document/ST-6698-2018-INIT/en/pdf> (last accessed 22 December 2022) that allows to understand the mandate conferred to the Commission in the negotiation of the BBNJ Agreement. See also Pascale Ricard, 'The European Union and the Future International Legally Binding Instrument on Marine Biodiversity Beyond National Jurisdiction', in Marta Chantal Ribeiro (ed), *The Global Challenges and the Law of the Sea* (Springer 2020).

105 *European Commission v Kingdom of Sweden* [2010] ECJ, ECLI:EU:C:2010:203, para 75.

5. Conclusion

This paper has analysed and discussed the recent EU Proposal on the position to be taken on behalf of the EU at the meetings of the ISA organs. The Proposal, which was also inspired by the EU Parliament resolutions pledging for a moratorium to exploitation activities in the Area, is part and parcel of a strategy carried out by the EU commission to claim exclusive competence in the protection of the marine environment with a view to negotiate relevant agreements and decisions in the field. In this respect, the mentioned *Weddell Sea* and IMO cases brought before the ECJ are much representative of this trend.

Several COMAR meetings were devoted to the discussion of the Proposal. The reaction from EU Member States, especially those directly involved in activities in the Area, was harsh. Indeed, the Proposal was not welcomed by the majority, *inter alia* because of the advanced status of the negotiations in respect of which the EU has long showed limited interest to take part in.[106] Moreover, doubts arose with respect to the exclusive competence claimed by the Commission for the negotiation of the environmental provisions of the Draft and on the proposed arrangements for the adoption of a common position.

In this respect, the paper has first concluded that the Proposal only aims at establishing an EU position at the ISA organs in the field of the protection of the marine environment from the negative effects arising from deep-sea mining. The EU enjoys shared competence in the field of the protection of the environment under article 4(2)(e) of the TFEU. Contrary to the rationale of the Proposal, the analysis has shown that there is no ground for the Commission to assert that such competence has become exclusive by virtue of article 3(2) TFEU. Indeed, the *ERTA* scenario the Commission relies upon – i.e. the alleged risk of alteration or affection of the EU *acquis* posed by the Draft – does not find application in the case at stake. In particular, the Commission does not raise convincing arguments on how the MSFD and the CFP would be affected by the environmental provisions of the Draft.

Although the EU does not enjoy exclusive competence in the field, nothing prevents the EU Council from obtaining the necessary majority for the EU to negotiate the Draft. In this scenario, the conduct of Member States would be regulated by the principle of sincere cooperation, entailing a duty of close cooperation between them and the EU institutions or even a duty of abstention to ensure the consistency of the EU action in international fora. This is particularly the case for the negotiations of the BBNJ agreement to which the EU is currently engaged. Some elements of the package deal tackled in the BBNJ agreement, like environmental impact assessment and the creation of certain area-based management tools, are also at the core of the Draft. In this context, it is necessary for

106 The harsh opposition of EU Member States to the Proposal might be reconsidered in light of the recent position taken by some of them at the 27th session of the ISA. See, in this respect, the speech by the French Permanent Representative to the ISA, who declared that his country cannot support any deep-sea mining operation taking place. The statement is available at <https://isa.org.jm/files/files/documents/France_d%C3%A9claration.pdf> (last accessed 22 December 2022).

Member States to ensure that their action at the ISA is consistent with the position taken by the EU in the negotiations of the BBNJ agreement. This is a much-debated issue also at the ISA, where there is historically no political and diplomatic coordination among the EU Member States elected at the Council.[107] While some EU Member States advocate for a much stronger coordination between the position of the EU at the BBNJ Intergovernmental Conference and at the ISA, so far this has not resulted in any concrete action to harmonise developments in the two fora.

107 An exception to this lack of coordination is represented by the recent declaration of the EU and its Member States at the ISA Council concerning the Russian aggression against Ukraine available at <https://isa.org.jm/files/files/documents/d%C3%A9claration_FR_au_nom_de_l%27UE_et_ses_EM.pdf> (last accessed 22 December 2022).

Maritime Safety and Security Law Journal

Litigation Strategies in the Mediterranean Sea: Analysis of Cases on Search and Rescue Joint Operations before the International Courts

*Jonatán CRUZ ÁNGELES**

Abstract

In this paper, we analyse the phenomenon of designing a litigation strategy. To do this, we study the case of search and rescue operations in the Mediterranean. In particular, we observe how teams of lawyers (supported by foundations and private donations) are trying to challenge EU immigration policies by developing different litigation strategies before the main international courts. To this end, we examine cases before the International Criminal Court, the European Court of Human Rights, and, more recently, the Court of Justice of the European Union (CJEU). By providing pro bono legal advice and representation to individual and organizational victims of EU migration policies, these law firms aim to change EU migration policies, provide redress to victims and hold to account those considered responsible.

Keywords: Strategic litigation, EU migration policies, search and rescue operations, Frontex, International Criminal Court (ICC), European Court of Human Rights (ECtHR), Court of Justice of the European Union (CJEU).

First published online: 17 May 2023

1. Introduction

Maritime safety is regulated by a number of international treaties and agreements, which aim to prevent and reduce marine pollution[1], set standards for the training and certification of seafarers[2], establish safety standards for fishing vessels[3], regulate the marking and construction of ships[4], and ensure the safe handling and transport of containers[5]. In addition to these treaties, UNCLOS[6] and IMO[7] Conventions are particularly relevant in the context of migration as they provide a legal framework

* Profesor Ayudante Doctor en el Área de Derecho Internacional Público y Relaciones Internacionales. Departamento de Derecho Público y Común Europeo, Universidad de Jaén (España) jangeles@ujaen.es.

1 International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) (MARPOL).

2 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) (STCW).

3 International Convention for the Safety of Fishing Vessels (adopted 11 June 1977, entered into force 12 September 1994) (SFV).

4 International Convention on Load Lines (adopted 5 April 1966, entered into force 21 July 1968) (LL).

5 International Convention for Safe Containers (adopted 2 December 1972, entered into force 6 September 1977) (CSC).

6 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

7 International Maritime Organization, Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958).

for the interception of migrants at sea, while also ensuring the safety and security of both migrants and those involved in migration operations, including commercial and humanitarian ships. These international legal frameworks help to ensure that maritime operations are conducted in a safe, legal, and responsible manner, while also protecting the human rights and dignity of migrants.[8]

The origins of the European Union's (EU) external migration policy can be traced back to the creation of a high-level group on 'migration and asylum' by the Council of the European Union in December 1998. The group's mandate was to develop action plans for some main countries of origin or transit of asylum seekers and migrants. In 1999, the Tampere Council welcomed the group's proposals to combat irregular immigration, including the establishment of systems to detect false documents, the sending of European liaison officers to countries of departure or transit, and the signing of readmission agreements. These proposals were considered useful tools 'to fight against the reasons for immigration and refugee flows' and 'to help reduce migratory tensions'.

The integration of immigration policy into the EU's relations with third countries was also on the agenda of the Seville European Council (2002). As a result, all future cooperation or association agreements signed between the EU and third countries were required to include a mandatory readmission clause in the case of illegal immigration. Furthermore, the Hague Programme, entitled 'Strengthening freedom, security, and justice in the European Union', formalizes and reinforces this dynamic, including the external dimension of migration policy.[9]

The Hague Programme was adopted by the European Council in Brussels on 4 and 5 November 2004. It structures European migration policy into two parts: on the one hand, 'ad intra', which refers to the establishment of a foreign asylum and immigration policy, and, on the other, 'ad extra', which involves the export of some migratory controls to the territory of third countries and the transfer to third countries of some responsibilities in terms of asylum and border control. Therefore, three dynamics are combined: first, extraterritoriality (migration controls beyond the borders of the Member States); second, cooperation (the conclusion of agreements with and deployment of liaison agents in so-called sensitive third countries); and third, privatization (in the absence of an adequate public maritime search and rescue service, this activity is privatized, mainly on the basis of interventions by commercial and humanitarian ships).

The interception operations carried out by the EU are essentially extraterritorial[10], since their aim is to arrest undocumented persons before they reach European territory. Hence, they can only be undertaken in two areas: on the high seas or in the territory of a third country. Having said that, it is

8 In the context of migration, these international legal frameworks are crucial for ensuring the safety and protection of migrants at sea. UNCLOS provides a legal basis for interception operations, but also establishes the obligation of the intercepting state to respect the human rights of the intercepted migrants, including the right to seek asylum. The IMO Conventions and protocols, on the other hand, provide the necessary guidance and regulations for ensuring the safety and security of both migrants and those involved in migration operations, including commercial and humanitarian ships. These frameworks help to ensure that migration operations at sea are conducted in a safe, legal, and responsible manner, while also protecting the human rights and dignity of migrants.

9 The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1.

10 Lisa Heschl, *Protecting the Rights of Refugees Beyond European Borders: Establishing Extraterritorial Legal Responsibilities* (1st published, Intersentia 2018) 141.

necessary to identify the legal basis of these operations. In fact, if the interception takes place on the high seas, the absence of a legal basis would not be sufficient to declare the procedure illegal.

However, this absence could have repercussions and lead to the liability of the intercepting European state if there is a violation of the intercepted migrants' fundamental rights. In this case, the plaintiffs would be obliged to demonstrate that there was 'effective control' by the state authorities, which is particularly complex in those cases where there was no physical contact between the applicants and the agents of the intercepting state. If the interception is accomplished in the territory of a third country, we must study the bilateral agreements between the Member State and the third country or the agreements that directly link the European Union with the third country. We should also note that Frontex has the legal capacity to enter into agreements directly with third countries to enhance the operational cooperation in joint operations.[11]

2. The Assignment of Roles in a SAR Operation

A search and rescue operation (also called a SAR operation) assists people in a situation of danger at sea, regardless of their nationality, the state in which they are located, or their circumstances, under international law and the maritime conventions. Additionally, in the European Union context, the Member States' SAR operations must comply with the primary law provisions (Treaty of the European Union, Treaty on the Functioning of the European Union, and Charter of Fundamental Rights),[12] and respect the obligations derived from secondary legislation created by the different EU institutions.[13] Finally, a SAR operation must respect all the rights and freedoms derived from the territorial application of the European Convention on Human Rights (which can be applied extraterritorially to specific and assessed cases).[14]

The Schengen Borders Code[15] stipulates that entry to the territories of the Member States will be refused to third country nationals who do not fulfil all the entry conditions. In such cases, the authorities must issue a decision stating the precise reasons for the refusal, without prejudice to the special provisions concerning the right to asylum and international protection. Moreover, Member States may decide not to apply the Return Directive[16] to third-country nationals who are subject to such a

11 To date (October 2022), Frontex has signed at least seventeen agreements with third countries (Albania, Armenia, Azerbaijan, Belarus, Bosnia, Canada, Cape Verde, Georgia, Macedonia, Moldova, Montenegro, Nigeria, Russia, Serbia, Turkey, Ukraine, and the United States of America), and two agreements with regional organizations whose members are third countries (the Coordination Service of the CIS Border Commandants' Council and MARRI).

12 Article 78 of the Treaty on the Functioning of the European Union and Articles 18 and 19 of the EU Charter of Fundamental Rights.

13 *Inter alia*, Directive 2008/115/EC on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98 sets out the standards and procedures governing the return of such nationals 'under fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

14 In particular, as we will see in greater detail in subsequent sections, Article 4 of Protocol 4 to the European Convention on Human Rights formally prohibits the 'collective expulsions of aliens of the kind who were a matter of recent history'.

15 Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1.

16 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

refusal of entry. The Return Directive can also be applied to third-country nationals who are intercepted in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained authorization or a right to stay in that Member State. In such cases, Member States may apply simplified national return procedures but must comply with the conditions laid down in Article 4(4) of the Return Directive, including the principle of non-refoulement.

Regulation no. 656/2014 (also known as the Sea Borders Regulation)[17] governs the surveillance of external sea borders by EU Member States within the context of operational cooperation with Frontex. Article 4 of this Regulation ensures the protection of fundamental rights and the principle of non-refoulement. According to Article 4(3), before any rescued person is disembarked into, forced to enter, conducted to, or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their circumstances and provide information on their destination. The rescued persons must also be allowed 'to express any reasons for believing that disembarkation in the proposed place would violate the principle of non-refoulement'.

Theoretically, border control is an exclusive competence of the Member States.[18] This argument has served to limit the liability of the high authorities to the mere planning of the European Union's migration policies, and to delimit the operational role of Frontex in the coordination of teams and additional experts in those border areas that are under significant pressure.[19]

Thus, in a joint operation, a whole series of actors can be involved, ultimately coordinated under the supervision of the Frontex Executive Director: first, there are border guards seconded by the Member States; secondly, there are Member State border guards hosting the operation; thirdly, there are border guards seconded by the Member States who have temporarily joined the Frontex staff; and finally, Frontex has its own uniformed service.[20] Regarding these 'official actors', we must add the usual presence of Non-governmental organizations' (NGO) humanitarian aid ships and boats. After the process of 'crim-

17 Regulation (EU) establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ 189/93.

18 The EU and its agencies have no mandate to conduct SAR operations, as this remains a competence of the Member States. The Regulation constrains Frontex's actions by establishing that 'under Union law and those instruments, the Agency should assist Member States in conducting search and rescue operations to protect and save lives whenever and wherever required'. The Agency must also set up an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all its activities. It must also suspend or terminate any (funding of) activities when serious or persisting violations occur.

19 In SAR operations, Regulation (EU) No 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and No 2016/1624 [2019] OJ L295/1 enshrines Frontex's role. This Regulation also applies to operations launched and carried out under Regulation (EU) No 656/2014 establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93 and international law. These operations occur in situations that may arise during border surveillance operations at sea. In these circumstances, Frontex must provide Member States and non-EU countries with technical and operational assistance in support of SAR operations.

20 SAR is a specific objective of the operational plan of every Frontex joint maritime operation. For this reason, vessels deployed by Frontex to an operational area should be ready to provide national authorities with support in SAR operations. It is important to underline that SAR operations are always coordinated by the national rescue and coordination centres (RCC). The RCC orders those vessels that are the closest to the incident or the most capable to assist in the rescue. These vessels may include national commercial or military vessels, vessels deployed by Frontex, private boats, and others.

inalization' that they have experienced in recent years,[21] they tend to remain in the background and/or to follow the coastguard's orders under the coordination of Frontex. Otherwise, they could face arrest and proceedings before the judicial authorities of the Member State leading the joint operation.

These joint Frontex operations are planned and developed based on annual risk analysis reports that analyse the likely future risk of irregular migration and cross-border crime along the external border of the European Union[22]. Throughout the year, the competent authorities of the Member States hold a series of meetings at which joint operations are prioritized based on their importance and the resources available to guarantee an effective response. In this way, Frontex consults the representatives in each Member State and assesses the number of experienced officers and the amount and type of technical equipment required. Frontex then sends a request to all Member States and Schengen Associated Countries requesting a certain number of agents, indicating their specific profile and the equipment needed for the operation. Each state must then assess its contribution to the start and/or maintenance of the mission and the extent of that contribution.

Each joint operation has an operational plan, which details the numbers and types of technical and official teams participating. Many procedures require the deployment of interrogation officers, who conduct interviews with immigrants and migrants to gather information about human smuggling networks. At this stage, the border guards and the technical team are deployed in the operational area to carry out their duties under the operational plan. Deployed officers (known as guest officers) work under the command and control of the authorities of the host country of the operation. During deployment, guest officers can perform all the tasks and powers of border control and border surveillance under the Schengen Borders Code. These tasks include, inter alia, border controls, border surveillance, interviewing undocumented persons, and consulting databases[23].

All officers deployed in agency-coordinated operations are bound by the Frontex Code of Conduct,[24] including in missions outside the EU territory. This Code of Conduct includes specific provisions on respect for fundamental rights and the right to international protection. Likewise, it establishes a set of rules of behaviour to be followed by all personnel involved in a Frontex joint operation. However (as we will see in the following sections), an ethical problem arises when Frontex coastguards delegate their responsibilities to guards from third states, who are not bound by the said Code of Conduct.

---

21 There is a causal link between the shrinking space for solidarity with migrants and the conditions conducive to constructive refoulement. State efforts to oust humanitarian organizations from the Mediterranean by criminalizing those engaged in SAR activities, and thereby to prevent them from operating, are detrimental to the rights of migrants. These efforts have most notably included charges against SAR NGOs related to human smuggling. We have also verified the use of bureaucratic obstacles to target such organizations to impede their work. In Italy, a code of conduct imposed on SAR NGOs in 2017 hinders their operational capabilities and undermines humanitarian principles such as impartiality and neutrality. The net effect of such criminalization is the elimination of humanitarian search and rescue activities from the Mediterranean, rendering migrants de facto rightless (further exposed to preventable death) and preventing them from protection against refoulement.

22 Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (1st edn, Cambridge University Press 2016) 205.

23 Bas Schotel, 'EU Operational Powers and Legal Protection: A Legal Theory Perspective on the Operational Powers of the European Border and Coast Guard' (2021) 22 German Law Journal 625.

24 European Border and Coast Guard Agency (Frontex), Code of Conduct applicable to all persons participating in frontex operational activities, 2020.

3. Evolving Form(s) of Refoulement at EU Maritime Borders

The traditional refoulement phenomenon (that of pushback practices) consists of 'various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of [sic] any individual assessment of their protection needs which may lead to a violation of the principle of non-refoulement'.[25]

This type of state measure lead to a doctrinal debate. On the one hand, following Seline Trevisanut's line of thought,[26] some authors support the application of border control measures (regardless of where they occur). On the other hand, the majority position within academia is that the non-refoulement principle must be applied to all actions of states, both on land borders and in maritime areas, including on the high seas. As a result of adopting one or other of these positions, the state(s) in question will consider the (greater or lesser) extension of its human rights obligations towards those persons who are within its (effective) jurisdiction.

Unfortunately, all these phenomena (in praxis) have resulted in European Union Member States not offering their support to those that are on the front line[27]. As a result, some EU countries (e.g., Italy[28], Greece, and Malta) have extended their protection of their 'own' external borders, focusing their efforts on developing cooperation with third countries (mainly Libya and Turkey). So, while most pushback practices are developed and implemented in a legal vacuum, these EU Member States have signed memoranda of understanding (MoUs)[29] establishing cooperation frameworks under the pretext of 'combating illegal immigration'. Among these MoUs are the 2017 memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking, and fuel smuggling, and reinforcing the security of borders between the State of Libya and the Italian Republic, which was renewed in February 2020.

Following the signing of the 2017 MoU, Italy intensified its capacity-building programmes for the so-called Libyan Coast Guard (LYCG). In addition, Italy obtained EU funding for border management and migration control in Libya, which includes strengthening the capacity of the authorities in maritime surveillance and rescue at sea. Based on this cooperation, Libya was able to notify the designation of its SAR region to the International Maritime Organization (IMO). The EU and Italian funding of the LYCG has led to a situation in which the LYCG would not be able to exist functionally

25 There is no internationally agreed definition of the term 'pushback' in the migration area. This definition is taken from the United Nations Human Rights Office of the High Commissioner's *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea* (12 May 2021) A/HRC/47/30.

26 Seline Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27 Leiden Journal of International Law 661.

27 Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016).

28 Francesca Cimino, 'Human Rights Implications for Vulnerable Migrants in Light of the EU and Italian Migration Policies' in Philip Czech and others (eds), *European Yearbook on Human Rights* (Intersentia 2019).

29 Zakariya El Zaidy, 'EU Migration Policy Towards Libya. A Libyan Perspective on the Memorandum of Understanding between Italy and Libya' (2017) Friedrich Ebert Stiftung 1, 11.

without such support. Against this background, instances of the 'contactless' interception and push-back of migrants, although 'exercised through remote management techniques and/or in cooperation with a local administration acting as a *proxy*',[30] may nonetheless engage the coordinating state's human rights obligations in a functional approach to jurisdiction.[31]

These collaboration policies in the framework of MoUs have significantly reduced the number of migrants arriving in Europe from Libya (mainly through Italy), although they have increased the number of persons detained at sea being transferred to detention centres by the Libyan Coast Guard. The detainees have high protection needs there, as they have no legal status and often face severe abuses, including rape, torture, extortion, forced labour, slavery, dire living conditions, and extrajudicial executions.[32] Furthermore, as a result of this increasing reliance on constructive refoulement and on interdiction by omission,[33] we can see how, in parallel, in the areas where 'search and rescue missions' are being carried out, seafarers are being compelled to take responsibility for the rescue of migrants. Consequently, they make risky choices of their own, choices that may lead them to act illegally, not to mention bearing the costs of imposing border controls.[34] Although the role of merchant ships had already become relevant in 2014, since they were increasingly called upon to support the response to the large-scale migrant crossings registered in that period, the new increase in their mobilization differs substantially from the previous one in purpose and effect. Rather than being called upon to perform rescues, merchant ships are strategically mobilized for interdiction and refoulement. This policy threatens to annul the fundamental rules of public international law, such as the *jus cogens* norm of non-refoulement and the principle of disembarkation in a place of safety recognized under the customary norms of the Law of the Sea.

---

30 Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385.

31 Riccardo Faini and Pentti Vartia, 'Migration in the Integrated EU' in Richard Baldwin, Pertti Haapararanta and Jaakko Kiander (eds), *Expanding Membership of the European Union* (Cambridge University Press 1995).

32 The REACH initiative estimated that, as of June 2021, 597,611 migrants were residing in the country, while the UNHCR recorded 41,404 individuals as registered refugees or asylum seekers in November 2021. The UN report also noted that the UN Mission in Libya (UNSMIL) continues to document cases of arbitrary detention, torture, sexual violence, and other violations of international law within facilities operated by the country's government and other groups. According to Guterres, thousands of detainees who do not appear in the official statistics provided by the Libyan authorities are unable to challenge the legal basis for their continued detention. Thus, 'female and male migrants and refugees continued to face heightened risks of rape, sexual harassment, and trafficking by armed groups, transnational smugglers and traffickers as well as officials from the Directorate for Combating Illegal Migration, which operates under the Ministry of Interior'. The report highlighted several abuse cases in the Mitiga prison facility and in several detention centres run by the Directorate for Combating Illegal Migration in al-Zawiyah and in Tripoli, about which the UN mission had received 'credible information on trafficking and sexual abuse of around 30 Nigerian women and children'. As of 14 December 2021, the Libyan Coast Guard had intercepted 30,990 migrants and returned them to Libya during the year 2021, around three times the total number of people returned to the country in 2020 (12,000 people). Guterres added that more than 1,300 people have died or disappeared attempting the journey. Since Libya's security operations in late 2021, thousands of people were sleeping rough in front of a UNHCR-run reception centre in Tripoli, which closed on 10 January 2022. Shortly after the UNHCR announced the impending closure of the facility, in late 2021, the Libyan authorities reportedly violently arrested hundreds of migrants, refugees, and asylum seekers.

33 Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

34 Eugenio Cusumano, 'Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya Between Humanitarianism and Border Control' (2019) 54(1) Cooperation and Conflict 3, 24.

4. The Design of Litigation Strategies

In recent years, we have witnessed a process for the defence of migrants (including individual petitions) before the main international courts, and this has focused on three main axes. In the first place, the presentation of a report before the International Criminal Court denounces the commission of crimes against humanity as a result of the design and management of the European Union's public policies. Secondly, we find a very rich jurisprudence in the European Court of Human Rights that deals with the issue of the (re)interpretation of the precepts of the European Convention on Human Rights and its Protocols in the light of today. Thirdly, and lastly, we also find a very flourishing line of work in the Court of Justice of the European Union, which is trying to hold EU officials and agents to account as a result of the damage caused during the execution of joint search and maritime rescue operations in the Mediterranean, through the filing of lawsuits by the migrants who were directly affected. As we will see below, this is a three-headed process in which the decision of one of these courts inevitably conditions the work of the rest, so lawyers must choose with great caution and care the procedural strategy they follow in each of these leading cases.

4.1 The Strategy before the International Criminal Court

In 2019, a complaint was brought before the International Criminal Court (ICC) that European Union Member States' migration policies in the Mediterranean constitute crimes against humanity. The plaintiffs argued that EU policies were responsible for causing thousands of migrant deaths in the Mediterranean and for returning some 40,000 migrants to militia-controlled camps in Libya. In their communication, the international lawyers Advocate Omer Shatz and Advocate Juan Branco provided evidence that 'implicates European Union and Member States' officials and agents in Crimes against Humanity, committed as part of a premeditated policy to stem migration flows from Africa via the Central Mediterranean route, from 2014 to date',[35] and asked the International Criminal Court to open an investigation into the matter. This complaint focuses on three main aspects of the European Union's migration policies between 2015 and 2019: first, the transition from the Italian Mare Nostrum rescue operation to the Frontex Joint Operation Triton; secondly, the ousting of NGOs that carry out search and rescue (SAR) missions; and finally, the EU cooperation with the Libyan Coast Guard.

The redesign of European migration policies is said to have caused the death by drowning of thousands of migrants (more than 20,000 deaths since 2015), the return of tens of thousands of migrants who had tried to flee Libya, and complicity in the subsequent crimes which have taken place in Libyan detention camps since 2016. Therefore, we will now analyse the elements of the different crimes against humanity attributed to the authorities, officers, and agents of the European Union (all of them contained in Article 7 of the Rome Statute).

35 Omer Shatz et al., 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute. EU Migrations Policies in the Central Mediterranean and Libya (2014-2019)' (*Statewatch*, 2019) <www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 15 December 2022.

> *Rome Statute. Article 7. Crimes against humanity. 1. For the purpose of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, rational, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

The multiple prohibited acts and omissions can be divided into two categories: the first are crimes committed between interception and disembarkation, jointly with or through the LYCG; the second are crimes occurring after disembarkation, typically committed in detention compounds, by co-perpetrators that may include militias other than the LYCG.

In the framework of the first category, it is considered that the EU may have orchestrated a systematic policy of 'deportation or forcible transfer'. This is because European Union agents are accused of knowingly having intercepted more than 40,000 victims (between 2016 and 2018)[36] within the meaning of Article 7(1)(d) of the Rome Statute.[37] EU and Member State officials and agents are alleged to have carefully designed and meticulously implemented highly coordinated naval border control operations with full awareness of the lethal consequences of their conduct. Specifically, in the interception of migrants in distress at sea, the active participation of EU military units includes providing key information (such as the location of migrant boats in distress) and giving orders to the LYCG related to the interception and refoulement of the boats. In addition, the EU provides material support for the LYCG to build its capacity. The military vessels of Member States also provide command and control capabilities to the LYCG. Beyond the prohibited acts of a violent nature occurring in Libya (which we will elaborate on below), the violent nature of the attack would be entrenched in the phase from interception to disembarkation in the course of the mass refoulement.

Once the forced displacements had been executed, the second category is more difficult to prove, as this is complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution, and other inhumane acts occurring in the Libyan detention camps. According to this argument, European Union agents also knowingly caused members of the civilian population to die, which falls under Article 7(1)(a) of the Rome Statute. Thus, the purpose of intentionally distancing EU vessels from certain areas was twofold: (1) to manipulate the law in bad faith to avoid the interna-

36 Between 2016 and 2018, the EU and Italy, via the LYCG, intercepted and pushed back to Libya more than 40,000 persons. In September 2018, out of 1,066 individuals who crossed, it is estimated that 22% died (or are missing), 66.9% were forcibly transferred back to Libya by the LYCG (or others), and only 11.2% disembarked in Europe.

37 'Deportation or forcible transfer of population' means the forced displacement of the persons concerned by expulsion or other coercive acts from the area where they are lawfully present, in the absence of grounds permitted under international law.

tional duties and obligations arising from EU control over the commanded region and (2) by causing the death by drowning of innocent civilians, to deter, or otherwise have an impact on the behaviour of, others seeking to flee Libya. EU agents are alleged to have had foreknowledge that this policy change, specifically the decision to move from the Italian Mare Nostrum operation to the EU and Frontex Joint Operation Triton, would result in lethal consequences and thousands of preventable deaths. As a paradigmatic example, the 'Black April' incidents took the lives of 1200 asylum seekers in one week.

Instead of prioritizing an urgent humanitarian response to tackle the loss of life of individuals under its control, the EU is using the category of illegal immigrants to facilitate the mistreatment of its members. So, EU and Italian agents had a key role in commanding, and coordinating these unlawful operations as part of a clear strategy in which the EU, Italy, and other Member States actively avoided SAR and non-refoulement obligations to ensure the pushback of tens of thousands of civilians fleeing persecution, within the meaning of Article 7(1)(h) of the Rome Statute.

As is set out above, the European Union and the leaders of its Member States are alleged to have been fully aware that individuals who were returned to Libya would be placed in detention camps or otherwise be deprived of their physical liberty. These detentions of individuals in Libya clearly violate the minimum standards for the protection of migrants in international law, both because of the lack of any rights to due process and because of the detention conditions.[38] These detentions should be considered as the crime of the 'imprisonment' of members of a civilian population in contravention of the fundamental rules of international law within the meaning of Article 7(1)(e) of the Rome Statute.

The refugees are in terrible conditions in these detention centres. Torture and ill-treatment are systematic in detention facilities across Libya, particularly in the initial period of detention and during interrogations. The most commonly used methods of torture include beatings with objects such as metal bars and water pipes, flogging on the soles of the feet, suspension in a stress position, burning with cigarettes or hot rods, and the administration of electric shocks.[39] Because of the scale, gravity, and increasingly systematic nature of these practices, they are described as constituting the crime of the 'torture' of members of a civilian population within the meaning of Article 7(1)(f).

For those immigrants who manage to survive the detention camps, one of the known consequences of systematic refoulement is that of human trafficking, which has been pointed to as a practice that constitutes the crime of slavery within the meaning of Article 7(1)(c) of the Rome Statute. In the specific case of women, these practices also lead to the crimes of rape, sexual slavery, and other forms of sexual violence of comparable gravity to members of a civilian population, within the meaning of Article 7(1)(g) of the Rome Statute. These practices often include selling, lending, or bartering the civilian population while they are stripped of their liberty, for sexual exploitation purposes, domestic servitude, forced labour, and/or criminal exploitation.

---

38 To this end, we must highlight that Libyan law criminalizes undocumented entry, stay, and exit, and this crime is punishable by imprisonment and forced labour. Furthermore, the law does not specify the maximum period for immigration detention. As such, immigration detention in Libya can be indefinite.

39 United Nations Office of the High Commissioner for Human Rights 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya' (1 April 2018) Country Report, 5, <www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf> accessed 15 December 2022.

Furthermore, the residual clause or category 'other inhumane acts' may also be found in any violence that occurs during the interception. Any inhumane treatment faced by the deportees after their disembarkation in Libya, such as poor conditions and degrading treatment in detention centres, trafficking, forced labour, and various forms of exploitation, abuse, and extortion, may also fall within the meaning of Article 7(1)(k) insofar as it does not meet the requirements for the other crimes listed in Article 7.

As a result of all the dynamics and crimes indicated above, the potential mode for the liability of EU agents is divided into two parts. On the one hand, there is the entire system of laws, regulations, policies, and decisions that enabled the operations through which the LYCG was funded, trained, and equipped in order for it to be falsely presented as a sovereign and competent national coastguard with the legitimacy and capability to conduct SAR operations under maritime and human rights law. Effective control over these actions accompanied this process through the determination of its goals, the distribution of means, and the use of other venues of the concerned territories and seas. On the other hand, there is the involvement of EU agencies and agents in the interception and pushback operations in the period 2016-2018. This complicity includes the entire process, starting from the reception of a distress call by a European body such as the Maritime Rescue Co-ordination Centre (MRCC) in Rome or by an EU or Member State body, unit, or vessel, and the on-scene coordination of the operation(s).

The concrete involvement of the European Union refers to multiple acts and omissions aimed at preventing NGOs or other efficient forces from being involved in SAR operations that would have resulted in lawful disembarkation in a safe port, that is, on EU soil. Instead, EU agents acted directly to ensure that LYCG was assigned command over the situation, with information on the location of the migrants' boats and real-time assistance and guidance. The direct acts and omissions were part and parcel of the overall official EU immigration policy to stem the migration flow from Libya by ensuring that all intercepted migrants would disembark not in European ports but in Libya. Subsequently, EU agents had foreknowledge of the crimes to which the migrants would be subjected in Libya. In addition, they were aware of the inevitable, immediate, and direct consequences of their acts and omissions. In other words, if the migrants had not been forced back to Libya, these crimes would not have happened. Without the EU and Italy orchestrating and coordinating the LYCG operations, the migrants would not have been pushed back to Libya, as the LYCG could have had neither the technical capabilities nor the political will to intercept migrants seeking to reach Europe. Thus, everything seems to indicate that, in this case, the task for the judges of the International Criminal Court will be to analyse the potential scope of the modes of liability that may be attributed to EU agents involved in EU migration policies in the Mediterranean and Libya and subsequently to evaluate the extent of their responsibility.[40]

4.2 The Strategy before the European Court of Human Rights

The ICCPR Human Rights Committee's work has significantly influenced the jurisprudence of the ECtHR in relation to human rights protection, including in the context of search and rescue operations at sea. The General Comments and Concluding Observations issued by the ICCPR Human Rights

40 In 2020, the ICC Chief Prosecutor confirmed to the EU Parliament that the Office of the Prosecutor (OTP) was bringing a case. Shortly after that, the Prosecutor confirmed that the case had been declared admissible. To this day (2022), we are still waiting for the investigation to progress.

Committee provide important guidance on the interpretation and application of the ICCPR, which has in turn contributed to the development of international human rights law[41]. The ECtHR has cited the ICCPR Human Rights Committee's jurisprudence in several cases, such as *Hirsi Jamaa and Others v. Italy*[42], where the Court referred to the Committee's General Comment No. 31 on the nature of the general legal obligation of states parties to the ICCPR, and *N.D. and N.T. v. Spain*[43], where the Court cited the Committee's Concluding Observations on the report of the European Union.

In this field, the European Court of Human Rights (the Court) has developed the scope of Article 4 (the prohibition on the collective expulsion of foreigners) of Protocol 4[44] to the European Convention on Human Rights through various leading cases. As a starting point, the Court defined 'collective expulsion' to mean any measure compelling aliens as a group to leave a country. Thus, there is an exception when the Court accepts a measure, based on its reasonable and objective examination of the particular case. In *Hirsi Jamaa and Others v Italy*[45], the Court was required, for the first time, to examine whether Article 4 of Protocol 4 of the Convention applied to a case involving the removal of aliens to a third state carried out outside national territory[46]. This case concerned Somalian and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. The Court observed in particular that the notion of expulsion, like the concept of 'jurisdiction', was principally territorial, but found that where a state had, exceptionally, exercised its jurisdiction outside its national territory, the exercise of extraterritorial jurisdiction by that state could be accepted by the Court to form the basis for collective expulsion. The Court also noted that the applicants' transfer to Libya had been carried out without examination of each situation. Thus, the Italian authorities had embarked the applicants and then disembarked them in Libya. In this particular case, the Court found that the applicants fell within the jurisdiction of the state authorities for the purposes of Article 1 of the Convention (obligation to respect human rights) in the period between boarding the ships and being handed over to the Libyan authorities, because the applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities.

The extent and limits of the precept contained in Article 4 of Protocol 4 to the European Convention on Human Rights regarding the 'prohibition on collective expulsion' have been developed in greater detail in cases such as *Georgia v Russia*,[47] *Shioshvili and Others v Russia*,[48] *Berdzenishvili*

41 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, Cambridge University Press 2005) 146.

42 *Hirsi Jamaa and Others v. Italy* [2016)] ECHR 27765/09.

43 *N.D. and N.T. v. Spain* [2020] ECHR 8675/15 and 8697/15.

44 Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms secures certain rights and freedoms other than those already included in the Convention and the First Protocol thereto. Article 4 (Prohibition of collective expulsion of aliens) states that 'Collective expulsions of aliens is prohibited'.

45 *Hirsi Jamaa and Others* (n 42).

46 Protocol No. 4 to the European Convention on Human Rights (Right to Free Movement and Choice of Residence; Prohibition of Exile, Collective Expulsion of Aliens, and Imprisonment for Civil Debts) (1968) 7 International Legal Materials 978.

47 *Georgia v Russia* [2014)] ECHR 13255/07.

48 *Shioshvili and Others v Russia* [2016] ECHR 19356/07.

and Others v Russia,[49] *M.K. and Others v Poland*,[50] *D.A. v Poland*,[51] *M.H. and Others v Croatia*[52] and *Moustahi v France*.[53] Likewise, the Court has also defined a whole series of measures, factual conduct, and practices that do not constitute a 'collective expulsion'. For this purpose, see *Sultani v France*,[54] *Shioshvili and Others v Russia*[55] and *Berdzenishvili and Others v Russia*.[56]

For our study, we will focus on a series of specific cases. In *Sharifi and Others v Italy and Greece*,[57] thirty-two Afghan nationals, two Sudanese nationals, and one Eritrean national alleged, in particular, that they had entered Italy illegally from Greece and been returned to that country immediately, with the fear of subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment. They also submitted, concerning Italy, that they had been subjected to indiscriminate collective expulsion. The Court held, in particular, that it shared the concerns of several observers concerning the automatic return, implemented by the Italian border authorities in the ports of the Adriatic Sea, of persons who, in the majority of cases, were handed over to ferry captains to be removed to Greece, thus depriving them of any procedural and substantive rights.

Another case of a similar nature is *Khlaifia and Others v Italy*.[58] This decision concerns the detention of migrants in a reception centre on Lampedusa and subsequently on ships moored in Palermo harbour. It also addressed the repatriation to Tunisia of clandestine migrants who had landed on the Italian coast in 2011 during the events linked to the Arab Spring. The Grand Chamber found, in particular, that Article 4 of Protocol 4 does not guarantee the right to an individual interview in all circumstances. The requirements of the provision were satisfied if each alien could raise arguments against his or her expulsion that could then be examined by the respondent state authorities. However, the Grand Chamber recognized a violation of Article 5(1) of the Convention (right to liberty and security), a violation of Article 5(2) (right to be informed promptly of the reasons for the deprivation of liberty), a violation of Article 5(4) (right to a speedy decision by a court on the lawfulness of detention), and a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3, which concerns the lack of a route to allow the applicants to complain about the conditions in the Lampedusa reception centre or on the ships[59].

---

49 *Berdzenishvili and Others v Russia* [2016] ECHR 14594/07, 14597/97, 14976/07, 14978/07, 152221/07, 16369/07 and 16706/07.

50 *M.K. and Others v Poland* ECHR [2020] 40503/17, 42902/17 and 43643/17.

51 *D.A. v Poland* [2021] ECHR 51246.

52 *M.H. and Others v Croatia* [2022] ECHR 15670/18 and 43115/18.

53 *Moustahi v France* [2020] ECHR 9347/14.

54 *Sultani v France* [2007] ECHR 45223/05.

55 *Shioshvili* (n 48).

56 *Berdzenishvili* (n 49).

57 *Sharifi and Others v Italy and Greece* [2014] ECHR 16643/09.

58 *Khlaifia and Others v Italy* [2016] ECHR 16483/12.

59 The ECtHR has developed Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture, inhuman or degrading treatment or punishment, in the context of search and rescue operations at sea. The Court has held that states have an obligation to respect the human rights and dignity of all persons, including migrants, during interception and rescue operations at sea. In the case of Hirsi Jamaa and Others v. Italy, the Court found that the applicants, who were migrants intercepted at sea and returned to Libya by Italian authorities, had been exposed to a real risk of being subjected to inhuman and degrading treatment, in violation of Article 3 of the ECHR. The Court held that states must ensure that their interception and rescue operations are conducted in a manner that respects the human rights and dignity of migrants, and that all persons intercepted at sea have the right to an effective remedy for any violations of their rights.

Aside from all the previous cases, without a doubt the most controversial case has been *N.D. & N.T. v Spain*[60]. The applicants were two migrants from Morocco who, with a group of several other sub-Saharan migrants, had attempted to enter Spain by scaling the fences surrounding the city of Melilla (a Spanish enclave on the North African coast). The applicants maintained that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance. They complained of a systematic policy of removing migrants without prior identification, which, in their view, had been devoid of legal basis at the relevant time. They also complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco.

Therefore, the Grand Chamber held, unanimously, that there had been no violation of Article 4 of Protocol No. 4 to the Convention[61]. It noted in particular that the applicants had in fact placed themselves in an unlawful situation when they had deliberately attempted to enter Spain on 13 August 2014 by crossing the Melilla border protection structures as part of a large group and at an unauthorised location, taking advantage of the group's large numbers and using force. They had thus chosen not to use the legal procedures which existed in order to enter Spanish territory lawfully. Consequently, the Court found that the lack of individual removal decisions could be attributed to the fact that the applicants – assuming that they had wished to assert rights under the Convention – had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct. The Grand Chamber also held that there had been no violation of Article 13 (right to an effective remedy) of the Convention taken together with Article 4 of Protocol No. 4. In this regard, the Court considered that, in so far as it had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct, it could not hold the respondent State responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal.

As of today (2022), this line of jurisprudence is in constant evolution, which is why there are many opportunities to develop a myriad of litigation strategies. Starting from this premise, we can find a whole series of cases on 'collective expulsions' pending resolution (see, inter alia, *W.A. and Others v Italy*,[62] *S.S. and Others v Italy*,[63] *A.B. v Italy*,[64] *J.A. and Others v Italy*[65] and four other applications[66]). Among these, we can highlight the case of a European citizen who claims to have been a victim of 'pushback'. The case was filed on behalf of a French student. She left the EU to study at a Turkish university. After she was persecuted politically and condemned to six years in prison by the Turkish

60 *N.D. & N.T.* (n 43).

61 The Court reached a similar conclusion – namely, that the respondent state provided genuine and effective access to procedures for legal entry and that the applicants did not have cogent reasons for not using those procedures – in *A.A. and Others v North Macedonia* (2022) ECHR 55798/16 and in four other cases.

62 *W.A. and Others v Italy* [2017] ECHR 18787/17.

63 *S.S. and Others v Italy* [2018] ECHR 21660/18.

64 *A.B. v Italy* [2018] ECHR 13755/18.

65 *J.A. and Others v Italy* [2018] ECHR 21329/18.

66 *H.B. v Italy* [lodged on 13 June 2018] ECHR 33803/18; *H.L. v Italy* [lodged on 2 November 2018] ECHR 52953/18; *C.L. v Italy* [lodged on 7 November 2018] ECHR 53788/18; and *M.J. v Italy* [lodged on 7 November 2018] ECHR 53790/18.

regime, she fled to Greece to enter EU territory and return to her family and home in France. After crossing the Evros river in October 2021, the victim presented her French passport and ID, permitting her to enter the Schengen zone, informed the Greek forces of the grave risk to which she was exposed in Turkey, and begged the Greek forces to let her in. Her family in France contacted the Greek and French consular authorities multiple times to alert them of the situation, and requested urgent diplomatic protection, but to no avail. Based on racial profiling, the Greek forces abducted, detained, abused, and forcibly transferred the young woman to an unsafe dinghy and expelled her with others on a life-threatening voyage to a military zone in Turkey, where soldiers captured her. She is now serving six years in a Turkish prison in cruel, degrading, and inhuman conditions. This case shows us the dynamics between the Greek government and Frontex at the external borders of the EU. Whether they are EU citizens or foreign nationals, tens of thousands of toddlers, women, and men have been victims of the application of the policy of pushback across the Evros river.

4.3 The Strategy before the Court of Justice of the European Union

In May 2021, the CJEU[67] submitted its first legal action against Frontex. This legal action was submitted on behalf of two asylum seekers (an unaccompanied minor and a woman). While they were seeking asylum on EU soil (Lesbos), they had been violently rounded up, assaulted, robbed, abducted, detained, forcibly transferred back to sea, expelled with others, and ultimately abandoned on rafts with no means of navigation, food, or water. The applicants were also victims of other 'pushback' operations when they attempted to seek protection in the EU. During these operations, a friend of one of the applicants drowned and died while European officials were watching. His body was never recovered. The subject of the dispute is an action against Frontex under Article 265 of the Treaty on Functioning of the European Union. The claim is that Frontex, by not suspending or terminating its activities in the Aegean Sea region within the meaning of Article 46 of the European Border and Coast Guard Regulation, committed an infringement of the Treaties.

However, the EU Court of Justice dismissed this action, stating that it was inadmissible. The Court declared that 'irrespective of whether the applicants' plea is well founded –their complaint that Frontex's position lacks clarity, is not sufficiently detailed and does not provide duly substantiated reasons, could, where appropriate, have formed the basis of an action for annulment under Article 263 TFEU – it must, however, be stated that the applicants did not intend to bring the present action under that article. It is only in the context of an action for annulment that they could, if necessary, and subject to being able to demonstrate standing and sufficient legal interest to bring proceedings against that decision, dispute the reasons provided by Frontex to justify its decision not to take the measures requested in the invitation to act'.[68]

In April 2022, another ground-breaking legal action against Frontex was submitted, the first in a potential avalanche of damages lawsuits[69]. A Syrian asylum seeker filed a case against the European

67 Case T-282/21 S.S. *and S.T. v Frontex* [2022] CJEU OJ C 289.

68 ibid.

69 Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532.

Border and Coast Guard Agency for a seventeen-hour-long 'pushback' operation in the Aegean Sea.[70] Alaa Hamoudi filed this action for damages in the EU Court of Justice after he was 'kidnapped from a Greek island, transferred to an unseaworthy raft, abandoned at sea for seventeen hours, and expelled with others to Turkey'. In support of the action, the applicant is relying on three points of law.

First, the applicant alleges that Frontex approved the launching of RBI Aegean in violation of Article 46(5) of Regulation 2019/1896, in a manifest error of assessment, misuse of power, and failure to act with due diligence, thereby failing to observe the principle of sound administration. The applicant then alleges that Frontex committed an unlawful omission capable of giving rise to non-contractual liability when failing to act under Article 46(4) of Regulation 2019/1896. Third, they allege that Frontex committed an unlawful act capable of giving rise to non-contractual liability. At this stage of the process, the details of the procedural strategy cannot yet be revealed. However, it is a very promising case that could open up a whole line of work before the Court of Justice of the European Union for the defence of migrants who have been harmed during joint Frontex operations in the Mediterranean Sea.

5. Conclusions

A successful litigation strategy requires a meticulous analysis of the relevant legal framework, including international conventions, treaties, and domestic laws. However, the legal team must also understand the social, economic, and political context in which the case is taking place. By combining legal expertise with a broader understanding of the issues at stake, the legal advisors can identify the most effective arguments and evidence to advance their client's case. Moreover, a litigation strategy may involve engaging with other stakeholders, such as civil society groups, international organizations, and governments, to increase the legal team's influence and raise awareness of the issues at stake. Depending on the circumstances, a litigation strategy can have multiple goals, including securing legal remedies, holding governments and other actors accountable for human rights violations, and setting legal precedents that can benefit other individuals or groups in similar situations. Pursuing multiple legal avenues simultaneously, such as filing complaints with national and international human rights bodies, pursuing civil litigation, and engaging in advocacy and public outreach, may also be necessary.

In the Mediterranean migration and asylum seeker context, *pro bono* legal services are crucial because these individuals often lack the financial resources and legal expertise to navigate complex legal systems. Large law firms provide free legal representation to help level the playing field and ensure that vulnerable individuals have access to justice. *Pro bono* legal services may involve designing litigation strategies, providing legal advice, conducting training sessions, and raising awareness of legal rights and remedies.

Several large law firms offer pro bono litigation strategies to safeguard the rights of migrants and asylum seekers in the Mediterranean. These firms are committed to identifying the most effective legal avenues to protect their clients, while ensuring that their rights are respected during the legal process. However, these organizations have identified several critical issues related to migration policies, including the criminalization of NGOs providing aid to migrants and refugees, lack of coordination between

70 Case T-136/22 *Hamoudi v Frontex* [2022] CJEU OJ L 295.

Member States, and the absence of a human rights-based approach. These firms have also criticized the inadequate resources and support measures provided to migrants and refugees, resulting in overcrowding and precariousness in reception centres. Moreover, the externalization policies of the EU, where Member States enter into agreements with third countries to curb irregular migration at the cost of violating the human rights of migrants and refugees, have been widely denounced by these firms.

Effectively addressing the challenges faced by migrants and asylum seekers in the Mediterranean necessitates a coordinated and multi-disciplinary approach. In addition to litigation strategies, interventions such as providing humanitarian aid, promoting social inclusion, and addressing the root causes of migration may also be essential. By partnering with other actors, including NGOs, government agencies, and international organizations, pro bono legal firms can help create a more comprehensive and sustainable response to the needs of migrants and asylum seekers. It is crucial to coordinate developments across this ecosystem while taking into account the unique characteristics of each court. This includes consulting the jurisprudence of each court, as well as human rights doctrine, to ensure that the approach taken is effective and appropriate.

Firstly, the International Criminal Court requires a litigation strategy that focuses on presenting solid evidence and cooperating with the prosecutor to ensure a thorough investigation and the presentation of robust charges. It's also important to be prepared to deal with the complexity of legal proceedings and possible opposition from some Member States. For example, a successful litigation strategy led to the prosecution of EU and Member State authorities, officials, and agents for their involvement in crimes against humanity arising from SAR operations in the Mediterranean, which prompted an investigation. However, given the Court's track record, it is challenging to imagine it determining their responsibility as possible accomplices of Libyan coastguards in committing crimes against humanity. Nonetheless, if such a request were successful, it would have far-reaching implications, upending the (re)design, implementation, and execution of European migration policies in ways that are difficult to anticipate today. The recognition of malpractice in search and rescue operations as an essential or constituent element of crimes against humanity could lead to the development of mechanisms that would ensure the effective protection for migrants and refugees attempting to cross the Mediterranean.

Secondly, the European Court of Human Rights presents a constantly evolving line of jurisprudence. Therefore, a litigation strategy should identify emblematic cases that demonstrate severe human rights violations and use them to seek a precedent-setting decision if we intend the petition or lawsuit to succeed. Additionally, the strategy should consider the particularities of the ECtHR system, which permits third-party intervention, including human rights organizations. The court's application of Article 4 of Protocol No. 4 to the European Convention on Human Rights has evolved significantly, from Hirsi Jamaa and Others v. Italy (2012) to N.D. and N.T. v. Spain (2020). In Hirsi Jamaa, the ECtHR held that refoulement of migrants to countries where they face the risk of torture or inhuman or degrading treatment is unlawful, whereas in N.D. and N.T., it held that summary refoulement is not unlawful per se, but must be carried out with adequate safeguards, and the concerned persons must have access to an effective remedy. After the Melilla case, the Spanish government appears to distinguish between asylum seekers and a category of individuals who 'attack' EU borders and the agents working at those borders. Meanwhile, the ECtHR seems to be relaxing its demands on the conditions that state authorities must meet in what has so far been considered the constituent elements of the minimum standard of protection for migrants both at sea and on land.

As a result, the legal battle may focus on preventing this (re)interpretation from restricting the rights achieved to date, rather than achieving an expansive interpretation of the Convention.

Thirdly, the Court of Justice of the European Union (CJEU) is becoming an increasingly important forum for new litigation strategies that rely on presenting clear and convincing arguments based on EU case law. Given the complexity of the EU legal system, it is essential to stay up-to-date with CJEU decisions and relevant EU law. As of 2022, the lawsuit in the Hamoudi case is still pending, which is based on Frontex's alleged responsibility for violating the applicant's fundamental rights, including the right to liberty and security, the right to protection from torture and inhuman or degrading treatment, the right to an effective remedy, and the right to a fair trial. The case is significant in light of the growing international attention on the EU's migration and border control policies and the responsibility of European institutions and Member States to protect the human rights of migrants and refugees. Moreover, it raises crucial questions about the responsibility and accountability of European security agencies for protecting human rights. The Luxembourg judge faces a challenging task of ruling in a context in which the Executive Director of Frontex has recently resigned due to scandals related to SAR operations. Thus, maintaining the appearance of a prudent judge while dealing with a complex and controversial case will require a delicate balancing act. It is clear that the responsibility of calming the waters lies in the judge's hands.