

**The international law for small-scale
fisheries:
Connecting the ecosystem approach and human rights
to secure participatory fisheries management**

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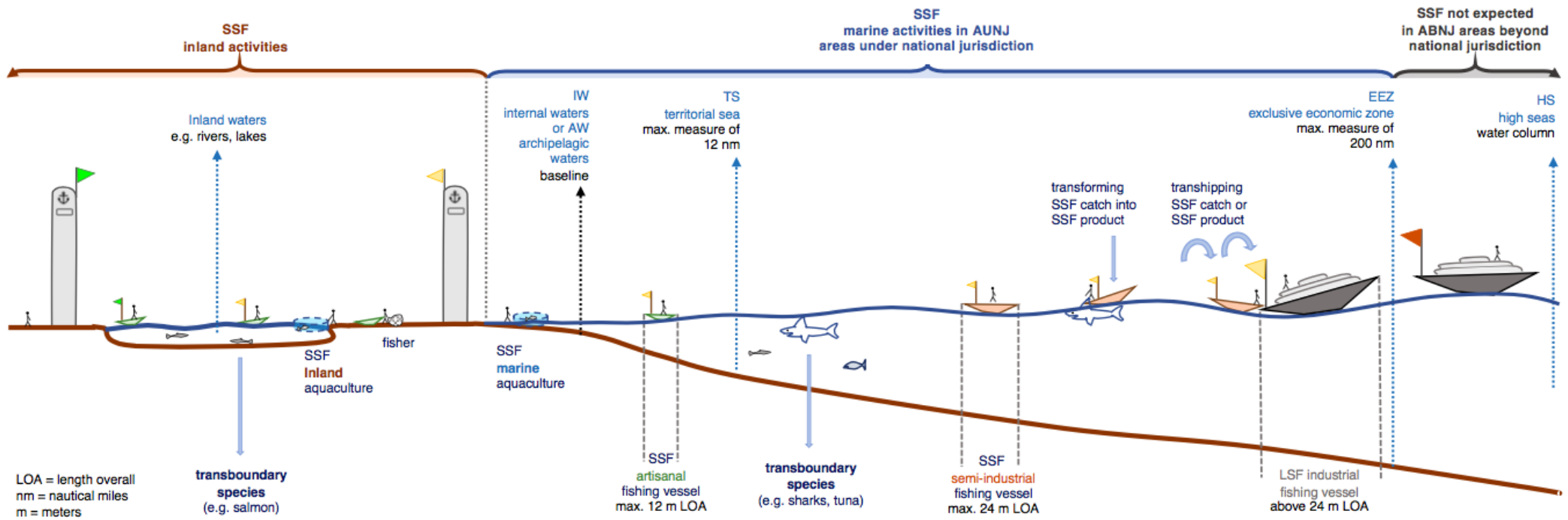
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ABSTRACT

Small-scale fisheries distinguish from other fisheries subsectors for mainly operating nearby riverbanks and seashores, using simple fishing gears and boats, if any. They comprise most of the world capture fisheries workforce, sustain the livelihoods of fishers and their communities, while building and transmitting traditional knowledge, and culture. At the same time, small-scale fisheries are complex to govern, manage, and regulate, having been historically overlooked by societies and governments. Due to their rich and dynamic features, complexities, and challenges, small-scale fisheries have attracted the interest of a multidisciplinary research community, which has grown over the last half-century and continues to expand. For international legal scholars, however, small-scale fisheries remain generally unknown or poorly known. An initial assumption is that international law has no, or very little, pertinence to and influence on small-scale fisheries, and vice-versa, as small-scale fisheries predominantly occur in areas over which states exercise sovereignty and primary jurisdiction. This thesis challenges such premise, and argues the contrary, demonstrating the current relevance, applicability and key contributions of international law to small-scale fisheries.

Specifically, this thesis provides an original account of international law contributions to securing the participation of small-scale fisheries peoples in international fisheries management. It does so by connecting the ecosystem approach and human rights, as applied to fisheries, and by systemically interpreting different international law regimes where the normative foundations for the participation of small-scale fisheries peoples in international fisheries management is grounded. Recognizing the practical challenges of advancing such participation based on the international legal framework, this thesis further examines participation in fisheries management from a governance perspective, researching polycentricity and deliberative democracy, and the extent to which the knowledgebase informing fisheries management is democratic. This thesis also assesses the extent to which participation of small-scale fisheries peoples in existing regional fishery bodies frameworks and frameworks involving two or more states is addressed. The meaningful and effective participation of small-scale fisheries peoples in international fisheries management can bring about more justice and fair outcomes for them in this context.

FIGURE: Small-scale fisheries in inland waters and marine waters



Source: Illustration by the author (Nakamura, 2020)

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ABBREVIATIONS

ABNJ	areas beyond national jurisdiction
AC	(fisheries) Advisory Council (of the EU)
APFIC	Asia-Pacific Fishery Commission
BBNJ	biodiversity beyond national jurisdiction
CACfish	Central Asian and Caucasus Regional Fisheries and Aquaculture Commission
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCPR	Committee on Civil and Political Rights
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CECAF	Fishery Committee for the Eastern Central Atlantic
CESCR	Committee on Economic, Social and Cultural Rights
CFP	Common Fisheries Policy (of the EU)
COFI	Committee on Fisheries (of the FAO)
CoP	Conference of the Parties
COPPESAALC	Commission for Small-Scale, Artisanal Fisheries and Aquaculture of Latin America and the Caribbean
CPPS	<i>Comisión Permanente del Pacífico Sur</i> [Permanent Commission for the South Pacific]
CRFM	Caribbean Regional Fisheries Mechanism
CRITFC	Columbia River Inter-Tribal Fish Commission
CSO	civil society organization
EAF	ecosystem approach to fisheries
EC	European Commission
EEZ	exclusive economic zone
EIA	ecosystem impact assessment
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCM	fisheries co-management
FFA	Pacific Islands Forum Fisheries Agency
FSP	fisheries science partnership
FPIC	free, prior and informed consent
GFCM	General Fisheries Commission for the Mediterranean
HRA	human rights approach
HRBA	human rights-based approach
HRC	Human Rights Council (of the United Nations)
I/ACHR	Inter-American Court of Human Rights
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
IDCP	International Dolphin Conservation Program
IGO	inter-governmental organization
ILO	International Labour Organization
IMO	International Maritime Organization
IOTC	Indian Ocean Tuna Commission
IPOA	International Plan of Action
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unreported, and unregulated (fishing)

LCBC	Lake Chad Basin Commission
LVFO	Lake Victoria Fisheries Organization
MPA	marine protected area
MRC	Mekong River Commission
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NEAFC	North-East Atlantic Fisheries Commission
NGO	non-governmental organization
NM	nautical miles
NPAFC	North Pacific Anadromous Fisheries Commission
NPFC	North Pacific Fisheries Commission
NWIFC	Northwest Indian Fisheries Commission
OHCHR	United Nations Office of the High Commissioner for Human Rights
PSC	Pacific Salmon Commission
RBA	rights-based approach
RECOFI	Regional Commission for Fisheries
RFAB	regional fisheries advisory body
RFB	regional fishery body
RFMO	regional fisheries management organization
RPOA	Regional Plan of Action
SDG	Sustainable Development Goal
SEAFO	South-East Atlantic Fisheries Organization
SIOFA	South Indian Ocean Fisheries Agreement
SPC	Secretary of the Pacific Community
SPRFMO	South Pacific Regional Fisheries Management Organization
SRFC	Sub-Regional Fisheries Commission
STECF	Scientific, Technical and Economic Committee for Fisheries
SWIOFC	South-West Indian Ocean Fisheries Commission
UN	United Nations
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
USA	United States of America
VME	vulnerable marine ecosystem
WCPFC	Western and Central Pacific Fisheries Commission
WECAFC	Western Central Atlantic Fishery Commission
WTO	World Trade Organization

CHAPTER 1

Introducing the thesis

Ever since humans could harvest fish, with their hands or using simple tools, to feed and nurture themselves, they could have already been seen as fishers in small-scale fisheries. The use of the term ‘small-scale fisheries’ has been opted by many authors, consequently reflected in contemporary fisheries scientific literature, policy, and legal documents.¹ For this reason, it is the term adopted in this thesis.² Small-scale fisheries naturally bring to one’s mind an image of a modest fisher deploying simple artisanal fishing techniques, with, and often without a boat or canoe, by a riverbank or seashore. Different meanings and purposes may simultaneously exist for, or be associated with, small-scale fisheries, that is: a means of survival, way of living, sense of existing; a cultural practice, expression of traditional knowledge, nature immersion; a labour occupation, formal job, duty; a means of income, barter, trade; or simply, a recreational exercise, beloved hobby, fun. These notions are not mere reflections, they indeed point to multiple benefits that small-scale fisheries bring to fishers, their families, and their communities.³ At the macro level, the most recent global scientific data on small-scale fisheries accounts their substantive contributions to sustainable development, worth

¹ The term is most commonly seen in texts in English while ‘artisanal fisheries’, for instance, is usually found in texts in Portuguese, French, and Spanish.

² This thesis will only refer to the term ‘small-scale’ in reference to ‘small-scale fisheries’ and ‘small-scale fishing’. It will refer to ‘fishers’ and ‘fishing communities’ regarding, respectively, individuals and communities that are part of or relate to the small-scale fisheries sector.

³ Throughout this thesis, the reader will find a large amount of diverse reference sources that make part of the small-scale fisheries literature. A general characterization of small-scale fisheries, and the different and multiple benefits and contributions they bring to fishers, their families and communities are usually described in books, scientific articles, and reports on the topic. In effect, it does not take too long of a conversation with a local fisher passionate about small-scale fisheries to find out the wonders of small-scale fishing.

noting: small-scale fisheries represent most of the world capture fisheries workforce,⁴ and forty percent of total global fisheries catch.⁵

That trivial image of a fisher in small-scale fisheries may also be associated with uncertainty and deep complexity if one thinks of small-scale fisheries as a fisheries subsector, which demands effective governance, regulation, management, monitoring, control and surveillance.⁶ Despite the major and meaningful role small-scale fisheries play to the livelihoods of fishers and dependent communities, the subsector can be very complex to govern and manage due to its diverse and dynamic nature, which varies by country and locality.⁷ Historically, small-scale fisheries have been known to be overlooked or marginalized by society and government of most countries.⁸ Such rooted inadequacy, in a way, has placed a stigma on small-scale fisheries, which are unintentionally associated with or considered a ‘vulnerable group’.⁹ This thesis does not treat fishers in small-scale fisheries as a vulnerable group per se, but recognizes these fishers as vulnerable to multiple socioeconomic and environmental problems and threats. In effect, because of their vulnerabilities and the lack of government support, many small-scale fisheries peoples have struggled to grow economically, leave poverty conditions, enhance their labour standards, obtain formal recognition of their

⁴ According with the *Illuminating Hidden Harvests* report – the outcome of a decade of research and data collection on small-scale fisheries carried by scientists and researchers of different backgrounds in multiple countries around the world – about 90% of capture fisheries employment, being 60 million people employed in small-scale fisheries (part-time or full-time), 53 million engaged in subsistence fishing (without an employment contract) and 379 million who relate to the fishers as household members. See FAO, Duke University and WorldFish, ‘Illuminating Hidden Harvests – The Contributions of Small-Scale Fisheries to Sustainable Development’ (2023) <<https://doi.org/10.4060/cc4576en>>.

⁵ About 37 million tonnes of the total 92 million tonnes of global fisheries catch. See *ibid*.

⁶ States may or not have established differentiated subsectors of the fisheries sector, and the degree of development and regulatory framework of the small-scale fisheries subsector, where this exists, largely depends on the level of technical and financial government support given to the subsector.

⁷ The complexity can be greater considering the different people involved in this sector (e.g. women, children, Indigenous Peoples), different areas of operation (e.g. transboundary rivers, maritime zones), interactions with different sectors (e.g. large-scale fisheries, shipping, tourism).

⁸ Despite the growing movement shaped and promoted by researchers, academics, and other non-State actors toward emphasizing the advances and positive contributions of small-scale fisheries to sustainability, as well as their resilience and adaptive capacity to tackling challenges they face.

⁹ Small-scale fisheries peoples may not see themselves as vulnerable nor want others to see them as vulnerable, an adjective that may give them a sense of inferiority and disempowerment. These insights came from speaking with leaders of small-scale fisheries peoples in a recent workshop on human rights and fisheries, organized by a national institute for human rights.

fundamental rights, and, consequently, fully realize such rights, and the subsector's alignment with the social, economic, and environmental spectrums of sustainability.

For these rich and dynamic features, complexities, and challenges, small-scale fisheries have attracted the interest of a large number of researchers and practitioners, from different backgrounds around the world, building on multidisciplinary small-scale fisheries research that has grown over the last half-century and continues to expand.¹⁰ For most international legal scholars, however, small-scale fisheries remain unknown or poorly known, and the international law literature on this topic stands relatively scarce.¹¹ An initial assumption is that international law has no, or very little, pertinence to and influence on small-scale fisheries, and vice-versa, owing to the fact that small-scale fishing and its related activities predominantly occur in areas over which states exercise sovereignty and primary jurisdiction. This thesis challenges such premise, and argues the contrary, demonstrating the current relevance, applicability, and key contributions of international law to enhancing the governance, management, and regulatory framework for small-scale fisheries. As such, this thesis fills a gap in the scarce international law literature on this topic.

Specifically, this thesis delves into a persisting challenge in fisheries sustainability, that of addressing environmental and social concerns more clearly, and in an integrated manner, through participatory fisheries management. Before going further, this introductory chapter provides a more detailed account of small-scale fisheries, its growing importance in the international fora, and linkages with international fisheries management (*section 1.1*). This elucidation is helpful to, then, present the research question (*section 1.2*). This author continues by revealing some personal reflections, which explain facts and factors that may have influenced this research (*section 1.3*). Importantly, some space is dedicated to demonstrating this thesis' novelty, originality, and contributions to international law literature and to the growing transdisciplinary research that studies fisheries from the perspectives of different epistemic communities (*section 1.4*). Finally, this thesis' methodology and structure are presented (*section 1.5*).

¹⁰ See section 1.4 of this thesis.

¹¹ As explained further in section 1.4 of this thesis.

1.1. The thesis in context

1.1.1. Small-scale fisheries and its growing importance in the international fora

As anticipated above, small-scale fisheries are part of human's history ever since humans fished aquatic species to feed themselves and others. As such, small-scale fisheries have been a source of nutritious food, but also a way of fulfilling people's livelihoods. Small-scale fisheries have rooted and continue to build customs, culture, traditions, values, and traditional knowledge, which are transmitted across generations, firming up strong relationships between fishers, their communities, as well as between small-scale fisheries peoples and the living resources and environment they interact.¹² As fish became subject to barter and trade, small-scale fisheries developed, for many, into more than a social and cultural activity, but also an economic one, a source of income or way to sustain basic needs and livelihoods. The importance and growth of the fisheries sector to national economies have led governments to develop the sector, organizing it into subsectors or types of fisheries.¹³ The organization of the national fisheries sector within a country varies, and where different fisheries subsectors are established, small-scale fisheries may also be referred to by different terms, according with the national reality, practice, and customs.¹⁴ Small-scale fisheries are thus part of the national fisheries sector of a country, and may be formally considered a standalone fisheries subsector (in turn, linked to other different terms e.g., subsistence fisheries, family-based, and customary), in addition to other fisheries subsectors (e.g., semi-industrial fisheries, large-scale industrial fisheries, experimental fisheries, recreational fisheries, and sportive fisheries).

¹² See more about social construction, wellbeing and values of small-scale fisheries in Derek J Johnson, 'The Values of Small-Scale Fisheries' in Derek J Johnson and others (eds), *Social Wellbeing and the Values of Small-scale Fisheries*, vol 17 (Springer 2018).

¹³ The ten major capture fisheries producing countries being (starting with the major one): China, Indonesia, Peru, Russia, United States of America, India, Viet Nam, Japan, Norway, and Chile. See FAO, 'The State of World Fisheries and Aquaculture 2022. Towards Blue Transformation' (FAO 2022) 14.

¹⁴ For a useful database that briefly describes, by country, the national fisheries sector of countries worldwide, and where it is possible to have an idea of the different subsectors that may exist within that sector, see FAO, 'Fishery and Aquaculture Country Profiles' (*Fisheries and Aquaculture*, 2024).

Despite of industrialization and the constantly growing technological advances, most of the capture fisheries workforce is in small-scale fisheries.¹⁵ In this subsector, fishers deploy practically zero, or a very low level of technology, use simple artisanal fishing gears, tools, and techniques. Hazin explains that ‘artisanal’ refers to ‘the relative level of technology’, while ‘small-scale’ refers to the ‘size of the fishing unit’.¹⁶ From this initial understanding follows questions on which level of technology, which type of technology, which size of the fishing unit, and which type of unit. Each of these features can be very diverse in small-scale fisheries, depending on the country and locality. Additionally, the adjective ‘small-scale’ can also be associated with the size of fishing gears, the catch unit per boat, and the amounts of investments received, considering that these features are small compared to large-scale industrial fisheries. The meaning of ‘small’ also varies by country, and so the technical descriptors, geographical and sociocultural parameters that can be used to define small-scale fisheries and related terms.¹⁷ Many national laws and policies define or interpret ‘small-scale fisheries’ and related terms – that is, in respect of the activity (small-scale or artisanal fishing) or the people (fisher, fisherfolk, small-scale or artisanal fishing community).¹⁸ However, it is often difficult to match the legal definition with what small-scale fisheries actually are on the ground.¹⁹ Due to this diverse, complex, and

¹⁵ See FAO, Duke University and WorldFish (n 4).

¹⁶ As stated in Prof Hazin’s presentation at the Sixth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea, in 2004. See Fábio Hazin, ‘Fisheries and Their Contribution to Sustainable Development: Small-Scale and Artisanal Fisheries’ (New York, 2004) <https://www.un.org/depts/los/consultative_process/documents/6_hazin.pdf> accessed 4 January 2023.

¹⁷ A systematic literature review carried out by Smith and Basurto found the dominant characteristics used to define small-scale fisheries, namely, the type of fishing gear, boat size, type and capacity, and the sociocultural factors. Also considered in the definition of small-scale fisheries, but less dominant, are the species, motorization, catch disposal, ecology and habitat, distance from shore, organization of labor, and other characteristics less represented in the definitions, such as ownership of fishing vessel or gear, trip duration, value-chain, time commitment and market integration. See Hillary Smith and Xavier Basurto, ‘Defining Small-Scale Fisheries and Examining the Role of Science in Shaping Perceptions of Who and What Counts: A Systematic Review’ (2019) 6 *Frontiers in Marine Science* 1, 8. See also Sarah Gibson and U Rashid Sumaila, ‘Determining the Degree of “small-Scaleness” Using Fisheries in British Columbia as an Example’ (2017) 86 *Marine Policy* 121.

¹⁸ Julia Nakamura, Ratana Chuenpagdee and Mostafa El Halimi, ‘Unpacking Legal and Policy Frameworks: A Step Ahead for Implementing the Small-Scale Fisheries Guidelines’ (2021) 129 *Marine Policy* 1.

¹⁹ In Brazil, for instance, the parameters for defining a small-scale fishing boat (i.e., with equal or less than 20 gross tonnage) are controversial, because it does not correspond to what technicians,

dynamic nature, coupled with the varying scales of small-scale fisheries operation, Chuenpagdee and Jentoft argue for a ‘flexible’ definition,²⁰ while Johnson understands that small-scale fisheries should ‘stand for a set of values that contrast with the capital-intensive, profit-oriented, mobile capitalist enterprise that is typical of the large-scale and, particularly, industrial sector of fisheries’.²¹ From a non-legal perspective, an open-ended meaning of what small-scale fisheries are has been proposed by scientists, and generally agreed that a ‘systematic approach to the characterization of fisheries’ can be useful for data analysis.²² These propositions are pertinent, but not helpful to legislators. If a given term is used in a law, but not clearly defined, or the definition provided is vague, the term may be interpreted differently by different people, creating legal uncertainty, and intensifying the risk of misusing the term when applying the law. Nonetheless, the fact is that multiple definitions of ‘small-scale fisheries’ exist and vary from country to country.

For the purpose of this thesis, it is sufficient to have in mind a general characterization of small-scale fisheries. In this sense, one should note that small-scale fisheries primarily operate in areas under national jurisdiction. In territorial land, activities include preparation of fishing gears, mending nets, building boats, carrying out preparatory works prior to go fishing, undertaking post-harvesting activities of processing, trade, or barter. In inland waters, small-scale fisheries involve the harvesting of aquatic resources, often transporting of fish across wetlands, rivers, and

specialists and fishers understand as a small-scale fishing boat in practice. For a detailed analysis of Brazil’s main fisheries law and policy, see Julia Nakamura and Fábio Hazin, ‘Assessing the Brazilian Federal Fisheries Law and Policy in Light of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries’ (2020) 113 *Marine Policy* 1.

²⁰ Ratana Chuenpagdee and Svein Jentoft, ‘Transforming the Governance of Small-Scale Fisheries’ [2018] *Maritime Studies* 101, 106.

²¹ Johnson (n 12) 3.

²² The characterization matrix provides a scoring system (from 0 to 3) that can be applied to each of the ‘marine characteristics’ that a fishery unit may have (fishing gear, mechanization; size of fishing vessel, motorization; fishing trip duration, fishing location and range; refrigeration/storage; labour/crew, ownership, time commitment; disposal of catch, utilization of catch, value addition/preservation; and integration into economy and/or management system) to determine the extent to which a fishery unit is large-scale or small-scale. See Simon Funge-Smith and others, ‘The Challenge of Defining Small-Scale Fisheries: Determining Scale of Operation by Identifying General Fisheries Characteristics’ in FAO, Duke University and WorldFish (eds), *Illuminating Hidden Harvests: the contributions of small-scale fisheries to sustainable development* (FAO, Duke University & World Fish 2023).

lakes.²³ Similarly, in marine waters, small-scale fisheries include fishing and carrying out fishing related activities at sea such as processing harvested species into fish products in vessels at sea and transshipment. In marine waters, small-scale fisheries predominantly take place in internal waters, archipelagic waters, and territorial seas of coastal states and archipelagic states, and are not expected on the high seas, due to their small fishing boats,²⁴ often non-powered, or with low power engines.

For the reasons explained above, states have not agreed on a universal definition of the term ‘small-scale fisheries’ provided in an international legal instrument adopted at the global level. This statement is reflected in paragraph 2.4 of the *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (SSF Guidelines),²⁵ which is the main non-formally binding instrument²⁶ for small-scale fisheries, endorsed by consensus of the members of the Committee on Fisheries (COFI) of the Food and Agriculture Organization of the United Nations (FAO), in 2014. Since this thesis is about international law and small-scale fisheries, thus not focusing on a specific national context, and recognizing the multiple definitions of ‘small-scale fisheries’ and its related terms in literature, policy and law, this author does not adopt a specific definition of the term. This thesis will rather discuss this matter in section 4.2, suggesting that international law can be useful in shedding light on potential criteria for characterizing small-scale fisheries peoples.

²³ Culture-based fisheries (CBF), which combines farming of stocking material and harvesting of the associated aquatic species, has been considered successful for increasing food fish production and benefiting rural communities, predominantly in Asian developing countries. See Sena S De Silva, ‘Culture Based Fisheries in Asia Are a Strategy to Augment Food Security’ (2016) 8 *Food Security* 585.

²⁴ According to statistics of 2020, small-scale fishing vessels measuring a length overall of less than 12 meters, most of which undecked, represented about 81 per cent of the motorized vessels in the world. See FAO, ‘The State of World Fisheries and Aquaculture 2022. Towards Blue Transformation’ (n 13) 63.

²⁵ FAO, *Voluntary Guidelines for Securing Sustainable Small-scale fisheries in the context of food security and poverty eradication* (SSF Guidelines) [adopted at the 31st Session of the Committee on Fisheries, Rome, 9-13 June 2014] para 2.4.

²⁶ As I explain elsewhere, while the SSF Guidelines are voluntary, they hold normative significance and legal force, having generated legal effects at regional and national levels, reason why the non-bindingness can be sought to be merely attached to the instrument’s title and use of soft language in its text. See Julia Nakamura, ‘Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries’ (2022) 37 *The International Journal of Marine and Coastal Law* 31.

Despite of ‘small-scale’, this fisheries subsector is very impactful in terms of contributions to sustainable development. About 40 percent of the total global marine and inland fisheries catch comes from small-scale fisheries, which support the livelihoods and jobs of over 490 million people, and near half of the this sector’s labour force is formed by women.²⁷ In many countries, small-scale fisheries play a major role in preventing and alleviating poverty, providing labour to less educated or unskilled workers and a minimal safety net for vulnerable resource-poor households in periods of individual or collective crisis.²⁸ This sector employs significantly more people and requires much less capital cost per job generated than in the industrial fleet.²⁹ As Chuenpagdee and Jentoft frame it, small-scale fisheries are ‘too big to ignore’ and ‘too important to fail’.³⁰ Yet, the significant contributions from small-scale fisheries to societies around the world are overshadowed and unfairly compensated by the lack or insufficient financial, infrastructural and social assistance they receive from most governments.³¹ Consequently, fishers in small-scale fisheries tend to struggle for the recognition and realization of their rights, are excluded from relevant decision-making processes relating to fisheries policy, law, and management, hold weak governance capacity, and incentive to support fisheries monitoring, control and surveillance.³² These issues often lead to irresponsible and unsustainable fishing practices in small-scale fisheries.³³ Additionally, small-scale fisheries, in many instances, operate under

²⁷ FAO, Duke University and WorldFish (n 4).

²⁸ Christophe Béné, Bjørn Hersoug and Edward H Allison, ‘Not by Rent Alone: Analysing the Pro-Poor Functions of Small-Scale Fisheries in Developing Countries’ (2010) 28 *Development Policy Review* 325, 338–339.

²⁹ *ibid* 336–337.at 336-337.

³⁰ Chuenpagdee and Jentoft have been for decades studying small-scale fisheries, signalling their challenges, and promoting the recognition of their values and importance, all which have created a fundamental pillar for advancing small-scale fisheries research and related discussions at the international level. See Ratana Chuenpagdee and Svein Jentoft, ‘Small-Scale Fisheries: Too Important to Fail’ in International Ocean Institute - Canada (ed), *The Future of Ocean Governance and Capacity Development: Essays in Honour of Elizabeth Mann Borgese (1918-2002)* (Brill Publishers 2019).

³¹ Anna Schuhbauer and others, ‘How Subsidies Affect the Economic Viability of Small-Scale Fisheries’ (2017) 82 *Marine Policy* 114, 117.

³² Steven W Purcell and Robert S Pomeroy, ‘Driving Small-Scale Fisheries in Developing Countries’ 2 *Frontiers in Marine Science* 1, 4; Aksel Sundström, ‘Corruption and Regulatory Compliance: Experimental Findings from South African Small-Scale Fisheries’ (2012) 36 *Marine Policy* 1255.

³³ Christopher Costello and others, ‘Global Fishery Prospects under Contrasting Management Regimes’ (2016) 113 *PNAS* 5125; David A Kroodsmas and others, ‘Tracking the Global Footprint of Fisheries’ (2018) 359 *Science* 904.

informal customary practices, are governed by custom, or not formally regulated by states' legislation,³⁴ which leaves a legal vacuum for enabling competent government authorities to monitor and control small-scale fisheries. National fisheries data systems tend to neglect small-scale fisheries and not provide the relevant disaggregated data, creating another barrier for small-scale fisheries to be fully understood and managed.³⁵

Exploring small-scale fisheries in this scenario of vulnerability, marginalization, and persisting challenges have been part of the small-scale fisheries dedicated research over the last decades.³⁶ More recently, this research has been emphasizing a more positive narrative that heightens the strengths, values, contributions, resilience, and progresses made in small-scale fisheries,³⁷ as well as promoting transdisciplinary research, which is comparative and integrate knowledge and insights from different disciplines, thus able to improve our knowledge about small-scale fisheries in multiple localities and contexts, and find solutions for overall bettering small-scale fisheries governance. At the international governance level, since 2003, the United Nations General Assembly (UNGA) has been drawing increasing attention to small-scale fisheries issues, including the need for enhancing their access to fisheries resources and markets, capacity development and technical support, and climate vulnerability issues.³⁸

Important achievements have been met in international law-making as well, notably through the SSF Guidelines, the explicit reference to small-scale fisheries in the Sustainable Development Goals (SDGs) targets 2.3,³⁹ and 14b,⁴⁰ and the adoption,

³⁴ Svein Jentoft and Maarten Bavinck, 'Reconciling Human Rights and Customary Law: Legal Pluralism in the Governance of Small-Scale Fisheries' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* 271.

³⁵ Purcell and Pomeroy (n 32) 2–3.

³⁶ Small-scale fisheries continue to raise concerns in respect of their vulnerability to suffering negative impacts from climate change, blue growth initiatives, and social injustices. See Ratana Chuenpagdee and Vesna Kerezi, 'Small-Scale Fisheries Sustainability: Progress and Challenges' (2022) 36 *Ocean Yearbook* 268.

³⁷ Jerneja Penca, 'Towards Constructing a Positive Narrative for Fisheries: Report from International Symposium on Fisheries Sustainability' (2020) 21 *Fish and Fisheries* 467.

³⁸ Julia Nakamura, 'International Fisheries Law: Past to Future' in Stefan Partelow, Maria Hadjimichael and Anna-Katharina Hornidge (eds), *Ocean Governance: Knowledge Systems, Policy Foundations and Thematic Analyses*, vol 25 (Springer 2023) 189–190 <<https://link.springer.com/book/10.1007/978-3-031-20740-2>>.

³⁹ SDG 14b: 'provide access for small-scale artisanal fishers to marine resources and markets'.

⁴⁰ SDG 2.3: 'double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers'.

in 2018, of the *UN Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP),⁴¹ under the auspices of the UN Human Rights Council (UNHRC) and subsequently endorsed by the UNGA.⁴² The UNDROP is applicable to any person, Indigenous peoples and local communities engaged in artisanal or small-scale fishing in rural areas,⁴³ arguably applicable to small-scale fisheries peoples in marine spaces as well.⁴⁴ This thesis will critically engage with the two instruments in section 4.1.2. At this stage, it is worth stressing that both significantly heighten the profile of small-scale fisheries peoples at the international level, underlining the human rights dimension in small-scale fisheries. The international community has continued to promote sustainable small-scale fisheries in recent years. In 2017, the UNGA proclaimed 2022 as the International Year of Artisanal Fisheries and Aquaculture (IYAFA),⁴⁵ and invited the FAO to serve as the lead agency for IYAFA. The FAO realized this mandate by supporting, coordinating, and collaborating with states and non-state actors on events and activities that raised awareness on various topics relating to small-scale fisheries, the implementation of the SSF Guidelines, as well as by building and developing the capacity of key stakeholders to continue supporting sustainable small-scale fisheries.⁴⁶

Having examined small-scale fisheries and briefly showcased its continued growing importance in the international fora, a matter which this thesis explores further in chapter 4, the next section moves on to explain the connections between small-scale fisheries and international fisheries management.

⁴¹ UNHRC, Resolution 39/12 of 28 September 2018, ‘United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas’ (UNDROP) [8 October 2018, UN Doc A/HRC/RES/39/12, adopted by 33 votes to 3 against (Australia, Hungary and the United Kingdom); 11 abstentions].

⁴² UNGA, Resolution 73/165 of 17 December 2018, ‘United Declaration on the Rights of Peasants and Other People Working in Rural Areas’ (21 January 2019) UN Doc A/RES/73/165.

⁴³ UNHRC UNDROP (n 41) art 1.2 and 1.3.

⁴⁴ See Elisa Morgera and Julia Nakamura, ‘Shedding a Light on the Human Rights of Small-Scale Fishers: Complementarities and Contrasts between the UNDROP and the Small-Scale Fisheries Guidelines’ in Mariagrazia Alabrese and others (eds), *The United Nations’ Declaration on Peasants Rights* (1st edn, Routledge 2022) 66.

⁴⁵ UNGA, Resolution 72/72 of 5 December 2017, ‘Sustainable Fisheries’ (19 January 2018) UN Doc A/RES/72/72 para 31.

⁴⁶ FAO, ‘International Year of Artisanal Fisheries and Aquaculture 2022 – Final Report’ (2023) <<https://doi.org/10.4060/cc5034en>>.

1.1.2. Linking small-scale fisheries to international fisheries management

International fisheries management is essentially founded on the states' duty to cooperate, directly or through competent international organizations – mainly the FAO and regional fishery bodies (RFBs) – for the management and conservation of transboundary aquatic species. This duty is provided in the main treaty governing the ocean, the *United Nations Convention on the Law of the Sea* (LOSC),⁴⁷ articles 61(2), 63 to 66, and 118, and further elaborated in the *Agreement for the Implementation of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (UNFSA).⁴⁸ While these instruments focus on marine fisheries, and prominent international fisheries law scholars consider this domain to be essentially about marine capture fisheries,⁴⁹ this thesis expands such notion in international fisheries management and includes research that is relevant to inland fisheries as well, especially in respect of RFBs governing fisheries in shared continental lakes and rivers.

Instead of the commonly used term 'shared stocks',⁵⁰ this thesis adopts the term 'transboundary aquatic species', which more broadly covers marine and inland species that respectively cross maritime zones and inland transboundary watercourses, and which may be caught in fisheries, as targeted species, or bycatch. In this respect, the LOSC provides for the states' duty to cooperate for the management and conservation of: straddling stocks (article 63), which move across neighbouring states' territorial

⁴⁷ United Nations Convention on the Law of the Sea (LOSC) (adopted 10 December 1982, entered into force 16 November 1994) (1883 UNTS 397).

⁴⁸ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) (adopted 4 December 1995, entered into force 11 December 2001) (2167 UNTS 3).

⁴⁹ The domain 'that relates specifically to the conservation, management and/or development of *marine capture* fisheries', as described in Erik Molenaar and Richard Caddell, 'International Fisheries Law: Achievements, Limitations and Challenges' in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019) 3 emphasis added.

⁵⁰ Encompassing three main non-exclusive categories: (i) 'transboundary stocks', which cross neighbouring EEZs; (ii) 'straddling stocks', which cross neighbouring EEZs and the high seas; and (iii) 'highly migratory stocks', which cross non-neighbouring EEZs and the high seas. See Julian Palacios-Abrantes and others, 'The Transboundary Nature of the World's Exploited Marine Species' (2020) 10 *Scientific Reports* 1; Gordon Munro, Annick Van Houtte and Rolf Willmann, 'The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects' (FAO 2004) 465.

seas and EEZs, such as shark species;⁵¹ and highly migratory species (article 64 and annex I), which migrate long distances across non-neighbouring states' EEZs, and from EEZs and the high seas, such as tuna and tuna-like species, oceanic sharks, and whales.⁵² The LOSC has a dedicated provision for whales species (article 65),⁵³ and their exploitation may be more strictly regulated, limited, or prohibited by states or the International Whaling Commission (IWC) in national waters as well as in areas beyond national jurisdiction (ABNJ).⁵⁴ The LOSC, article 66, interacts with fisheries in inland transboundary watercourses by establishing the duty of the state, in whose rivers anadromous stocks originate, to exercise primary responsibility for such stocks, which spend most part of their lifespan at sea, and return to breeding in inland watercourses, such as salmon.⁵⁵

In this context, while small-scale fisheries primarily operate near riverbanks and seashores, the aquatic species they harvest are constantly moving, and some migrate across maritime zones and inland transboundary watercourses (see **FIGURE**). In small-scale fisheries, these species may include sharks, tuna, whales, and salmon, which may be targeted in small-scale fisheries, or as 'bycatch'.⁵⁶ The greatest diversity of shark

⁵¹ For instance, sharks species crossing the EEZs of the United States of America (USA) and Mexico. About 129 species of straddling fish stocks were identified as occurring in the Pacific Ocean, Atlantic Ocean, Southern Ocean and the Mediterranean Sea. Details on the species by each region are provided in Jean-Jacques Maguire and others, 'The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species' (FAO 2006) 495.

⁵² *ibid* 7–31.

⁵³ For a detailed legal analysis of this provision and the international regulation of whales, see Richard Caddell, 'Marine Mammals and Migratory Species' in Rosemary Rayfuse, Aline Jaeckel and Natalie Klein (eds), *Research Handbook on International Marine Environmental Law* (2nd edn, Edward Elgar Publishing 2023).

⁵⁴ LOSC art 120.

⁵⁵ Salmon in transboundary rivers shared by the USA and Canada, and sturgeon species in the Mediterranean and Black Sea regions. There are about 263 transboundary river basins around the world and most of inland capture fisheries occurs in the tropical and subtropical latitudes, where SSF are mostly located as well. The status of fishery resources in inland waters has been recently reviewed in Simon Funge-Smith, 'Review of the State of the World Fishery Resources: Inland Fisheries' (FAO 2018) C942 Rev3.

⁵⁶ Scientists have criticized the inconsistent use of the term, suggesting a new simplified way of defining 'bycatch' as 'the catch that is either unused or unmanaged'. See RWD Davies and others, 'Defining and Estimating Global Marine Fisheries Bycatch' (2009) 33 *Marine Policy* 661; Graham D Raby and others, 'Freshwater Commercial Bycatch: An Understated Conservation Problem' (2011) 61 *BioScience* 271.

species is, in fact, in coastal areas.⁵⁷ Case studies have found sharks caught in small-scale fisheries in the Pacific, Southwestern Indian Ocean, Western Equatorial Atlantic, and the Mediterranean,⁵⁸ and, at national level in countries such as Peru, Mexico, Guinea-Bissau, and Madagascar.⁵⁹ As regards tuna species, about 72 percent of the world's tuna catches by small-scale fisheries occurs in East and Southeast Asia,⁶⁰ about 36 percent of the total tuna catch in the Indian Ocean is caught by small-scale fisheries,⁶¹ and there is great potential for further development of small-scale tuna fisheries in the Pacific Islands to address coastal stocks decline.⁶² In turn, aboriginal subsistence whaling is carried out in Denmark (Greenland), Russia (Chukotka), Saint Vincent and the Grenadines (Bequia), the United States of America (USA) (Alaska), and in certain small-scale fisheries in Japan.⁶³ Salmon fishing in small-scale fisheries, though decreasing and subject of ban in certain areas, is also particularly relevant in

⁵⁷ Efforts are being made to gather information on data collection programmes and tools for sharks in SSF. See Monica Barone and Kim Friedman, 'Better Data Collection in Shark Fisheries – Learning from Practice' (FAO 2021) 1227.

⁵⁸ Matthieu Junker, Maya Robert and Eric Clua, 'Coastal Shark Fisheries in the Pacific: A Brief Overview of Current Knowledge' (SPC 2006); Andrew J Temple and others, 'Marine Megafauna Catch in Southwestern Indian Ocean Small-Scale Fisheries from Landings Data' (2019) 230 *Biological Conservation* 113; Jones Santander-Neto and Vicente Faria, 'Sharks and Rays Caught by a Small-Scale Fisheries in the Western Equatorial Atlantic' 36 *Applied Ichthyology* 830; Manfredi Di Lorenzo and others, 'Small-Scale Fisheries Catch More Threatened Elasmobranchs inside Partially Protected Areas than in Unprotected Areas' (2022) 13 *Nature Communications* 1' (2022) 13 *Nature Communications* 1.

⁵⁹ Philip D Doherty and others, 'Big Catch, Little Sharks: Insight into Peruvian Small-Scale Longline Fisheries' (2014) 4 *Ecology and Evolution* 2375; Juan Carlos Pérez-Jiménez and Iván Mendez-Loeza, 'The Small-Scale Shark Fisheries in the Southern Gulf of Mexico: Understanding Their Heterogeneity to Improve Their Management' (2015) 172 *Fisheries Research* 96; Helen Cross, 'Elasmobranch Capture by Commercial Small-Scale Fisheries in the Bijagós Archipelago, Guinea Bissau' (2015) 168 *Fisheries Research* 105; Frances Humber and others, 'Assessing the Small-Scale Shark Fishery of Madagascar through Community-Based Monitoring and Knowledge' (2017) 186 *Fisheries Research* 131.

⁶⁰ Robert Gillet, 'Bycatch in Small-Scale Tuna Fisheries: A Global Study' (FAO 2011) 560 x, 1–2.

⁶¹ Marie Lecomte and others, 'Indian Ocean Tuna Fisheries: Between Development Opportunities and Sustainability Issues' (IDDRI 2017) <<https://www.iddri.org/sites/default/files/PDF/Publications/Hors%20catalogue%20Iddri/201811-tuna-indian%20oceanEN.pdf>>.

⁶² Despite only two percent of the tuna fisheries being reported to be of small-scale, these species offer opportunity for small-scale fisheries to overcome the coastal fisheries decline. See SPC, 'Small-Scale Tuna Fishery Development: Lessons Learned and Way Forward'.

⁶³ See IWC, 'Aboriginal Subsistence Whaling' (2023) <<https://iwc.int/management-and-conservation/whaling/aboriginal>> accessed 5 January 2023; Randall R Reeves, 'The Origins and Character of "Aboriginal Subsistence" Whaling: A Global Review' (2002) 32 *Mammal Review* 71; Aiko Endo and Masahiro Yamao, 'Policies Governing the Distribution of By-Products from Scientific and Small-Scale Coastal Whaling in Japan' (2007) 31 *Marine Policy* 169.

some Northern European States.⁶⁴ Based on this context, this thesis investigates the practice of selected RFBs that govern these transboundary aquatic species which interact with small-scale fisheries, and examines other regional and subregional fisheries management arrangements that are relevant to small-scale fisheries.⁶⁵

An important distinction within RFBs is worth noting from the onset. Literature usually refers to two types of RFBs:⁶⁶ the regional fisheries management organizations (RFMOs), whose members are competent to adopt conservation and management measures, which, pursuant to the organization's constituent instrument and rules of procedure, may be binding upon members concerned, unless opposed;⁶⁷ and the regional fisheries advisory bodies (RFABs), whose members are competent to adopt non-binding measures or recommendations. This thesis investigates the practice of both types of RFBs, examining selected ones to evaluate the extent to which the participation of small-scale fisheries peoples has been considered and, if so, how it has been taken into account. Important to note that, since 2005, the UNGA has been urging efforts from RFMOs, 'as a matter of priority, to strengthen and *modernize* their

⁶⁴ See Masha Shaw, 'History, Status and Governance of Small-Scale Fisheries in Arkhangelsk Oblast, Northwest Russia' in José Pascual-Fernández, Cristina Pita and Maarten Bavinck (eds), *Small-Scale Fisheries in Europe: Status, Resilience and Governance* (Springer 2020); Pekka Salmi and Juhani Mellanoura, 'Finnish Small-Scale Fisheries: Marginalisation or Revival?' in José Pascual-Fernández, Cristina Pita and Maarten Bavinck (eds), *Small-Scale Fisheries in Europe: Status, Resilience and Governance* (Springer 2020).

⁶⁵ To understand whether a given species occurs in small-scale fisheries, it is useful to search on the FAO database, which allows visualising the distribution of aquatic species relevant for fisheries in general. This author used this database to identify where the tuna, sharks and salmon species are distributed across the world. See FAO, 'Aquatic Species Distribution Map Viewer' (FAO, 2023) <<https://www.fao.org/figis/geoserver/factsheets/species.html>> accessed 4 January 2023. For the whales, the International Whaling Commission (IWC) provides abundance estimates of whales populations in different regions of the world. See International Whaling Commission, 'Population (Abundance) Estimates' (International Whaling Commission, 2023) <<https://iwc.int/estimate>> accessed 4 January 2023.

⁶⁶ James Harrison, 'Key Challenges Relating to the Governance of Regional Fisheries' in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2021); Terje Løbach and others, 'Regional Fisheries Management Organizations and Advisory Bodies: Activities and Developments, 2000-2017' (FAO 2020) 651 1.

⁶⁷ Not all measures are binding, and usually the legal nature of the measure, whether binding or not, is indicated by the RFMO. Additionally, a measure may not be binding for members of RFMOs that oppose to the measure. See Harrison, 'Key Challenges Relating to the Governance of Regional Fisheries' (n 66) 79. These measures may stipulate, inter alia, the total allowable catch, quotas, restrictions on fishing gears, prohibitions of certain species caught. For more on fisheries management and conservation, see Keven L Cochrane and Serge M Garcia, *A Fishery Manager's Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009).

mandates to include an ecosystem approach to fisheries management’,⁶⁸ whilst urging states, international and national organizations to ‘provide for the participation of small-scale fishery stakeholders in related policy development and fisheries management strategies’.⁶⁹ Since 2006, the UNGA has also been commending RFMOs to ‘improve transparency and to ensure that their decision-making processes are fair and transparent (...), address participatory rights’.⁷⁰ These three points raised by the UNGA have been consistently reinforced in its subsequently adopted resolutions.⁷¹ The review conference of the UNFSA, last resumed in 2023, emphasized the need to avoid adverse impacts on, and ensure access to small-scale fisheries in developing states, ‘when establishing conservation and management measures for straddling and highly migratory stocks’.⁷²

These international developments makes this thesis’ research particularly relevant as well. Having clarified the linkages between small-scale fisheries and international fisheries management, this author moves on to presenting the research question this thesis aims to address.

1.2. The research question and preliminary reflections

International fisheries management is not only a matter of balancing political and economic interests of fishing nations. In addition to environmental concerns for the long-term survival of species, their ecosystems and related biodiversity, international fisheries management can also affect fishers and fishing communities that depend on those species, ecosystems and biodiversity for their livelihoods, social stability, cultural traditions and values. As noted above, small-scale fisheries and international fisheries management are intrinsically linked by the transboundary aquatic species,

⁶⁸ UNGA, Resolution 60/31 of 29 November 2005, ‘Sustainable Fisheries’ [10 March 2006, UN Doc A/RES/60/3]. at para 58.

⁶⁹ *ibid.* at para 8.

⁷⁰ UNGA, Resolution 61/105 of 8 December 2006, ‘Sustainable Fisheries’ (6 March 2007) UN Doc A/RES/61/105. at para 72.

⁷¹ UNGA, Resolution 78/68 of 5 December 2023, ‘Sustainable Fisheries’ [11 December 2023, UN Doc A/RES/78/68] paras 42, 183 and 190.

⁷² UN, ‘Report of the Resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks’ (UN 2023) Doc. A.CONF/210/2023/6 para 130.

which can be simultaneously harvested by small-scale fisheries and managed by states through international cooperation. In this scenario, one may wonder whether states place any concern on the people affected by international fisheries management; or whether the fishers concerned have any say or can participate in fisheries management that is led by states. These reflections pointed this author to the following research question: *to what extent can international law contribute to secure the participation of small-scale fisheries peoples in international fisheries management?*

Since small-scale fisheries mainly operate in areas under national jurisdiction, an initial assumption is that international law has no bearing nor should have any influence over small-scale fisheries. Conversely, for their local operation, small-scale fisheries peoples would have no reason to care for international law, even less so for the opportunity to influence international law-making. These assumptions came across this author's research throughout these years of doctoral studies. There appears to be an unintentional friction that keeps two epistemic communities (international law scholars, and small-scale fisheries scientists) apart, working in silos, despite the interconnections between the two fields, which this thesis underscores, and their common research goals aiming to effectively realize the full spectrum of fisheries sustainability. On one hand, international law scholars generally see fisheries as a unified sector (without distinguished fisheries subsectors or types); a sector that only raises international law concerns where fishing is of interest to more than one state, or when fishing impacts the environment, contributes or is impacted by climate change, tending to neglect the differentiated treatment that international law can provide to protect and promote small-scale fisheries.⁷³ On the other hand, small-scale fisheries scientists tend to generally see international law through a narrow lens, associated with the LOSC, its complementary instruments, the work led by FAO, and the SDGs, only more recently connecting small-scale fisheries with other international legal regimes dedicated to human rights, labour, and trade. Unpacking this thesis' main research question has thus led this author to think in a holistic and integrated manner, with a view to approximate the discussions of these two epistemic communities, and other

⁷³ With the exception of few scholars looking into small-scale fisheries issues in recent years, including this author, as section 1.4 of this thesis also demonstrates, the greatest part of the international legal scholarship refers to or examines fisheries in generic terms.

relevant ones, and interpret the different legal regimes that are pertinent to this context in a mutually supportive and complementary manner.

Before engaging further with this thesis and the methodology used to explore the research question, the next section reveals a bit of personal information about this author, which helps managing the reader's expectations and explaining the choices and directions taken when writing this thesis. From the next section onwards, this author uses the first personal pronouns to clearly state her own statements and opinions.

1.3. Author's positionality and subjectivity

Exploring a researcher's positionality helps the researcher and her/his audience to better understand the research itself, how the research was carried out, and how it has led to a given interpretation of facts and the research findings.⁷⁴ Positionality is informed by reflexivity, requiring researchers to self-reflect, reflect on their research, and unravel their part in it.⁷⁵ I hope this section can help the reader to better understand the researcher behind this thesis, my research, and how I see myself as a part in it.

Public international law, particularly the specialized environmental, marine, and fisheries regimes, has been part of my research interests over the last ten years.⁷⁶ But it was not until 2017 that I found myself deeply connected with the law of the sea, and encountered my passion for international fisheries law and the various different legal topics relating to fisheries and aquaculture. These topics include, unsurprisingly, small-scale fisheries, the SSF Guidelines, fisheries interactions with human rights,

⁷⁴ Andrew Gary Darwin Holmes, 'Researcher Positionality – A Consideration of Its Influence and Place in Qualitative Research – A New Researcher Guide' (2020) 8 *International Journal of Education* 1.

⁷⁵ *ibid* 2.

⁷⁶ I was initially drawn to studying international environmental law's effectiveness to understand its ability to influence States' behavioural change in response to sustainable development matters. I then focused on exploring liability issues arising from development activities in the ocean, particularly the use of carbon capture and storage technologies employed in the sub-seabed, a potential solution for mitigating climate change. Only the former work from my LLB research is publicly available, see Julia Nakamura, 'O Direito Ambiental Internacional: Construção e Efetividade Na Defesa Do Meio Ambiente' (Monography, LLB, Pontificia Universidade Católica do Rio de Janeiro (PUC-Rio) 2014) <<https://www.maxwell.vrac.puc-rio.br/22533/22533.PDF>> accessed 5 January 2023.

climate change,⁷⁷ the ecosystem approach to fisheries,⁷⁸ and, among others, illegal, unreported and unregulated (IUU) fishing, and the implementation of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) through national fisheries legal frameworks.⁷⁹ That 2017 year marked the beginning of my experience working for the Development Law Service (within the Legal Office of the FAO), including multiple consultancies carried out in parallel to these doctoral studies. Since February 2023, I have been working at the FAO as a legal officer.

We are now in February 2024, about five years and five months after my PhD induction week in September 2018. Although this is not a long period in a lifetime, it represented significantly intense and productive years for me. I carried out substantive research and concomitantly worked on those forementioned topics, including through consultancies on fisheries topics provided to different entities and research networks.⁸⁰ I will explain more about my research contributions in the next section, as they shed light on the gaps found in the literature review carried out for this thesis. For most part, my research gained unique and invaluable insights from the technical knowledge and practical work built during this experience, and which directly relate to this thesis' topic, especially my experiences working with the ecosystem approach to fisheries, the SSF Guidelines, and the interactions between fisheries and human rights issues.⁸¹

⁷⁷ The next section of this thesis showcases my substantive research work on these topics and contributions to small-scale fisheries research.

⁷⁸ I was the main author developing a diagnostic tool, which provides a checklist against which users can assess the level of alignment of a national policy and legal framework with the ecosystem approach to fisheries, and I have co-authored over 25 country reports that provide the findings of using this tool against such countries' policy and legal frameworks. This work is available at FAO, 'EAF-Nansen Programme' (*EAF-Nansen Programme*, 2023) <<https://www.fao.org/in-action/eaf-nansen/publications/programme-reports/en/>> accessed 21 January 2023.

⁷⁹ I have been working closely with the CITES Secretariat on this matter over the past five years. I co-authored the sourcebook that elucidates the interactions between CITES and fisheries, as well as provides guidance on enhancing fisheries legislation for better implementation of CITES in fisheries. See Julia Nakamura and Blaise Kuemlangan, 'Implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) through National Fisheries Legal Frameworks: A Study and a Guide (2nd Edition)' (FAO 2023) Legal Guide 4 <<https://www.fao.org/documents/card/en/c/cc8051en>>.

⁸⁰ In addition to the FAO, I provided consultancy services to the Pacific Islands Forum Fisheries Agency, the International Ocean Institute, and research collaborations on small-scale fisheries legal matters with the One Ocean Hub and the Too Big To Ignore Global Partnership for Small-Scale Fisheries Research.

⁸¹ I have also contributed to the development of two eLearning courses about the policy and legal considerations for the implementation of the ecosystem approach to fisheries and the SSF Guidelines; the publication of a policy brief that unpacks the human rights-based approach to

One of the greatest challenges I faced in this journey was to effectively alternate between the distinct styles of writings and aims of academic work and consultancies I used to do. It is important to note that this thesis reflects my independent work as a PhD researcher and scholar affiliated to the University of Strathclyde. My research for this thesis has been guided by international law, social, environmental, and fisheries science literature, and global governance doctrine. And I have attempted to write this thesis based on my own reflective thinking, subjectivity, and critique.

As an international law researcher, I align with the ‘enlightened positivists’,⁸² who, as Boyle and Chinkin explain, follow a more flexible theoretical approach and consider a broader set of methodologies that can be used to determine both state consent and the evidence constituting state consent, without relying solely on the formal sources of law as the core features of international legal discourse.⁸³ I do not affiliate with the traditional view of international law, which sees it as ‘a system of objective principles and neutral rules emanat[ing solely] from states’ will’, although I recognize that states are still the primary, but not the only, subjects of the international legal order.⁸⁴ Therefore, I understand the international law sources as not strictly those in the mainstream list of article 38(1) of the *Statute of the International Court of Justice* (ICJ Statute).⁸⁵ For me, normativity is not only attributed to ‘hard law’ (binding rules),

small-scale fisheries; and the development of ‘SSF-LEX’, a policy and legal database entire dedicated to small-scale fisheries. See FAO, ‘Applying Coherently the Human Rights-Based Approach to Small-Scale Fisheries for Achieving Multiple Sustainable Development Goals’ <<https://www.fao.org/3/cc3251en/cc3251en.pdf>> accessed 24 January 2023. See also FAO, ‘SSF-LEX’ <<https://ssfex.fao.org>> accessed 16 July 2023.

⁸² As opposed to traditional positivists. A recent review of the theories of law and their positions in respect of principles and the general principles of international law can be found in Ricardo P Mazzeschi and Alessandra Viviani, ‘General Principles of International Law: From Rules to Values?’ in Ricardo P Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018).

⁸³ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 12–13. See also Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 46–52; Ines Gillich, ‘The Normativity of Principles Within the Positivist Theory of International Law’ (2015) 41 *NCJ Intl L* 1, 6–7. at pp. 46-52; Gillich. at 6-7.

⁸⁴ As summarised in Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 21.

⁸⁵ Article 38(1) provides for ‘a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of

but may arguably be attributed to ‘soft law’ (non-formally binding rules) as well, which, in my view, can exert normative significance and legal effects.⁸⁶ As Boyle explains, soft law can be seen as an alternative and complementary to treaties, or as authoritative tools for treaties’ interpretation or amplification.⁸⁷ Soft law can be a substitute to a treaty in cases where states seek to avoid cumbersome processes of adopting and ratifying a treaty, or evade harder processes relating to a treaty’s future amendments.⁸⁸ Through soft law, states agree on detailed guidance, broader or more elaborated standards, with the discretion to adopt or not, in full or partially, such standards at the national level, while enjoying more limited consequences for non-compliance.⁸⁹ This is an important discussion because soft law plays a critical part in the international law for small-scale fisheries, as I explain in detail in chapter 4.

It is worth noting that this PhD research has also gained valuable insights from transdisciplinary research, aimed at integrating and conciliating knowledge and perspectives across different disciplines dealing with fisheries.⁹⁰ I have been part of such transdisciplinary research initiatives and recognise its usefulness in clarifying, expanding, and enhancing knowledge on fisheries, as well as in identifying needs and solutions to persisting challenges hindering fisheries sustainability.⁹¹

law’. See Statute of the International Court of Justice (ICJ Statute) (adopted 26 June 1945, entered into force 24 October 1945) (1946 UKTS 67).

⁸⁶ The extent to which soft law has achieved greater levels of acceptance and recognition by states and the international community varies by instrument and depends on how they attribute the instrument’s normative value, force, and effect. See Dinah Shelton, ‘Introduction: Law, Non-Law and the Problem of Soft Law’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2003); Andrews T Guzman and Timothy Meyer, ‘International Soft Law’ (2010) 2 *Journal of Legal Analysis* 171; Bryan H Druzin, ‘Why Does Soft Law Have Any Power Anyway?’ (2017) 7 *Asian Journal of International Law* 361.

⁸⁷ Alan Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *The International and Comparative Law Quarterly* 901. See also his recent piece in Alan Boyle, ‘Soft Law’, *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021).

⁸⁸ Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (n 87) 903.

⁸⁹ *ibid.*

⁹⁰ For recent papers, see Ratana Chuenpagdee, ‘Transdisciplinary Perspectives in Ocean Governance’ in International Ocean Institute - Canada (ed), *The Future of Ocean Governance and Capacity Development: Essays in Honour of Elizabeth Mann Borgese (1918-2002)* (Brill Publishers 2019).

⁹¹ TBTI Global, ‘Handbook for Transdisciplinarity in Fisheries & Ocean Sustainability: Online Learning and Training Course’ (TBTI Global 2021); Elizabeth A Nyboer and others, ‘Goals, Challenges, and next Steps in Transdisciplinary Fisheries Research: Perspectives and Experiences from Early-Career Researchers’ [2022] *Reviews in Fish Biology and Fisheries*; Steve Cooke and

Let me now return to the thesis.

1.4. Literature review and thesis' originality

Participatory fisheries management is not a new issue to the fisheries world, as the seminal works of Pinkerton, Jentoft,⁹² and Ostrom on the collective action for the 'governance of the commons',⁹³ back in the late 1980s, set out the conceptual foundations for literature on participatory approaches to managing common resources like fisheries. However, this thesis' main inquiry remains insufficiently addressed by literature, as the context here is focused on small-scale fisheries and participatory international fisheries management, examining this topic from an international law perspective. Importantly, this thesis investigates such topic through an in-depth study of the ecosystem approach and its application to fisheries, further connecting this approach to human rights in the context of small-scale fisheries, and originally elaborating the international law for small-scale fisheries in what it entails for the participation of small-scale fisheries peoples in international fisheries management.

As noted earlier in this chapter, the international law literature on small-scale fisheries is scarce. The closest to researching this topic in international law was Van der Burgt, who, among other things, argued for a 'widened poverty approach' in fisheries law instruments to ensure they: equally address resource-related and human development issues, broadly tackle poverty, clearly define small-scale fisheries, include the human dimensions of poverty (e.g. vulnerability), and the elements of

others, 'Towards Vibrant Fish Populations and Sustainable Fisheries That Benefit All: Learning from the Last 30 Years to Inform the next 30 Years'.

⁹² For the seminal literature on the topic, see: Evelyn Pinkerton (ed), *Co-Operative Management of Local Fisheries: New Directions for Improved Management and Community Development* (UBC Press 1989); Svein Jentoft, 'Fisheries Co-Management: Delegating Government's Responsibility to Fishermen's Organizations' (1989) 13 *Marine Policy* 137; Fikret Berkes, Peter George and Richard J Preston, 'Co-Management: The Evolution in Theory and Practice of the Joint Administration of Living Resources' (1991) 18 *Alternatives* 12; Sevaly Sen and Jesper Raakjaer Nielsen, 'Fisheries Co-Management: A Comparative Analysis' (1996) 20 *Marine Policy* 405; Robert S Pomeroy and Fikret Berkes, 'Two to Tango: The Role of Government in Fisheries Co-Management' (1997) 21 *Marine Policy* 465.

⁹³ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).; Elinor Ostrom, 'Collective Action and the Tragedy of the Commons' in Garrett Hardin and John Baden (eds), *Managing the Commons* (WH Freeman 1977).

human development (e.g. education).⁹⁴ Van der Burgt found that treaties and other instruments mainly address, but not specify, the needs and interests of small-scale fisheries peoples in fisheries management and conservation,⁹⁵ without recognizing their contribution to human development.⁹⁶ The principle of participation in decision-making is analysed, but she solely identifies the principle's expressions in provisions of international instruments.⁹⁷ I will engage more with her research later in the thesis, but it is worth underlining a couple of limitations I find therein, which contrast with my analysis. First, in understanding the principles of equity and participation, Van der Burgt divides them into 'among state/interstate' aspects, which draws attention to developing countries, and 'within state/intrastate' aspects, which shed light on local fishing communities. As such, she does not envision the principles of equity and participation within the intersection of those two aspects, meaning: a scenario of *interstate* aspects, where states negotiate through RFBs, and which, at the same time, considers the participation of *intrastate*'s actors, through the representation of small-scale fisheries peoples in RFBs' meetings, either directly or indirectly through the respective national delegations or NGOs, a matter that is relevant to both developed and developing countries. In other words, it is a scenario where small-scale fisheries peoples can equitably enjoy the right to participate in interstate negotiations. Another limitation in Van der Burgt's research is a temporal one, in that her analysis was concluded some time ago, prior to the adoption of the SSF Guidelines, UNDROP, and other instruments that have significantly elaborated on the principles of equity and participation in fisheries, as I examine in section 3.2.

Other small-scale fisheries issues covered in Van der Burgt's research have been examined in related research, notably the analysis of fishing bilateral and multilateral agreements, which regulate, by third parties (e.g., EU, China, and USA), fishing of the surplus available in the exclusive economic zones (EEZs) of African, Caribbean and

⁹⁴ See chapter 4 'Human Development and the Small-Scale Fisheries Sector' in Neiken Van der Burgt, *The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EU Fisheries Instruments*, vol 15 (Brill Publishers 2012) 117–120. at 117-120.

⁹⁵ *ibid* 185–190. at 185-190.

⁹⁶ *ibid* 209–211. at 209-211.

⁹⁷ *ibid* 352–354. at 352-354.

Pacific developing states. Gammage, Witbooi and Elliott explored these agreements in respect of their economic, environmental, and social impacts on the hosting countries, and on small-scale fisheries peoples' human rights.⁹⁸ While my research does not discuss fishing access agreements, it can benefit this research through the notion that meaningful participation of small-scale fisheries peoples in the negotiations of such agreements should be duly considered, as provided in the SSF Guidelines.⁹⁹

The remaining international law literature on small-scale fisheries has dealt with other issues, but not with participatory international fisheries management. Witbooi examined the implications of applying stronger law enforcement approaches against crimes in small-scale fisheries, and the related impacts on human rights and access rights to fishery resources.¹⁰⁰ In turn, Goettsche-Wanli, Gavouneli, and Soliman have explored the cross-cutting issue of gender equality in small-scale fisheries.¹⁰¹ Other contributions, which I will examine later in this thesis, are worth noting: Song and Soliman's article on the meaning of human rights in small-scale fisheries;¹⁰² Morgera and Diz's analysis of ecosystem services' contributions to sustainable small-scale fisheries and poverty alleviation;¹⁰³ Morgera and Ntona's discussion on opportunities for enhancing scientific knowledge, research capacity, marine technology transfer to support small-scale fisheries' social development, while protecting their access rights

⁹⁸ Clair Gammage, 'A Sustainability Impact Assessment of the Economic Partnership Agreements: Challenging the Participatory Process' (2010) 3 *Law and Development Review* 107; Emma Witbooi, *Fisheries and Sustainability: A Legal Analysis of EU and West African Agreements*, vol 6 (Brill Publishers 2011); Kyle Elliot, 'Trouble in the Caribbean: Responses to a Potential Chinese-Bahamian Bilateral Fishing Agreement' (2018) 28 *Duke Environ L & Policy Forum* 305.

⁹⁹ FAO SSF Guidelines (n 25) para 5.7.

¹⁰⁰ Monieba Isaacs and Emma Witbooi, 'Fisheries Crime, Human Rights and Small-Scale Fisheries in South Africa: A Case of Bigger Fish to Fry' (2019) 105 *Marine Policy* 158.

¹⁰¹ Gabriele Goettsche-Wanli, 'Gender and the Law of the Sea: A Global Perspective' in Irini Papanicolopulu (ed), *Gender and the Law of the Sea*, vol 88 (Brill Publishers 2019) 41, 51, 65 and 68; Maria Gavouneli, 'Protecting Women Fishers: The Gender Parameters of Labour Rights at Sea', *Gender and the Law of the Sea*, vol 88 (Brill Publishers 2019); Adam Soliman, 'Understanding Gender Equality in Small-Scale Fisheries and Its Role in Enhancing Blue Justice' in Svein Jentoft and others (eds), *Blue Justice: Small-Scale Fisheries in a Sustainable Ocean Economy*, vol 26 (Springer 2022).

¹⁰² Andrew Song and Adam Soliman, 'Situating Human Rights in the Context of Fishing Rights – Contributions and Contradictions' (2019) 103 *Marine Policy* 19.

¹⁰³ Daniela Diz and Elisa Morgera, 'Insights for Sustainable Small-Scale Fisheries' in Karen Schreckenber, Georgina Mace and Mahesh Poudyal (eds), *Ecosystem Services and Poverty Alleviation: Trade-Offs and Governance* (Routledge 2018).

to fishery resources;¹⁰⁴ Penca and others' account of the practical implications of article 17 of the European Union (EU) Common Fisheries Policy (CFP),¹⁰⁵ through selected case studies, and identification of levels of inequality in the systems governing and facilitating access to fishery resources.¹⁰⁶

Additionally, there is legal research specific to regions where small-scale fisheries have grown with considerable agency in markets, policy, and law, despite persisting challenges of recognition and inclusivity. For instance, in Europe and North America, Penca analysed market-based tactics empowering small-scale fisheries with products' advertising, traceability, and labelling, arguing that such initiatives can set out standard-based regulation for small-scale fisheries, representing a useful way to implement the SSF Guidelines and the CFP.¹⁰⁷ My research complements these works interpreting systemically different regimes of international law for small-scale fisheries, with a focus on the participation of small-scale fisheries peoples in international fisheries management.

During my doctoral studies, I have contributed to linking small-scale fisheries and international law through different publications. Since the article published with Hazin assessing the alignment of Brazil's fisheries and aquaculture policy and law with the SSF Guidelines,¹⁰⁸ I have been arguing, accordingly, that due to the multiple small-scale fisheries issues covered by the SSF Guidelines, fisheries policies and laws should be interpreted and used in conjunction with other policies and laws, which, in turn, complement the fisheries instruments with detailed guidance and regulation on, inter alia, human rights, social, labour, environmental, and trade issues. With Chuenpadee and El Halimi, we developed a rapid appraisal framework to assess key legal issues

¹⁰⁴ Elisa Morgera and Mara Ntona, 'Linking Small-Scale Fisheries to International Obligations on Marine Technology Transfer' (2018) 93 *Marine Policy* 295.

¹⁰⁵ Which requires EU member States to use 'transparent and objective criteria including those of an environmental, social and economic nature' when allocating fishing opportunities across the said States. See European Parliament and European Council Regulation (EU) No 1380/2013 of 11 December 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 (CFP).

¹⁰⁶ Alicia Said and others, 'Small-Scale Fisheries Access to Fishing Opportunities in the European Union: Is the Common Fisheries Policy the Right Step to SDG14b?' (2020) 118 *Marine Policy* 1.

¹⁰⁷ Jerneja Penca, 'Transnational Localism: Empowerment through Standard Setting in Small-Scale Fisheries' 8 *Transnational Environmental Law* 143.

¹⁰⁸ Nakamura and Hazin (n 19).

for small-scale fisheries in the laws and policies of 25 countries,¹⁰⁹ the findings of which served as a ‘step-zero’ for advancing transdisciplinary work that deepens the understanding of countries’ laws and policies relevant to small-scale fisheries. This article was the basis for a book I co-edited with Chuenpagdee and Jentoft, containing case studies of countries and territories around the world, which examine in greater depth the extent to which those key legal issues for small-scale fisheries are addressed in national laws and policies.¹¹⁰ In the same book, I wrote a chapter that explores the recognition and protection of human rights, fishing rights, and tenure rights of fishers in international law jurisprudence.¹¹¹ In an article published in 2022, I argued and continue to defend the SSF Guidelines’ normative significance and legal force, based on the legitimate participatory process of the guidelines’ development and adoption; the guidelines’ normative content that reinforces existing obligations states have already adhere to in treaties and these instruments’ application to the small-scale fisheries context, and; the guidelines’ law-making effects translated into instruments subsequently adopted that reiterate the guidelines, to different extents, at different governance levels.¹¹² My contributions to building the international law for small-scale fisheries will be elaborated in chapter 4 and throughout this thesis.¹¹³

This thesis provides a novel contribution to literature, which has not specifically explored the intersection underpinning international law, small-scale fisheries, and participation in international fisheries management. Let me elaborate more on this

¹⁰⁹ These key legal issues are: legal definition of small-scale fisheries and related terms; tenure and/or labour rights; participation in fisheries management and conservation; partial, exclusive zones and/or preferential access; public financial mechanisms; gender laws and policies; climate change laws and policies; and representation of small-scale fisheries peoples in institutional arrangements. See Nakamura, Chuenpagdee and El Halimi (n 18).

¹¹⁰ Julia Nakamura, Ratana Chuenpagdee and Svein Jentoft, *Implementation of the Small-Scale Fisheries Guidelines: A Legal and Policy Scan* (Springer 2024).

¹¹¹ Julia Nakamura, ‘The Fundamental Rights of Small-Scale Fishers and Their Communities in the International Jurisprudence’ in Julia Nakamura, Ratana Chuenpagdee and Svein Jentoft (eds), *Implementation of the Small-scale Fisheries Guidelines: A Legal and Policy Scan* (Springer 2024).

¹¹² Nakamura, ‘Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries’ (n 26).

¹¹³ For now, it is worth mentioning that other contributions include: Morgera and Nakamura (n 44); Julia Nakamura, Daniela Diz and Elisa Morgera, ‘International Legal Requirements for Environmental and Socio-Cultural Impact Assessment for Large-Scale Industrial Fisheries’ (2022) 31 *Review of European, Comparative & International Environmental Law* 336; Kyle Fawkes, Julia Nakamura and Mitchell Lennan, ‘Leveraging International Fisheries Law for Coastal Security in the Anthropocene: Addressing Conflicts in Fisheries’ in Ilaria Vianello and Pierandrea Leucci (eds), *Fisheries and Law of the Sea in the Anthropocene Era*, vol 2 (Luglio Editore 2023); *ibid.*

specific literature gap. In addition to Van der Burgt's analysis on participation in the 'among state/interstate' and 'within state/intrastate' contexts, other researchers began to argue, over the last decade, for more transparent and accessible decision-making processes in RFBs, concerned that the decisions adopted in such forums would create a disproportionate burden on developing states. Hanich and others encouraged research on the 'equitable distribution of conservation limits in transboundary oceanic fisheries'.¹¹⁴ In turn, Clark and others found good transparency practices in 12 RFMOs, while recognising need for improvement in certain practices such as in the availability of information on monitoring, control and surveillance.¹¹⁵ Research on transparency in fisheries governance was later advanced in a special issue of *Marine Policy*, published in early 2022,¹¹⁶ and I return to this literature in chapter 6. The fact is that research on the impacts of international fisheries management and transparency in RFMOs has been primarily concerned with the impacts on, and needs of developing *states*, and have not dealt with non-state actors also affected, notably, the small-scale fisheries peoples. This thesis thus contributes to filling this literature gap as well, by exploring the participation of small-scale fisheries peoples in RFBs decision-making, which can ultimately contribute to more equitable, transparent and just outcomes in such forums.

Let me now present how this thesis was developed and its outline organized.

1.5. Thesis' methodology and structure

This thesis adopts a doctrinal research method, examining both primary and secondary sources of international law, and gives special emphasis on non-formally binding instruments and governance processes for their particular significance to the

¹¹⁴ Quentin Hanich and others, 'Research into Fisheries Equity and Fairness – Addressing Conservation Burden Concerns in Transboundary Fisheries' (2015) 51 *Marine Policy* 302. See also Kamal Azmi and others, 'Defining a Disproportionate Burden in Transboundary Fisheries: Lessons from International Law' (2016) 70 *Marine Policy* 164.

¹¹⁵ Each RFMOs completed a questionnaire of 34 questions, divided into three sections (availability of information, participation in decision-making processes, and access to outcomes), and the findings placed the RFMOs in a scoring range where the maximum 50 points represented the most transparent behaviour. See Nichola A Clark, Jeff A Ardron and Linwood H Pendleton, 'Evaluating the Basic Elements of Transparency of Regional Fisheries Management Organizations' (2015) 57 *Marine Policy* 158.

¹¹⁶ Guest editors Solène Guggisberg, Aline Jaeckel and Tim Stephens were in charge of the special section of Volume 136 of the journal.

international law for small-scale fisheries. I use systemic interpretation of instruments from different legal regimes, based on article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),¹¹⁷ thus considering the broad context of international instruments and rules relevant to the thesis' topic. Using this systemic interpretative lens, I explore the ecosystem approach, the fisheries and human rights nexus, the international law for small-scale fisheries, and selected regional fisheries management practices, linking and interpreting international law in different specialized regimes to answer the research question.

Following this introductory chapter, the thesis provides additional five chapters, summarized below:

Chapter 2 explores the evolving developments in international law literature on the ecosystem approach, its legal status, and specifically demonstrates the consolidated status of the ecosystem approach to fisheries as a principle of international fisheries law. This in-depth analysis finds the human dimensions of the ecosystem approach to fisheries to be insufficiently explored in literature, without a full understanding of the needs of the humans behind the fishing activities. This leads me to expand the research on the human dimensions of the EAF through a complementary analysis of the human rights framework.

Chapter 3 investigates the human rights and fisheries nexus, drawing useful insights from international law literature on the protection of people at sea, noting its predominant concerns with issues of decent work and safety applicable to fishers and fishworkers on board fishing vessels. This leads me to critically examine the human rights approaches in the fisheries context, including the human rights-based approach to small-scale fisheries. Then I link the ecosystem approach to fisheries with human rights to expand the meaning of adequate participation of small-scale fisheries peoples in international fisheries management and the consequent protection of their rights.

Chapter 4 moves slightly away from the thesis' topic but finds this necessary for the interpretative exercise of key international law instruments that govern and regulate small-scale fisheries. This brings me to question the pertinence of defining

¹¹⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1155 UNTS 331) art 29.

small-scale fisheries in international law and suggest preliminary ideas on potential international legal criteria for characterizing small-scale fisheries peoples. I then return to the participation element of the thesis, recalling on the principles and rules for public participation in the management of natural resources and interpreting these legal sources in conjunction with other principles and instruments specifically relevant to small-scale fisheries. This analysis, I argue, provides the normative foundations for the participation of small-scale fisheries peoples in international fisheries management.

Chapter 5 takes a different turn on the thesis' topic, examining participation from a governance perspective, recognizing the practical challenges of realizing participatory international fisheries management, based on the complex international legal framework. I thus critically engage with studies on polycentricity in fisheries, then reflect on deliberative democracy as a conceptual framework that can guide participatory international fisheries management. I research democratization of the knowledge system informing fisheries management, and demonstrate the international normative foundations for the adequate integration of small-scale fisheries peoples' knowledge contributions to international fisheries management. Based on these accounts, I analyse social justice (and blue justice), as driving forces for strengthening participatory international fisheries management and transformation in global fisheries governance toward this end.

Chapter 6 then brings a more practical investigation of the matter of participation of small-scale fisheries peoples in RFBs. I examine selected RFBs for their pertinence in addressing small-scale fisheries issues, including RFBs that cover coastal fisheries and govern inland fisheries in transboundary watercourses. Relevant experiences in the EU, Canada, USA, and New Zealand illustrate the different levels of participatory fisheries management in inter-state and inter-tribal forums. I further explore the scholarly debate on transparency in RFMOs and assess the normative framework of selected RFMOs to clarify potential procedural avenues for the participation of small-scale fisheries peoples in the relevant decision-making processes.

Finally, chapter 7 concludes this thesis. I re-state the research question based on the findings of the previous chapters, provide recommendations for future research, and share some considerations for the way forward.

CHAPTER 2

Exploring the ecosystem approach in international law for enhanced participatory fisheries management

States govern their fisheries sector and subsectors through multiple tools, policies, laws, and plans. These instruments provide guidance, standards, and rules on a range of fisheries matters, notably on fisheries management. The latter, in turn, takes the form of a process, which includes the collection of data, analysis, planning, decision-making, regulation and governance of fishing and fishing related activities based on predefined objectives.¹¹⁸ Complex features of this process are captured in Cochrane's description of fisheries management as a 'multi-pronged process that never ends as long as the fishery continues', or 'a multi-disciplinary process, requiring input from many different specialists'.¹¹⁹ Therefore, managing fisheries relies on principles and approaches that guide the actions of different stakeholders. The ecosystem approach is one of such approaches. This approach has been part of the international legal discourse for about fifty years. While research on this topic began to timidly flourish from the mid-1980s, the approach, or part of its elements, has been alluded by many contemporary authors to be implicitly enshrined in several international instruments previously adopted, as old as the 1972 Stockholm Declaration on the Human Environment.¹²⁰ In effect, while multiple conceptual and legal reference points exist about the ecosystem approach, informed by natural and social science, and legal

¹¹⁸ FAO, Fisheries management (FAO Technical Guidelines for Responsible Fisheries No. 4. Rome, FAO. 1997) 1997 7.

¹¹⁹ Kevern L Cochrane, 'Introduction - Fisheries Management' in Kevern L Cochrane and Serge M Garcia (eds), *A Fishery Manager's Guidebook* (FAO and Wiley-Blackwell 2009) 5.

¹²⁰ See Principle 2 of the UN, Declaration on the Human Environment (Stockholm Declaration) (adopted at the UN Conference on the Human Environment, Stockholm, 16 June 1972) UN Doc. A/Conf.48/14.

literature,¹²¹ the ecosystem approach is a dynamic and adaptive concept that evolves as our knowledge grows about ecosystems, and its interactions with biotic and abiotic resources. De Lucia provides a valid point about locating the ecosystem approach within a ‘broad conceptual space’, rather than a ‘well-defined concept’, as distinct orientations exist, as well as different views, ideologies, and perspectives that influence and articulate this approach in different contexts.¹²²

In this thesis, I adopt two definitions of the ecosystem approach: a broad one and a specific one to fisheries, which were respectively adopted under the biodiversity and fisheries regime. The first, agreed upon by the Conference of the Parties (CoP) to the *Convention on Biological Diversity* (CBD),¹²³ defines the ecosystem approach as a ‘strategy for the *integrated* management of land, water and living resources that promotes conservation and sustainable use in an *equitable* way’.¹²⁴ I stressed two elements of this definition because of their relevance to the notion of approximating international and local stakeholders (integration) for the management of transboundary aquatic species commonly shared, taking small-scale fisheries participation adequately into account (equity). As Morgera rightly explains, integration entails that legal and management strategies are integrated at both international and local levels through harmonisation and coherence of national and international efforts, coordinated cooperation of national and local actors, and use of different knowledge sources as basis for decision-making.¹²⁵ The same would be pertinent for realizing participatory international fisheries management. Equity, in turn, relates to ‘a decentralized, social process’, which requires ‘representation of community interests in the decision-making process’.¹²⁶ This is ideally expected in participatory fisheries management,

¹²¹ There is not a single definition of the ecosystem approach agreed upon and used universally. The approach remains undefined in treaties, but it is defined differently in non-binding instruments, as explained further below.

¹²² Vito De Lucia, *The ‘Ecosystem Approach’ in International Environmental Law: Genealogy and Biopolitics* (Routledge 2019) 56 and 63.

¹²³ Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993) (1760 UNTS 79).

¹²⁴ CBD, CoP5, ‘Ecosystem Approach’, UNEP/CBD/COP/5/23 (22 June 2000) Decision V/6 s A(1) emphasis added.

¹²⁵ As explained in Elisa Morgera, ‘The Ecosystem Approach and the Precautionary Principle’ in Elisa Morgera and Jona Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar Publishing 2017) 72.

¹²⁶ *ibid* 72–73.

ensuring that all interested people are included and adequately represented in the discussions and deliberations on conservation and management measures.

The other definition of the ecosystem approach was developed through the FAO, which refers to the ecosystem or ecosystem-based approach to fisheries (EAF) as one that ‘strives to balance diverse *societal* objectives’ and which takes into account the ‘knowledge and uncertainties about biotic, abiotic, and *human* components of ecosystems and their interactions and applying an integrated approach to fisheries within ecological meaningful boundaries’.¹²⁷ This sectoral definition complements the definition of the ecosystem approach under the CBD, bringing the need to balance the different interests of groups and communities within a society, and of integrating their collective efforts in managing and conserving fisheries, its ecosystems, and the human components of ecosystems. I underscored two elements in that definition as they explicitly relate to the social aspect of the EAF, which links to participatory fisheries management. I get back to this in section 2.4.

When used in conjunction, the two definitions shed light on the relevant elements supporting equitable integrated fisheries management. As explained further below, more detailed guidance on the normative contents of the ecosystem approach and the EAF help one to understand their meaning and how their use can strengthen participatory and equitable international fisheries management. Integration and equity also relate to the notion of giving special guarantees for the meaningful participation of vulnerable groups in managing transboundary aquatic species. Having seen these definitions of the ecosystem approach and the EAF, this chapter moves on to a more in-depth analysis of the ecosystem approach pursuant to international law literature and international legal developments over the last thirty years (*section 2.1*). I then investigate the approach’s legal status in international law (*section 2.2*). These findings substantiate my submission that the EAF is a consolidated principle of international fisheries law (*section 2.3*). The participation and equity components of the ecosystem approach are further examined, noting the challenges and weakness of this approach in respect of its human dimensions (*section 2.4*). Finally, I conclude (*section 2.5*).

¹²⁷ FAO, The ecosystem approach to fisheries (FAO Technical Guidelines for Responsible Fisheries No 4, Suppl 2 Rome 2003) (EAF Technical Guidelines) 6 emphasis added.

2.1. The evolving international legal discourse on the ecosystem approach

Literature on the ecosystem approach is vast, involving multiple disciplines and contexts that deal with holistic and integrative ways of conducting environmental management and planning, and which apply the approach across different sectors and scales of governance. To organize my knowledge about the ecosystem approach, and the evolving international legal discourse on this approach over the years, I structure the international law scholarly production on the ecosystem approach by period. I frame the relevant international law literature in three moments: early assessments (prior to 2000's), contemporary studies (prior to 2020's), and emerging trends (from 2020's onwards). This scholarly debate evolved alongside key international legal developments, which elaborated the ecosystem approach, its normative content, and sectoral application.

2.1.1. Early assessments: awakening ecosystems considerations

The first authors to examine the ecosystem approach did so at a time when the approach was beginning to formally reach international law texts explicitly. While one can find implicit expressions of the ecosystem approach in treaties and non-binding instruments adopted since the 1970s,¹²⁸ legal scholars began to engage with this approach from the mid-1980s. Back then, early assessments on the approach primarily dealt with states' jurisdictional constraints and criticism for states and institutions' narrow views on environmental management, which were limited and focused on specific zones, species, and ecosystems. I understand such phase as one of 'awakening' international law to ecosystem considerations, which led authors to conceptualize the meaning of the ecosystem approach. In 1985, Martin Belsky, former deputy general

¹²⁸ For instance, the 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction called for States to cooperate in the adoption of international rules, standards and procedures for preventing marine and coastal pollution, contamination and interference with the ecological balance of the marine environment. See UNGA, Resolution 2749/XXV of 17 December 1970, 'Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction' [12 December 1970, UN Doc A/RES/25/2749, adopted by 108 votes to 0 against; 14 abstentions] para 11.

counsel of the National Oceanic and Atmospheric Administration (NOAA),¹²⁹ USA, explored opportunities for a ‘new international law’ favouring ‘total ecosystem management’.¹³⁰ This new domain, imbedded in, but not limited to Part XII, LOSC (‘protection and preservation of the marine environment’), would, in his views, be sensitive and duly consider all resources, species, habitats, found within and beyond national jurisdiction.¹³¹ While recognizing that the ‘total ecosystem management’ reached merely moral support in international law,¹³² Belsky underscored its potential, noting the ecosystem-sensitive provisions of the *Convention on the Conservation of Antarctic Marine Living Resources* (CCAMLR Convention).¹³³ Belsky argued that this ‘new international law requirement’ meant a comprehensive or ‘ecosystem model’ for ocean policy and management, and promoted and ascertained the possibility for the USA to implement the model under its existing statutes.¹³⁴

The growing interest of the international community in embracing ecosystems considerations in policy and law was seen in the adoption of the ecosystem approach as the ‘primary framework of action’ under the CBD, at CoP-2 in 1995,¹³⁵ stimulating more scholarly production. Belsky reinforced the ecosystem model in a more thorough analysis of the legal developments that enshrined the ecosystem approach in both treaty law and non-formally binding instruments, demonstrating the evolution of international law in applying such model, which, he argued, could continue to be

¹²⁹ The fisheries division under the NOAA (known as NOAA Fisheries) is the fisheries management and regulatory authority in the USA. Currently, NOAA Fisheries adopts ecosystem-based approach to its ‘broad ocean and coastal stewardship, science, and service programs’. The ecosystem-based fisheries management or EBFM underlies the NOAA Fisheries’ mission. See more in NOAA Fisheries, ‘Ecosystem-Based Fisheries Management’ <<https://www.fisheries.noaa.gov/national/ecosystems/ecosystem-based-fisheries-management>> accessed 20 January 2023.

¹³⁰ Martin H Belsky, ‘Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law’ (1985) 22 San Diego Law Review 733.

¹³¹ *ibid.*

¹³² *ibid* 757.

¹³³ Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR Convention) (20 May 1980, entered into force on 7 April 1982) (19 ILM 841) art II(3) and preamble.

¹³⁴ Martin H Belsky, ‘The Ecosystem Model Mandate for a Comprehensive United States Ocean Policy and Law of the Sea’ (1989) 26 San Diego Law Review 417; Martin H Belsky, ‘Using Legal Principles to Promote the “Health” of an Ecosystem’ (1996) 3 Tulsa Journal of Comparative and International Law 183, 192–204.

¹³⁵ CBD, CoP2, ‘Preliminary consideration of Components of Biological Diversity particularly under Threat and Action which should be taken under the Convention’, UNEP/CBD/COP/2/19 (6-7 November 1995) Decision II/8 para 1.

operationalized through states practice and become ‘a custom binding on nation-states’.¹³⁶ These initial efforts of Belsky were accompanied by Brunée and Toope, who shed light on environmental security, and explored the ecosystem approach in the shared freshwater context.¹³⁷ The two scholars argued that international environmental law needed a reorientation, by shifting emphasis ‘from its territorial focus to a more ecosystem-oriented approach’.¹³⁸ Recognizing the challenges of accommodating ‘ecosystem perspectives’ into the international legal order, Brunée and Toope suggested nuanced approaches, which would entail clarifying procedures and regimes, reinforcing existing rules and enhancing them from an ecosystem perspective.¹³⁹ At the same time, they proposed more radical approaches, which would entail embedding explicitly ecosystem orientation into the principles of sustainable development, intergenerational equity, and precautionary principle, while ensuring the scope of environmental management is centred on ecosystems and enables cooperation among states interacting with such ecosystems.¹⁴⁰ By prioritizing ecosystems values rather than states’ boundaries and territorial interests, the ‘international ecosystem law’, as they called it, could contribute to effective environmental security.¹⁴¹

Similarly, Korhonen argued that national and international conservation measures were needed to ‘reflect the interdependent links that characterize riverine ecosystems’, and accordingly ensure ‘protection across jurisdictional boundaries’.¹⁴² She contended that the ecosystem approach requires ‘rethinking and reshaping our normative and management frameworks’ in a spatial sense and through incorporation of the ‘ecological considerations into all human uses of the environment’.¹⁴³ In another paper, Brunée and Toope argued that the ecosystem approach would ‘help focus attention on the ultimate beneficiaries of security’, namely, the individuals and

¹³⁶ Martin H Belsky, ‘Using Legal Principles to Promote the “Health” of an Ecosystem’ (1996) 3 *Tulsa Journal of Comparative and International Law* 183, 192–204, at 192–204.

¹³⁷ Jutta Brunnée and Stephen J Toope, ‘Environmental Security and Freshwater Resources: A Case for International Ecosystem Law’ (1994) 5 *Yearbook of International Environmental Law* 41.

¹³⁸ *ibid* 55.

¹³⁹ *ibid* 56–65.

¹⁴⁰ *ibid* 65–75.

¹⁴¹ *ibid* 66 and 71.

¹⁴² Iris M Korhonen, ‘Riverine Ecosystems in International Law’ (1996) 36 *Natural Resources Journal* 481, 482.

¹⁴³ *ibid* 513.

communities, and would bring an ‘independent value’ to the protection of freshwater resource in negotiations, benefiting both industrialized and developing countries.¹⁴⁴ This is likely the first time literature directed attention to local communities, though without including them or considering their participation in managing ecosystems and associated resources. Kirk, in turn, reflected on the history of the law of the sea, and flagged out the problems of managing the ocean and regulating activities therein on a sectoral basis.¹⁴⁵ She proposed a ‘holistic ecosystem-oriented approach’ to facilitate intersectoral coordination, and cross-referencing of information between regulatory regimes and organizations dealing with different species.¹⁴⁶ In fisheries, Redgwell showcased the CCAMLR Convention as a ‘path-breaking example’ of the ecosystem approach for adopting a ‘modern multispecies ecosystem approach’,¹⁴⁷ stating that the ‘frailties of traditional fisheries resource regimes’ could be addressed ‘if only an ecosystem approach (however well it functions) is adopted’.¹⁴⁸

These propositions and expectations underpinning the ecosystem approach in international law were met, to some extent, in the late 1990s and thereafter. Notably, the *Malawi Principles for the Ecosystem Approach* (‘CBD Malawi principles’) were endorsed at CBD CoP-4, delineating the twelve complementary and interlinked principles for the ecosystem approach.¹⁴⁹ I examine some of these CBD Malawi principles in section 3.3.1. Other international legal developments dealt with the ecosystem approach in different contexts, and contributed to strengthening the recognition and legal content of the approach in international law.

¹⁴⁴ Jutta Brunnée and Stephen J Toope, ‘Environmental Security and Freshwater Resources: Ecosystem Regime Building’ (1997) 91 *The American Journal of International Law* 26, 27.

¹⁴⁵ Elizabeth A Kirk, ‘Maritime Zones and the Ecosystem Approach: A Mismatch?’ (1999) 8 *Review of European, Comparative & International Environmental Law* 67.

¹⁴⁶ *ibid* 69–71.

¹⁴⁷ Catherine Redgwell, ‘Protection of Ecosystems under International Law: Lessons from Antarctica’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999).

¹⁴⁸ *ibid* 224.

¹⁴⁹ CBD, CoP4, ‘Report and recommendations of the third meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, and instructions by the Conference of the Parties to the Subsidiary Body on Scientific, Technical and Technological Advice’ (4-15 May 1998) Decision IV/1.

2.1.2. Contemporary studies: consolidating ecosystem approaches

With the turn of the century, international law evolved in advancing the normative content of the ecosystem approach, alongside activities preceding the publication of the 2005 Millennium Ecosystem Assessment.¹⁵⁰ The relevant decisions adopted at CBD CoPs 5 and 7, respectively, defined the ecosystem approach and provided for the operational guidance for the approach's application,¹⁵¹ as well as the detailed rationale for each of the twelve CBD Malawi principles.¹⁵² In the fisheries world, in turn, concerns on ecosystems considerations in fisheries management were being promoted by Iceland and Norway, at the realm of the FAO COFI.¹⁵³ An international conference jointly organized by these two governments and the FAO was held in Reykjavik, in 2001, which resulted in the adoption of the *Declaration on Responsible Fisheries in the Marine Ecosystems* ('Reykjavik Declaration').¹⁵⁴ While not explicitly referring to the EAF, this Declaration is evidently about the approach, elucidating the meaning of ecosystems considerations to sustainable fisheries management, that is, to take into account 'the impacts of fisheries on the marine ecosystem and the impacts of the marine ecosystem on fisheries'.¹⁵⁵ The continued research on this topic was supported by states' interests, through the FAO, in developing dedicated technical guidance on the EAF. The definition of the EAF was introduced in the FAO EAF Guidelines, followed by various other legal developments on the ecosystem approach and the EAF that unravelled within and outside the CBD and FAO regimes, as literature has well documented.¹⁵⁶ At the UNGA level, there has also been discussions around 'ecosystem

¹⁵⁰ UNEP, 'Millennium Ecosystem Assessment, Ecosystems and Human Well-Being: Synthesis' (UNEP 2005).

¹⁵¹ CBD CoP5, 'Ecosystem Approach', UNEP/CBD/COP/5/23 (22 June 2000) Decision V/6 (n 124) s C.

¹⁵² CBD, CoP7, 'Ecosystem Approach', UNEP/CBD/COP/DEC/VII/11 (13 April 2004) Decision VII/11 s B and Table 1.

¹⁵³ FAO, 'Report of the Twenty-Fourth Session of the Committee on Fisheries. Rome, 26 February-2 March 2001' (2001) 655 <<https://www.fao.org/3/y2161e/y2161e.pdf>>.

¹⁵⁴ Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (adopted at the Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem, Reykjavik, 1 to 4 October 2001).

¹⁵⁵ *ibid* preamble.

¹⁵⁶ See De Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (n 122); Froukje M Platjow, *Environmental Law and the Ecosystem Approach* (Routledge 2016); Cecilia Engler, 'Beyond Rhetoric: Navigating the Conceptual Tangle Towards Effective Implementation of the Ecosystem Approach to Oceans Management' (2015) 23 *Environmental Reviews* 288; Duncan J Currie, 'Ecosystem-Based Management in Multilateral

approaches and the oceans’,¹⁵⁷ where 14 elements of the ecosystem approach were identified, and the means to achieve its improved application.¹⁵⁸ The UNGA suggested that ‘ecosystem approaches to ocean management’ be focused on managing human activities to maintain and restore ecosystem health for goods and environmental services, while providing social and economic benefits to food security, sustaining livelihoods, and conserving biodiversity.¹⁵⁹

In this phase of contemporary studies on the ecosystem approach, literature underscored specific needs for realizing the approach in different contexts, including tracing the approach or its elements as explicitly and implicitly enshrined in treaties and non-binding instruments,¹⁶⁰ investigating the approach’s meanings, its historical developments, purposes, normative content, principles, legal foundations, legal status, implications, achievements, constraints, and implementation challenges.¹⁶¹ This phase thus realizes that there is not a single ecosystem approach, but various ecosystem approaches that share the primary concern for ecosystems considerations seen above.

Environmental Agreements: Progress towards Adopting the Ecosystem Approach in the International Management of Living Marine Resources’ (WWF 2007); Hanling Wang, ‘Ecosystem Management and Its Application to Large Marine Ecosystems: Science, Law, and Politics’ (2010) 35 *Ocean Development & International Law* 41.

¹⁵⁷ The Consultative Process was established in 1999 to facilitate UNGA’s annual review of ocean affairs and law of the sea developments, taking into account the Secretary General’s report on oceans and the law of the sea. In relation to UNGA’s seminal recommendation on ecosystem approaches, see UNGA, Resolution 60/30 of 29 November 2005, ‘Oceans and the Law of the Sea’ [8 March 2006, UN Doc A/RES/60/30] para 103. at para 103.

¹⁵⁸ UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea, ‘Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea at Its Seventh Meeting’ (UN 2006) UN Doc A/61/156.

¹⁵⁹ UNGA, Resolution 61/222 of 20 December 2006, ‘Oceans and the Law of the Sea’ [16 March 2007, UN Doc A/RES/61/222] para 119.

¹⁶⁰ For example, see C Max Finlayson and others, ‘The Ramsar Convention and Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands’ (2011) 14 *Journal of International Wildlife Law & Policy* 176; Milton O Haughton, ‘International Environmental Instruments and the Ecosystem Approach to Fisheries in CARICOM States’ in Lucia Fanning, Robin Mahon and Patrick McConney (eds), *Towards Marine Ecosystem-Based Management in the Wider Caribbean* (Amsterdam University Press 2011).

¹⁶¹ Notably, Diz framed the EA as legal basis for law-making in respect of fisheries management in ABNJ, and for implementing SDG 14. See Daniela Diz, *Fisheries Management in Areas Beyond National Jurisdiction: The Impact of Ecosystem-Based Law-Making* (Martinus Nijhoff 2012); Daniela Diz, ‘The Ecosystem Approach as a Frame for SDG 14 Implementation’ (2019) 33 *Ocean Yearbook* 187.

In addition to Morgera's analysis of this approach's key elements,¹⁶² two other authors outstand in the international environmental law literature on the ecosystem approach.

De Lucia coins the ecosystem approach as an 'elusive, unstable and, importantly, contested' concept.¹⁶³ In dealing with this complexity, he offers to 'read law *outside* of the formal legal text' and originally explores the approach using legal narrative methodologies.¹⁶⁴ As such, based on a genealogical method,¹⁶⁵ De Lucia reconstructs the approach to elucidate its expressions in, influences from, and different articulations by competing narratives or logics of ecocentrism and anthropocentrism.¹⁶⁶ He is quite critical about the disparities in plural ecosystem approaches, 'traversing different ideological affiliations and responding differently to the different institutional and regulatory contexts into which they are inserted'.¹⁶⁷ De Lucia pledges distance of the approach's articulations in international environmental law from 'hegemonic closures of anthropocentrism', which undesirably deploys the approach as a methodology.¹⁶⁸ He advocates for an approach that internalizes ecocentrism, seeing the approach as a 'scientific and philosophical basis for the radical re-evaluation of the relation between human beings and nature'.¹⁶⁹ For De Lucia, both the CBD and the FAO articulations of the ecosystem approach are anthropocentric in that such articulations see the approach as a 'tool to achieve sustainable development'.¹⁷⁰

Platjow, in turn, explores the role of law in the implementation of the ecosystem approach, particularly in addressing inconsistencies and incoherencies that result from

¹⁶² Namely: integration, conservation, equity, fair and equitable benefit-sharing Morgera, 'The Ecosystem Approach and the Precautionary Principle' (n 125).

¹⁶³ De Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (n 122) 39. See also Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91, 93.

¹⁶⁴ De Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (n 122) 36–39.

¹⁶⁵ In his words, 'genealogy aims at the reconstruction of the contingencies and contestations constituting the complex history of (legal) concepts'. See *ibid* 255.

¹⁶⁶ De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (n 163) 116.

¹⁶⁷ De Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (n 122) 57.

¹⁶⁸ *ibid* 103, 104 and 116.

¹⁶⁹ *ibid*.

¹⁷⁰ *ibid* 107.

environmental law's fragmentation and administrative discretion.¹⁷¹ She contends that the implementation of this holistic approach is complicated by the fact that parts of ecosystems may be regulated by different legislation, which, in turn, may overlap in scope, and conflict in substance and values, leading to inaction and conflicting action.¹⁷² Additionally, the use of ambiguous terms and principles in environmental legislation leaves too much flexibility for public authorities to interpret and apply the relevant rules differently, and leaves room for 'weighing and balancing of diverse values', including those of ecosystem services, all which can lead to inconsistencies, incoherencies, and unpredictability.¹⁷³ This ultimately jeopardizes the maintenance of ecosystem integrity and the adequate governance of ecosystems, considering their complex ecological relationships.¹⁷⁴

On one hand, De Lucia and Platjow's contributions pose pertinent critiques on the ecosystem approach from a legal perspective, with which I agree. On the other hand, one needs to recognize that the legal issues they raise are also what make the ecosystem approach most interesting and attractive, constituting a useful, dynamic, flexible, and adaptable concept that is particularly useful to address complex topics, such as small-scale fisheries and international fisheries management, particularly as these matters occur in and interact with ecosystems in a constantly changing environment. Importantly, this holistic approach incites participatory fisheries management where all relevant stakeholders engage in the planning and decision-making about how they should manage fisheries. In this respect, one of the elements of the ecosystem approach to which little attention has been paid, as Kirk notes, is the 'fuller forms of engagement such as co-decision making or delegated decision making', which goes beyond enhancing the quality of information provided, or including non-governmental organizations (NGOs) in the process, but rather engages all sectors of society in decision-making at the 'appropriate level'.¹⁷⁵ I will go back to this issue in section 2.4,

¹⁷¹ Platjow (n 156).

¹⁷² *ibid* 116. at 116.

¹⁷³ *ibid* 121 and 139.

¹⁷⁴ *ibid*.

¹⁷⁵ Elizabeth A Kirk, 'The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance' (2013) 46 *Ocean Development & International Law* 33, 44.

but let me now continue with the analysis of the next phase of the scholarly debate on the ecosystem approach.

2.1.3. Emerging legal reflections: focusing on better implementation

The third and current phase begins in the 2020s' with the dedicated to research on the implementation of the ecosystem approach and means for enhancing it in a given context. Scholars explore the ecosystem approach with a view to promote its role and application through coordinated cooperation, integrated and equitable environmental management and planning. For instance, Enright and Boteler recalled that the ecosystem approach was featuring in the proposed text of the *Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (BBNJ Agreement),¹⁷⁶ and, in effect, continues to feature in the recently adopted text.¹⁷⁷ For them, the proposed text represented an 'endorsement' of the ecosystem approach,¹⁷⁸ and they recognized that the BBNJ process would have a 'significant bearing on how the ecosystem approach is translated into practice in the future'.¹⁷⁹ De Lucia, in turn, traced the ecosystem approach in the BBNJ process.¹⁸⁰ His analysis raised a concern with the distinct and separate discussions that states have had regarding the approach and its elements, also in the course of the BBNJ negotiations, hindering a desirable 'coherent articulation' of the ecosystem approach in the BBNJ Agreement.¹⁸¹ It is worth noting that the two specific references to the approach in articles 19(3) and 26(5)

¹⁷⁶ Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement) (adopted 19 June 2023, not yet in force) (A/CONF232/2023/4*).

¹⁷⁷ The Agreement's article 7(f) provides for "an ecosystem approach" among the general principles and approaches guiding the Agreement, but does not define the approach. The Agreement also explicitly refers to the approach alongside the precautionary approach, both which should be considered in the process of formulation of proposals regarding the establishment of area-based management tools (article 19(3)) and of making decision or recommendations on the amendment, extension or revocation of such tools (article 26(5)).

¹⁷⁸ Sarah Ryan Enright and Ben Boteler, 'The Ecosystem Approach in International Marine Environmental Law and Governance' in Timothy G O' Higgins, Manuel Lago and Theodore H DeWitt (eds), *Ecosystem-Based Management, Ecosystem Services and Aquatic Biodiversity* (Springer 2020) 344.

¹⁷⁹ *ibid* 349.

¹⁸⁰ Vito De Lucia, 'The BBNJ Negotiations and Ecosystem Governance in the Arctic' (2022) 142 *Marine Policy* 1, 3–4.

¹⁸¹ *ibid*.

of the BBNJ Agreement concerns decision-making processes of formulating proposals for the establishment of area-based management tools, and decision-making processes for amendments, extension or revocation of such tools. The provisions also refer to decision-making based on ‘best available science and scientific information’ and ‘relevant traditional knowledge of Indigenous peoples and local communities’. This reinforces the relevance of the ecosystem approach to participatory decision-making that integrates vulnerable groups and individuals at the local level.

In the fisheries context, Engler looked into the practice of RFMOs to clarify their efforts in more effectively implementing the ecosystem approach in transboundary settings, and in addressing the challenges of adapting to climate change impacts as a consequence of the changes in distribution patterns and abundance of transboundary stocks.¹⁸² Also in the fisheries arena, Karim, Techera, and Al Arif examined the extent of the ecosystem approach’s implementation in the Indian Ocean RFMOs, finding that, while only two out of eight RFMOs enshrine the ecosystem approach in its constituent instruments, the approach has influenced to varied degrees the governance of these organizations and its conservation and management measures, showcasing ‘elements of best practice fisheries management’.¹⁸³ Yet, the authors note that only by having the ecosystem approach included in the RFMOs’ constituent instruments or in ‘a broadly applicable legally binding Resolution’ would make the approach part of the ‘core elements for decision-making’, coupled also with the need of ‘best practice guidance’ to precisely determine the approach’s meaning in the Indian Ocean fisheries context.¹⁸⁴ While it is difficult to keep track of the regional practice of states, through RFBs, and fully understand whether RFMOs have been effectively advancing on internalizing the ecosystem approach in their legal framework, there has been important contributions to the EAF’s normative content at the global level. The FAO has been playing an important role in providing further guidance on the meaning of the EAF from a legal perspective, through the development of a guide, a diagnostic tool, and various country

¹⁸² Cecilia Engler, ‘Transboundary Fisheries, Climate Change, and the Ecosystem Approach: Taking Stock of the International Law and Policy Seascape’ (2020) 25 *Ecology & Society* 43.

¹⁸³ Md Saiful Karim, Erika Techera and Abdullah Al Arif, ‘Ecosystem-Based Fisheries Management and the Precautionary Approach in the Indian Ocean Regional Fisheries Management Organisations’ (2020) 159 *Marine Pollution Bulletin* 1, 3–4.

¹⁸⁴ *ibid* 3–5.

reports that assess the alignment of national policy and legal frameworks with EAF legal requirements.¹⁸⁵ In effect, such requirements include the principles of broadening stakeholder participation with integration of lower level authorities and bodies, ensuring right of access to fair and transparent information, and allowing for sufficient time for comments on proposed management decisions.¹⁸⁶

These emerging legal reflections on the ecosystem approach demonstrate the approach's continued role in propelling environmental and fisheries management strategies in ways that are more holistic, integrated, adaptive, equitable, and participatory. This analysis shed light on the evolution of the legal discourse on the ecosystem approach, arguably contributing to the consolidation of the approach among international law's sources, based on which current and future law-making can be developed. Morgera contends that, while the CBD regime has gradually developed the ecosystem approach 'into a fully-fledged system of soft law principles and guidelines that capitalize on previous legal developments in international environmental law', the question of whether the approach should be among the principles of international environmental law remains open.¹⁸⁷ I examine this matter in the next section.

2.2. The legal status of the ecosystem approach in international environmental law

Scholars have had different impressions and expectations about the ecosystem approach's normative status in international environmental law, or the extent to which the approach has firmed its legal status, either as a principle of international environmental law or as part of customary international law. This is often justifiable by the period during which a given analysis was carried out. In other words, recent research would probably be more optimistic in admitting the approach's legal status.¹⁸⁸ In effect, the ecosystem approach or part of its normative components have been

¹⁸⁵ I have been part of this work, as anticipated in section 1.3. In 2024, I will be leading the development of a scientific journal article that consolidates and showcases the key findings of the all the EAF legal reports, which assessed the alignment of a total of 31 countries' policy and legal frameworks with the EAF.

¹⁸⁶ See EAF legal requirements 3, 4 and 25 in FAO, 'A Diagnostic Tool for Implementing an Ecosystem Approach to Fisheries through Policy and Legal Frameworks'.

¹⁸⁷ Morgera, 'The Ecosystem Approach and the Precautionary Principle' (n 125) 71 and 78.

¹⁸⁸ As noted above, Belsky's initial assessment recognized no more than moral support for 'total ecosystem management' in international law. See Belsky, 'Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law' (n 130) 757.

reflected in both treaty and non-formally binding instruments, as demonstrated thoroughly by literature cited above. The question I examine now is how scholars understand the ecosystem approach's legal status, or where has the approach been placed within the sources of international law. It is worth noting that not all scholars analysing the ecosystem approach have actually fully clarified this question or clearly stated their views about the approach's legal status. Brunée and Toope, for instance, elaborated the principles of 'international ecosystem law', which foster ecosystem orientation in international law, thus, with a focus on the ecosystem approach as part of regime development.¹⁸⁹ Belsky, in turn, encouraged state practice in applying total ecosystem management, so that the ecosystem approach would eventually become 'customary, rule of law',¹⁹⁰ and later argued that customary international law was moving toward the acceptance of the 'ecosystem model' principle.¹⁹¹ This position contrasts with Trouwborst, to whom the ecosystem approach has not been considered in treaty or customary law, as the approach's status in international law 'seriously outdistance' from international environmental law principles such as the precautionary principle.¹⁹² For Trouwborst, the 'commitments to apply the ecosystem approach' were 'confined to non-legally binding instruments'.¹⁹³ Enright and Boteler also find weak normative content of the ecosystem approach, as they see the approach being mostly developed through soft law.¹⁹⁴

While these scholars put the ecosystem approach's legal status into question, Tarlock was enthusiastic on the approach's potential in contributing to the evolution of customary law related to the management of freshwater ecosystems.¹⁹⁵ McIntyre agrees that the approach is 'scientifically sound and potentially far-reaching' to

¹⁸⁹ Brunnée and Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (n 144) 28–29.

¹⁹⁰ As noted above, Belsky's initial assessment recognized no more than moral support for 'total ecosystem management' in international law. See Belsky, 'Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law' (n 130) 757.

¹⁹¹ Belsky, 'Using Legal Principles to Promote the "Health" of an Ecosystem' (n 136) 197.

¹⁹² Arie Trouwborst, 'The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages' (2009) 18 *Review of European, Comparative & International Environmental Law* 26, 30.

¹⁹³ *ibid* 30 and 34.

¹⁹⁴ Enright and Boteler (n 178) 348–349.

¹⁹⁵ Dan Tarlock, 'Ecosystems' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 588 and 589.

environmental rights and obligations’, with ‘much to offer in relation to the continuing evolution of international environmental law’.¹⁹⁶ Similarly to Belsky’s expectations, thus, McIntyre notes that there should be little doubt on the ecosystem approach’s normative status in as far as it receives ‘wider and more emphatic support among the international community’.¹⁹⁷

In a different vein, Platjow finds that the developments of the ecosystem approach are diffused and widely endorsed in international and European law, leading towards the ‘codification of the ecosystem approach in legal instruments’.¹⁹⁸ The evidence that the approach is a principle of international environmental law is mainly, if not only, stemming from the formal incorporation of the approach by certain treaties and non-binding instruments in selected contexts, either in explicit or implicit terms, or through state practice at the national level. In this respect, Engler argues that the ecosystem approach may be considered a general principle of international environmental law, as the approach has been ‘consistently endorsed by high-level policy instruments’ since the 1970s, and because an ecosystem approach ‘legal obligation’ to protect ecosystems can be drawn from ‘common human values and reason’.¹⁹⁹ The two scholars thus assert the ecosystem approach as a principle of international environmental law, while also providing evidence of state practice in applying the approach through legal instruments. In contrast to Platjow and Engler’s arguments, Kirk observes that the ecosystem approach’s implicit expressions in treaty and non-binding text can also demonstrate a rather incomplete acceptance of the approach across ocean governance issues, as the relevant instruments do not incorporate all aspects of the approach.²⁰⁰ She recognizes that part of this issue is because the ecosystem approach had not been fully developed when the relevant instruments were adopted, admitting, in fact, that

¹⁹⁶ Owen McIntyre, ‘The Emergence of an “Ecosystem Approach” to the Protection of International Watercourses under International Law’ (2004) 13 *Review of European, Comparative & International Environmental Law* 1, 14.

¹⁹⁷ Owen McIntyre, ‘The Protection of Freshwater Ecosystems Revisited: Towards a Common Understanding of the “Ecosystem Approach” to the Protection of Transboundary Water Resources’ (2014) 23 *Review of European, Comparative & International Environmental Law* 88, 95.

¹⁹⁸ Platjow (n 156) 28 and 54. at 28 and 54.

¹⁹⁹ Engler (n 156). at 315.

²⁰⁰ Kirk, ‘The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance’ (n 175). at 41.

the growing acceptance of the approach ‘provides fertile ground for the development of integrated principal objectives and processes for ocean governance’.²⁰¹

One needs to be cautious when exploring the normative nature of the ecosystem approach, based on how it is applied in particular sectors or regions, because the level of detail of what the overall action may require can vary greatly by context. This concern relates to the paper of Futhazar, who argued that the ecosystem approach is not a source of international environmental law *per se*, but rather an ‘interstitial principle’, a conclusion he substantiated by studying the approach in a regional context (Mediterranean).²⁰² Futhazar recognizes, and stresses repeatedly his understanding of a common minimal thread or denominator of the ecosystem approach in that such approach ‘requires the governance of ecosystems to mirror their interconnected and dynamic nature’.²⁰³ At the same time, he argues that the ecosystem approach lacks normative autonomy as it depends on other rules to be able to prescribe a specific concrete behaviour and have normative impact.²⁰⁴ This statement seems to contradict that common minimal thread of the ecosystem approach, which does provide for a specific action required by the approach. Furthermore, one needs to note that, as other international environmental principles, the action called by the principle can be operationalized differently depending on the context and sector that the principle applies, and, in effect, relies on further rules to elaborate the full meaning and detail of the action. Futhazar takes, in my view, a foregone conclusion in understanding the ecosystem approach as an ‘interstitial norm’, drawing from the concept introduced by Lowe with respect to the principle of sustainable development,²⁰⁵ which would thus be a type of norm that has normative status and functions as a principle (legitimation,

²⁰¹ *ibid.* at 41.

²⁰² Guillaume Futhazar, ‘The Normative Nature of the Ecosystem Approach: A Mediterranean Case Study’ (2020) 10 *Transnational Environmental Law* 109, 121–129.

²⁰³ *ibid.* 112, 114 and 115 emphasis added.

²⁰⁴ *ibid.* 128.

²⁰⁵ Lowe’s views were that emergent concepts can be ‘interstitial norms’ or ‘modifying norms’ or ‘meta-principles’ as ‘they do not themselves have a normative force of the traditional kind but instead operate by modifying the normative effect of other, primary norms of international law’. See Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000) 213.

coherence and interpretation of rules), but which lacks normative autonomy.²⁰⁶ As stated, this alleged lack of normative autonomy contradicts Futhazar's own notion of the minimal denominator of the ecosystem approach, which in fact provides specific action and makes the approach autonomous in itself. The ecosystem approach aids the interpretation of other rules through specific action, thus exerting normative influence. Furthermore, while Futhazar uses Lowe's notion of interstitial norm to illustrate sustainable development as a norm that lacks normative autonomy,²⁰⁷ he exemplifies the same principle as one which has normative autonomy in requiring states to 'adopt a certain type of behaviour in order to achieve sustainable development'.²⁰⁸ Moreover, Futhazar's argument that the ecosystem approach does not exercise 'direct normative influence', limiting to generate the adoption of management plans and decisions in the Mediterranean region,²⁰⁹ seem to underestimate the usefulness and concrete effect that such plans and decisions may actually have. In practice, fisheries management plans are the main tool that guide fisheries managers and fishers in respect of the measures and actions to be taken in managing the fisheries concerned.²¹⁰ Due to these plans' importance to the fisheries sector, certain countries formalize fisheries policies and fisheries management plans through national legislation.²¹¹

Another point that Futhazar and Kirk make concerns the dependency aspect of the ecosystem approach, which relies on other rules to generate normative effect. It seems to me that this is a characteristic present not only in the ecosystem approach, but in other international environmental principles. Take the precautionary principle, for instance, which is widely considered as part of customary international law, and which

²⁰⁶ Futhazar (n 202) 121–129.

²⁰⁷ *ibid* 121.

²⁰⁸ *ibid* 129–130.

²⁰⁹ *ibid* 130.

²¹⁰ Fisheries managers and fishers are usually more familiar with these instruments, rather than the fisheries law itself. The legal aspects of fisheries management and the content of fisheries law can be understood in an instructive piece by Kuemlangan. See Blaise Kuemlangan, 'Legal Aspects' in Kevern L Cochrane and Serge M Garcia (eds), *A Fishery Manager's Guidebook* (2nd edn, Wiley-Blackwell; FAO 2009).

²¹¹ For instance, in Brazil, the Federal Law No. 11 959 of 2009 provides for the National Policy for the Sustainable Development of Fisheries and Aquaculture. In Cabo Verde, the Fishery Resources Management Plan for 2020-2024 was formally approved by the Council of Ministries and the Prime-Minister, and published in the official gazette through the Resolution No. 94 of 2020. In Albania, the Plan for the Management of European Eel for 2019-2024 was formally approved by the government's Order No. 536 of 2019.

implies on a main generic action or duty to act in situations of scientific uncertainty about risks of serious or irreversible environmental damage.²¹² One specific action required based on the precautionary principle is the undertaking of environmental impact assessments (EIAs), the minimum content, form, and regulation of which vary by national context. Similarly, one may consider that the ecosystem approach implies on a main generic action of *ensuring environmental management activities are undertaken in an integrated and equitable manner, with due regard to ecosystems' considerations*. A specific action required based on the ecosystem approach is, for example, the protection of vulnerable marine ecosystems (VMEs) through participatory and decentralized natural resources management.

As such, the ecosystem approach provides for a main action or duty that gives rise to other specific requirements that vary by context. Indeed, while states have not agreed on a single definition of the ecosystem approach, what exists today is a multiple set of ecosystem approaches and associated normative regimes, which are used and applied in accordance with a given context. Expressions of the approach are noticed in old and contemporary international environmental legal instruments. This shows the gradual acceptance by states of the need to take due account of and protect ecosystems, its components, and its relationship with living resources and habitats. This also signals a general state practice in firming up the application of the ecosystem approach across multiple sectors and governance levels, which reiterates the understanding of the ecosystem approach as a principle of international environmental law. Its detailed normative content and how the approach is enshrined in a given legal instrument vary by context in which the approach is applied. As such, in my view, just like the precautionary principle, the ecosystem approach is indeed a principle of international environmental law.

In fisheries, the approach may arguably sustain a greater level of recognition as a principle, and even giving rise to a duty to apply the EAF in marine waters. To this matter I turn in the next section.

²¹² UN, Declaration on Environment and Development (Rio Declaration) (adopted at the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26 principle 15.

2.3. The ecosystem approach to fisheries as a principle of international fisheries law

An assessment of the EAF in international legal instruments and state practice, steered by Molenaar, in the early 2000s, led him to conclude that no ‘firm obligation’ of states exists to engage in ecosystem-based fisheries management under international law.²¹³ His conclusion would likely be different now, as a number of instruments, of both binding and non-formally binding nature, adopted over the past twenty years, explicitly and implicitly provide or enshrine the EAF in certain provisions, as detailed below.²¹⁴ For Engler, the approach is ‘a *fundamental* principle for fisheries management’, which ‘has become, if not customary international law, at least a *best management practice*’.²¹⁵ Engler contends that the EAF can be considered a principle or custom in international fisheries law.²¹⁶ Fabra, in turn, recalls the international legal requirements for the protection of the marine environment and fisheries, recognizing the ecosystem approach among the ‘principles of modern ocean governance’.²¹⁷ Diz goes further in submitting that there is in fact a legal obligation to apply the approach in ABNJ,²¹⁸ considering the various expressions of the approach in international law, as well as the decision adopted by the World Trade Organization (WTO)’s Appellate Body on the *Shrimp-Turtle* case,²¹⁹ which took into account ecosystem considerations

²¹³ Erik Molenaar, ‘Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law’ (2002) 17 *The International Journal of Marine and Coastal Law* 561, 581.

²¹⁴ Literature provides evidence that the EAF is enshrined implicitly and explicitly in major regional and international fisheries legal instruments. See Engler (n 156) 308–316; Abdullah Al Arif, ‘Exploring the Legal Status and Key Features of Ecosystem-Based Fisheries Management in International Fisheries Law’ (2018) 27 *Review of European, Comparative & International Environmental Law* 320, 323; Abdullah Al Arif, *Sustainable Fisheries Management and International Law: Marine Fisheries in Bangladesh and the Bay of Bengal* (Routledge 2022) 64–65.

²¹⁵ Engler (n 156) 315 emphasis.

²¹⁶ *ibid* 315–316.

²¹⁷ Adriana Fabra, ‘The Protection of the Marine Environment Pollution and Fisheries’, *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021).

²¹⁸ Diz, *Fisheries Management in Areas Beyond National Jurisdiction: The Impact of Ecosystem-Based Law-Making* (n 161) 45.

²¹⁹ India, Malaysia, Pakistan and Thailand against the USA due to the latter’s ban on the import of certain shrimp and shrimp products pursuant to the application of an environmental rule that prohibited the import of shrimp harvested with technology harmful to certain sea turtles. The WTO Appellate Body’s ruling was against the USA, not for environmental reasons, but for failing to meet the non-discrimination criteria, that is, for having discriminated between WTO members when applying the shrimp import ban. See *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body (12 October 1998) Doc WT/DS58/AB/R* (WTO Appellate Body).

by asserting a broad interpretation of the term ‘natural resources’ mentioned in article XX(g) of the General Agreement on Tariffs and Trade (GATT).²²⁰ Her insights on this case recall the important contributions that international jurisprudence can make to the recognition of the EAF as a principle and requirement in international law. Al Arif understands that the legal obligation to apply the EAF exists, for reasons similar to Diz, in respect of areas under national jurisdiction.²²¹ These accounts of the EAF reiterate the notion that the EAF is not only a principle of international fisheries law but gives rise to the duty to apply the EAF in marine areas.

Let me thus revisit the EAF in international fisheries law to unravel the EAF’s normative content in international fisheries instruments.

2.3.1. The ecosystem approach to fisheries’ expressions in international fisheries law

Many legal scholars, including Fabra, Engler, and Diz, have demonstrated the multiple expressions of the EAF, explicitly and implicitly, in international fisheries law. Prominent scholars have also demonstrated that the LOSC enshrines the concerns for ecosystems’ considerations in provisions on the conservation of species associated with or dependent on harvested fish stocks.²²² Article 5(e), UNFSA, requires state parties to adopt conservation and management measures ‘for species belonging to the same ecosystem or associated with or dependent upon the target stocks’, aiming to maintain or restore populations of such species above sustainable levels.²²³ The Code

²²⁰ General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

²²¹ Al Arif, ‘Exploring the Legal Status and Key Features of Ecosystem-Based Fisheries Management in International Fisheries Law’ (n 214) 323; Al Arif, *Sustainable Fisheries Management and International Law: Marine Fisheries in Bangladesh and the Bay of Bengal* (n 214) 64–65.

²²² LOSC art 61(4) and 195(5). See Robin Churchill, ‘The LOSC Regime for Protection of the Marine Environment – Fit for the Twenty-First Century?’ in Rosemary Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2015) 11–12; Richard A Barnes, ‘The Law of the Sea Convention and the Integrated Regulation of the Oceans’ (2012) 27 *The International Journal of Marine and Coastal Law* 859; Rüdiger Wolfrum and Nele Matz, ‘The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity’ (2000) 4 *Max Planck Yearbook of United Nations Law Online* 445.

²²³ This provision mirrors article 61(4) of the LOSC, but with explicit reference to ‘ecosystems’. An earlier assessment of this UNFSA obligation in RFMO practices indicated that most RFMOs did not follow an EA. See Michael W Lodge and Satya N Nandan, ‘Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory

of Conduct for Responsible Fisheries (CCRF) captures the EAF across numerous provisions, from the principle of conserving aquatic ecosystems and species belonging to the same ecosystem, associated with or dependent on targeted species, to the requirement to protect and rehabilitate all critical fisheries habitats in the marine and aquatic ecosystems and to take conservation and management measures to conserve and protect them.²²⁴

Following the adoption of the Reykjavik Declaration,²²⁵ the EAF's normative content was substantively developed by the FAO.²²⁶ The approach was adopted and enshrined in voluntary guidelines, including the SSF Guidelines,²²⁷ as well as those on deep-sea fisheries,²²⁸ bycatch and discards,²²⁹ and marking of fishing gears.²³⁰ In 2021, Members of the FAO COFI noted the importance of the approach 'as an *effective* framework for integrating conservation and sustainable utilization objectives'.²³¹ At the UNGA fora, the two main sets of yearly adopted resolutions on 'Oceans and Law of the Sea' and 'Sustainable Fisheries' are consistent in reiterating the need for states

Fish Stocks of 1995' (2005) 20 *The International Journal of Marine and Coastal Law* 345, 350, 359–361.

²²⁴ Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (adopted at the Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem, Reykjavik, 1 to 4 October 2001) (n 154).

²²⁵ FAO, Code of Conduct for Responsible Fisheries (CCRF) (adopted at the 28th Session of the FAO Conference, Rome, 31 October 1995) Resolution 4/95 FAO Conference arts 6, 7.2.2, 7.2.3, 9.1.2, 9.2, 9.2.1, 9.2.2, 9.2.3, 9.3.1, 10.1.1, 12.4, 12.5, 12.10 and 12.11.

²²⁶ See *supra*. See also FAO, 'A Diagnostic Tool for Implementing an Ecosystem Approach to Fisheries through Policy and Legal Frameworks' (n 186). Together with Teresa Amador, I have worked on applying this tool to identify the alignment of various African and southeast Asian countries' national policy and legal instruments with the EAF. At the time of writing, we concluded 27 EAF Legal Reports. The levels of alignment is identified based on examining the relevant policy and legal framework against 82 EAF legal requirements. The level of alignment with the EAF has been identified as: high (meeting 73 to 82 requirements) for 3 countries; medium-high (62 to 72) for 13 countries; medium (51 to 61) for 10 countries; and medium-low (31 to 50) for 1 country. See all published EAF Legal Reports in FAO, 'EAF-Nansen Programme' (n 78).

²²⁷ FAO SSF Guidelines (n 25) para 3(3.1)(11).

²²⁸ FAO, International Guidelines for the Management of Deep-Sea Fisheries in the High Seas (Adopted at FAO Technical Consultation on International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, 25-29 August 2008) (Deep-sea Fisheries Guidelines) para 12(i).

²²⁹ FAO, Voluntary Guidelines on Bycatch Management and Reduction of Discards (adopted at the 19th Session of the Committee on Fisheries, Rome, February 2011) para 2(2.2).

²³⁰ FAO, Voluntary Guidelines on the Marking of Fishing Gear (adopted at the 32nd Session of the Committee on Fisheries, Rome, 9-13 July 2018) para 3.

²³¹ FAO, 2021 COFI Declaration for Sustainable Fisheries and Aquaculture (FAO, Rome, 2021) emphasis added.

to apply ecosystem approaches and consider ecosystems related issues.²³² Specifically, the UNGA encourages states to, inter alia, apply the Reykjavik Declaration and the ecosystem approaches through conservation and management measures on issues of bycatch, pollution, overfishing, protection of habitats of specific concern, improving the status of transboundary stocks, deep-sea fisheries, preventing significant adverse impacts on VMEs, and addressing uncertainties related to climate change impacts.²³³ These are examples of specific requirements arising from the EAF.

The two sets of UNGA resolutions, as Caddell duly points out, provide ‘valuable impetus to address destructive fishing practices, with tangible regulatory outcomes’,²³⁴ as these instruments influenced the adoption of stricter control over large-scale pelagic driftnets on the high seas and on the protection to VMEs.²³⁵ Aligned with what I also suggest, Caddell notes that the EAF has gained a central recognition in the UNFSA and associated requirements for RFMOs, which take ecosystems considerations and consequently reflect a more ecological focus.²³⁶ Elements of the EAF can be found in many RFMOs,²³⁷ and reflected as a principle in the RFMOs’ constituent instruments, in the respective treaty’s original or revised texts, as I explain in the next section.

²³² See resolutions at UN, ‘Division for Oceans Affairs and the Law of the Sea’ (2023) <<http://www.un.org/depts/los/>> accessed 5 January 2023. Note that the titles of the UNGA Resolutions referring to ‘Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments’ were shortened to ‘Sustainable Fisheries’ in the footnotes.

²³³ UNGA, Resolution 58/14 of 24 November 2003, ‘Sustainable Fisheries’ [21 January 2004, UN Doc A/RES/58/14] para 43; UNGA, Resolution 59/25 of 17 November 2004, ‘Sustainable Fisheries’ para 58; UNGA Resolution 60/31 of 29 November 2005, ‘Sustainable Fisheries’ (n 68) para 63; UNGA, Resolution 66/68 of 6 December 2011, ‘Sustainable Fisheries’ (28 March 2012) UN Doc A/RES/66/68 para 10; UNGA, Resolution 67/79 of 11 December 2012, ‘Sustainable Fisheries’ (30 April 2013) UN Doc A/RES/67/79 para 11; UNGA, Resolution 74/18 of 10 December 2019, ‘Sustainable Fisheries’ (19 December 2019) UN Doc A/RES/74/18 paras 20, 56, 130, 190 and 192; UNGA, Resolution 75/89 of 8 December 2020, ‘Sustainable Fisheries’ (18 December 2020) UN Doc A/RES/75/89 paras 15, 17, 18, 21, 24, 56, 129, 185, 189, 191, 192 and 200–204; UNGA, Resolution 76/71 of 9 December 2021, ‘Sustainable Fisheries’ (17 December 2021) UN Doc A/RES/76/71 paras 17, 21, 24, 56, 129, 163, 185, 189, 191, 192 and 208.

²³⁴ Richard Caddell, ‘International Fisheries Law and Interactions with Global Regimes and Processes’ in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019) 137. See also Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edn, Manchester University Press 2022) 40.

²³⁵ Caddell (n 234) 137–162.

²³⁶ *ibid* 163.

²³⁷ Guillermo Ortuño Crespo and others, ‘High-Sea Fish Biodiversity Is Slipping through the Governance Net’ (2019) 3 *Nature Ecology & Evolution* 1273, 1274.

2.3.2. The ecosystem approach to fisheries in regional frameworks

The CCAMLR regime is widely acclaimed for its progressive standards that originally unveiled the ecosystem approach in international fisheries law.²³⁸ The approach is manifested in the CCAMLR Convention,²³⁹ as scholars note,²⁴⁰ and in the conservation measures that give effect to the EAF, regarding the protection of VMEs, for instance.²⁴¹ In respect of the RFBs established under the auspices of the FAO,²⁴² despite the FAO's substantive work to promote the EAF, the approach is not reflected in all the constituent instruments of such RFBs. Scholars have found the absence of the approach in the Indian Ocean Tuna Commission (IOTC) Agreement,²⁴³ and in the Regional Commission for Fisheries (RECOFI) framework.²⁴⁴ This is justifiable for the fact that many RFBs' constituent instrument were negotiated and adopted prior to the EAF's conceptualization.²⁴⁵ But there could have been amendments later on to ensure these constituent instruments enshrined the EAF, which was not the case. While this shows lack of legal review and update, it does not mean the EAF is not at all present in these RFBs frameworks. In fact, IOTC gives effect to the EAF through many of its conservation and management measures, which underscore the need for mitigating potential negative impacts on ecosystems, and establishing concrete measures

²³⁸ Adriana Fabra and Virginia Gascón, 'The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Ecosystem Approach' (2008) 23 *The International Journal of Marine and Coastal Law* 567. See also De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (n 163) 107–110; Wang (n 156) 47–48.

²³⁹ CCAMLR preamble, art I and II(3)(b).

²⁴⁰ See for instance Fabra and Gascón (n 238) 574; Redgwell (n 147).

²⁴¹ James Harrison, 'Towards Integrated Management of Regional Marine Protected Area Networks: A Case Study of Regime Interaction in the Southern Ocean' (2021) 9 *Korean Journal of International and Comparative Law* 212, 224–225.

²⁴² In the exercise of the Organization's competence to establish regional commissions to advise on the formulation and implementation of policy and to coordinate the implementation of the policy (article VI(1)), as well as the competence to approve conventions and agreements that establish regional fishery bodies (article XIV). See FAO, 'Basic Texts of the Food and Agriculture Organization of the United Nations' art VI(1)(2) and XIV.

²⁴³ As also noted by Karim, Techera and Al Arif (n 183) 3.

²⁴⁴ See observation noted in Løbach and others (n 66) 54.

²⁴⁵ In 1993 for the IOTC Agreement; and in 1999 for the resolution establishing RECOFI. See Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement) (adopted 25 November 1993, entered into force 27 March 1996) (1927 UNTS 329).; FAO, Resolution 1/117 of 1999, adopted at the 117th Session of the FAO Council 1999.

accordingly, for example, prohibiting large-scale driftnets for their major impact on ecosystems in the IOTC area.²⁴⁶

Differently from the constituent instruments of the IOTC and RECOFI, which are absent of the EAF, the Agreement establishing the General Fisheries Commission for the Mediterranean (GFCM) explicitly provides for the approach, mandating the respective Commission to formulate and recommend conservation and management measures to minimize impacts of fishing activities on marine living resources and their ecosystems; adopt management plans based on the EAF; and establish fisheries restricted areas for the protection of VMEs.²⁴⁷ As Futhazar explains, the ecosystem approach was formally adopted by the GFCM through the 2014 amendment to the GFCM Agreement, but the approach was already reflected in the recommendations (e.g. on bycatch of seabirds and sea turtles, and size of fishing nets) of the GFCM expert bodies.²⁴⁸ Many of the current active GFCM recommendations and resolutions are based on the EAF, giving effect to the approach through different conservation and management measures.²⁴⁹ In turn, the Agreement establishing the Central Asian and Caucasus Regional Fisheries and Aquaculture Commission (CACFish) requires this Commission, in performing its functions, including formulating and recommending

²⁴⁶ Resolution 17/07 on the prohibition to use large-scale driftnets in the IOTC area. See also Resolution 18/04 on BIOFAD Experimental Project, which promotes the use of biodegradable fishing aggregating device, and other relevant conservation and management measures, available at the IOTC website, noting that the compendium of active measures is periodically updated. See IOTC, ‘Indian Ocean Tuna Commission Conservation and Management Measures’ (2024) <<https://iotc.org/cmms>> accessed 2 January 2024.

²⁴⁷ Agreement for the Establishment of the General Fisheries Commission for the Mediterranean (GFCM Agreement)(adopted 24 September 1949, entered into force 20 February 1952), as amended art 8(b)(ii)-(iv).

²⁴⁸ These recommendations were elaborated in response to the 2011 performance review, which criticized the outdated approach of the Commission. See Futhazar (n 202) 126–127.

²⁴⁹ Including, for instance, measures for the sustainable management of red coral in the Mediterranean Sea (Recommendation GFCM 43/2019/4), sustainable trawl fisheries targeting certain shrimp species in the Strait of Sicily, Levant Sea, Ionian Sea (Recommendations GFCM/43/2019/6, GFCM/42/2018/3, GFCM 42/2018/4), among many others available at the GFCM website, noting that the compendium of active measures is periodically updated. See GFCM, ‘Decisions Adopted by the General Fisheries Commission for the Mediterranean’ (2024) <<https://www.fao.org/gfcm/decisions/en/>> accessed 2 January 2024.

conservation and management measures, to apply the ‘ecosystem approach to conservation and management decisions’.²⁵⁰

Out of the auspices of the FAO, in addition to CCAMLR, at least four RFMOs enshrine the EAF in its constituent instruments, namely, the: South Pacific Regional Fisheries Management Organization (SPRFMO), North Pacific Fisheries Commission (NPFC), South Indian Ocean Fisheries Agreement (SIOFA), and Northwest Atlantic Fisheries Organization (NAFO). The EAF underpins the objectives of the SPRFMO Convention,²⁵¹ and its parties are required to apply the approach.²⁵² The SPRFMO Convention notes the EAF as an ‘integrated approach’, for which the adoption of conservation and management measures takes into account the functioning of wider marine ecosystems, ensuring long-term conservation and sustainable use of resources while safeguarding these ecosystems.²⁵³ The EAF is also perceived in the provisions on compatibility of said measures for fishery resources straddling areas under the national jurisdiction of a coastal state contracting party and the adjacent high seas of the Convention area,²⁵⁴ and the dedicated provisions on conservation and management measures.²⁵⁵ The NPFC Convention, in turn, requires its parties to adopt and apply measures in line with the EAF.²⁵⁶ Consequently, the NPFC Commission is required to adopt conservation and management measures and management strategies for species belonging to the same ecosystem or dependent upon or associated with the target

²⁵⁰ Agreement on the Central Asian and Caucasus Regional Fisheries and Aquaculture Commission (CACFish Agreement) (adopted 30 September 2009, entered into force 3 December 2010) (2754 UNTS 191) art III(3).

²⁵¹ Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention) (adopted 14 November 2009, entered into force 24 August 2012) (2899 UNTS 211) art 2.

²⁵² *ibid* 3(1)(b).

²⁵³ *ibid* 3(2)(b).

²⁵⁴ Taking into account the biological relationships, states dependency levels and potential impacts to the whole living marine resources. See *ibid* 4.

²⁵⁵ Including their objectives for: the long-term sustainability of fishery resources, preventing and eliminating overfishing and excess fishing capacity, maintaining or restoring populations of non-target and associated or dependent species, and protecting habitats and marine ecosystems, including measures to prevent significant adverse impacts on VMEs. Additionally, the measures provide for, *inter alia*, the determination of precautionary reference points, fishing closed seasons, fishing gears control. See *ibid* 20.

²⁵⁶ Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean (NPFC Convention) (24 February 2012, entered into force 19 July 2015) art 3(c).

stocks, as well as to prevent significant adverse impacts on VMEs.²⁵⁷ The EAF is also enshrined in the duties of the NPFC Commission, which relate to experimental, scientific and exploratory research, data collection on species belonging to the same ecosystem or dependent upon or associated with the target stocks, and VMEs,²⁵⁸ and the functions of the advisory scientific body.²⁵⁹

The SIOFA Convention's general principles include implementing an EAF for the adoption of conservation and management measures,²⁶⁰ but the functions of the meeting of the parties and subsidiary bodies do not refer to VMEs nor ecosystems in particular, although the approach is implicitly reflected therein.²⁶¹ Differently, the NAFO Convention addresses the EAF as a commitment by the contracting parties to apply an 'ecosystem approach to fisheries management'.²⁶² Its objective incorporates safeguarding of marine ecosystems,²⁶³ and ecosystems considerations are included in the functions of the NAFO Commission,²⁶⁴ those of the Scientific Council²⁶⁵ as well as in those that both bodies do in collaboration.²⁶⁶

Another supporting evidence of the EAF in treaty-text is found in the Sub-Regional Fisheries Commission (SRFC) Convention,²⁶⁷ which defines the EAF as 'a means of ensuring the sustainable development of the fisheries sector'; an approach that 'explicitly acknowledges the interdependence between human well-being and that of the ecosystem'; and which emphasizes 'the need to maintain the ecosystem in a good state and improve its productivity so that the level of fisheries production is

²⁵⁷ *ibid* 7(1)(c)-(e).

²⁵⁸ *ibid* 7(3)(c)-(e).

²⁵⁹ In respect of collection of data, development of science-based standards, assessment reviews concerning species belonging to the same ecosystem or dependent upon or associated with the target stocks, and VMEs. See *ibid* 10(4)(e)-(i).

²⁶⁰ Southern Indian Ocean Fisheries Agreement (SIOFA) (adopted 7 July 2006, entered into force 21 June 2012) art 4(a).

²⁶¹ *ibid* 6 and 7.

²⁶² Convention on Cooperation in the Northwest Atlantic Fisheries (NAFO Convention) (24 October 1978, entered into force 1 January 1979), as amended until 2017 (1135 UNTS 369) preamble.

²⁶³ *ibid* II.

²⁶⁴ *ibid* VI(6).

²⁶⁵ *ibid* VII(8).

²⁶⁶ *ibid* VI(7)(8).

²⁶⁷ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the SRFC's Members (adopted 8 June 2012, entered into force 16 September 2012).

maintained or improved for the benefit of current and future generations'.²⁶⁸ The SRFC's member states are required to ensure access agreements are in line with an ecosystem-based approach.²⁶⁹ The EAF is also enshrined in various other provisions, notably in the obligation of member states, in giving access to fishing vessels, to ensure such vessels take into account, inter alia, the protection of endangered and juvenile species, limitation of bycatch and discards control.²⁷⁰ It is worth noting the importance of the SRFC to the small-scale fisheries context, as the West African sub-region covered by the SFRC Convention area includes the EEZ of member states.²⁷¹ This marine subregion hosts intensive harvesting by small-scale fishing vessels flying the flag of the coastal state and operating within the EEZ of the coastal state as well as in the adjacent EEZs of other coastal states.²⁷²

The South East Atlantic Fisheries Organization (SEAFO) Convention provides for the principle by which parties should adopt conservation and management measures for 'species belonging to the same ecosystem as, or associated with or dependent upon, the harvested fishery resources'.²⁷³ Similarly, the Western and Central Pacific Fisheries Commission (WCPFC) Convention takes ecosystem considerations in the principle of assessing the impacts of fishing.²⁷⁴ This instrument also provides for the ecosystems considerations within the scientific research to be promoted by the WCFC Commission,²⁷⁵ and the stocks assessments that may be conducted by scientific experts within the Convention area.²⁷⁶ Differently, the EAF is not present among the principles of the Convention of the North-East Atlantic

²⁶⁸ *ibid* 2(1).

²⁶⁹ *ibid* 3(3).

²⁷⁰ *ibid* 9(1).

²⁷¹ These are Cabo Verde, Gambia, Guinea, Guinea Bissau, Mauritania, Senegal and Sierra Leone.

²⁷² This is the case, for instance, of Senegalese fishers migrating to fish in the EEZs of Gambia, Guinea, Guinea Bissau, Mauritania, and Sierra Leone. See El Hadj Bara Deme, Pierre Failler and Moustapha Deme, 'Migration of Senegalese Artisanal Fishermen in West Africa: Patterns and Impacts' (2021) 19 *African Identities* 253.

²⁷³ Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (SEAFO Convention) (adopted 20 April 2001, entered into force 13 April 2003) (2221 UNTS 189) art 3(d).

²⁷⁴ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC Convention) (adopted 5 September 2000, entered into force 19 June 2004) (2275 UNTS 43) art 5(d).

²⁷⁵ *ibid* 12(2)(c).

²⁷⁶ *ibid* 13(3)(b)(c).

Fisheries Commission (NEAFC), but it is reflected in this Commission's obligation to take due account of marine ecosystems when making recommendations,²⁷⁷ and when providing a forum for consultation and information exchange.²⁷⁸

These numerous examples of the EAF in both international fisheries instruments and regional legal frameworks provide additional evidence that the EAF has been not only incorporated as a principle of international fisheries law, but also enshrined in treaty-text and conservation and management measures that duly enshrine ecosystems' considerations. Based on the foregoing, one can hardly question the EAF's legal status in international fisheries law. This conclusion aligns with Engler's understanding of the EAF as part of customary international law,²⁷⁹ and supports the findings of Diz and Al Arif, in respect of the legal obligation to apply the EAF in marine areas within and beyond national jurisdiction.²⁸⁰ The main sectoral action arising from the EAF can be depicted as: *ensuring fisheries management activities are undertaken in an integrated and equitable manner, with due regard to ecosystems' considerations*. Other specific requirements based on the EAF and the approach's ability to shape fisheries management rules can take different forms and focus depending on the governance context to which the EAF is applied.

This exploration of the EAF in international law evinces the considerable attention given to ecosystems considerations and the protective measures for ecosystems, dependent or associated with targeted stocks, VMEs, but there is also the human component of the EAF, which I elaborate in the next section.

2.4. A closer look at the human dimensions of the ecosystem approach to fisheries

The human dimensions of the EAF were essentially developed by academics and experts through a technical paper and technical guidelines on that topic, published by

²⁷⁷ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NEAFC Convention) (adopted 24 October 1980, entered into force 1982) (1135 UNTS 370) art 4(2)(c).

²⁷⁸ *ibid* 4(3).

²⁷⁹ Engler (n 156) 308–316.

²⁸⁰ Diz, *Fisheries Management in Areas Beyond National Jurisdiction: The Impact of Ecosystem-Based Law-Making* (n 161) 45; Al Arif, 'Exploring the Legal Status and Key Features of Ecosystem-Based Fisheries Management in International Fisheries Law' (n 214) 323; Al Arif, *Sustainable Fisheries Management and International Law: Marine Fisheries in Bangladesh and the Bay of Bengal* (n 214) 64–65.

the FAO in 2008 and 2009.²⁸¹ These guidelines unpack the ‘social, cultural, economic, political and institutional processes and factors’, which the EAF’s human dimensions entail, and without due consideration of which, the guidelines note, the ‘EAF cannot be successful’.²⁸² The identification and involvement of stakeholders are considered central to the EAF process, and the guidelines also highlight the need to understand the power differences and dynamics among stakeholder groups (including fishers in the small-scale and large-scale fisheries subsectors), their needs and aspirations for ensuring effective participation, especially of vulnerable and marginalized groups.²⁸³ For the legal framework, the guidelines provide different options for participatory fisheries management, based on the EAF, including mechanisms for stakeholder engagement, decentralizing decision-making, coordination, and integration between fisheries administrations and other institutions responsible for ecosystem management and use.²⁸⁴ Despite this important technical guidance, literature from the international fisheries law domain has not engaged much with the human dimensions of the EAF. In effect, the participation of vulnerable groups in decision-making was not discussed by most scholars.²⁸⁵ The EAF is examined primarily in respect of its ecological components, such as the environmental impacts caused in bycatch²⁸⁶ or through climate change,²⁸⁷ and analysis of the environmental tools and assessments for achieving the EAF.²⁸⁸ In turn, the human dimensions underpinning the EAF have not

²⁸¹ Cassandra De Young, Anthony Charles and Antonia Hjort, ‘Human Dimensions of the Ecosystem Approach to Fisheries: An Overview of Context, Concepts, Tools and Methods’ (FAO 2008) FAO Fisheries and Aquaculture Technical Paper 489; FAO, The human dimensions of the ecosystem approach to fisheries (FAO Technical Guidelines for Responsible Fisheries No 4, Suppl 2, Add. 2, Rome, 2009).

²⁸² FAO The human dimensions of the ecosystem approach to fisheries (FAO Technical Guidelines for Responsible Fisheries No 4, Suppl 2, Add. 2, Rome, 2009) (n 281) 2–3.

²⁸³ *ibid* 16–20; 23–24.

²⁸⁴ *ibid* 38–40.

²⁸⁵ In an early assessment, participation only figured as a pending question posed by Redgwell in respect of non-parties to RFMOs. See Redgwell (n 147) 224.

²⁸⁶ Karen N Scott, ‘Bycatch Mitigation and the Protection of Associated Species’ in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019).

²⁸⁷ Rosemary Rayfuse, ‘Addressing Climate Change Impacts in Regional Fisheries Management Organizations’ in Erik Molenaar and Richard Caddell (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019).

²⁸⁸ Daniel C Dunn, Guillermo Ortuño Crespo and Richard Caddell, ‘Area-Based Fisheries Management’ in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019); Simon Marsden, ‘Environmental

been explored much by literature. In early assessments of the EAF, Molenaar refers to ‘equitability’ in a footnote reference to explain the role of law in ‘facilitating conflict resolution and decision-making processes’, through allocation of fishing opportunities among stakeholders.²⁸⁹ Fabra and Gascón identify ‘participatory governance and involvement of relevant stakeholders’ among the elements to be included in the implementation of the ecosystem approach to marine policies, but their analysis is limited to describe decision-making procedures under the CCAMLR Convention,²⁹⁰ without any particular concern to vulnerabilities of certain stakeholder groups.²⁹¹

These accounts differentiate from the analysis of other areas or contexts where the ecosystem approach is applied. For instance, as Langlet and Rayfuse recall, ‘public participation and stakeholder engagement’ are known to be ‘core tenets’ of the approach in ocean governance.²⁹² The reason for this, the authors rightly explain, is twofold: firstly, for being an inclusive, understandable, and accessible ‘knowledge acquisition process’, and secondly, for ‘ensuring engagement of concerned actors’, so that relevant stakeholders can contribute with their knowledge, and ‘have a genuine impact on the outcome of the process’.²⁹³ These participatory considerations are fundamental to fisheries in both marine and inland landscapes. To further elaborate the human dimensions of the EAF, particularly its participatory elements, I move on to examine the relevant CBD and FAO principles for the ecosystem approach and the EAF.

2.4.1. Stakeholders’ integration in managing biodiversity and fisheries

Within the CBD framework, three of the CBD Malawi principles relate to participation in resources management, namely, the principles: 2 (‘management

Assessment and International Fisheries Law’ in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019).

²⁸⁹ Molenaar (n 213) 593.

²⁹⁰ CCAMLR.

²⁹¹ Fabra and Gascón (n 238) 569.

²⁹² David Langlet and Rosemary Rayfuse, ‘The Ecosystem Approach in Ocean Planning and Governance: An Introduction’ in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance* (Brill Publishers 2019) 9.

²⁹³ David Langlet and Rosemary Rayfuse, ‘Challenges in Implementing The Ecosystem Approach: Lessons Learned’ in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance* (Brill Publishers 2019) 454–455.

should be decentralized to the lowest appropriate level’), 11 (‘consider all forms of relevant information, including scientific and Indigenous and local knowledge, innovations and practices’) and 12 (‘involve all relevant sectors of society and scientific disciplines’).²⁹⁴ As anticipated, the CBD parties have agreed on the rationale and implementation guidelines for each of the CBD Malawi principles.²⁹⁵ The rationale for principle 2 suggests that decentralized management systems can result in ‘greater efficiency, effectiveness and equity’, and that ‘the closer management is to the ecosystem, the greater the responsibility, ownership, accountability, participation, and use of local knowledge’. Principle 2 is indeed quite vague for leaving to State’s discretion the decision to decide who are the stakeholders in the ‘lowest appropriate level’, how they should be involved, which contributions they could bring to decision-making, and where transboundary impacts may be experienced.²⁹⁶ From an ecological perspective, Kirk suggests that the ‘level chosen must be capable of ensuring that the functions and structure of ecosystems are maintained’.²⁹⁷ Thus, decision on the ‘lowest appropriate level’ would largely depend on scientific evidence or other information available about what is needed to keep the integrity of ecosystems functions and structure. Kirk’s critique is in a way supported by De Lucia, but in a different manner. Based on a biopolitical reading of the ecosystem approach,²⁹⁸ De Lucia understands that principle 2 is susceptible of suffering ‘biopolitical closures and subjectivities’, by intending to use local users for ‘nurturing and subjugating nature’, under ‘biopolitical mechanisms of control and regularization of nature’.²⁹⁹ These critiques are pertinent and valid. Principle 2 in the fisheries context would read the ‘lowest appropriate level’ as the level of small-scale fisheries peoples, capable of participating in decision-

²⁹⁴ CBD CoP5, ‘Ecosystem Approach’, UNEP/CBD/COP/5/23 (22 June 2000) Decision V/6 (n 124) s C.

²⁹⁵ CBD CoP7, ‘Ecosystem Approach’, UNEP/CBD/COP/DEC/VII/11 (13 April 2004) Decision VII/11 (n 152) s B and Table 1.

²⁹⁶ Kirk, ‘The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance’ (n 175) 40.

²⁹⁷ *ibid.*

²⁹⁸ He applies biopolitics (representing the polarity of biopower) to nature, which thus is ‘no longer simply an object of exploitation, but becomes the recipient of a series of interventions that aims at its optimization, and at the enhancement of its productive forces’. See De Lucia, *The ‘Ecosystem Approach’ in International Environmental Law: Genealogy and Biopolitics* (n 122) 129–130.

²⁹⁹ *ibid.* 193.

making and contributing to fisheries management with their knowledge and experiences about transboundary aquatic species and ecosystems.

In turn, principles 11 and 12 underscore the importance of ‘information from all sources’, and the ‘necessary expertise and stakeholders at the local, national, regional, and international level’, which should instruct and inform the basis for decentralized management to attain better knowledge of ecosystems and more effective management strategies. These notions relate to the meaningful integration of fishers’ knowledge, views, and practical experiences into the knowledgebase for international fisheries management, a matter which I discuss in section 5.3. De Lucia has a more positive biopolitical reading of principles 11 and 12 than in comparison to the one he suggests for principle 2 above. He finds principle 11 to be consistent with CBD article 8(j),³⁰⁰ and an expression of ‘epistemological pluralism’ (scientific, Indigenous, and local knowledge),³⁰¹ while principle 12 encourages ‘inclusive and plural epistemological approach’, ‘transversal cooperation, across political and jurisdictional hierarchies’.³⁰² At the same time, and a topic which I go back to later, De Lucia recognizes the challenges of incorporating the practice-based knowledge of local and Indigenous fishers in a ‘qualitative and narrative form’ into fisheries management systems, which rather usually follows a ‘quantitative and formalized manner’.³⁰³

There is one point that De Lucia contends, and which I do not entirely agree. To further elaborate the ‘full significance’ of the said ‘epistemological pluralism’, De Lucia relies on the perspective of ‘epistemic location’ to posit knowledge ‘in the *middle*, rather than in a centre that reproduces and enforces power through particular regimes of truth’.³⁰⁴ It appears to me that the notion of placing knowledge in the *middle*

³⁰⁰ ‘Each Contracting Party shall, as far as possible and as appropriate: (...) (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with their approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices’.

³⁰¹ De Lucia, *The ‘Ecosystem Approach’ in International Environmental Law: Genealogy and Biopolitics* (n 122) 193–194.

³⁰² *ibid* 193.

³⁰³ *ibid* 193–194.

³⁰⁴ *ibid* 226, 243–245 emphasis added.

can raise scepticism, because it somehow (and perhaps unintentionally) overlooks the possibility of knowledge that is co-created among different epistemic communities and different types of knowledge holders, who, from that *middle* perspective, would be far from each other.³⁰⁵ Merging the scientific and traditional communities in the *middle* may lead to a superficial account and incorporation of traditional knowledge into decision-making processes. It gives the sensation of knowledge encountering in the *middle*, where knowledge can in fact emerge from the middle, where the two epistemic communities work together as a one community co-creating knowledge. Another important aspect that relates to this co-produced knowledge potentially feeding international fisheries management is the equitable sharing of benefits arising from and owed to the knowledge holders.³⁰⁶ If the interpretation of principles 2, 11 and 12 is broadened to encompass the notion of co-produced knowledge, then one could arguably factor in guarantees and measures similar to those associated with the ‘integrated knowledge’, which, again, merge the knowledge in the *middle*.

All these accounts relate to the ecosystem approach under the CBD regime, and are complemented and detailed at the sectoral level by the FAO EAF technical guidelines.³⁰⁷ The latter provides eleven principles relevant to the EAF, including the principles of ‘improving human well-being and equity’, ‘promoting sectoral integration’, and ‘broadening stakeholder participation’.³⁰⁸ As seen previously, the technical guidelines on the human dimensions of the EAF further elaborate the participatory aspects of decentralized fisheries management that the EAF calls for. While very useful to guide participatory fisheries management, the FAO EAF

³⁰⁵ Milena Arias Schreiber, Ratana Chuenpagdee and Svein Jentoft, ‘Blue Justice and the Co-Production of Hermeneutical Resources for Small-Scale Fisheries’ (2022) 137 *Marine Policy* 1.

³⁰⁶ As Morgera assertedly explains, equitable benefit-sharing, based on the ecosystem approach, entails ‘procedural guarantees’ for community participatory decision-making, and ‘substantive measures’ that formally recognize communities’ sustainable management practices, as well as guide and support better practices to improve their sustainability levels and enhance livelihoods. See Morgera, ‘The Ecosystem Approach and the Precautionary Principle’ (n 125) 73.

³⁰⁷ In reference to the institutional background supporting the EAF paradigm, these guidelines mention several international instruments, including the CBD. They also refer to the CBD when detailing the principle of an EAF concerning maintenance of ecosystem integrity, including biodiversity at biological community, habitat, species and genetic levels. Social and cultural elements of the CBD’s framework are enshrined in the principles of an EAF addressing human well-being and equity (including inter-cultural equity) and stakeholder participation. See FAO EAF Technical Guidelines (n 127) Annex 1, p 7, and Annex 2, 85–88.

³⁰⁸ FAO EAF Technical Guidelines (n 127).

technical guidelines do not elaborate on the extent to which participatory fisheries management could or should be used in regional and international forums. The FAO EAF legal guide, in turn, suggests 17 EAF legal components to be reflected in national legislation for the EAF implementation.³⁰⁹ Components 4 and 5 resonate with the foreseen CBD Malawi principles, shedding light on mechanisms for stakeholder participation, transparency, institutional coordination, cooperation, and integration. Component 6 relates to the integration of lower-level authorities, bodies and stakeholders into management processes, and suggests fisheries co-management for ‘improved knowledge and consideration of local resources and systems’, as well as ‘strengthened implementation and enforcement of management measures’.³¹⁰

The CBD Malawi principles 2, 11, and 12, can be read in conjunction with the FAO EAF legal components 4, 5, and 6, for stronger support to the participation of small-scale fisheries peoples, through their knowledge and inputs by integration or, arguably, knowledge co-production, in international fisheries management. I now pass on to examine how participation can be realized in an equitable manner.

2.4.2. Equitable participation through the ecosystem approach to fisheries

Questions around equity and the EAF have been examined by Al Arif, who explains the EAF’s aim ‘at ensuring equitable benefits from fisheries resources for people who depend on these resources for their livelihood’, and proposes its use as a solution for issues of unfair competition between large-scale fisheries and small-scale fisheries, and the predominance of large businesses in fisheries management decisions.³¹¹ Al Arif also stresses stakeholder participation, in reference to the CBD Malawi principle 12, due to the importance of fisheries to fishers’ livelihoods, while recognizing the need for a bottom-up and inclusive decision-making process for this

³⁰⁹ FAO, ‘A How-to Guide on Legislating for an Ecosystem Approach to Fisheries’.

³¹⁰ Additionally, the FAO published subsequent technical guiding materials, which emphasized the human component of the EAF and the options for legislating for the EAF. See FAO The human dimensions of the ecosystem approach to fisheries (FAO Technical Guidelines for Responsible Fisheries No 4, Suppl 2, Add. 2, Rome, 2009) (n 281) 6 and 20.

³¹¹ Al Arif, ‘Exploring the Legal Status and Key Features of Ecosystem-Based Fisheries Management in International Fisheries Law’ (n 214) 329.

participation to be effective and address stakeholders' aspirations.³¹² Al Arif's arguments are indeed much aligned with what is proposed in this thesis.

Examining the EAF in the EU CFP, Wakefield notes that the approach plays a 'marginal' role in this policy, because while the applicable regulation defines and requires the approach, the regulation does not clarify how to strike balance between the 'highly complex involving variables and diffuse ecological and socio-economic objectives'.³¹³ Yet, Wakefield draws attention to the flawed 'participatory democracy' in the fisheries Advisory Councils (ACs), in charge of providing advice on fisheries management and conservation measures to the European Commission and member states.³¹⁴ I will explore this issue in chapter 6, but it is worth noting Wakefield's criticism, to whom, in the ACs context, 'a smaller group with a cohesive voice is able to triumph over the disparate views of the majority', giving 'predominance to the strongest interest group',³¹⁵ that is, the fisheries large-scale industrial sector.

In section 1.4, I anticipated the scholarly debate put forward by Davis and Hanich, whose research distinguish from most legal literature on the EAF by drawing attention to the participatory components of the approach in fisheries. The authors associate effective fisheries management in transboundary aquatic species with schemes that recognizes and responds to 'broader concerns of *participants*'.³¹⁶ The latter are not, evidently, small-scale fisheries peoples, but rather 'some states', especially developing states, which for them suffer a 'disproportionate burden of fisheries conservation and management measures'.³¹⁷ Davis and Hanich identify four main factors influencing the distribution of the concerned burden and benefit, including 'the importance of recognizing the special needs of vulnerable states and communities'.³¹⁸ Accordingly, the UNFSA, article 24(2)(b), which requires states to take into account 'the need to

³¹² *ibid* 330.

³¹³ Jill Wakefield, 'The Ecosystem Approach and the Common Fisheries Policy' in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance* (Brill Publishers 2019) 298–299.

³¹⁴ *ibid* 301.

³¹⁵ *ibid* 302.

³¹⁶ Ruth Davis and Quentin Hanich, 'Developing an Equitable and Ecosystem-Based Approach to Fisheries Management' in Harry N Schreiber, James Kraska and Moon-Sang Kwon (eds), *Science, Technology, and New Challenges to Ocean Law* (Brill Publishers 2015) 125 emphasis added.

³¹⁷ *ibid*.

³¹⁸ *ibid* 135.

protect subsistence and artisanal fishers and fish-workers' in cooperating for the management of the concerned stocks, is factored into the burden in question.³¹⁹ Nonetheless, Davis and Hanich do not elaborate further on the extent of such burden, and what it entails for the protection of small-scale fisheries peoples and fishworkers, as required by the UNFSA. The two scholars rather evaluate the EAF applied to the Pacific islands' tuna fisheries, and recognize the limitations of the approach in this context, arguing that such fisheries need a 'far more sophisticated and holistic approach', capable of measuring and considering the conservation burden and benefit outcome from each measure in respect of certain (most affected) States, distributing the conservation burden effectively and in an equitable manner.³²⁰

Davis and Hanich deal with a *de facto* situation, a problem that is already happening and which, they argue, leads to inequitable distribution of conservation burden, and hinders certain states lacking technical and financial capacity to deal with such burden. It is an interesting point, and from a small-scale fisheries perspective, one could think of a 'small-scale fisheries burden' on states, which would entail ensuring meaningful and effective participation of small-scale fisheries peoples in international fisheries management. In this respect, the EAF is not sufficient as it tends to leave the perspective of fishers in the surface, without a meaningful understanding of their needs and their rights in the context of fisheries management. To address this matter, I link the EAF to human rights in the next chapter.

2.5. Conclusion

It can be a 'long and winding road', as Ekebom puts it,³²¹ the analytical process of understanding the complex and variable uses of the ecosystem approach. To this end, I ventured on situating the international law literature dedicated to the ecosystem approach over the past forty years into phases, from 'awakening' international law to ecosystems' consideration to the current one concerned with enhancing the approach's implementation, and using it to guide coordination and adaptation in different contexts,

³¹⁹ *ibid* 137.

³²⁰ *ibid* 143–147.

³²¹ Jan Ekebom, 'The Long and Winding Road of the Ecosystem Approach into Marine Environmental Policies' (2013) 23 *Aquatic Conserv: Mar Freshw Ecosyst* 1.

including international fisheries management, the BBNJ Agreement, and climate change. This literature review led me to explore the ecosystem approach's legal status, which I understand as an international environmental law principle based on its main action or duty (*ensuring environmental management activities are undertaken in an integrated and equitable manner, with due regard to ecosystems' considerations*). Similarly, I consider the EAF, based on its main action or duty (*ensuring fisheries management activities are undertaken in an integrated and equitable manner, with due regard to ecosystems' considerations*), a principle of international fisheries law. These main actions entail different expressions and elaborations of the approach in particular contexts. For the EAF, its consolidated status as a principle of international fisheries law is also firmed up by the approach's numerous expressions in regional fisheries frameworks illustrated above.

This exploration of the EAF also shows the poor exploration of the human dimensions of the EAF in the relevant literature. I then explored such dimensions, the participatory and equity elements of the ecosystem approaches, noting both the relevant principles of the CBD Malawi principles, the FAO EAF guidelines and EAF legal components. From this lens, the EAF can be understood as fostering knowledge co-creation and the equitable participation of small-scale fisheries peoples in fisheries management. Importantly, the conservation burden on all states could arguably factor in the 'small-scale fisheries burden', by ensuring the small-scale fisheries peoples effectively and meaningfully participate in international fisheries management.

The human dimensions of the EAF, despite the analysis above, remain insufficient in enabling one to fully capture the needs and interests of the people involved in and affected by fisheries management. Such inadequacy consequently leads to fisheries management decisions adopted on the basis of ecological preferences, without the appropriate considerations for the humans behind fisheries. With this in mind, the next chapter explores the human rights and fisheries nexus with a view to providing a deeper understanding of the human dimensions of the EAF and expand the meaning of adequate participation of small-scale fisheries peoples in international fisheries management.

CHAPTER 3

Disentangling the human rights and fisheries nexus for realizing adequate participation in fisheries management

As seen in chapter 2, international fisheries law literature has examined the EAF with a focus on the environmental or ecological side of the approach, with much less attention paid to its human dimensions. This is not a surprise given that international fisheries law is commonly seen as a specialized domain related to marine capture fisheries,³²² with a focus on the management, conservation, and development of the activities rather than on the safety and decent working conditions of the sector's workforce, or the needs and rights of fishers and their communities.³²³ As Kirschner notes, challenges related to human rights and fishing are 'multidimensional', given that fisheries directly involve multiple actors (states, fishers, communities, companies, organizations), from or associated to different nationalities, and who operate in fishing vessels that may be flagged, or unflagged.³²⁴

In this context, and to elucidate the human dimensions underpinning fisheries management, this chapter broadens the research to explore the human rights and fisheries nexus. I begin this analysis with some considerations from the law of the sea perspective, noting the issues of applicability of human rights to marine spaces, examining the protection of people at sea literature, and the matters of decent work and safety on board fishing vessels (*section 3.1*). I then reflect on certain groups generally considered vulnerable in the fisheries context, illustrating the case of Indigenous peoples, and examining gender concerns (*section 3.2*). This is followed by

³²² Molenaar and Caddell (n 49) 1.

³²³ That is, States' main concerns have been toward firming fishing agreements to harvest fish in each other's maritime zones, and setting out principles and rules regulating fisheries management. See also Nakamura, 'International Fisheries Law: Past to Future' (n 38).

³²⁴ Stefan Kirchner, 'Human Rights and Fishing: A Multidimensional Challenge' (2019) 12 *Baltic Journal of Law & Politics* 155.

my account of human rights approaches in the fisheries and specifically the small-scale fisheries context (*section 3.3*). This chapter brings me to a deeper understanding of the human rights and fisheries nexus, which complements the EAF by expanding the meaning of adequate participation of small-scale fisheries peoples in international fisheries management, and what this entails for the protection of their rights (*section 3.4*). Finally, I conclude (*section 3.5*).

3.1. Some considerations from a law of the sea perspective

The international law literature on the human rights and fisheries nexus began to flourish in recent years, developed by few scholars, including myself, for instance, in examining the specific linkages between small-scale fisheries and human rights from an international law perspective.³²⁵ A preliminary concern worth elucidating is on the applicability of human rights law to marine areas. Scholars reiterate this matter to underscore the need to respect human rights law in the marine context, as well as to reinforce the unequivocal application of human rights treaties to marine spaces. Such concern stems, as noted by Papanicolopulu, from the fact that ‘[t]reatises on human rights ignore the peculiarities of the marine context, concentrating their analyses on the application of human rights on land’.³²⁶ She further contends that the applicability of human rights law to sea spaces cannot be seriously questioned, but the lack of provisions in human rights law dedicated to the protection of people at sea ‘may create interpretative dilemmas concerning both the scope and the content of states’ obligations towards persons at sea’, and would consequently demand further rethinking to adapt states’ duties to ‘complex overlap of jurisdictions that characterizes marine space’.³²⁷ For Enyew, the issue of applicability becomes clear when zooming into human rights treaties’ provisions regarding the treaty’s application to the parties’ territorial limits and areas under their national jurisdiction.³²⁸ Where such requirement

³²⁵ See section 1.4 of this thesis.

³²⁶ Iriñi Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018) 67.

³²⁷ *ibid* 95.

³²⁸ See examples of such treaties identified by Enyew in Endalew L Enyew, ‘International Human Rights Law and the Rights of Indigenous Peoples in Relation to Marine Spaces and Resources’ in Stephen Allen, Nigel Bankes and Ravna Øyvind (eds), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing 2019) 46–47.

is absent in a treaty, the general rule of international law reflected in article 29, VCLT, applies, according to which the treaty is binding upon each party in respect of its entire territory.³²⁹ If the doubt persists, Enyew and Bankes make a pertinent argument that ‘there is nothing in the text of other instruments to suggest that the rights articulated should be confined to terrestrial areas’.³³⁰ In effect, unless an explicit exemption is provided, it is reasonable to affirm that human rights treaties, for their universal character, generally apply to marine areas, including states’ territorial lands, inland waters, internal waters, territorial seas (extending up to twelve nautical miles), and archipelagic waters, as applicable. It is on these areas under state’s jurisdiction that small-scale fishing activities and related activities of preparation, processing and marketing take place. I venture further in arguing that the applicability of human rights law to marine spaces also entails the applicability of non-formally binding human rights instruments to marine spaces. As Morgera and I explain, the UNDROP’s protection of human rights of small-scale fisheries peoples in a rural context essentially concerns fishing grounds, which in effect cover inland areas as well as areas extending the territorial land seawards.³³¹ Consequently, the UNDROP applies *mutatis mutandis* to the territorial seas of coastal states and archipelagic states, affirming the protection of the human rights of small-scale fisheries peoples in marine territorial areas as well.

Having noted the issue of applicability, I now move on to a more structured legal analysis of the human rights and fisheries nexus, which naturally led me to explore, in the next sections, the protection of people at sea; decent work and safety on board fishing vessels, and; so-called ‘vulnerable groups’ in small-scale fisheries.

³²⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) art 29.

³³⁰ Endalew L Enyew and Nigel Bankes, ‘Interaction between the Law of the Sea and the Rights of Indigenous Peoples’ in Nele Matz-Lück, Jensen Øystein and Elise Johansen (eds), *The Law of the Sea: Normative Context and Interactions with Other Legal Regimes* (Routledge 2022) 153. Teh and others recall on the need of them to be ‘assiduously implemented by the national authorities and expressly applied to the maritime sector in order to inspire meaningful outcomes’. See Lydia Teh and others, ‘The Role of Human Rights in Implementing Socially Responsible Seafood’ (2019) 14 PLoS ONE 1.

³³¹ As anticipated above, the UNDROP applies to artisanal or small-scale fisheries peoples who have a special dependency or attachment to the land, including the fishing grounds. See Morgera and Nakamura (n 44) 66.

3.1.1. Protecting people and fishers at sea

Tullio Treves, the former judge of the International Tribunal for the Law of the Sea (ITLOS), contends that the rules under the law of the sea regime are at times ‘inspired by human rights considerations’, and ‘may or must be interpreted in light of such considerations’.³³² Let me illustrate this by unpacking article 73, LOSC, which provides for coastal states’ rights and duties on enforcement of fisheries legislation in their EEZ.³³³ Article 73(1) recognizes the coastal state’s right to take enforcement action such as boarding, inspection, and arrest, while paragraphs 2 to 4 balance these actions, as Goodman rightly notes, limiting the ‘freedom of the persons involved’.³³⁴ As such, article 73(2) provides for the coastal state’s duty to *promptly release* arrested vessels and their crews upon the posting of reasonable bond or other financial security.³³⁵ This obligation presumes the need to protect individual rights affected by a vessel’s detention, which, as Petrig and Bo explain, could entail the protection of the ‘right to liberty of the crew and the right to property of the ship owner’.³³⁶ In their account of the ITLOS jurisprudence examining article 73(2), the authors stress the human rights-based approach adopted by Treves,³³⁷ and the ‘humanisation’ of that provision by the Tribunal, which has ‘tacitly tak[en] into account human rights’, and interpreted the prompt release obligation alongside the guarantees under article 73(3) and (4).³³⁸ This understanding aligns with Goodman’s position, who asserts that ‘every

³³² Tullio Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 Berkeley Journal of International Law 1, 12.

³³³ As Petrig and Bo note, this provision has ‘been scrutinised the most’ by the International Tribunal for the Law of the Sea and, while not being a human rights clause per se, it ‘contain[s] “ordinary” international individual rights’. The authors refer to ‘ordinary’ international individual rights in reference to Anne Peters’ categorisation of two groups of rights: human rights, which are fundamental often anchored in constitutions, and the ‘ordinary’ international individual rights, which are ‘simple’ individual rights such as the right to data protection, right to social services, etc. See Anna Petrig and Marta Bo, ‘The International Tribunal for the Law of the Sea and Human Rights’ in Martin Scheinin (ed), *Human Rights Norms in ‘Other’ International Courts* (Cambridge University Press 2019) 355; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 436.

³³⁴ As noted in Camille Goodman, *Coastal States Jurisdiction over Living Resources in the Exclusive Economic Zone* (Oxford University Press 2021) 218–224.

³³⁵ Article 73(2) should be read in conjunction with article 292 on the procedures relating to the prompt release of vessels and crews.

³³⁶ Petrig and Bo (n 333) 356.

³³⁷ Notably reflected in *The “Juno Trader” Case (Saint Vincent and the Grenadines v Guinea-Bissau)*, *Prompt Release (Separate Opinion of Judge Treves)* ITLOS Rep 2004 17 [3 and 6].

³³⁸ Petrig and Bo (n 333) 357, 363–364, 393 and 410. at 357, 363-364, 393 and 410.

paragraph of article 73 is to be read in the context of the article as a whole', which means that every enforcement measure taken by a coastal state, pursuant to article 73, must be both necessary and reasonable.³³⁹ In turn, article 73(3) prohibits the coastal state from applying *imprisonment*, unless 'agreements to the contrary by the States concerned', and prohibits any other form of *corporal punishment*, both instances for the violation of the coastal state's fisheries legislation. This provision can thus bring to effect the protection of the offender's human right to life, freedom from torture and other cruel, inhumane, or degrading treatment. In turn, article 73(4) requires the coastal State to notify the flag State on the actions taken and penalties imposed on the flag State's fishing vessel, ensuring respect of the due process guarantee.

Petrig and Bo predict that the ITLOS would likely render inadmissible provisional measures seeking to protect human rights, as its jurisdiction 'does not extend to the adjudication of human rights norms'.³⁴⁰ Nevertheless, the authors convincingly suggest ways through which the Tribunal could circumvent this limitation. One is by understanding that the actions severely undermining the human rights of individuals on board fishing vessels could aggravate the dispute; another is by considering human rights norms 'incidentally', in reference to three 'anchoring' rules.³⁴¹ One rule is article 293(1) requiring the competent court and ITLOS to apply the LOSC and 'other rules of international law not compatible with this Convention', thus possibly human rights rules. The second rule is the 'considerations of humanity', which the ITLOS coined in one case,³⁴² reiterated in subsequent cases, and could thus be a statement on which human rights rules could fill in the interpretation of article 293(1). The third rule is article 300, requiring states to 'fulfil in good faith' the obligations under the LOSC, and exercise recognised rights, jurisdictions, and freedoms without 'abuse of right', which could be used in conjunction with another LOSC provision to enable the adjudication by ITLOS of human rights violations.³⁴³

³³⁹ Goodman further explores the meaning of 'necessary' and 'reasonable', as interpreted by judicial authorities, but I will not go into this discussion as it is not pertinent for the present analysis. See Goodman (n 334) 221–224..

³⁴⁰ Petrig and Bo (n 333) 393–394.

³⁴¹ *ibid* 393–395.

³⁴² *M/V Saiga (No 2) Case (Saint Vincent and the Grenadines v Guinea) (Judgement)* [1999] ITLOS Rep 1999 10 [155].

³⁴³ Petrig and Bo (n 333) 395–409.

In effect, international law scholars concerned with the protection of people at sea have been dealing with, as Haines explains, ‘the human rights of *everyone at sea*’, ‘not restricted in any geographical or sectoral sense’.³⁴⁴ Fishers are thus among the multiple groups protected under the reference to ‘people at sea’. Specific protection of people *while at sea*,³⁴⁵ as Papanicolopulu notes, remains absent in both the law of the sea and human rights law regimes.³⁴⁶ Her elaboration of the legal and conceptual foundations for a new special regime dedicated to ‘the protection of people at sea’ covers fishers engaged in marine fishing,³⁴⁷ but does not scrutinize small-scale fisheries, and her analysis of procedural rights does not relate to participatory international fisheries management and rather concerns ‘access to international justice’.³⁴⁸ Galani’s account is similarly on the protection of people at sea generally, examining the EU obligations under the law of the sea and human rights law regimes.³⁴⁹ In effect, the two scholars have joined the efforts of non-state actors in launching the *Geneva Declaration on Human Rights at Sea*,³⁵⁰ which, while generic in protecting all people at sea, does cover issues of slavery, forced labour, decent work, and child labour in fisheries. These matters are actually the main ones linking social and human rights-related concerns of states and fisheries at the international level, as I continue to examine in the next section.

³⁴⁴ Steven Haines, ‘Developing Human Rights at Sea’ (2021) 35 *Ocean Yearbook Online* 18, 30 emphasis added. See also Tafsir Malick Ndiaye, ‘Human Rights at Sea and the Law of the Sea’ 10 *Beijing Law Review* 261.

³⁴⁵ Papanicolopulu is particularly concerned with the hostile and unsafe marine environment, which often entails deaths, personal injuries, crimes, forced labour, poor working conditions, and other security threats. See Papanicolopulu (n 326) 24–32.

³⁴⁶ *ibid* 33–34 and 38.

³⁴⁷ *ibid* 19–20.

³⁴⁸ *ibid* 90 and 192–193.

³⁴⁹ Sofia Galani, ‘Assessing the Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain’ (2020) 35 *The International Journal of Marine and Coastal Law* 325. Galani has also examined the international protection of people at sea impacted by port closures due to the Covid-19 pandemic. See Sofia Galani, ‘Port Closures and Persons at Sea in International Law’ (2021) 70 *The International and Comparative Law Quarterly* 605.

³⁵⁰ Launched by the NGO Human Rights at Sea in March 2022. See *Human Rights at Sea, Geneva Declaration on Human Rights at Sea*.

3.1.2. Securing fishers' rights to decent work and safety on board fishing vessels

The human rights and fisheries nexus originally stems from the concerns of certain states with combatting slavery, trafficking and forced labour in ships, including fishing vessels at sea.³⁵¹ Although the *Convention concerning forced labour* dates back to 1930s,³⁵² adopted under the auspices of the International Labour Organization (ILO), and the human right to decent work is anchored in the Universal Declaration of Human Rights (UDHR) of 1948,³⁵³ and further elaborated in the International Covenant on Economic, Social and Cultural Rights (ICESCR),³⁵⁴ these and other international instruments of binding and non-formally binding nature that support the decent work agenda in fisheries have not been sufficient in tackling the occurrence of severe human rights violations in fisheries.³⁵⁵ This scenario has prompted the continued and growing work of national human rights institutions, and the Special Rapporteur on the Right to Food, toward the promotion and protection of the human rights of fishers generally, and the related monitoring of the human rights situation.³⁵⁶ Nevertheless, states' lack

³⁵¹ A list of treaties relevant to human rights abuses at sea is provided in Sara G Lewis and others, 'Human Rights and the Sustainability of Fisheries', *Conservation for the Anthropocene Ocean: Interdisciplinary Science in Support of Nature and People* (Academic Press 2017) 382–384. See also Vasco Becker-Weinberg, 'Time to Get Serious about Combatting Forced Labour and Human Trafficking in Fisheries' (2020) 36 *The International Journal of Marine and Coastal Law* 88.

³⁵² *Convention concerning forced labour*, as modified by the Final Articles Revision Convention, 1946 (ILO C-29) (adopted 28 June 1930, entered into force 1 May 1932) (39 UNTS 55).

³⁵³ Article 23 reads: '1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests'. See Universal Declaration of Human Rights (adopted 10 December 1948) (UNGA Resolution 217(III)A (UDHR)).

³⁵⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered in force 3 January 1976) (993 UNTS 3) arts 6–10.

³⁵⁵ See for instance Bloom, 'Canned Brutality: Human Rights Abuses in the Tuna Industry' (Bloom 2023) <<https://bloomassociation.org/wp-content/uploads/2023/05/Canned-brutality.pdf>> accessed 7 February 2024.

³⁵⁶ Stefania Errico and others, 'Human Rights in Fisheries and Aquaculture: A Briefing Note for National Human Rights Institutions' (The Danish Institute for Human Rights 2023) <https://www.humanrights.dk/files/media/document/HUMAN%20RIGHTS%20IN%20FISHERIES%20AND%20AQUACULTURE%20-%20A%20BRIEFING%20NOTE%20FOR%20NATIONAL%20HUMAN%20RIGHTS%20INSTITUTIONS_accessible.pdf> accessed 7 February 2024; Commission on Human Rights of the Republic of the Philippines, 'A Monitoring Report: The Human Rights Situation of Artisanal Fisherfolks' (2021) <<https://chr.gov.ph/wp-content/uploads/2022/06/Resolution-POL2022-010-Monitoring-Report-The-HR-Situationer-of-Artisanal-Fisherfolks-full.pdf>> accessed 7 February

of interest in ensuring the wellbeing and protection of fishers and fishworkers is reflected, for instance, in the few ratifications of two key treaties specifically addressing decent work in fisheries and safety of fishing vessels, respectively adopted through the ILO and the International Maritime Organization (IMO), namely: the *Convention concerning Work in the Fishing Sector* (C188),³⁵⁷ and the *Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention of the Safety of Fishing Vessels of 1977* (Cape Town Agreement),³⁵⁸ the latter not yet into force.³⁵⁹ I examine the limitations of these treaties as regards their applicability to small-scale fisheries in section 4.1.3 further below. Importantly, the linkages between decent work, safety on board fishing vessels, and port state measures were part of the core discussions of the fifth session of the FAO-ILO-IMO *ad hoc* joint working group on IUU fishing and related matters, a critical initiative that can help to integrate more human rights-related concerns across fisheries management, monitoring, control and surveillance, ultimately contributing to the fight against IUU fishing.³⁶⁰ As such, the human rights and fisheries nexus could also have a positive impact on both human and food security as well, as Barnes and Rossello note. They stress ‘the critical role that effective fisheries management can play in supporting human security’ by

2024; Michael Fakhri, ‘Fisheries and the Right to Food in the Context of Climate Change (A/HRC/55/49)’ (2024).

³⁵⁷ This Convention took ten years to enter into force and remains poorly ratified, with 21 ratifications as of January 2024. The Convention will enter into force for Spain on 29 February 2024. See *Convention concerning Work in the Fishing Sector* (ILO C188) (adopted 14 June 2007, entered into force 16 November 2017) (reg no I-54755); ILO, ‘Ratifications of C188, Work in Fishing Convention, 2007 (No. 188)’ (2024) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312333> accessed 21 January 2024.

³⁵⁸ *Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention of the Safety of Fishing Vessels of 1977* (adopted 11 October 2012, not yet into force).

³⁵⁹ Currently, 22 states have ratified this treaty, which corresponds to one of the requirements for triggering the 12-month period after which the treaty can be considered as having entered into force. The other requirement has not been met yet, which is for state parties to this treaty to have an aggregate 3,600 fishing vessels of 24 meters in length and over operating on the high seas. See FAO, ILO and IMO Secretariats, ‘Working Document Providing Guidance on Agenda Items of the 5th Session of the Joint FAO/ILO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters’ <<https://www.fao.org/3/cc9166en/cc9166en.pdf>> accessed 21 January 2024.

³⁶⁰ See *ibid.*

encompassing threats to human wellbeing and concerns with food, living and working conditions.³⁶¹

The literature examined above raises a couple of concerns. First, while problems of decent work and safety at sea are critical in fisheries generally, it is important to note that these issues can be worse in small-scale fisheries, which suffer from greater levels of marginalization and vulnerability. Literature has placed emphasis on certain ‘vulnerable groups’ like women and Indigenous peoples, as detailed further below, but it is necessary to underscore the specific needs and challenges faced by small-scale fisheries peoples as well within the fisheries sector. Moreover, international law scholars tend to look into the human rights of procedural nature, primarily in respect of access to justice, and superficially examining participatory rights in fisheries management decision-making processes. This is understandable due to the urgency in addressing severe human rights violations and ensuring right holders can realize their rights of access to justice. However, in fisheries, a key entry-point for enabling fishers to raise governments’ concerns about the high number of accidents and fatalities occurring due to poor safety equipment, as well as the reported gross human rights violations on board fishing vessels due to forced labour and poor working conditions of fisherworkers,³⁶² is by ensuring fishers, especially small-scale fisheries peoples, effectively participate in relevant decision-making processes that can influence action toward tackling those problems.

At the international level, participation of small-scale fisheries peoples could make a difference to further the integration of social and human rights issues into the RFBs arena. In effect, decent work and safety on board fishing vessels are being discussed in certain RFBs, with an emphasis on flag state responsibility and compliance with applicable labour and human rights rules.³⁶³ In 2018, the Western and

³⁶¹ Richard A Barnes and Mercedes Rosello, ‘Fisheries and Maritime Security: Understanding and Enhancing the Connection’ in Malcolm D Evans and Sofia Galani (eds), *Maritime Security and the Law of the Sea: Help or Hindrance?* (Edward Elgar Publishing 2020) 50, 55 and 56.

³⁶² Natalie Klein, ‘Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law’ (2022) 53 *Ocean Development & International Law* 232, 29.

³⁶³ Penelope Ridings, ‘Labour Standards on Fishing Vessels: A Problem in Search of a Home?’ (2021) 22 *Melbourne Journal of International Law* 308, 311–317; Elda Belja, Raymon van Anrooy and Daniela Kalikoski, ‘Regional Fisheries Bodies and Their Role in Improving Safety and Decent Work on Fishing Vessels’ (FAO 2022) *FAO Fisheries and Aquaculture Circular* 1260.

Central Pacific Fisheries Commission (WCPFC) adopted a non-binding *Resolution on labour standards for crew of fishing vessels* (R 2018-01), which calls upon members, cooperating non-members and participating territories to ‘ensure that their relevant national legislation fully extends to all crew working on fishing vessels flying their flag in the WCPFC Convention Area’ and to ‘adopt measures into their national legislation to establish minimum standards regulating crew labour conditions’.³⁶⁴ In turn, article 25(4), SPRFMO Convention,³⁶⁵ explicitly requires members to ensure operation by fishing vessels flying its flag in the SPRFMO Convention area is in accordance with relevant international obligations, recommendations and guidelines on ‘safety at sea for vessels and their crews’.

With this in mind, I move on to reflect in the next section on the extent to which literature has explored, within the broad protection of certain groups of people generally considered vulnerable, the element of their participation in fisheries management decision-making processes.

3.2. Participatory rights of groups subject to vulnerable fisheries contexts

At the onset, I clarified that this thesis does not treat small-scale fisheries peoples as a vulnerable group, but rather recognizes that they suffer from vulnerability due to multiple socio-economic and environmental reasons. In fisheries, like in other sectors, vulnerable groups are known to include Indigenous peoples, women, children, and migrants.³⁶⁶ Van der Burgt’s book is a useful resource when examining this topic from an international law perspective. Her book explores the extent to which multilateral fisheries instruments reflect normative consensus on human development, while

³⁶⁴ The resolution provides a non-exhaustive list of fair working conditions to be observed, including fair terms of employment, decent working and living conditions on board fishing vessels, decent and regular remuneration, provision for crew members to disembark and seek repatriation if so entitled. See WCPFC, Resolution on labour standards for crew on fishing vessels (adopted at the 15th Regular Session of the WCPFC, 10-14 December 2018, Honolulu, Hawaii, USA) 2018. In addition to this non-binding resolution, there is a draft conservation and management measure on labour standards for crew on fishing vessels, which, if adopted, will be binding on WCPFC members. See Belja, van Anrooy and Kalikoski (n 363) 9.

³⁶⁵ SPRFMO Convention.

³⁶⁶ The SSF Guidelines place emphasis on ‘vulnerable and marginalized people’, ‘vulnerable and marginalized groups’, ‘vulnerable fisheries people’ in certain paragraphs, but also explicitly refer to women and men in several instances, and, where relevant, to children, indigenous peoples, and ethnic minorities. See FAO SSF Guidelines (n 25).

investigating the principles of equity and participation in international fisheries law instruments.³⁶⁷ She indeed helped clarifying ‘equity, poverty and participation in the context of international fisheries law’, and in detailing these ‘key principles that frame modern fisheries governance’.³⁶⁸ Various textual manifestations of the equity principle cover the notions of equitable access to fishery resources, which Van der Burgt categorises as: ‘equity among states’, linked to the special needs and requirements of developing states and coastal communities; and ‘equity within states’, related to local fishing communities in developing states, often recognizing the needs and interests of small-scale fisheries.³⁶⁹ She investigates the principle of participation, described as entailing both ‘access to information’ and ‘capacity building and empowerment’.³⁷⁰ For Van der Burgt, ‘interstate participation’ is mostly in legally binding instruments that cover access to decision-making by developing countries at international and regional forums; whereas ‘within states participation’ is more comprehensively addressed in non-binding instruments that cover capacity building and empowerment of specific groups such as local fishing communities.³⁷¹ Importantly, Van der Burgt finds that the normative consensus reflected in several instruments, particularly with respect to participation, is the ‘least represented’ in fisheries instruments, compared to the indicators of equity and poverty eradication.³⁷² Further, that participation of individuals or groups, such as women and fisher workers, is ‘non-existent’ in fisheries instruments.³⁷³ Indeed, her arguments remain valid to the extent of binding fisheries instruments, but, evidently, her research preceded the adoption of the SSF Guidelines and UNDROP, which have significantly addressed the limitations Van der Burgt found in fisheries instruments, while, respectively, bridging human rights considerations to

³⁶⁷ See chapter 6 ‘Human Development in Multilateral Fisheries Instruments’ in Van der Burgt (n 94).

³⁶⁸ Quentin Hanich, ‘The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EU Fisheries Instruments, Written by Neinke Van Der Burgt’ (2015) 31 *The International Journal of Marine and Coastal Law* 198. For a more critical account, see Andrew Serdy, ‘Nienke van Der Burgt, The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EU Fisheries Instruments’ (2014) 28 *Ocean Yearbook Online* 769.

³⁶⁹ Van der Burgt (n 94) 170–188.

³⁷⁰ *ibid* 207.

³⁷¹ *ibid* 209.

³⁷² *ibid* 345.

³⁷³ *ibid* 345–346.

small-scale fisheries and bridging small-scale fisheries to a human right instrument explicitly.

The conflictual dynamics between the adoption of conservation and management measures and the protection of livelihoods arising from the efforts of states in meeting international obligations (e.g., LOSC, UNFSA and CBD) and following scientific advice in decision-making (on e.g., total allowable catch, habitat and biodiversity protection) can lead to deeper levels of poverty and increased marginalisation of local communities dependent on those resources.³⁷⁴ In addition to capacity building and technology transfer to address this matter, Diz, Morgera and Wilson advocate for ‘more participatory conservation and management measures’.³⁷⁵ This understanding rightly points to the added-value of participatory international fisheries management, that is, by empowering small-scale fisheries peoples and ultimately contributing to poverty alleviation in their contexts.

Let me examine certain groups generally considered vulnerable in small-scale fisheries. To illustrate the types of considerations that would be needed in participatory international fisheries management, I will examine the Indigenous peoples, followed by an analysis of the elements of gender discrimination.

3.2.1. Reflecting on Indigenous peoples engaged in fishing

In Enyew’s analysis of ‘specific human rights norms relevant to Indigenous people’s rights to marine space and marine resources’, he underscores the procedural right of Indigenous peoples to participate and be consulted, ‘directly or through their chosen representatives’, in decision-making processes affecting their rights and interests.³⁷⁶ Enyew interprets the states’ duties under the ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (C169)³⁷⁷ and the *UN*

³⁷⁴ Daniela Diz, Elisa Morgera and Meriwether Wilson, ‘Sharing the Benefits of Sustainable Fisheries: From Global to Local Legal Approaches to Marine Ecosystem Services for Poverty Alleviation’ 26.

³⁷⁵ *ibid.*

³⁷⁶ Enyew (n 328) 65.

³⁷⁷ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO C-169) (adopted 27 June 1989, entered into force 5 September 1991) (1650 UNTS 383) art 6(1)(a), 7, 15 and 16.

Declaration on the Rights of Indigenous Peoples (UNDRIP)³⁷⁸ as entailing the duty of consultation prior to states' adoption of conservation and management measures susceptible of causing negative consequences on Indigenous communities, such as the 'prohibition of fishing and hunting, process to determine quotas, restrictions on fishing and hunting methods, or the establishment of MPAs within traditional fishing grounds'.³⁷⁹ The consultation, he contends, should be in good faith, where states are 'open to hear, and be influenced by, the views of the Indigenous communities concerned' while being 'prepared to abandon or modify the proposed measure' with a view to minimise its potential negative impacts.³⁸⁰ Enyew also notes that the protection of procedural rights of Indigenous peoples may require states to obtain free, prior and informed consent (FPIC) of the community affected, as enshrined in the UNDRIP,³⁸¹ in reference to cases where proposed projects or the disposal of hazardous waste affect communities' living areas or their fishing grounds.³⁸²

In effect, the duty to protect Indigenous peoples' procedural rights in the fisheries context is arguably enshrined in provisions of different international fisheries law instruments. These include article 24(2)(b), UNFSA, which requires states to take into account the need to avoid adverse impacts on and ensure access to fisheries by Indigenous people when cooperating for the management and conservation of the concerned stocks; article 7.6.6, CCRF, which calls for states and RFMOs to take due account of Indigenous peoples' interests when deciding on conservation and management measures; and paragraph 3.1(6), SSF Guidelines, which provides for the principles of consultation and participation, ensuring 'active, free, effective, meaningful and informed participation' of Indigenous peoples in the 'whole decision-making process related to the fishery resources and areas where small-scale fisheries operate as well as adjacent land areas', differently from the FPIC standard, but not contradictory to article 19, UNDRIP. The SSF Guidelines recognize the role of these

³⁷⁸ UNGA, Resolution 61/295 of 13 September 2007, 'Declaration on the Rights of Indigenous Peoples' (UNDRIP) [2 October 2007, UN Doc. A/RES/61/295 (adopted by 143 votes to 4 against (Australia, Canada, New Zealand and USA); 11 abstentions; 34 non-voting] art 19.

³⁷⁹ Enyew (n 328) 65.

³⁸⁰ *ibid* 66.

³⁸¹ UNGA UNDRIP (n 378) art 10.

³⁸² Enyew (n 328) 66.

groups in restoring, conserving, protecting and co-managing local aquatic and coastal ecosystems, and support their knowledge, culture, traditions and practices.³⁸³ An FAO operational guide on the CCRF and Indigenous peoples further asserts that, pursuant to the FPIC principle, the participation of affected Indigenous fishing communities must be recognized and prioritized in all fisheries management decision-making processes.³⁸⁴

In a different vein, Allen’s analysis on the jurisprudence of artisanal fishing rights, which overlap to some extent with Indigenous fishing rights, found the recognition by courts and arbitral tribunals of traditional and artisanal fishing rights in relation to coastal states’ internal and territorial waters, and EEZs.³⁸⁵ He contends that a ‘compelling way forward’ for artisanal fishing communities to trigger adjudication of their rights of access to fishing resources would be ‘to invoke applicable human rights treaties *directly against the coastal State involved*’, as opposed to ‘relying on their own State to take up their claim via the LOSC’s dispute resolution mechanism’.³⁸⁶ Perhaps an international case on small-scale fisheries could test Petrig and Bo’s arguments, seen above,³⁸⁷ and bring human rights-related issues to a potentially evolved and more humanised ITLOS. Or it may seem more reasonable that small-scale fisheries peoples resort to the regional human rights courts, and/or *quasi-judicial* human rights treaty-monitoring bodies, notably the Committees established by core human rights treaties such as the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (CCPR), which respectively monitor implementation of the ICESCR and the *International Covenant on Civil and Political Rights* (ICCPR),³⁸⁸ with a view to claim for the recognition and protection of human rights and fishing rights affected. Based on my account of selected international cases relevant to the

³⁸³ FAO SSF Guidelines (n 25) para 5.4, 5.5 and 11.6.

³⁸⁴ FAO, ‘The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide’ 18 <<https://www.fao.org/3/i0840e/i0840e.pdf>> accessed 23 January 2023.

³⁸⁵ Stephen Allen, ‘The Jurisprudence of Artisanal Fisheries Revisited’ in Stephen Allen, Nigel Bankes and Ravna Øyvind (eds), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing 2019).

³⁸⁶ *ibid* 118–119.

³⁸⁷ Petrig and Bo (n 333) 393–394.

³⁸⁸ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered in force 23 March 1976) (999 UNTS 171).

protection of small-scale fisheries,³⁸⁹ only one of the assessed 21 decisions recognizes the right of fishing-dependent individuals and communities to participate in decision-making processes affecting them. In the case *Apirana Mahuika et al v. New Zealand*,³⁹⁰ the Apirana Mahuika and 18 other individuals belonging to the Maori people of New Zealand claimed to be victims of violations by New Zealand of articles 1, 2, 16, 18, 26 and 27, ICCPR. The claim originated from an old concern on fishing rights, pursuant to the 1840 *Treaty of Waitangi* (between Maori and the British Crown), which affirmed the rights of Maori to, inter alia, self-determination and control tribal fisheries, but which was not implemented nationally for about 140 years, until the Quota Management System was introduced as an interim measure through the 1989 Maori Fisheries Act.³⁹¹ This, however, did not prevent more conflicts over fishing rights, and the case brought to the CCPR concerned the Treaty of Waitangi (Fisheries Claims) Settlement Act, signed in 1992, which the authors claimed to have ‘confiscate[d] their fishing resources, denie[d] them their right to freely determine their political status and interfere[d] with their right to freely pursue their economic, social and cultural development’.³⁹² Although the CCPR concluded that New Zealand took the necessary steps through broad consultation prior to legislating on fisheries settlement and quota system, in compliance with article 27, ICCPR,³⁹³ the Committee did recognize that such settlement instrument and its mechanisms limited the cultural rights of the concerned Maori tribes, and tolerated the fisheries measures taken by New Zealand upon the condition that members of the said minority group would be given the opportunity to participate in the relevant decision-making processes, and, as such, continue to benefit from their traditional activities.³⁹⁴

In another topic on Indigenous fishing and human rights, Fitzmaurice brings in key insights for participation in the international regime on whaling, regulated by the

³⁸⁹ Nakamura, ‘The Fundamental Rights of Small-Scale Fishers and Their Communities in the International Jurisprudence’ (n 111).

³⁹⁰ *Apirana Mahuika et al v New Zealand (Adoption of Views) Communication No 547/1993, CCPR/C/70/D/547/1993* (UNHRC).

³⁹¹ *ibid* 5.1, 5.2 and 5.4.

³⁹² *ibid* 6.1.

³⁹³ *ibid* 9.8.

³⁹⁴ *ibid* 9.5.

International Convention for the Regulation of Whales (ICRW).³⁹⁵ She assertedly notes that one of the most important areas of the IWC's functioning relates to civil society participation as observers in IWC meetings, given that the 2018 IWC Review recommended the IWC Secretariat to consult with NGOs so they could be more effectively involved in future meetings.³⁹⁶ I will examine NGOs' participation in RFBs later, but it is worth noting that participation of Aboriginal fishers in the IWC meetings appears to be more acceptable as observers, rather than through national delegations, considering that, for governments in general, Aboriginal fishers would have 'little to say in the matters of Aboriginal whaling' in the IWC meetings.³⁹⁷ Fitzmaurice alerts that vesting full decision-making powers to Indigenous peoples, rather than states, seems unrealistic in current times, but she presents two valuable reasons for such participation to be realized: considering 'some participation of Indigenous peoples in the allocation of Aboriginal quotas'; and giving them opportunities to 'voice their points of view' and contribute toward enhanced 'understanding and coherence in the regulation of Aboriginal whaling'.³⁹⁸ Fitzmaurice also explains that quota allocation to Aboriginal subsistence whaling is set out as long as the hunting does not seriously increase the risks of extinction; and that such hunting keeps targeted whales' populations at relatively high healthy levels while meeting appropriate 'cultural and nutritional needs' of the Aboriginal peoples concerned.³⁹⁹ This latter evidence, she notes, is difficult to obtain, and it is complicated considering the interpretation by the CCPR on Indigenous culture under article 27, ICCPR, which includes traditional livelihoods and means of subsistence (traditional diet and economic viability).⁴⁰⁰ On article 27 of the ICCPR, I noted elsewhere that, in cases where Indigenous peoples were prevented from fully enjoying the communal property of ancestral lands and preserving their cultural identity, the Inter-American Court of Human Rights

³⁹⁵ International Convention for the Regulation of Whaling (ICRW) (adopted 2 December 1946, entered into force 10 November 1948) (161 UNTS 72). See Malgosia Fitzmaurice, 'Indigenous Peoples in Marine Areas: Whaling and Sealing' in Stephen Allen, Nigel Bankes and Ravna Øyvind (eds), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing 2019).

³⁹⁶ Fitzmaurice (n 395) 74.

³⁹⁷ *ibid* 84.

³⁹⁸ *ibid* 89.

³⁹⁹ *ibid* 75.

⁴⁰⁰ *ibid* 78.

(I/ACHR) has consistently interpreted ‘fishing’ as part of the essential components of the culture and cultural rights protected under that ICCPR provision.⁴⁰¹

Indigenous peoples are well covered by the SSF Guidelines and the UNDROP, complementing the C169 and UNDRIP.⁴⁰² Morgera and I consider that both the SSF Guidelines and UNDROP enshrine the requirements and standards under international human rights law, biodiversity law, the relevant jurisprudence on Indigenous peoples, and *Knox’s Framework Principles on Human Rights and the Environment*.⁴⁰³ Key safeguards on consultation and participation are provided in the SSF Guidelines, paragraph 3.1(1)(6), and UNDROP, article 2(3), referring to ‘active, free, effective, meaningful and informed participation’. The actual impact of fishers’ participation on decision-making, through their traditional knowledge, depends on the adequate recognition of their procedural rights, including access to relevant information.⁴⁰⁴ The same is needed for ensuring meaningful participation of small-scale fisheries peoples’ representatives in international fisheries management.

With these useful insights in mind, I pass on to examine gender considerations, as gender discrimination can exacerbate the vulnerability of certain groups in small-scale fisheries with implications on their participation in decision-making as well.

3.2.2. Considerations on gender in small-scale fisheries

In small-scale fisheries, most women operate in post-harvesting activities, such as processing, transporting, trading, and selling.⁴⁰⁵ With close to half of the people in small-scale fisheries value-chains being women, it is fundamental to integrate women

⁴⁰¹ Nakamura, ‘The Fundamental Rights of Small-Scale Fishers and Their Communities in the International Jurisprudence’ (n 111).

⁴⁰² UNGA UNDRIP (n 378) art 19.

⁴⁰³ Proposed by the first and former UN Special Rapporteur on human rights and the environment John Knox in his 2018 report. See UN Human Rights Council, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (UN Human Rights Council 2018) UN Doc A/HRC/37/59.

⁴⁰⁴ Morgera and Nakamura (n 44) 71 and 75.

⁴⁰⁵ Women represent about 39.6 percent of the total people active in small-scale fisheries. An estimated of 44.7 million women participate in small-scale fisheries, of which about 49.8 percent in the post-harvesting activities. See Sarah Harper and others, ‘Towards Gender Inclusivity and Equality in Small-Scale Fisheries’ in FAO, Duke University and WorldFish (eds), *Illuminating Hidden Harvests: the contributions of small-scale fisheries to sustainable development* (FAO, Duke University & World Fish) 128.

in decision-making processes affecting them, particularly regarding post-harvesting topics. In this regard, Soliman's account of feminist legal theories and methodologies is useful to clarify the meaning and role of gender equality in small-scale fisheries.⁴⁰⁶ He begins by recalling on paragraphs 3.1(4) and (5), SSF Guidelines, which provide for and define the guiding principles of 'gender equality and equity' and 'equity and equality'. Soliman understands that there is 'no differentiation between the terms equity and equality',⁴⁰⁷ which I do not agree. While the SSF Guidelines combine these terms, one can depict the differences between the two in that 'gender equality' is about 'equal rights and opportunities' of both men and women, while 'gender equity' is about specifically '[r]ecognizing the vital role of women in small-scale fisheries' and acknowledging the 'differences between women and men', 'using preferential treatment where required to achieve equitable outcomes'.⁴⁰⁸ An important analysis by Soliman is on the meaning of gender equality from a feminist legal theory perspective, noting that a 'single meaning of gender equality assumes homogeneity of women's experiences', and there is indeed 'diversity of meanings and theories behind equality'.⁴⁰⁹ Soliman unpacks the different approaches that fisher women may follow, according with their peculiar contexts, with a view to achieve gender equality. From a symmetrical approach, which does not admit differences among men and women, 'women and men should be treated alike' by assimilation, or 'both women and men should be treated naturally' based on the androgyny model.⁴¹⁰ From an asymmetrical approach, which admits differences between women and men, gender equality is to be achieved through: granting of special rights to women; differentiated treatment in certain, but not all cases, considering cultural differences that may be hard to classify such differentiated treatment; acceptance of sex differences, but focusing on unequal effects arising from sex differences; and women's empowerment.⁴¹¹ Soliman sheds light on these options, suggesting more in-depth studies to understand fisher women's

⁴⁰⁶ Soliman (n 101).

⁴⁰⁷ *ibid* 639.

⁴⁰⁸ FAO SSF Guidelines (n 25) para 3.1(4) and (5).

⁴⁰⁹ Soliman (n 101) 639.

⁴¹⁰ *ibid* 639–640.

⁴¹¹ *ibid* 640–642.

preferences, following feminist legal methodologies (i.e., asking women questions, feminist practical reasoning, and consciousness-raising).⁴¹²

As Soliman's proposal depends on empirical work in different jurisdictions and contexts, let me take a closer look at international human rights instruments and guidance, which complement the aforementioned principles of the SSF Guidelines and, specifically, its chapter 8 on gender equality. The *Convention on the Elimination of All forms of Discrimination Against Women* (CEDAW),⁴¹³ article 8, is of particular relevance to this thesis, as it requires state parties to take appropriate measures to ensure to 'women, on equal terms with men and without any discrimination, the opportunity to represent their governments at the international level'. According with the CEDAW Committee, these measures include 'temporary special measures aimed at accelerating de facto equality between men and women' provided in article 4.⁴¹⁴ The *Beijing Declaration and Platform for Action*,⁴¹⁵ paras 13 and 16, underscore, respectively, that women's participation in decision-making processes is fundamental for achieving equality, development and peace, and that 'equal participation of women and men as agents and beneficiaries of people-centred sustainable development' contributes to poverty eradication. Recently, in 2022, the CEDAW Committee adopted specific guidance for Indigenous women and girls, underscoring their right to participate in 'decision-making positions at the local, national, regional and international levels'.⁴¹⁶ These human rights instruments and guidance strengthen the SSF Guidelines, paragraph 5.1.5, which call for participatory fisheries management, giving 'special attention to equitable participation of women, vulnerable and marginalized groups' in designing, planning and implementing management measures. This is crucial given that, in small-scale fisheries, the burdens tend to fall

⁴¹² *ibid* 645–646.

⁴¹³ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979, entered into force 3 September 1981) (1249 UNTS 13).

⁴¹⁴ CEDAW, 'General Recommendation No. 8: Implementation of Article 8 of the Convention (Adopted at the Seventh Session of the Committee on the Elimination of Discrimination against Women, 1988)'.

⁴¹⁵ Beijing Declaration and Platform for Action (27 October 1995) A/CONF.177/20/Add.1 (adopted at the 4th World Conference on Women) 1995.

⁴¹⁶ CEDAW, 'General Recommendation No. 39 on the Rights of Indigenous Women and Girls' para 43.

unbalanced on women,⁴¹⁷ and gender-based discrimination and violence affect fishing communities livelihoods, in places where they are excluded by local norms and their representation in decision-making is poorly considered or not at all.⁴¹⁸

In effect, the need to read human rights instruments and guidance in conjunction with fisheries instruments, such as the SSF Guidelines, is also noticed by the lack of or poor gender-sensitive provisions in the LOSC, UNFSA, and C188, as scholars note, and lack of a specific instrument entirely dedicated to gender issues in fisheries, despite the significant role of women in fisheries.⁴¹⁹ With this note, I continue with an examination of the human rights approaches applied to fisheries, which is pertinent to further strengthen the linkages between ecosystem and human rights approaches.

3.3. Distinguishing human rights approaches in the fisheries context

The so-called human rights-based approach (HRBA) is normatively founded on the contemporary international human rights law regime and its evolving interpretation given by international jurisprudence and doctrine.⁴²⁰ The ‘human rights’ in the HRBA

⁴¹⁷ Violence and personal security, including gender-based violence were identified among the areas of concern within human rights-based case law regarding fishing communities. See Blake D Ratner, Björn Åsgård and Edward H Allison, ‘Fishing for Justice: Human Rights, Development, and Fisheries Sector Reform’ 27 *Global Environmental Change* 120, 124; Danika L Kleiber and others, ‘Promoting Gender Equity and Equality Through the Small-Scale Fisheries Guidelines: Experiences from Multiple Case Studies’ in Svein Jentoft and others (eds), *The Small-Scale Fisheries Guidelines: global implementation*, vol 14 (Springer 2017).

⁴¹⁸ The double shifts that women often undertake, accumulating productive fishing activities, household chores and family care overweigh the work of fisher women, which continues being undervalued, either subjectively seen as merely an assistance, support or an obligation instead of a livelihood source. A literature review on the relationship between women and fishing activities in artisanal fishing communities in some states of Brazil evinced these issues. See Marília Fonseca and others, ‘The Women Role of the Marine Artisanal Fishery: A Study of a Fishery Community of the City of Rio Das Ostras, RJ, Brazil’ 16 *Revista de Gestão Costeira Integrada* 231. The development of gender topics and perspectives in fisheries research is still at an inceptual phase, and a literature review covering studies in different countries reveal the difficulties and challenges faced with the lack of sex-disaggregated fisheries data. See Katia Fragounes and Siri Gerrard, ‘(En)Gendering Change in Small-Scale Fisheries and Fishing Communities in a Globalized World’ (2018) 17 *Maritime Studies* 117.

⁴¹⁹ Gavouneli’s exploration of legal issues relating to women fisher workers, for instance, note that the absence of gender-sensitive text of the ILO C188 is a ‘deliberate omission’, as the ILO has been working toward mainstreaming gender equality and non-discrimination concerns, and broadly studying women at work. See Gavouneli (n 101). See also Gabriela Oanta, ‘Sustainable Development and Fisheries with Special Emphasis on Gender Equality’ in Irini Papanicolopulu (ed), *Gender and the Law of the Sea* (Brill Publishers 2019).

⁴²⁰ Although, as will be seen later, human rights have been interacted with various other legal regimes, influencing law-making in other regimes, which reflect human rights principles and standards. For example, see Elisa Morgera, ‘Dawn of a New Day? The Evolving Relationship between the

comprises the set of civil, political, economic, social and cultural rights enshrined in core human rights instruments, namely, the UDHR,⁴²¹ *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),⁴²² ICCPR,⁴²³ ICESCR,⁴²⁴ as well as the Optional Protocols to the ICCPR and ICESCR, which generically and indistinctively apply to all human beings. Additionally, the human rights of specific groups are protected in subsequently adopted treaties: CEDAW,⁴²⁵ the *Convention on the Rights of the Child* (CRC),⁴²⁶ the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICMW),⁴²⁷ and Optional Protocol to the CRC. I understand this broad notion of the HRBA as also encompassing the interpretation given by international human rights courts in respect of the rights protected and duties provided under any of the mentioned treaties, as well as the guidance from international human rights non-formally binding instruments, such as the UNDRIP and the UNDROP.

The origin of the HRBA is largely associated with the seminal link that states placed between human rights and the right to development,⁴²⁸ particularly through the *UNGA Declaration on the Right to Development*.⁴²⁹ This Declaration affirmed the inalienable human right to development, which implies on, inter alia, the central role

Convention on Biological Diversity and International Human Rights Law' Wake Forest Law Review 691; Ndiaye (n 344).

⁴²¹ UNDHR.

⁴²² International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (adopted 7 March 1966, entered in force 4 January 1969) (660 UNTS 195).

⁴²³ ICCPR.

⁴²⁴ ICESCR.

⁴²⁵ CEDAW.

⁴²⁶ Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) (1577 UNTS 3).

⁴²⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (adopted 18 December 1990, entered into force 1 July 2003) (2220 UNTS 3).

⁴²⁸ See Malcolm Malone and Deryke Belshaw, 'The Human Rights-Based Approach to Development: Overview, Context and Critical Issues' (2003) 20 *Transformation* 76, 80; Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the "Rights-Based Approach" to Development into Perspective' (2004) 25 *Third World Quarterly* 1415, 1422–1433; Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experience' (2017) 22 *The International Journal of Human Rights* 664.

⁴²⁹ UNGA, Resolution 41/128 of 4 December 1986, 'Declaration on the Right to Development' [23 February 1987, UN Doc A/RES/41/128].

of humans as participants and beneficiaries of development,⁴³⁰ and called for states to cooperate and formulate international policies to facilitate the full realization of human rights in the context of development.⁴³¹ By endorsing this Declaration, the UNGA was arguably and implicitly calling for the HRBA to development. The decades following that Declaration have seen the increasing promotion of human rights, as placed in core activities and delivery of services of the UN and its agencies.⁴³² Consequently, UN bodies have a common understanding on the HRBA to development cooperation and development programming, guided by the principles of, inter alia, equality, non-discrimination, participation and inclusion, accountability and the rule of law.⁴³³ The Office of the UN High Commissioner for Human Rights (OHCHR) describes the HRBA as ‘a conceptual framework for the process of human development’, ‘normatively based on international human rights standards’, ‘operationally directed to promoting and protecting human rights’.⁴³⁴ The FAO *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines)*⁴³⁵ call for the HRBA to food security, and the emphasis that states should make on universal, interdependent, indivisible and interrelated human rights, and the need to realize existing rights for achieving food security.⁴³⁶ In international fisheries instruments, the most evident expression of the HRBA is certainly, if not only, in the SSF Guidelines, paragraph 1.2, which promotes the application of the HRBA for achieving the guidelines’ objectives.

⁴³⁰ *ibid* 2.

⁴³¹ *ibid* 3.

⁴³² Alisa Clarke, ‘The Potential of the Human Rights-Based Approach for the Evolution of the United Nations as a System’ (2012) 13 *Human Rights Review* 225, 230–231.

⁴³³ Also, universality, inalienability, indivisibility, interdependence, and interrelatedness. See UN Office of the UN High Commissioner for Human Rights, ‘Frequently Asked Questions on Human Rights-Based Approaches to Development Cooperation’ annex II, para 2.

⁴³⁴ *ibid* 15. at 15.

⁴³⁵ FAO, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Right to Food Guidelines)*(adopted at the 127th Session of the FAO Council, Rome, November 2004).

⁴³⁶ *ibid* 19.

3.3.1. Finding the right balance between human (rights)-based approaches

Before the adoption of the SSF Guidelines, considerations around taking a HRBA to small-scale fisheries have been generally supported by scholars,⁴³⁷ but this approach did not escape harsh criticism. For Ruddle and Davis, the ‘human rights approach’ (HRA), as initially advocated, failed to account the complexities, sensibility and practicality that such approach has in the small-scale fisheries context, and rather served to defensively redefine the pro-development discourse, enabling states to continue their neo-liberal philosophy, practices, and priorities under the disguise of human rights language.⁴³⁸ In a way, this understanding of the HRA resonates with the notions around the instrumental use of the ecosystem approach alluded by De Lucia, as seen in this thesis’ section 2.1.2. Ruddle and Davis contend that the asserted benefits for small-scale fisheries, when the HRA is considered, actually represent ‘mediums for and carriers of neo-liberalism’, while facilitating the ‘penetration into communities of rationalities and operational methods that betray resource harvesters’, consequently ‘undermining family life and cultural systems, and destroying the local social organization of production’.⁴³⁹ Strongly opposed to the articulations for implementing the HRA in the small-scale fisheries context, the scholars argued for a reconfiguration focused on social relationships, dynamics, social and political conditions governing exchange relations, and cultural content.⁴⁴⁰ These considerations fed into the scholarly debate that subsequently reflected on the conceptual framework underpinning the HRBA, its complexities, and contributed to construe compatible and appropriate means to implement the HRBA in the small-scale fisheries context.

In that debate, Song suggests ‘human dignity’, as clearly linked to human rights, to serve as a ‘reconciling concept’ for strengthening the HRA’s position in fulfilling

⁴³⁷ Edward H Allison, ‘Should States and International Organizations Adopt a Human Rights Approach to Fisheries Policy?’ (2011) 10 MAST 95; Anthony Charles, ‘Small-Scale Fisheries: On Rights, Trade and Subsidies’ (2011) 10 MAST 85; Edward H Allison and others, ‘Rights-Based Fisheries Governance: From Fishing Rights to Human Rights’ (2012) 13 Fish and Fisheries 14.

⁴³⁸ Kenneth Ruddle and Anthony Davis, ‘Human Rights and Neo-Liberalism in Small-Scale Fisheries’ (2013) 39 Marine Policy 87.

⁴³⁹ *ibid* 91. See also Anthony Davis and Kenneth Ruddle, ‘Massaging the Misery: Recent Approaches to Fisheries Governance and the Betrayal of Small-Scale Fisheries’ 71 Human Organization 244.

⁴⁴⁰ Ruddle and Davis (n 438) 91–92.

its aim of reducing vulnerability and insecurity of fishing people.⁴⁴¹ Such proposition would imply a significant drawback, as Willman and others contend, because they understand that, differently from human rights, the ‘human dignity’ concept lacks universalistic character and principles basis for case-law, with a rather ‘little understanding of what human dignity requires substantively within or across jurisdictions.’⁴⁴² In another vein, the HRBA is proposed as an alternative approach to overcome the traditional ‘rights-based approach’ (RBA), which is seen by small-scale fisheries peoples’ advocates as undesirable and contradicting the HRBA.⁴⁴³ Sunde explains that the RBA reflects ‘various degrees of privatization and commodification of fisheries rights’, which are seen as property rights through, for instance, the establishment of individual transferable quotas (ITQs) and territorial user rights in fisheries systems (TURFs).⁴⁴⁴ RBA amounts to protecting and promoting individual or community-based fishing rights, including the rights of access to and use of fisheries resources and land, tenure rights and property rights in fisheries.⁴⁴⁵ For these reasons, the RBA has been historically contended by small-scale fisheries peoples’ movements, to whom the RBA ‘has very little, if anything, to do with *human rights*’, often resulting in ‘massive social disruption in fishing communities through increases in distinction between social classes, with severe impacts on the struggle for equity and social justice’.⁴⁴⁶

Willman and others, in support of the HRBA to small-scale fisheries, contend that this approach provides opportunities to advance the application of human rights principles and its legal framework to small-scale fisheries sustainable development. These opportunities can be realized due to the HRBA’s positive features, including:

⁴⁴¹ Andrew Song, ‘Human Dignity: A Fundamental Guiding Value for a Human Rights Approach to Fisheries?’ (2015) 61 *Marine Policy* 164.

⁴⁴² Rolf Willmann and others, ‘A Human Rights-Based Approach to Securing Small-Scale Fisheries: A Quest for Development as Freedom’ in Svein Jentoft and others (eds), *The Small-Scale Fisheries Guidelines: Global Implementation* (Springer 2014) 21.

⁴⁴³ World Fishers, ‘Human Rights vs. Property Rights: Implementation and Interpretation of the SSF Guidelines’ (Transnational Institute, World Forum of Fisher People and Afrika Kontakt 2016).

⁴⁴⁴ Jackie Sunde, ‘Expressions of Tenure in South Africa in the Context of the Small-Scale Fisheries Guidelines’ in Svein Jentoft and others (eds), *The Small-Scale Fisheries Guidelines: Global Implementation* (Springer 2014) 144.

⁴⁴⁵ Ratner, Åsgård and Allison (n 417) 121.

⁴⁴⁶ World Fishers (n 443) 5.

being sensitive to the manner human development is achieved; avoiding the burden of efforts falling disproportionately on poor and marginalized people; empowering communities to know and claim their rights as needed; enhancing the accountability of duty-bearers responsible to recognize, respect and protect fishers' human rights; and being instrumental in stemming potentially negative influence of neoliberal policies.⁴⁴⁷ The scholarly debate on the HRBA has been overcome by the current practice in small-scale fisheries governance, which draws from the SSF Guidelines and the HRBA enshrined therein. I thus pass on to analyse the HRBA's influence in guiding states and non-state actors to realize human rights' considerations in the small-scale fisheries context.

3.3.2. The human rights-based approach to small-scale fisheries

Following the UNGA's resolution mandating the FAO, in 2006, to develop guidance on the contributions of small-scale fisheries to poverty eradication and food security,⁴⁴⁸ the FAO led a multistakeholder and inclusive process for developing an instrument that reflected the HRBA, and which later resulted in the SSF Guidelines. It was a very broad inclusive participatory process that, in my view, has significantly strengthened the normative authority of the SSF Guidelines.⁴⁴⁹ The HRBA has guided the development of the SSF Guidelines, with support and contributions of more than 4000 stakeholders directly involved in the process,⁴⁵⁰ and the technical inputs from human rights experts, notably De Schutter, the former UN Special Rapporteur on the Right to Food.⁴⁵¹ Reflecting human rights considerations into the SSF Guidelines did not come without any constraints. Not all of De Schutter's comments were fully taken

⁴⁴⁷ Willmann and others (n 442) 18–22.

⁴⁴⁸ UNGA Resolution 61/105 of 8 December 2006, 'Sustainable Fisheries' (6 March 2007) UN Doc A/RES/61/105 (n 70) paras 12 and 97.

⁴⁴⁹ See the detailed analysis of the process of developing of the SSF Guidelines in Nakamura, 'Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries' (n 26) 40–42.

⁴⁵⁰ FAO, 'Chairperson's Report of the Technical Consultation on International Guidelines for Securing Sustainable Small-Scale Fisheries' (FAO 2014) COFI/2014/Inf.10 para 4.

⁴⁵¹ Olivier De Schutter, 'Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms (Doc A/67/268, New York, 2012)'.

into account,⁴⁵² and the USA shared explicit concerns on the ‘human rights language’ in the guidelines, noting that the guidelines would not imply that states adhere to human rights treaties and standards that they are not parties to or agree with.⁴⁵³ Accordingly, the USA shared its understanding that the HRBA is ‘an approach anchored in the system of rights and corresponding obligations established by international human rights law’.⁴⁵⁴ These concerns did not prevent consensus being reached by members of the FAO COFI in adopting the SSF Guidelines, which, as paragraph 3.1 provides, ‘based on international human rights standards’.

The HRBA is not only enshrined in the process leading to the adoption of the SSF Guidelines, but also in the guidelines’ text,⁴⁵⁵ and in the process of implementing the guidelines. Consequently, implementing the guidelines based on the HRBA entails, for instance, giving special attention to Indigenous peoples and ethnic minorities,⁴⁵⁶ migrants,⁴⁵⁷ women,⁴⁵⁸ and children.⁴⁵⁹ It also entails reinforcing the responsibility of business enterprises, related to or affecting small-scale fisheries, to respect human rights,⁴⁶⁰ which are crucial to safeguarding the rights of small-scale fisheries peoples and their communities in situation of forced evictions, and where there is lack of consultation prior to the development of undertakings or other commercial activities impacting fishing grounds.⁴⁶¹ Since the adoption of the SSF Guidelines, the HRBA

⁴⁵² The cross-reference to other international instruments and the alignment of human rights concepts, such as free, prior and informed consent, were not reflected in the final text of the guidelines. See more details in Nakamura, ‘Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries’ (n 26) 53–54.

⁴⁵³ FAO, ‘Chairperson’s Report of the Technical Consultation on International Guidelines for Securing Sustainable Small-Scale Fisheries’ (n 450) para 24.

⁴⁵⁴ *ibid.*

⁴⁵⁵ FAO SSF Guidelines (n 25) para 3.1.

⁴⁵⁶ The approach gives direction to the guidelines, whose objectives are to be realized through the HRBA, based on international human rights standards and principles of, *inter alia*, human rights dignity, respect of culture, non-discrimination, gender equality, participation, accountability, transparency, and the rule of law. See *ibid* 3.1(2)(6), 5.4, 5.5, 9.2 and 11.6.

⁴⁵⁷ *ibid* 6.10.

⁴⁵⁸ An entire chapter of the guidelines are devoted to gender equality, but various other provisions address both men and women. See *ibid* 8.

⁴⁵⁹ *ibid* 6.14–6.15.

⁴⁶⁰ *ibid* 3.1(1). Despite the suggestion in De Schutter – see De Schutter (n 451). the SSF Guidelines do not refer to the UN Guiding Principles on Business and Human Rights, which shed light to three main pillars of States’ international human rights obligations *i.e.* the duty to protect, the responsibility to protect and the duty to ensure access to effective remedy.

⁴⁶¹ A review of case law involving this issue pointed to SSF communities being disproportionately affected, physically and procedurally (meaning without being appropriately consulted), by

continues to instigate discussions on its adequate implementation in small-scale fisheries.⁴⁶² In addition to the debate seen above, I agree with Willman and others that the HRBA does not replace, but rather complements approaches such as the EAF, by bringing the human rights perspective to challenges faced in small-scale fisheries regarding access to fisheries, marine and land resources, healthy and sustainable environment, adequate access to markets, social services, and infrastructure.⁴⁶³ In interpreting the application of the HRBA to fisheries, Song and Soliman recognize the complexity of realizing multiple aspects of human rights, while integrating human rights principles into governance processes and enhancing the capacity of fishers as right-holders and governments as duty-bearers to respectively claim rights and comply with obligations.⁴⁶⁴ The authors highlight the HRBA's functionality in guiding fishers for securing fishing rights 'via a legally recognizable and protected means', whilst showcasing the untidy implications that can result from using the same approach in multiple claims concerning fishing rights.⁴⁶⁵ Not all fishing rights can be considered human rights, and I argue that fishing rights (access to fishery resources) and tenure rights may have the same fundamental value of human rights, in as far as fishers and their communities who depend on fishing for survival are concerned.⁴⁶⁶

Another pertinent debate was put forward by Jentoft and Bavinck, who question the potential conflicts arising from the transnational legal origins of the HRBA and the cases of national and local legal plurality, a peculiarity in small-scale fisheries contexts with 'diverse systems of laws, values and norms, straddling both customary and statutory systems of governance'.⁴⁶⁷ They argue that in fisheries co-management, notably, it is crucial to include the participation of individuals aware of the 'legal

interventions such as conversion of properties into aquaculture facilities and conservation areas used in tourism, as well as transformation of river courses for irrigated agriculture and dams. See Ratner, Åsgård and Allison (n 417) 124.

⁴⁶² Also from the part of FAO. See FAO, 'Exploring the Human Rights-Based Approach in the Context of the Implementation of the SSF Guidelines. Workshop Proceedings, 24-26 October 2016' (FAO 2017) FAO Fisheries and Aquaculture Proceedings 53.

⁴⁶³ Willmann and others (n 442) 30.

⁴⁶⁴ Song and Soliman (n 102) 21.

⁴⁶⁵ *ibid* 21–22.

⁴⁶⁶ Nakamura, 'The Fundamental Rights of Small-Scale Fishers and Their Communities in the International Jurisprudence' (n 111).

⁴⁶⁷ Jentoft and Bavinck (n 34) 272.

particularities and subtleties of customary systems and who understand their significance in their own social and cultural context'.⁴⁶⁸ These national and local issues do not seem to challenge the participation of small-scale fisheries representatives in the international fora, unless if considering the implications of internalizing, through national legislation, RFMOs' conservation and management measures, which could potentially conflict with existing customary rules already governing the same species – a matter that will not be covered in this thesis, but should be explored in future research.

The HRBA has been instrumental to support small-scale fisheries' defence against development activities, including initiatives that promote 'blue economy' or 'blue growth'.⁴⁶⁹ Adopting the HRBA can facilitate development activities that are more culturally respectful and compatible with customary laws or other rules that may apply in legal pluralistic contexts.⁴⁷⁰ As the HRBA is not defined in the SSF Guidelines, the meaning of the HRBA could be interpreted differently by states,⁴⁷¹ but, as scholars and myself have interpreted, applying the HRBA to small-scale fisheries essentially means the application of existing human rights treaties and standards to promote and ensure the protection of human rights of small-scale fisheries peoples.⁴⁷² Notably, the element of 'participation in decision-making processes that affect small-scale fishers' has been noted by researchers as a key element of the procedural side of the HRBA to small-scale fisheries.⁴⁷³ This would entail specific actions by states and relevant non-state actors, such as: ensuring fair representation of small-scale fisheries peoples in those processes, based on their preferences and choices; ensuring such participation is

⁴⁶⁸ *ibid* 286.

⁴⁶⁹ Philippa J Cohen and others, 'Securing a Just Space for Small-Scale Fisheries in the Blue Economy' (2019) 6 *Frontiers in Marine Science* 1.

⁴⁷⁰ Jentoft and Bavinck (n 34).

⁴⁷¹ See for instance the understanding of the USA about what the HRBA means. FAO, 'Chairperson's Report of the Technical Consultation on International Guidelines for Securing Sustainable Small-Scale Fisheries' (n 450) para 24.

⁴⁷² One Ocean Hub, 'Unpacking a Human Rights-Based Approach to Small-Scale Fisheries: How the Integrated Protection of Substantive and Procedural Human Rights Can Contribute to Achieving Multiple Sustainable Development Goals' 3 <https://oneoceanhub.org/wp-content/uploads/2022/06/Policy-brief_HUMANRIGHTS_Smallscalefisheries_OOH.pdf> accessed 5 January 2023; FAO, 'Applying Coherently the Human Rights-Based Approach to Small-Scale Fisheries for Achieving Multiple Sustainable Development Goals' (n 81).

⁴⁷³ One Ocean Hub (n 472) 3.

provided at early stages of the processes, so that small-scale fisheries peoples' representatives are given 'culturally-sensitive' opportunities to express their views; integrating small-scale fisheries peoples' knowledge into those processes, as to inform and serve as the basis for decision-making.⁴⁷⁴

With this thorough account of the human rights and fisheries nexus, it remains for me to link the EAF and human rights.

3.4. Connecting the ecosystem approach to fisheries and human rights

As seen in section 2.5, the human dimensions of the EAF are poorly addressed in fisheries. The EAF and human rights are intrinsically linked through their support to participatory fisheries management, although such support places greater emphasis on, respectively, the benefits that participation brings to fisheries resources and humans. Therefore, connecting the EAF with human rights ensures an enhanced and more comprehensive framework that can simultaneously contribute to the holistic management of fisheries, associated species, and ecosystems, whilst contributing to the protection of the right of small-scale fisheries peoples to equitably participate in fisheries management and consequently realize their fundamental rights to adequate food⁴⁷⁵ and culture,⁴⁷⁶ intrinsically linked to their fishing and tenure rights.⁴⁷⁷

In fisheries, one important issue to take into account is that there are apparently conflicting interests between, on one hand, fisheries management and need to continue harvesting fish for food security and livelihoods, and, on the other hand, environmental protection and the need to establish no-take zones and protected areas.⁴⁷⁸ Fisheries scientists have addressed and minimised these tensions by identifying balanced views

⁴⁷⁴ One Ocean Hub, 'Unpacking a human rights-based approach to small-scale fisheries: How the integrated protection of substantive and procedural human rights can contribute to achieving multiple Sustainable Development Goals' (One Ocean Hub, published 31 May 2022) <https://oneoceanhub.org/wp-content/uploads/2022/06/Policy-brief_HUMANRIGHTS_Smallscalefisheries_OOH.pdf> accessed 1 November 2022, at 3.

⁴⁷⁵ UNDHR art 25(1); ICESCR art 11.

⁴⁷⁶ UNDHR art 27; ICCPR art 27.

⁴⁷⁷ FAO SSF Guidelines (n 25) para 5.1; UNHRC UNDROP (n 41) arts 15, 17 and 26.

⁴⁷⁸ Kjell Grip and Sven Blomqvist, 'Marine Nature Conservation and Conflicts with Fisheries' (2019) 49 *Ambio* 1328.

and common goals in the interface of the two governance streams,⁴⁷⁹ which can be said to meet in the aim for fisheries sustainability and conservation. As such, Garcia and others identify ‘parallel strands in conservation and fishery governance’, one of which regards the types of governance, which have more recently evolved into decentralized and participatory fisheries management and biodiversity conservation schemes.⁴⁸⁰ They demonstrate the ‘convergence’ and/or ‘coevolution’ intersecting both streams,⁴⁸¹ explaining why similar responses (such as participatory fisheries management) have been opted in both governance spheres. The missing link in this debate is that, as a consequence of supporting fisheries management for food security, livelihoods and conservation, the protection of fishers’ rights, particularly of small-scale fisheries peoples, can be enhanced as well. Again, human rights considerations are somehow dismissed in this scholarly debate.

The SSF Guidelines significantly strengthens the links between the EAF and the international human rights framework supporting small-scale fisheries.⁴⁸² The guiding principles of the SSF Guidelines include, along human rights principles, the holistic and integrated approaches, explicitly referring to the EAF in paragraph 3.1(11). According to this provision, the EAF embraces ‘the notions of comprehensiveness and sustainability of all parts of ecosystems as well as the livelihoods of small-scale fishing communities’. The SSF Guidelines’ chapter five on the governance of tenure in small-scale fisheries and resource management concretely provides recommendations for states and non-state actors that enshrine both approaches. Notably, in addition to the

⁴⁷⁹ Serge M Garcia, Jake Rice and Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Co-Evolution* (Wiley-Blackwell 2014); Simo Jennings and others, ‘The Ecosystem Approach to Fisheries: Management at the Dynamic Interface Between Biodiversity Conservation and Sustainable Use’ [2014] *Annals of the New York Academy of Sciences* 1322; Kim Friedman, Serge M Garcia and Jake Rice, ‘Mainstreaming Biodiversity in Fisheries’ (2018) 95 *Marine Policy* 209.

⁴⁸⁰ Serge M Garcia, Jake Rice and Anthony Charles, ‘Governance of Marine Fisheries and Biodiversity Conservation: Convergence or Coevolution?’ in Serge M Garcia, Jake Rice and Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Co-Evolution* (Wiley-Blackwell 2014) 24–27.

⁴⁸¹ The authors define ‘convergence’ as occurring when ‘two or more independent adaptation processes unintentionally produce similar responses to common “forcing” contextual factors’, while ‘coevolution’ occurs when ‘two or more inter-dependent adaptation processes intentionally (albeit sometimes reluctantly) adapt to each other in response to their direct interaction (cooperation or competition)’. See Garcia, Rice and Charles (n 480).

⁴⁸² Morgera and Nakamura (n 44) 76.

provisions on participatory fisheries management that I discuss in the next chapter, the guidelines support the ‘equitable distribution of the benefits yielded from responsible management of fisheries and ecosystems’ (paragraph 5.1); the ‘secure, equitable, and socially and culturally appropriate tenure rights to fishery resources (marine and inland) and small-scale fishing areas and adjacent land’ (paragraph 5.3); the consideration, prior to large-scale development projects, of ‘social, economic and environmental impacts through impact studies’ as well as ‘effective and meaningful consultation’ with affected communities (paragraph 5.10); the recognition that ‘tenure rights are balanced by duties, and support the long-term conservation and sustainable use of resources and the maintenance of the ecological foundation for food production’ (paragraph 5.14).

Connecting the EAF and human rights also sheds light on the ultimate benefits that participatory fisheries management can bring to the realization of the right of all to a safe, clean, healthy and sustainable environment, which gained heightened recognition as a universal human right by the international community, through the resolutions adopted by the Human Rights Council (HRC) in 2021,⁴⁸³ and the UNGA in 2022.⁴⁸⁴ The HRC also encouraged states to take actions for protecting the human right to a safe, clean, healthy and sustainable environment, including through capacity-building, enhanced multilateral cooperation, information-sharing, and policy-making.⁴⁸⁵ The international recognition of this human right represented the outcomes of a substantive work carried out under the HRC’s auspices since 2012, when the first Special Rapporteur on Human Rights and the Environment John Knox was appointed by the Council.⁴⁸⁶ Knox made a significant contribution in clarifying, in his 2018 report, the existing basic human rights obligations of states that relate to the enjoyment of a safe, clean, healthy, and sustainable environment, by providing detailed guidance

⁴⁸³ UNHRC, Resolution 48/13 of 8 October 2021, ‘The Human Right to a Safe, Clean, Healthy and Sustainable Environment’ [18 October 2021, UN Doc A/HRC/48/13 (adopted by 43 votes against 0; 4 abstentions – China, India, Japan and Russia)] para 1.

⁴⁸⁴ UNGA, Resolution 76/300 of 28 July 2022, ‘The human right to a clean, healthy and sustainable environment’ [1st August 2022, UN Doc RES/76/300, adopted by 161 votes to 0 against; 8 abstentions (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russian Federation, Syria)].

⁴⁸⁵ *ibid* 4.

⁴⁸⁶ The HRC appointed John Knox to serve as the Independent Expert on human rights and the environment (2012-2015), then as the Special Rapporteur on human rights and the environment (2015-2018). Since August 2018, David R Boyd has been serving as the Special Rapporteur.

in the 16 Frameworks Principles on Human Rights and the Environment (‘Knox Frameworks Principles’).⁴⁸⁷ These principles were built on human rights law and drawn from the ‘converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment’.⁴⁸⁸ Knox explains the interdependence of environmental and human rights in that ‘[e]nvironmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development’.⁴⁸⁹ Knox’s Framework Principles provide two important interdependent recommendations directed at states, which are particularly relevant to the recognition of the right of small-scale fisheries peoples to participate in international fisheries management, namely: (i) to ensure, through procedural means, the full realization of the human right to a safe, clean, healthy and sustainable environment, so that fishers can fully enjoy their human rights to food, culture, property, including fishing grounds and tenure;⁴⁹⁰ and (ii) to ensure the respect, protection and fulfilment of fishers’ human rights to non-discriminatory public access to participation in decision-making processes affecting them and the environment, prior consultation, so that fishers are capable to contribute to the full realization of everyone’s human right to a safe, clean, healthy and sustainable environment.⁴⁹¹

Based on the foregoing, participatory international fisheries management can enable small-scale fisheries peoples to be closer to more fully realising their human right to a safe, clean, healthy, and sustainable environment, which they depend on as well as fulfilling their other fundamental human rights, notably, the rights to food, culture, property, and decent work.

⁴⁸⁷ UN Human Rights Council (n 403). Based on Knox’s report and framework principles, the HRC called upon States ‘to implement fully their obligations to respect and ensure human rights without distinction of any kind, including in the application of environmental laws and policies’. See UNHRC, Resolution of 22 March 2018, ‘Human Rights and the Environment’ [16 March 2018, UN Doc A/HRC/37/8, adopted without a vote] para 3.

⁴⁸⁸ UNHRC Resolution of 22 March 2018, ‘Human Rights and the Environment’ (n 487) paras 8–9.

⁴⁸⁹ *ibid* Annex 1, para 1.

⁴⁹⁰ UN Human Rights Council (n 403) Framework Principles 1 and 10.

⁴⁹¹ *ibid* Framework Principles 2-3, 6-8, 11, and 15.

3.5. Conclusion

This chapter explored the human rights and fisheries nexus, clarifying the extent to which international law literature has explored fishers' right to participate in decision-making processes affecting them. Importantly, scholars agree that human rights treaties apply to marine spaces, and there are reasonable arguments to bring about a claim on human rights-related issues to the ITLOS, though yet to be seen. The growing concerns of international law scholars with protecting people at sea resonate, in fisheries, primarily with the concerns on decent working and living standards and safety on board fishing vessels. Matters which, in turn, have been dealt in international forums by FAO, ILO and IMO, as well as in certain RFMOs, such as WCPFC and SPRFMO. These developments signal changes in states' interests toward addressing more effectively those human rights and related topics in fisheries, contributing to the integration of social and human dimensions in the content of measures traditionally confined to fisheries management and conservation. This change could be an entry-point for raising the needs of small-scale fisheries peoples affected by such contemporary international fisheries management. Small-scale fisheries peoples, through their knowledge, could feed into research and scientific advice that informs or serve as basis for this decision-making.

My analysis also showed the pertinence of resorting to human rights treaties, guidance and jurisprudence to clarify potential specific requirements that participatory international fisheries management could entail for Indigenous peoples (states' good faith consultation and FPIC) and women fishers (identifying their preferences through feminist legal theories and methodologies). Differently from the debate addressed by scholars on the equitable participation from a developing state perspective, or from local communities within a state's fora, I examined equitable participation to frame international fisheries management for the benefit of small-scale fisheries peoples. After engaging with the scholarly discussion underpinning human rights approaches, and the tensions of using HRA and RBA, I underscored the importance of the HRBA to small-scale fisheries, as enshrined in the SSF Guidelines, as key in also guiding the use of the human rights regime broadly, including the UNDROP and other relevant human rights instruments that interact with and are pertinent to fisheries.

In this connection, I noted that the apparently conflicting interests and tensions between the fisheries management and environmental protection have been softened by the realization that both streams converge into common goals of sustainability and conservation, and propose similar solutions, such as participatory fisheries management. Nevertheless, this debate fails to link these issues with human rights, and the contributions and benefits of protecting fishers' rights, particularly of small-scale fisheries peoples. The SSF Guidelines significantly advance the linkages between fisheries management, EAF and human rights. In turn, the EAF and human rights depend on a broader reading of human rights instruments that can protect small-scale fisheries peoples in the context of participatory fisheries management. This protection, in turn, can ultimately contribute to the human right of all to a clean, healthy, and sustainable environment.

The human rights and fisheries nexus shed light on the need of involving small-scale fisheries peoples in international fisheries management for various reasons. First, small-scale fisheries peoples can contribute to enhance the knowledgebase for decision-making in RFB forums, particularly by sharing practical experiences and traditional knowledge. Second, small-scale fisheries peoples enjoy a particular interest in the topics being discussed in these forums, which are not strictly about fisheries management and conservation per se but can also relate to decent work, safety on board fishing vessel. Third, the participation of small-scale fisheries peoples can help bringing to effect a stronger support from governments to the small-scale fisheries sector, ultimately contributing to the realization of small-scale fisheries people's fundamental rights and the right of all to a clean, healthy and sustainable environment.

Having examined the human rights and fisheries nexus, and linked the EAF with human rights, I continue in the next chapter with an analysis of the international law for small-scale fisheries, gradually focusing on participation.

CHAPTER 4

Unravelling the international law for small-scale fisheries and participatory international fisheries management

As seen in the previous chapters, the international legal standards for small-scale fisheries are provided and detailed in non-formally binding instruments, especially the SSF Guidelines⁴⁹² and the UNDROP.⁴⁹³ For its part, the SSF Guidelines have been, to varied extents, reflected in certain regional, subregional, and national policies and plans,⁴⁹⁴ having also been explicitly reflected in a couple of national laws (i.e., in Costa Rica and Cabo Verde).⁴⁹⁵ Reading in conjunction the SSF Guidelines and UNDROP, one finds a myriad of principles, treaties and other non-formally binding instruments, from different international law regimes, which are relevant in supporting sustainable small-scale fisheries, as well as in protecting small-scale fisheries peoples' rights. While this thesis focuses on their participation in international fisheries management, a broader analysis of the international law for small-scale fisheries is useful for this research, and considered necessary, given that literature on the topic remains scarce. This chapter thus examines the extent to which certain treaties and non-formally binding instruments relate to and are relevant to small-scale fisheries, noting

⁴⁹² FAO SSF Guidelines (n 25).

⁴⁹³ UNHRC UNDROP (n 41).

⁴⁹⁴ For instance, the 2015-2025 Integration Policy of Fisheries and Aquaculture adopted by the Central American Fisheries and Aquaculture Organization, 2016 Model Law for Artisanal or Small-Scale Fishing of the Latin American and Caribbean Parliament, the 2018 GFCM Regional Plan of Action for Small-Scale Fisheries in the Mediterranean and Black Sea, the 2018 Protocol on Securing Sustainable Small-Scale Fisheries under the Caribbean Community Common Fisheries Policy. See more examples and full references in Nakamura, 'Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries' (n 26) 61.

⁴⁹⁵ The Costa Rica's Decree No. 39195 MAG-MINAE-MTSS of 2015 provides the competence and mandate for national authorities in implementing the SSF Guidelines, while the Cabo Verde's Legislative Decree No. 2 of 2020 regulating marine fisheries affirms that the fishery management plans promote and support the SSF Guidelines. For more details, see *ibid* 65–66.

specifically these instruments' implications for participatory international fisheries management.

I begin by delving into the international law and related legal developments, departing from the SSF Guidelines and UNDROP, and carrying out an interpretative exercise on the applicability of selected instruments and their relevance to small-scale fisheries in international fisheries law and other different legal regimes (*section 4.1*). Then, I explore the international legal criteria for characterizing small-scale fisheries peoples, which is useful to delineate the scope of their participation in international fisheries management (*section 4.2*). This analysis is followed by a more detailed examination of key principles, rights and duties underpinning participatory management of natural resources, fisheries and biodiversity, which support the participation of small-scale fisheries peoples in international fisheries management (*section 4.3*). Finally, I conclude (*section 4.4*).

4.1. Building the global safety net for small-scale fisheries in international law

The international legal framework relevant to small-scale fisheries is very broad. Attempts to listing the main instruments can only be but non-exhaustive (see **Table 1**). Evidently, each instrument has its degree of relevance to small-scale fisheries, and many require a more in-depth analysis to understand the applicability of relevant provisions to small-scale fisheries. The previous chapters provide useful exploration of environmental and human rights treaties and formally non-binding instruments that compose the international law for small-scale fisheries. It is beyond this thesis' scope to examine each all relevant instruments, so I delineate this research to undertaking a comparative analysis of two main ones, namely, the SSF Guidelines and the UNDROP, and later carrying out an interpretative exercise of the applicability of selected instruments and their relevance to small-scale fisheries from international fisheries law and other different legal regimes.

4.1.1. The SSF Guidelines and the UN Declaration on Peasants' Rights

The SSF Guidelines and the UNDROP were both the outcomes of inclusive and multistakeholder-driven processes of international law-making, which counted with active and influential participation of local communities' representatives from various

parts of the world.⁴⁹⁶ The process of development of the SSF Guidelines was led by the FAO, and involved regional consultations with small-scale fishing communities and civil society organizations (CSOs).⁴⁹⁷ According with the FAO, more than 4000 stakeholders were directly involved in this process, contributing to the final text, which was negotiated and endorsed by consensus of the FAO COFI Members in 2014.⁴⁹⁸ In turn, the process of development of the UNDROP was largely driven by a global agrarian movement, La Via Campesina, which contributed substantially to the drafting of the Declaration.⁴⁹⁹ Differently from the consensus-based endorsement of the SSF Guidelines, the UNDROP was adopted by majority of vote of the HRC members, in 2018, with Australia, Hungary and the United Kingdom (UK) voting against and 11 abstentions.⁵⁰⁰ In my view, the multi-stakeholder participatory process of developing these instruments, imbued with the inputs from multiple stakeholders, including representatives from local communities, assured global legitimacy and greater authoritative status to these instruments. In effect, both arguably have rich normative contents by recalling treaty obligations, international standards, and guidance, especially on human rights, and reinforcing the applicability of these frameworks to small-scale fisheries. As such, the SSF Guidelines and UNDROP play a key role in firming up the minimum international norm-setting standards for small-scale fisheries.⁵⁰¹

A key difference between the two instruments merits attention. Typically, despite being imbedded on the HRBA and human rights principles, the SSF Guidelines are not a human rights instrument per se. As stated in the preface of the guidelines, they ‘were developed to provide complementary guidance with respect to small-scale

⁴⁹⁶ Morgera and Nakamura (n 44) 63–65; Nakamura, ‘Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries’ (n 26) 44–47.

⁴⁹⁷ FAO, ‘Update on the Development of International Guidelines for Securing Sustainable Small-Scale Fisheries (COFI/2012/7)’ paras 8–23.

⁴⁹⁸ FAO, ‘Report of the Thirty-First Session of the Committee on Fisheries’ (FAO 2014) FAO Fisheries and Aquaculture Report 1101.

⁴⁹⁹ Morgera and Nakamura (n 44) 63–65.

⁵⁰⁰ UNHRC UNDROP (n 41).

⁵⁰¹ The arguments for the normative significance and legal force of the SSF Guidelines have been presented in Nakamura, ‘Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries’ (n 26).. See the comparison between the UNDROP and the SSF Guidelines in terms of both process of development and adoption and normative content in Morgera and Nakamura (n 44).

fisheries in support of the overall principles and provisions of the Code’, the latter being the CCRF.⁵⁰² The SSF Guidelines were adopted under the auspices of the FAO, which is not a human rights entity like the HRC. Consequently, the provisions of the guidelines take the perspectives of the duty-bearers, as Morgera and I explain, ‘identifying good practices and sector-specific means of implementation’, and seeking to balance the needs of ensuring progressive realization of small-scale fisheries peoples’ rights and the sustainable management of resources.⁵⁰³ In contrast, the UNDROP, which is a human rights instrument, takes the perspectives of the right holders, asserting small-scale fisheries peoples’ rights and clarifying the measures states need to take to ensure the full realization of such rights.⁵⁰⁴ Nevertheless, as Morgera and I demonstrate, the SSF Guidelines and the UNDROP are compatible and mutually supportive.⁵⁰⁵ The SSF Guidelines aim at advancing food security and sustainability in small-scale fisheries based on the HRBA, with guidance for duty-bearers (states and non-state actors) that ultimately strengthen the protection of small-scale fisheries. The UNDROP, in turn, affirms the human rights of small-scale fisheries peoples, requiring states to protect, respect, promote and fulfil such rights.⁵⁰⁶ In this sense, the two instruments complement and strengthen each other, particularly in respect of the recognition and protection of legitimate tenure rights in fisheries (i.e., to fishery resources and fishing grounds in inland and coastal waters), and associated safeguards (impact assessments, consultation, and benefit-sharing).⁵⁰⁷ The two instruments also contain mutually supportive provisions on the recognition and protection of traditional knowledge, as well as on the means of securing this recognition and protection, and of using traditional knowledge to inform policy-making.⁵⁰⁸ Another key contribution of the two instruments concerns their provisions

⁵⁰² FAO CCRF (n 225).

⁵⁰³ Morgera and Nakamura (n 44) 76.

⁵⁰⁴ *ibid.*

⁵⁰⁵ Morgera and Nakamura (n 44).

⁵⁰⁶ *ibid* 67–68.

⁵⁰⁷ *ibid* 68–69.

⁵⁰⁸ *ibid* 73–74.

on procedural rights, which include access to information, access to justice, and effective remedies, such as compensation and reparation.⁵⁰⁹

One should also note that the CBD is not explicitly referred in the SSF Guidelines, which rather take biodiversity considerations in mentioning that the ‘health of aquatic ecosystems and associated biodiversity are a fundamental basis’ for small-scale fisheries peoples’ livelihoods and wellbeing,⁵¹⁰ and that there is a need to ensure responsible and sustainable use of aquatic biodiversity for present and future generations.⁵¹¹ The absence of CBD explicit reference in the SSF Guidelines has not prevented biodiversity mainstreaming in fisheries policies generally,⁵¹² which is consistent with the CBD duty requiring state parties to integrate biodiversity conservation and sustainable use into sectoral policies, and national decision-making.⁵¹³ In turn, the UNDROP explicitly recalls the CBD and the Nagoya Protocol,⁵¹⁴ while requiring states to prevent biodiversity depletion and ensure its conservation and sustainable use in order to promote the full realization of the rights of small-scale fisheries people;⁵¹⁵ and take appropriate measures to promote and protect the traditional knowledge, innovation and practices of those concerned peoples, relevant to the conservation and sustainable use of biodiversity.⁵¹⁶

The SSF Guidelines and the UNDROP used in conjunction can, thus, heighten the protection of small-scale fisheries peoples. Another difference between these two instruments concerns their capacity to produce law-making effects. As anticipated in the beginning of this chapter, evidence of states’ practice in support of the SSF Guidelines’ implementation is perceived through subsequently adopted policy and

⁵⁰⁹ *ibid* 75.

⁵¹⁰ FAO SSF Guidelines (n 25) preface.

⁵¹¹ *ibid* 5.1.

⁵¹² Evidence shows that the fisheries sector has increased awareness and taken into account ecological considerations in fishing operations, and has integrated biodiversity elements in fisheries planning and development. See Friedman, Garcia and Rice (n 479).

⁵¹³ CBD art 6(b) and 10(a).

⁵¹⁴ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol)(adopted 29 October 2010, entered into force 12 October 2014) (Doc UNEP/CBD/DEC/X/1 of 29 October 2010).

⁵¹⁵ UNHRC UNDROP (n 41) art 20(1).

⁵¹⁶ *ibid* 20(2).

legal instruments at the international, regional, and national levels.⁵¹⁷ In turn, the UNDROP's implementation in small-scale fisheries is yet to be seen. In October 2023, a dedicated working group for a period of three years was established by the HRC (by vote of 38, with USA and UK voting against and seven abstentions)⁵¹⁸ to, inter alia, promote the effective and comprehensive implementation of the UNDROP.⁵¹⁹ To the extent of inland small-scale fisheries and, arguably, coastal small-scale fisheries, the implementation of the SSF Guidelines can be said to support the implementation of the UNDROP, considering that both instruments recognize the protection of legitimate tenure rights to land, which include fishing grounds, and the access to, sustainable use and management of fisheries.⁵²⁰

Having examined and compared key features of the SSF Guidelines and the UNDROP, I move on to an analytical exercise of interpreting certain international fisheries law instruments to unravel the pertinence of certain provisions to small-scale fisheries.

4.1.2. Binding the safety net for small-scale fisheries in marine waters

The SSF Guidelines and the UNDROP are late developments in international law for small-scale fisheries. This is due to states' general reluctance to adopting binding commitments over complex and sensitive matters subject to their national sovereignty and jurisdiction.⁵²¹ Small-scale fisheries are among such issues, as their diverse and dynamic operations primarily occur in areas under a state's jurisdiction, sovereignty,

⁵¹⁷ Nakamura, 'Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries' (n 26) 56–69.

⁵¹⁸ UN Human Rights Council, Resolution 54/9 of 11 October 2023, 'Working Group on the rights of peasants and other people working in rural areas' (12 October 2023) UN Doc. A/HRC/54/9 2023.

⁵¹⁹ A first regional consultation on the implementation of the UNDROP was held in Colombia, in December 2023, but the agenda did not include a dedicated item on small-scale fisheries. I have been involved in the work of the FAO to strengthen collaboration with the OHCHR, aiming to enhance the linkages between human rights and fisheries.

⁵²⁰ Morgera and Nakamura (n 44) 11–12.

⁵²¹ For an analysis of the constraints in adopting fisheries legally binding instruments, see the case of the CCRF in Jürgen Friedrich, 'Legal Challenges of Non-Binding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

and control.⁵²² However, this jurisdiction and control are not absolute. Limitations apply in respect of obligations that states have adhered to, including through the LOSC, UNFSA, the ILO C188, and, as seen above, human rights treaties. In this respect, one needs to examine the extent to which treaties' provisions are pertinent to address or solve a given legal issue relating to small-scale fisheries. Let me give examples in key international fisheries law instruments.

Literature is very sparse and limited in examining the provisions from the law of the sea regime that are relevant to small-scale fisheries.⁵²³ The LOSC,⁵²⁴ which is widely known as the 'constitution' governing the oceans,⁵²⁵ with close to universal participation,⁵²⁶ has codified the customary rules for the exercise of states' rights and duties, also in relation to fisheries, under each maritime zone, including the territorial sea,⁵²⁷ archipelagic waters,⁵²⁸ the EEZ,⁵²⁹ and the high seas⁵³⁰ (i.e., the water column in ABNJ). There are few LOSC's provisions relevant to small-scale fisheries, and most are indirectly relevant. Most of the LOSC provisions address obligations and rights of states, eventually 'ships'.⁵³¹ In the absence of a clear definition of the latter in the

⁵²² Revisit section 1.1.2 of this thesis.

⁵²³ Few commentators have looked into the provisions of the LOSC and UNFSA requiring States parties to take into account the, respectively, the economic needs and interests of artisanal and subsistence fishers. See for example Gunnar G Schram and André Tahindro, 'Developments in Principles for the Adoption of Fisheries Conservation and Management Measures' in Ellen Hey (ed), *Development in International Fisheries Law* (Kluwer Law International 1999) 270–271.

⁵²⁴ LOSC.

⁵²⁵ Tommy TB Koh, 'A Constitution for the Oceans (Remarks of the President of the Third UN Conference on the Law of the Sea, 1982)'.

⁵²⁶ The LOSC has 168 ratifications, as of November 2022. Coastal States that are not parties to the LOSC include the USA, Colombia, El Salvador, Eritrea, Israel, Peru, Turkey and Venezuela. See UN, 'Division for Oceans Affairs and the Law of the Sea (DOALOS)' (2023) <<http://www.un.org/depts/los/>> accessed 6 January 2023.

⁵²⁷ LOSC arts 3–26 and 47–54.

⁵²⁸ *ibid* 55–75.

⁵²⁹ *ibid* 49–50.

⁵³⁰ *ibid* 86–115.

⁵³¹ As Papanicopolulu noticed, the horizontal State relationships that characterizes international law and the maritime law's approach to 'personify' ships, tend to leave the individual aside from treaty texts, rather being 'substituted not only by States but also by ships, even in cases when it is evident that it is the individual that is concerned'. She provides the example of article 230(3) of the LOSC, which recognises the rights of the 'accused' in the conduct of proceedings on violations committed by a foreign vessel. In this provision, while the 'accused' refers to the vessel, it is evidently meaning the persons involved in the violations. See Papanicopolulu (n 326) 85.

treaty,⁵³² the term ‘ships’ can be interpreted as covering all vessels regardless of their size or type, therefore including small-scale fishing vessels, except where the treaty explicitly refers to ‘tankers’, ‘nuclear-powered ships’ or ‘merchant ships’.⁵³³ For instance, the LOSC provisions on the territorial sea mainly concern navigational rights of foreign vessels, which must respect the principle of innocent passage.⁵³⁴ The lawful exercise of the right of innocent passage in territorial waters by foreign vessels, which may include small-scale fishing vessels,⁵³⁵ is thus important for the maintenance of order in maritime zones where small-scale fisheries operate, and in preventing potential collisions between the foreign fleet and the coastal state’s small-scale fishing vessels whose structure are particularly fragile.⁵³⁶ Similarly, the respect for the principle of innocent passage is crucial in semi-enclosed seas, where opposite coastal states have shorter extension of their territorial waters,⁵³⁷ or in territorial seas with

⁵³² The lack of a definition of ‘ship’ also raises questions on the precise object of flag State jurisdiction, which is consolidated in the principle of flag States exclusive jurisdiction over ships. See Richard A Barnes, ‘Flag States’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 310–311.

⁵³³ For example, see LOSC arts 23 and 27.

⁵³⁴ *ibid* 17–19.

⁵³⁵ Foreign vessels may include small-scale fishing vessels in sub-regions, such as Western Africa, where fishing occurs in coastal States with neighbouring EEZs. One commentator has noted that stateless fishing vessels count for many of the small-scale fleet. See John E Noyes, ‘The Territorial Sea and Contiguous Zone’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015). This scenario gets more complicated considering that in certain coastal States, small-scale fishing vessels may be exempted from registration. In Brazil, for example, Indigenous peoples carrying out subsistence SSF are exempted from registration. See Nakamura and Hazin (n 19). The national legislations of Australia and Canada also exempt small-scale vessels from registration. See Douglas Guilfoyle, ‘The High Seas’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 214–215.

⁵³⁶ Accidents at sea may involve a foreign vessel with a fishing vessel within the coastal waters. For instance, it was reported the collision between an Indian small-scale fishing vessel and a Panamanian bulk carrier within Indian territorial waters, which resulted in the death of three fishermen. Foreign merchant shipping vessels have also been reported to collide with Chinese small-scale fishing vessels. See, respectively, The Maritime Executive, ‘Fishing Vessels: Avoid Them and Avoid the Consequences’ (16 June 2017) <<https://maritime-executive.com/blog/fishing-vessels-avoid-them-and-avoid-the-consequences>> accessed 6 January 2023; Zaicai Yi, ‘Study on Collision between Fishing Vessels and Merchant Ships within the Chinal Coastal Waters’ (Dissertation, Master of Science in Maritime Affairs, World Maritime University 2015) <https://commons.wmu.se/cgi/viewcontent.cgi?article=1125&context=msem_dissertations> accessed 6 January 2023.

⁵³⁷ This is the case, for instance, of Greece and Türkiye in the Aegean Sea, where these States with opposite coasts have less than 24 nm apart. See Churchill, Lowe and Sander (n 234) 130–155. An collision between a Turkish small boat and a Greek tanker has led to the death of five Turkish fishers. See The Maritime Executive, ‘Five Turkish Fishermen Killed in Collision With Greek

overlapping straits used for international navigation,⁵³⁸ as the shorter distance separating one state and the other could produce tensions between a foreign large-scale or other type of vessel navigating in the territorial sea of a coastal state and the small-scale fishing vessels therein.

Specific provisions in the LOSC more relevant to small-scale fisheries are those requiring coastal states to take into account the ‘economic needs of coastal fishing communities’ when establishing conservation and management in their EEZ.⁵³⁹ While this provision does not refer to the sociocultural needs of coastal fishing communities, one can associate these needs by factoring in the point that coastal fishing communities need fishing not only to bring income to their families, but also to sustain their livelihoods and culture. Another relevant provision of the LOSC requires landlocked states and geographically disadvantaged states to take into account the need to avoid effects detrimental to fishing communities of the coastal state when fishing in such state’s EEZ pursuant to fishing access agreements.⁵⁴⁰ The soft and vague language fails to precise minimum measures that the states concerned need to do in ‘taking into account’ those considerations for the benefit of small-scale fisheries peoples. It is therefore important to read these provisions in conjunction with the SSF Guidelines, whose paragraph 5.7, for instance, suggests states to ‘grant preferential access of small-scale fisheries to fish in waters under national jurisdiction’ and consider specific measures such as ‘creation and enforcement of exclusive zones for small-scale fisheries’ in the context of fishing access agreements with third countries or parties.

In turn, the UNFSA’s provisions relevant to small-scale fisheries specifically relate to the context of inter-state cooperation in the management and conservation of straddling fish stocks and highly migratory fish stocks, requiring, also in soft and vague language, state parties to: ‘*take into account* the interests of artisanal and subsistence fishers’ as part of the Agreement’s general principles;⁵⁴¹ ‘*take into account*

Tanker’ (11 November 2020) <<https://maritime-executive.com/article/five-killed-when-greek-tanker-and-turkish-fishing-boat-collide>> accessed 26 February 2023.

⁵³⁸ The right of innocent passage also applies to straits used for international navigation. See LOSC art 45.

⁵³⁹ *ibid* 61(3).

⁵⁴⁰ *ibid* 62(3), 69(2)(a) and 70(3)(a).

⁵⁴¹ UNFSA art 5(i) emphasis added.

the needs of coastal fishing communities which are dependent mainly on fishing for stocks’ when determining the nature and extent of participatory rights for new members of RFMOs;⁵⁴² and to ‘*take into account* the special requirements of developing states, in particular the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing states, particularly small island developing states’.⁵⁴³ These provisions reflect state parties’ concern with small-scale fisheries in the context of cooperation for the management and conservation of straddling fish stocks and highly migratory fish stocks but are not strong nor clear enough in actually determining the necessary measures for the protection of small-scale fisheries peoples. In this respect, the SSF Guidelines, paragraph 5.19, brings meaning to the term ‘take into account’ in those provisions by recommending states, in the specific context of shared fishery resources, to ‘work together to ensure that the tenure rights of small-scale fishing communities that are granted are protected’.

Complementing the LOSC and UNFSA, the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (Compliance Agreement),⁵⁴⁴ adopted under auspices of the FAO, has, in the first instance, limited relevance to small-scale fisheries, as it applies to ‘all fishing vessels that are used or intended for fishing on the high seas’.⁵⁴⁵ This excludes, to a great extent, the small-scale fishing fleet, which generally operates either without, or with low power, motorized engines, thus not being expected to reach beyond coastal states’ EEZ.⁵⁴⁶ Furthermore, the Compliance Agreement, similarly to certain ILO and IMO instruments examined below, contains a flexibility clause, article II(2), which allows parties to ‘exempt fishing vessels of less than 24 metres in length entitled to fly its flag’ from this Agreement’s application, unless the exemption undermines its

⁵⁴² *ibid* 11(d) emphasis added.

⁵⁴³ *ibid* 24(2)(b).

⁵⁴⁴ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) (adopted 29 November 1993, entered into force 24 April 2003) (2221 UNTS 91).

⁵⁴⁵ *ibid* II(1).

⁵⁴⁶ Daniel Pauly, ‘A Vision for Marine Fisheries in a Global Blue Economy’ (2018) 87 *Marine Policy* 371, 373.

implementation.⁵⁴⁷ Nevertheless, it is important to note that, in practice, small-scale fishing vessels can operate on the high sea. This occurs in very specific cases, but which are important for involving parties to the Compliance Agreement, namely, Peru, the EU, and some of EU member states. Let me explain.

In Peru, the fisheries authority has granted fishing licenses to two artisanal fishing vessels to fish on the high seas, in the area covered by the Permanent Commission for the South Pacific (CPPS).⁵⁴⁸ As the current national fisheries legislation does not make reference to vessel length parameters to characterize artisanal fishing activities,⁵⁴⁹ the requirements under the Compliance Agreement must be observed by Peru in respect of those two artisanal fishing vessels flying Peru's flag, unless the country brings to effect the forementioned exemption under the Agreement. In turn, there may also be small-scale fishing vessels flying the flag of EU member states, and which operate on the pockets of high sea areas in the Mediterranean sea, where a variety of maritime zones with diverse lengths and purposes of use have been claimed by different states.⁵⁵⁰ In any case, for a party to the Compliance Agreement, if a small-scale fishing vessel entitled to fly its flag is found on the high seas, the party would need to ensure that such vessel is duly registered and licensed to fish in such areas, and meets the requirements under that Agreement.

For its part, the *Agreement on Port States Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (PSMA)⁵⁵¹ regulates the entry into port of foreign fishing vessels, empowering port states to take measures (i.e., deny access and/or use of port) that are instrumental to prevent fish and fishery products originated from IUU fishing from entering into ports and markets. Article 3(1)(a)

⁵⁴⁷ Other conditions apply if parties opt to implement such exemptions. See Compliance Agreement art II(2)(a)(b).

⁵⁴⁸ 'Pesca Artesanal: Dos Embarcaciones Fueron Autorizadas Para Pescar Pota En Altamar' *SPDAD Actualidad Ambiental* (Peru, 2021) <<https://www.actualidadambiental.pe/pesca-artesanal-dos-embarcaciones-fueron-autorizadas-para-pescar-pota-en-altamar/>> accessed 7 February 2024.

⁵⁴⁹ Peru, Ley General de Pesca, Decreto Ley No. 25977, Lima, Peru, 21 de diciembre de 1992 1992.

⁵⁵⁰ Fisheries zones, for instance, have been proclaimed in different lengths by different states, ranging from 20 to 62 nm. See Irini Papanicolopulu, 'The Mediterranean Sea' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 607–611.

⁵⁵¹ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) (adopted 22 November 2009, entered into force on 5 June 2016) (Appendix E to FAO Doc C 2009/REP).

exempts state parties from applying the PSMA to ‘vessels of a neighbouring state that are engaged in artisanal fishing for subsistence’ with the condition that the port state and flag state concerned cooperate to ensure such vessels does not engage in IUU fishing or activities in support of such fishing. Consequently, the PSMA applies to commercial artisanal fishing vessels, and is key in the control of IUU fishing by foreign commercial small-scale fishing vessels, whose entry into and use of a port can be denied by state parties to the Agreement.⁵⁵² This may be particularly relevant to certain marine regions of the world, such as the Western African subregion, where artisanal fishing boats from different states have been reported to practice IUU fishing within their own waters and the waters of neighbouring states.⁵⁵³ Illegal practices in small-scale fisheries include poaching, use of prohibited fishing methods or gears, fishing during closed seasons, fishing in no-take zones or partially protected areas, and fishing protected species.⁵⁵⁴ Given the interests of coastal states in protecting their national fleet, and of port states in preventing entry of fish and fishery products deriving from IUU fishing, the possibility of greatening port states control over foreign fishing vessels, through the PSMA, is an incentive for states to ensure special attention is given to foreign commercial small-scale fishing fleet, which may be harder to monitor and control. In this respect, the SSF Guidelines, paragraph 5.16, recommend states to ‘ensure effective monitoring and enforcement mechanisms to deter, prevent and eliminate all forms of illegal and/or destructive fishing practices’ and ‘to improve registration of the fishing activity’, while calling upon small-scale fisheries peoples to support in monitoring, control, and surveillance.

⁵⁵² *ibid* 9 and 11.

⁵⁵³ It has been reported ‘persistent and recurrent fraudulent and irregular cross-boarder incursions of Senegalese boats’, and that ‘IUU fishing is present in all SRFC member states. This is due to both domestic and foreign industrial vessels and also artisanal fisheries boats’. See SRFC, ‘Written Statement, Version 2, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea - ITLOS, SRFC Permanent Secretariat’ 65–68.

⁵⁵⁴ Unreported and/or miss-reported fishing occurs in SSF where often poor monitoring and technology tools do not appropriately reach, if ever, their end. Unregulated SSF entails where legislation, for example, do not provide detailed rules on the SSF’s rights and obligations with respect to fisheries management, conservation and monitoring, control and surveillance. See KL Drammeh Ousman, ‘Illegal, Unreported and Unregulated Fishing in Small-Scale Marine and Inland Capture Fisheries (FAO Specialist Background Paper for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with the FAO)’.

Another treaty relevant to fisheries is the IMO *International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel* (STCW-F),⁵⁵⁵ which provides for the certification and minimum training requirements for crews of fishing vessels at sea, in respect of safety and marine environmental protection. However, the STCW-F has a limited scope, and applies to seagoing fishing vessels measuring equal to or more than 24 metres in length, and powered by main propulsion machinery of equal to or more than 750 kilowatt.⁵⁵⁶ Scope is also a matter for the Cape Town Agreement, which applies to fishing vessels measuring 24 metres in length or more, and leaves to parties' discretion the use of provisions exempting this Agreement's application. For instance, if the state considers such application to be unreasonable and impracticable in view of the vessel type.⁵⁵⁷ These flexibility clauses make more challenging to secure international minimum standards for decent work and safety in small-scale fishing vessels.

Before concluding this part and going back to focus on this thesis' topic, let me pass on to examine other relevant treaties as part of this exercise of interpreting provisions that are pertinent to small-scale fisheries.

4.1.3. Assembling different legal regimes for small-scale fisheries

Human rights treaties have been discussed in the previous chapter, thus let me briefly elaborate on the ILO relevant treaties. For its part, the C188 outlines safety and health standards for fishers, applicable to 'all fishers and all fishing vessels engaged in *commercial* fishing operations' (emphasis added).⁵⁵⁸ As such, the C188 does not apply to subsistence small-scale fishing, and may apply, in whole or in part, to fishers working on commercial small-scale fishing vessels measuring less than 24 metres in length, if the state, after consultation, decides to do so.⁵⁵⁹ Most requirements under the C188 are fundamental for the safety and health of the fisher and the crew,⁵⁶⁰ with a

⁵⁵⁵ International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F) (adopted 7 July 1995, entered into force 29 September 2012).

⁵⁵⁶ *ibid* 24.

⁵⁵⁷ Cape Town Agreement rr 1 and 3.

⁵⁵⁸ ILO C188 art 2(1) (emphasis added).

⁵⁵⁹ *ibid* 2(3).

⁵⁶⁰ This treaty further provides for the duty of the skipper to ensure fishers perform their work in the best conditions of safety and health, prevents fatigue, facilitate on-board occupational safety and

special attention to fishworkers under 16 years of age.⁵⁶¹ While the treaty was considered a ‘new beacon’ for being concise in regulating conditions of employment and working conditions of fishers,⁵⁶² C188 remains, as anticipated, poorly ratified. For parties and non-parties to C188, it is thus important to also follow the ILO’s *Work in Fishing Recommendation* (R199),⁵⁶³ which, I find, more precisely links fisheries management with human rights, recommending members to include the compliance to C188 (enabler of the realization of fishers’ right to decent work) as a pre-condition for the issuance of licenses of fishing vessels concerned.⁵⁶⁴

Other ILO treaties are worth noting. The *Convention concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour* (ILO C-182)⁵⁶⁵ should be read in conjunction with the CRC, requiring states to take effective and time-bound measures to prevent the engagement of children in the worst forms of child labour, including all forms of slavery or similar practices such as trafficking of children and debt bondage.⁵⁶⁶ The *Convention concerning Migration for Employment* (ILO C-97)⁵⁶⁷ is another treaty relevant to small-scale fisheries, where migration is a ‘common livelihood strategy’,⁵⁶⁸ and should be read in conjunction with the ICMW. Requirements such as putting in place appropriate and free service to assist migrants for employment can support adequate integration of migrant fishers in small-scale fisheries. There are many other important ILO conventions and guidelines that provide labour, occupational, and employment requirements, as well as set out fundamental

health awareness training and ensure compliance with safety of navigation, watchkeeping and associated good seamanship standards. See *ibid* 8(2)(6).

⁵⁶¹ It outlines the minimum age of 16 for work on board a fishing vessel, with the possibility of authorisation of 15 years fish workers engaged in vocational training in fishing and not subject to compulsory schooling, and the prohibition of fishers under the age of 18 for work at night See *ibid* 9.

⁵⁶² An example and potentially the only one: George P Politakis, ‘From Tankers to Trawlers: The International Labour Organization’s. *New Work in Fishing Convention*’ (2008) 39 *Ocean Development & International Law* 119.

⁵⁶³ ILO, *Work in Fishing Recommendation* No. 199 (14 June 2007) 2007.

⁵⁶⁴ *ibid* 55.

⁵⁶⁵ *Convention concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour* (ILO C182) (adopted 17 June 1999, entered into force 19 November 2000) (38 ILLM 1207).

⁵⁶⁶ *ibid* 3(a) and 7(2).

⁵⁶⁷ *Convention concerning Migration for Employment (Revised)* (ILO C-97) (adopted 2 July 1949 in Geneva, entered into force 22 January 1952) (120 UNTS 70).

⁵⁶⁸ FAO SSF Guidelines (n 25) para 6.10.

minimum standards, such as the *Convention concerning the Abolition of Forced Labour* (ILO C-105).⁵⁶⁹

In the international environmental law domain, the CBD regime is, evidently, relevant to small-scale fisheries, not only for the ecosystem approach framework discussed in chapter 2, but for the benefits that biodiversity conservation and sustainable use bring to fisheries,⁵⁷⁰ and the contributions of small-scale fisheries peoples to these efforts.⁵⁷¹ I get back to this in section 4.3. Let me examine another relevant treaty, the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention).⁵⁷² This is one of the earliest environmental treaties adopted by states, currently with 172 state parties.⁵⁷³ It aims at the conservation and wise use of all wetlands, which include transboundary rivers, lakes and mangroves used by small-scale fisheries,⁵⁷⁴ and coastal sites such as coral reefs and other marine areas no deeper than six metres at low tide, where small-scale fisheries may operate.⁵⁷⁵ Preventing threats and protecting Ramsar sites from loss and degradation can be particularly challenging for small-scale fisheries in developing countries, due to the low capacity in implementing conservation measures.⁵⁷⁶ Multiple stakeholders, from

⁵⁶⁹ ILO C-29.

⁵⁷⁰ Garcia, Rice and Charles (n 479); Jennings and others (n 479); Friedman, Garcia and Rice (n 479).

⁵⁷¹ Diz and Morgera (n 103).

⁵⁷² Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) (adopted 2 February 1971, entered into force 1 December 1975) (996 UNTS 245).

⁵⁷³ As of August 2023. See Ramsar Convention, 'Contracting Parties to the Ramsar Convention' <https://www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf> accessed 3 February 2024. In 2021, the Convention completed 50 years since its signing in 1971. Critics noted the advances made throughout the years, and remaining needs for broadening this treaty's role, cooperative mechanisms with other regimes, and focusing on monitoring and managing Ramsar sites, particularly in the face of persisting wetland loss, rapid and unpredictable environmental changes. See Peter Bridgewater and Rakhyun E Kim, 'The Ramsar Convention on Wetlands at 50' (2021) 5 *Nature Ecology & Evolution* 268.

⁵⁷⁴ For example, small-scale fisheries operate in mangrove, lagoon and near-shore pelagic environments in the Solomon Islands. See Philippa J Cohen, Louisa Evans and Hugh Govan, 'Community-Based, Co-Management for Governing Small-Scale Fisheries of the Pacific: A Solomon Islands' Case Study' in Svein Jentoft and Ratana Chuenpagdee (eds), *Interactive Governance for Small-Scale Fisheries: Global Reflections* (Springer 2015) 44–45.

⁵⁷⁵ For example, in Madagascar and in Tanzania, there has been projects in place for community-based aquaculture farming for sea cucumber using hatchery-reared sandfish. See Hampus Eriksson, 'Sea Cucumber Aquaculture in the Western Indian Ocean: Challenges for Sustainable Livelihood and Stock Improvement' (2012) 41 *Ambio* 109, 111.

⁵⁷⁶ There are currently 2,400 Ramsar designated sites covering over 2,5 million square kilometres, which have been considered of international importance for their ecology, botany, zoology, limnology or hydrology. See Ramsar Convention, 'Wetlands of International Importance (Ramsar

farmers, small-scale fisheries peoples to industrialists and urban dwellers,⁵⁷⁷ competing on the use of wetlands for a range of different purposes, add another layer of complexity and challenge to those sites' monitoring. The Ramsar framework contains relevant requirements in respect of participation of local communities in the conservation of Ramsar sites, which I will examine in section 4.3.3.

For its part, provisions relevant to small-scale fisheries in the *UN Framework Convention on Climate Change* (UNFCCC)⁵⁷⁸ include article 4(1)(d)(e), requiring state parties to cooperate in conserving and enhancing coastal and marine ecosystems for adaptation to the impacts of climate change, and in this treaty's objectives, as expanded in the Paris Agreement,⁵⁷⁹ to include 'efforts to eradicate poverty', and the emphasis on 'resilience of communities, livelihoods and ecosystems' as an area for states parties' cooperation and facilitation.⁵⁸⁰ Importantly, certain obligations set out under the Paris Agreement enshrine a HRBA.⁵⁸¹ For instance, article 7(5) recognizes adaptation action to be 'country-driven, gender-responsive, participatory and fully transparent approach', which duly considers 'vulnerable groups, communities and ecosystems', based on and guided by, inter alia, 'traditional knowledge, knowledge of indigenous peoples and local knowledge systems'. Here is another example of a treaty provision whose relevance to small-scale fisheries is strengthened by reading it in conjunction with the SSF Guidelines, specifically paragraph 9.2, which recommend states to adopt climate change adaptation and mitigation strategies 'in full and effective consultation' with small-scale fisheries peoples, with special support given to those 'living on small islands'. Additionally, the UNDROP, article 18(3), strengthens these provisions by affirming the right of small-scale fisheries peoples to 'contribute to the

Sites)' (2023) <<https://www.ramsar.org/about/wetlands-of-international-importance-ramsar-sites>>.

⁵⁷⁷ Finlayson and others (n 160) 180.

⁵⁷⁸ United Nations Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 21 March 1994) (1771 UNTS 107).

⁵⁷⁹ Paris Agreement on Climate Change (adopted 12 December 2015 in Paris, entered into force 4 November 2016).

⁵⁸⁰ *ibid* 2(1) and 8(4)(h).

⁵⁸¹ Julia Nakamura, Julia Weston and Mitchell Lennan, 'International Legal Responses for Protecting Fishers' Fundamental Rights Impacted by a Changing Ocean' [2023] *The International Journal of Marine and Coastal Law* 21–22.

design and implementation of national and local climate change adaptation and mitigation policies, including through the use of practices and traditional knowledge’.

It is also worth noting the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES),⁵⁸² as it is becoming increasingly pertinent to the fisheries sector, due to the increasing number of commercially exploited species (e.g., certain species of eels, turtles, rays, sharks, queen conch, sea cucumber) being included in CITES Appendix II.⁵⁸³ For the international trade of these CITES-listed species, parties are required to obtain evidence of non-detriment findings to ascertain that the species proposed for trade will not suffer detrimental effects, and to provide evidence of legal acquisition finding to determine that the species were acquired in conformity with the applicable law.⁵⁸⁴ Meeting these requirements can be challenging for developing countries lacking technical and financial capacity. Consequently, it would likely not be economically viable for the small-scale fisheries sector to comply with CITES requirements if the fish and fishery products originating from small-scale fisheries are CITES-listed and enters international trade.⁵⁸⁵ The Convention’s text does not give any special consideration to local communities affected by international trade in CITES-listed species. Parties have taken slow steps in considering such matter under the CITES regime,⁵⁸⁶ but progress is seen through the adoption of resolution Conf. 16.6 (Rev. CoP18) on CITES and livelihoods, particularly relevant to the participation of small-scale fisheries peoples in the international fora, as I will detail in section 4.3.3.

⁵⁸² Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (3 March 1973, entered into force 1 July 1975) (993 UNTS 243).

⁵⁸³ This issue has resulted in important works conducted by CITE Secretariat in cooperation with FAO on matters concerning CITES listing criteria, improved guidelines on responsible fisheries trade and the interpretation and legal application of ‘introduction from the sea’. See Nakamura and Kuemlangan (n 79).

⁵⁸⁴ CITES art III, IV, and V.

⁵⁸⁵ CITES Parties have been encouraged to offer, upon request, cooperative assistance through e.g., financial, technical support to developing countries, for improvement of capacity to make NDFs, based on nationally identified needs. See CITES, CoP16, ‘Non-detriment findings’ (March 2013, revised in 2016) Resolution Conf. 16.7 (Rev. CoP17) para 2(f).

⁵⁸⁶ Almost thirty years after the entry into force of the Convention that the parties, in 2004, Parties have expressly recognised the potential benefits that legally traded species bring to the development of local people and the need to take into account the impacts that CITES-listing decisions may cause on the livelihoods of the poor. See CITES, CoP8, ‘Recognition of the benefits of trade in wildlife’ (March 1992, revised in 2004) Resolution Conf. 8.3 (Rev. CoP13).

Another treaty indirectly relevant to small-scale fisheries, and which falls in a different regime, under the auspices of the UN Educational, Scientific and Cultural Organization (UNESCO), is the *Convention concerning the Protection of the World Cultural and Natural Heritage* (WHC).⁵⁸⁷ Pursuant to this treaty, state parties are required to identify, protect, conserve, preserve and transmit to future generations ‘natural heritage’ sites of ‘outstanding universal value’, and to adopt a general policy for the purpose of giving such natural heritage a *function* in the life of the community.⁵⁸⁸ This *function* could be translated into alternative livelihoods to small-scale fisheries peoples operating in areas designated as a world natural heritage site. To minimize the impacts imposed by restrictions or prohibition of fishing in such protected area, the concerned small-scale fishing communities could be placed at the core of management schemes designed to sustain the integrity and functions of ecosystems in that area, providing data for ecosystem monitoring in a cost-effective manner.⁵⁸⁹ The WHC’s revised operational guidelines encourage participation of stakeholders and local communities in the identification, nomination and protection of world heritage properties, and evidence of FPIC of Indigenous peoples (e.g., publicized nominations in appropriate languages, public hearings) in the nomination of properties.⁵⁹⁰ Those guidelines also stress the significant contribution of protecting such sites by a ‘partnership approach to nomination, management and monitoring’, with due account of local communities and Indigenous peoples.⁵⁹¹ This participation is considered essential to ensure shared responsibility with governments in the maintenance of the property.

⁵⁸⁷ Convention concerning the Protection of the World Cultural and Natural Heritage (WHC) (adopted 16 November 1972, entered into force 17 December 1975) (1037 UNTS 151).

⁵⁸⁸ *ibid* 4 and 5(a).

⁵⁸⁹ This approach has been adopted in the management of a Japanese traditional fishing peninsula and its adjacent areas. Based on the so-called Shiretoko Approach, the catch data of local fishers compiled for more than 60 years has been officially utilised for monitoring ecosystem cost, within a system of role-sharing among government, fishers and other ecosystems service users. See Mitsutaku Makino, *Fisheries Management in Japan: Its Institutional Features and Case Studies*, vol 34 (Springer 2011) 138–139.

⁵⁹⁰ UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (2017) WHC.17/01 July 2017 s 12.

⁵⁹¹ *ibid* 39–40.

The above analysis demonstrated that, despite the limited applicability of treaties to small-scale fisheries, a more in-depth interpretation of their provisions shed light on their relevance to small-scale fisheries, which should not be overlooked. Importantly, it is useful to read them in conjunction with non-formally binding instruments, notably the SSF Guidelines, UNDROP, but also the specific guidance adopted by parties to the relevant treaties. Let me then continue the next section by examining the extent to which international law is useful for the issue of definition of small-scale fisheries. This is helpful for delineating the scope of small-scale fisheries participation in international fisheries management.

4.2. To define or not define small-scale fisheries in international law

As noted in section 1.1.1, due to the diverse, dynamic, and peculiar features of small-scale fisheries, the definition of ‘small-scale fisheries’ or related terms (e.g., ‘small-scale fisher’, ‘small-scale fishing’, ‘small-scale fishing community’) has not been agreed upon by states in international law. The SSF Guidelines, paragraph 2.4, recognizes the absence of a ‘single, agreed definition of the subsector’, and ‘do not prescribe a standard definition’. This provision further notes the need ‘to ascertain which activities and operators are considered small-scale, and to identify vulnerable and marginalized groups needing greater attention’. The term small-scale fisheries is associated with a range of types of fishing, such as local, traditional, ancestral, historic, artisanal, subsistence, Indigenous, Aboriginal, and customary.⁵⁹² Many states have defined small-scale fisheries and related terms in national legislation and policies.⁵⁹³ At the regional level, EU member states have defined ‘small-scale coastal fishing’,⁵⁹⁴ and the members of the International Commission for the Conservation of Atlantic

⁵⁹² See Smith and Basurto (n 17); Gibson and Sumaila (n 17); FAO, ‘Legislating for Sustainable Small-Scale Fisheries – A Guide and Considerations for Implementing Aspects of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication in National Legislation’.

⁵⁹³ Nakamura, Chuenpagdee and El Halimi (n 18).

⁵⁹⁴ Defined as ‘fishing activities carried out by: a) marine and inland fishing vessels of an overall length of less than 12 metres and not using towed gear (...); or b) fishers on foot, including shellfish gatherers’. See European Parliament and European Council Regulation (EU) No 2017/1004 of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004 art 2(14).

Tunas (ICCAT) define ‘small-scale coastal vessels’.⁵⁹⁵ At the subregional level, the SRFC Convention does not define small-scale fisheries, but rather characterizes ‘artisanal fisheries’ as fishing activities necessarily meeting all or most of the SRFC’s prescribed five criteria.⁵⁹⁶ These criteria are: technical specifications (undecked gear, lower power or small size), fishing gear (not mechanically controlled), means of propulsion (manual, mechanical or wind turbine), means of conservation (ice or salt) and fishing zone close to the shore. Despite this, the SRFC Convention provides that the definition under national legislation prevails over this characterization.⁵⁹⁷

The SRFC approach seems to find a balance between the need for some minimum guidance on what small-scale fisheries are or entail while respecting the definition that the applicable national legislation may already provide. Using criteria to characterize small-scale fisheries is, I find, a good approach, because it is not too specific and gives the interpreter some flexibility to understand small-scale fisheries in the absence of a specific definition at the national level. But before exploring what could potentially be considered international legal criteria for characterizing small-scale fisheries, let me ponder some considerations on the definition of such term in particular cases.

4.2.1. Each instrument merits its own considerations

From a legal standpoint, generally speaking, the lack of definition or interpretation given to certain terms in laws is not desirable, as this gap creates legal uncertainty, leaving open the possibilities for varied interpretation of the terms in different contexts and often for different purposes. This can lead to inadequate, inconsistent, and possibly conflicting uses of the terms, whose meanings may change to realize interpreters’ personal intentions and interests. While this can be true in general, and most likely in

⁵⁹⁵ Defined as ‘a catching vessel with at least three of the five following characteristics: (a) length overall <12 m; (b) the vessel is fishing exclusively inside the territorial waters of the flag CPC (c) fishing trips have a duration of less than 24 hours (d) the maximum crew number is established at four persons, or (e) the vessel is fishing using techniques which are selective and have a reduced environmental impact’. See ICCAT, Recommendation 21-08 by ICCAT amending the Recommendation 19-04 amending the Recommendation 18-02 establishing a multi-annual management plan for bluefin tuna in the Eastern Atlantic and the Mediterranean (entered into force 17 June 2022) Recommendation 3(dd).

⁵⁹⁶ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the SRFC’s Members (adopted 8 June 2012, entered into force 16 September 2012) art 20(1).

⁵⁹⁷ *ibid* 20(2).

national legislation, defining small-scale fisheries terms may not always be necessary in international law instruments. For instance, as seen earlier, the PSMA, article 3(1)(a), exempts the Agreement's application to foreign fishing vessels engaged in 'artisanal fishing for subsistence', but it does not define the term. This may appear an issue, but the lack of a definition of this term does not actually hinder the application of the PSMA. The legal consequence of not having a definition for that term is that the PSMA unequivocally applies to foreign fishing vessels engaged in artisanal fishing for *commercial* purposes. In practice, it is unreasonable to imagine a situation where a state would argue that a fishing vessel flying its flag and requiring entry into another state's port, is, in fact, exempted from the PSMA application because that vessel is actually engaged in artisanal fishing for subsistence. It is just simply too suspicious, not to say unrealistic, that a coastal state's fishing vessel engaged in artisanal fishing for subsistence would actually request entry into another state's port. Consequently, that exemption under the PSMA serves to say the obvious: the Agreement applies to all foreign fishing vessels, including commercial artisanal fishing vessels, and excluding subsistence artisanal fishing vessels. This clearer understanding is captured in the *Bali Strategy*, adopted at the 4th Meeting of the Parties (MoP) to the PSMA in 2023.⁵⁹⁸

Similarly, other binding instruments illustrate the use of generic terms related to fisheries that are considered sufficient for those particular contexts, at least for the time being. For instance, the C188, article 1(a)(e)(g), defines, respectively, 'commercial

⁵⁹⁸ Paragraph 3 recommends parties at the national level to recognize that port states measures and the PSMA 'apply to the entire fisheries sector, including the commercial small-scale fisheries, the specificities of which should be duly take into consideration in the design and implementation of measures, including capacity development related measures to address the specific requirements of developing countries'. See FAO, 'Report of the Twenty-Fourth Session of the Committee on Fisheries. Rome, 26 February-2 March 2001' (n 153) app 4.

fishing’,⁵⁹⁹ ‘fisher’,⁶⁰⁰ ‘fishing vessel owner’,⁶⁰¹ and ‘fishing vessel or vessel’,⁶⁰² but this treaty, as seen above, generally applies to fishers working on vessels of 24 metres in length and over, and may apply to smaller vessels if agreed by the party after consultation. Thus, the critical criteria here is the length of the vessel for determining whether the C188 applies and consequently the definitions herein provided become relevant. In turn, the ICMW, article 2(2)(c), defines the term ‘seafarer’ as including a ‘fisherman’ and referring to ‘a migrant worker employed on board a vessel registered in a state of which he or she is not a national’. This is a very specific definition that could be associated with migrant small-scale fishworkers. However, the situation of a ‘migrant worker employed on board a vessel registered in a state of which he or she is not a national’ implies that, first, the migrant worker is employed; second, that such worker is a national of a country different from the country whose flag the vessel concerned is flying; third, that such vessel is registered. These cumulative criteria would need to be evaluated on a case-by-case basis, whether small-scale fishworker would fit into such definition.

Notwithstanding, scholars have questioned the use of references to small-scale fisheries and its related terms, without defining them, in fisheries legal instruments, which would put into question the effectiveness of such references.⁶⁰³ As seen above, members of the EU and ICCAT have agreed on definitions of small-scale fisheries related terms in specific regional instruments where such definitions were deemed necessary and pertinent. It goes beyond this thesis to investigate the reasons for and

⁵⁹⁹ ‘means all fishing operations, including fishing operations on rivers, lakes or canals, with the exception of subsistence fishing and recreational fishing’.

⁶⁰⁰ ‘means every person employed or engaged in any capacity or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying out work aboard a fishing vessel and fisheries observers’.

⁶⁰¹ ‘means the owner of the fishing vessel or any other organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the vessel from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on fishing vessel owners in accordance with the Convention, regardless of whether any other organization or person fulfils certain of the duties or responsibilities on behalf of the fishing vessel owner’.

⁶⁰² ‘means any ship or boat, of any nature whatsoever, irrespective of the form of ownership, used or intended to be used for the purpose of commercial fishing’.

⁶⁰³ Van der Burgt (n 94) 107; Giulia Sajeva, ‘The Political Ecology of Small-Scale and Artisanal Fisheries: Enclosures, Property and Conservation’ (2022) 59 *Ragion Pratica* 413.

parameters based on which EU members and ICCAT members have reached out to those definitions, but it is important to stress that the definitions apply specifically in the context of the EU and ICCAT, for the purposes of the instruments that provide for such definitions.⁶⁰⁴ The same for the characterization of artisanal fisheries provided in the SRFC Convention at the subregional level. Therefore, it appears to me that, where a clear interpretation of the term is needed in a given instrument, states would naturally discuss, insist, and ultimately agree on having the interpretation or definition of the term in the relevant instrument. Each instrument merits its own considerations on the pertinence of defining small-scale fisheries and related terms.

Relating to the matter, one cannot ignore the discussion around the definition of small-scale fisheries within the Agreement on Fisheries Subsidies,⁶⁰⁵ recently adopted under the auspices of the World Trade Organization (WTO).⁶⁰⁶ The WTO members did not agree on the definitions that would distinguish the large-scale industrial fisheries and the small-scale fisheries sectors.⁶⁰⁷ Without this distinction, the agreement left out the special provisions of earlier versions of the text, which would: protect the access of small-scale fisheries to marine resources and markets; ensure developing countries and least developed countries have the proper transition period to implement fisheries subsidies disciplines on unreported and unregulated small-scale fisheries; and ensure such countries be allowed to grant or maintain fisheries subsidies to small-scale fisheries.⁶⁰⁸ It remains to be seen if and how this issue will be resolved.

⁶⁰⁴ See European Parliament and European Council Regulation (EU) No 2017/1004 of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004 art 2(14); ICCAT Recommendation 21-08 by ICCAT amending the Recommendation 19-04 amending the Recommendation 18-02 establishing a multi-annual management plan for bluefin tuna in the Eastern Atlantic and the Mediterranean (entered into force 17 June 2022) (n 595).

⁶⁰⁵ Agreement on Fisheries Subsidies (adopted 17 June 2022, not yet in force) 2022 (WT/MIN(22)/33 - WT/L/1144).

⁶⁰⁶ This Agreement prohibits subsidies for: vessels and operators engaged in IUU fishing (article 3); fishing or related activities concerning overexploited stocks (article 4), and; fishing or related activities in areas beyond national jurisdiction and outside an RFMO's competence.

⁶⁰⁷ In this 2018 document, 'small-scale fisheries' were to be defined based on the size and/or capacity of the fishing vessel, provided that such parameters are consistent with the applicable national law, taking into account the SSF Guidelines. See WTO, 'Fisheries Subsidies Working Document (WTO Negotiating Group on Rules, TN/RL/W/274/Rev.6, 2018)'; WTO, 'Fisheries Subsidies Draft Consolidated Chair Text, (WTO Negotiating Group on Rules, TN/RL/W/276/Add.1, 2021)' para 56.

⁶⁰⁸ This is my understanding based on earlier versions of the text. The final text of the Agreement has also been criticized for other matters that it failed to cover, including fishing overcapacity and the

Based on the foregoing, I am inspired by the SRFC approach to reflect on potential international legal criteria for characterizing small-scale fisheries peoples. This can help delineating the scope of what is meant by small-scale fisheries peoples in participatory international fisheries management.

4.2.2. International legal criteria for characterizing small-scale fisheries people

One preliminary contribution can be depicted from the SSF Guidelines, which clarify the meaning of ‘small-scale fisheries actors’, as including ‘fishers, fish workers, their communities, traditional and customary authorities’, in addition to ‘related professional organizations and CSOs’.⁶⁰⁹ The guidelines explicitly refer to small-scale fisheries actors in certain provisions, which make clear to whom exactly the provisions are addressed. For instance, paragraphs 5.18 and 7.8 require small-scale fisheries actors to encourage and support the role and involvement of men and women in fisheries co-management; and recognise fair distribution of benefits from international trade. Any small-scale fisheries actor could then draw from such provision to act accordingly. The reference to small-scale fisheries actors also strengthens the notion of a collective group of its own, and which, as such, can represent small-scale fisheries peoples in international decision-making processes. In an ideal scenario, a small-scale fisheries representative would be entitled to seat within his or her respective country’s delegation in an RFB meeting, which would allow him or her to potentially influence decision-making through the national delegation’s intervention. While this may read too idealistic and unfeasible for practical and financial reasons, it is not distant from reality, considering the growing attention given to small-scale fisheries by the international community, and the need to give them voice in international negotiations affecting them.

Back to the issue of criteria, the SSF Guidelines’ preface elucidates certain trends in the characterization of small-scale fisheries people: they ‘tend to be strongly

differential treatment to developing countries. See Stephanie Switzer, Elisa Morgera and Elaine Webster, ‘Casting the Net Wider? The Transformative Potential of Integrating Human Rights into the Implementation of the WTO Agreement on Fisheries Subsidies’ (2023) 31 *Review of European, Comparative & International Environmental Law* 360.

⁶⁰⁹ FAO SSF Guidelines (n 25) para 2.3.

anchored in local communities, reflecting often historic links to adjacent fishery resources, traditions and values, and supporting social cohesion’; for many of them, ‘fisheries represent a way of life’; and many small-scale fisheries peoples ‘are directly dependent on access to fishery resources and land’. Although still vague, this initial characterization can be firmed up when linked to other more precise characterizations found in other international instruments or fora. Let me give examples. The UNDROP defines ‘peasants’,⁶¹⁰ but not ‘other people working in rural areas’, which include small-scale fisheries peoples. Nevertheless, there are certain elements in the definition of peasants – i.e., ‘reliance on family labour or other non-monetised way of organizing labour’ and ‘special dependency on and attachment to the land’ – which relate to the cited characterization of small-scale fisheries peoples in the SSF Guidelines. As the UNDROP uses the terms ‘peasants and other people working in rural areas’ throughout all its provisions, which apply to small-scale fisheries peoples, it seems reasonable to use by analogy the two criteria, linked to the characterization of the SSF Guidelines, to also delineate the criteria for characterizing small-scale fisheries peoples. Additionally, the term ‘land’ mentioned in the criteria, in the case of small-scale fisheries peoples, includes fishing grounds in both inland and coastal areas.⁶¹¹ Again, the UNDROP, article 17(1), affirms the right of small-scale fisheries peoples to ‘have access to, sustainably use and manage land and the *water bodies, coastal seas, fisheries*’ (emphasis added).

Another inspiring basis for the characterization of small-scale fisheries peoples is the criteria used by the International Whaling Commission for the interpretation of ‘Indigenous peoples’ in the context of subsistence whaling and the ICRW.⁶¹² The Commission understands Indigenous peoples as ‘aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a

⁶¹⁰ As: ‘any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land’. See UNHRC UNDROP (n 41) art 1(1).

⁶¹¹ Morgera and Nakamura (n 44). at 66-67.

⁶¹² ICRW.

continuing traditional dependence on whaling and on the use of whales'.⁶¹³ In this case, the characterization is very specific, associated, evidently, to Indigenous people engaged in subsistence whaling, but the notion of sharing 'strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and use of whales' resonates with the aforementioned characterization of small-scale fisheries peoples in the SSF Guidelines. The IWC thus bring additional elements to the criteria for characterizing subsistence small-scale fisheries people: 'strong community, familial and cultural ties related to a continuing traditional dependence on' fishing and on the use of fish.

In a different vein, international case-law bring some interesting insights. Specifically, the debate around artisanal or small-scale fishing has reached international jurisprudence in few instances.⁶¹⁴ In the *South China Sea Arbitration*,⁶¹⁵ for example, the tribunal recognised that the 'essential defining element of artisanal fishing' is 'relative', varying from region to region⁶¹⁶ – nothing new to the current debate, but by comparing artisanal fishing with industrial fishing, the tribunal asserted that the 'distinguishing characteristic' of artisanal fishing is that small-scale fishing is 'simple and carried out on a small scale, using fishing methods that largely approximate those that have historically been used in the region'.⁶¹⁷ In this case, the tribunal interpreted artisanal fishing as being necessarily traditional, given that industrial fishing 'departs radically from traditional practices', and that 'artisanal

⁶¹³ Greg P Donovan, 'The International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981' in Greg P Donovan (ed), *Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries (Reports of the International Whaling Commission Special Issue 4)* (1982). at 79, 83.

⁶¹⁴ Notably, one tribunal found irrelevant the debate on the legal significance of historic and artisanal fishing practices by Barbados for the delimitation of the EEZ between this country and Trinidad and Tobago, stating: 'The question whether the Barbadian fishing activity is artisanal in nature, and the question of the degree of dependence of Barbados upon fishing for flyingfish, are not material to the making or existence of these commitments, and it is unnecessary to comment upon those questions'. See *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them (Award)* [2006] 27 RIAA 147 (PCA) [289].

⁶¹⁵ This case discussed the exercise of sovereignty by, and exclusive historic rights of the People's Republic of China over a large portion of the South China. See *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China (Award)* [2016] 33 RIAA 153 (PCA).

⁶¹⁶ *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China (Award)* [2016] 33 RIAA 153 (PCA) [797].

⁶¹⁷ *ibid* 797.

fishing rights attach to the individuals and communities that have traditionally fished in the area'.⁶¹⁸ The tribunal noted that 'traditional fishing rights are customary rights, acquired through long usage', and that artisanal fishing is considered as such when 'carried out for generations', and 'keeping with the traditions and customs of the region'.⁶¹⁹ The historic links between small-scale fisheries peoples and fishery resources, traditions and values, stated in the SSF Guidelines' preface, speak to this characterization of small-scale fishing narrated by the tribunal. Based on this interpretation, one could more precisely understand that small-scale fisheries peoples are those who engage on 'traditional customary fishing carried out for generations', which can be considered another criteria for their characterization in international law.

The foregoing provides some preliminary reflections of potential four criteria that could serve as a basis to characterize small-scale fisheries peoples in international law. From the UNDROP, two criteria were identified: reliance on family labour or other non-monetised way of organizing labour, drawing from the UNDROP criteria; and special dependency on and attachment to the (marine or inland) fishing grounds, also drawing from the UNDROP criteria. From the IWC, the criteria would specifically apply to small-scale fisheries peoples engaged in subsistence fishing: strong community, familial, social and cultural ties to fishing and on the use of fish, based on the IWC criteria. Finally, based on the tribunal decision held in the South China Sea Arbitration, the last criteria would be that small-scale fisheries peoples engage in traditional customary fishing practice across generations. These are, again, a point of departure in clarifying the minimum criteria for characterizing small-scale fisheries peoples in international law. It is also useful in scoping small-scale fisheries peoples that could represent the sector in international fisheries management.

With this in mind, let me reengage with the participation element of this thesis. One cannot study participation of small-scale fisheries peoples in international fisheries management without noting the existing research and international legal framework on public participation in the management of natural resources in broad terms, which encompass fisheries. Therefore, also part of the international law for

⁶¹⁸ *ibid* 798.

⁶¹⁹ *ibid* 806.

small-scale fisheries are the instruments and principles underpinning participation in fisheries management, as I investigate in the next section.

4.3. Normative framework for small-scale fisheries' participation in fisheries management

The normative foundations for participatory decision-making in the management and conservation of natural resources are anchored in international environmental law, as scholars have well demonstrated,⁶²⁰ and elaborated in a range of other related contexts, which include fisheries, as well as, for example, climate,⁶²¹ water,⁶²² and biodiversity.⁶²³ Despite the particularities of each legal regime, fisheries management and conservation is based on common underlying principles and rights provided under international environmental law and human rights law.⁶²⁴ It is thus pertinent to revisit these principles and rights that contribute to the normative foundation for participation of small-scale fisheries peoples in international fisheries management.

⁶²⁰ Jonas Ebbesson, 'Public Participation' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021); Jona Razzaque, 'Information, Public Participation and Access to Justice in Environmental Matters' in Erika Techera and others (eds), *Routledge Handbook of International Environmental Law* (2nd edn, Routledge 2020); William Murray Tabb, 'Public Participation in Environmental Decision Making' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Elgar 2023).

⁶²¹ Sébastien Jodoin, Sébastien Duyck and Katherine Lofts, 'Public Participation and Climate Governance: An Introduction' 24 *RECIEL* 117; Bryant W Smith, 'Meaningful Participation in a Global Climate Regime' (2009) *Environmental Law Reports* 39 <Smith, Bryant Walker, Meaningful Participation in a Global Climate Regime (2009). *Environmental Law Reports*, Vol. 39, p. 10881, 2009, Available at SSRN: <https://ssrn.com/abstract=1694193>>.

⁶²² Yu Su, 'Evolving Normativity in Contemporary International Water Law: A Communicative Approach to the Growing Role of Non-State Actors' (2020) 29 *Review of European, Comparative & International Environmental Law* 372.

⁶²³ Catherine Redgwell, 'The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity' in Donald M Zillman, Alastair Lucas and George Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002).

⁶²⁴ See Glenn M Wiser, 'Transparency in the 21st Century Fisheries Management: Options for Public Participation to Enhance Conservation and Management of International Fish Stocks' (2001) 4 *Journal of International Wildlife Law & Policy* 95.

4.3.1. Principle and right to participate in fisheries management

As explained by scholars, the *UN Declaration on Environment and Development* (Rio Declaration), principle 10⁶²⁵ and the Agenda 21,⁶²⁶ outcome documents of the UN Conference on Environment and Development, segmented the three pillar principles of public participation in the context of natural resources management, namely, access to information, access to decision-making, and access to justice, which are reflected in several treaties adopted thereafter.⁶²⁷ These principles also guide contemporary ocean governance decision-making processes.⁶²⁸ Yet, the international community remains without a global treaty entirely dedicated to rules on public participation in natural resources management, which leaves the protection of participatory rights to the discretion of most states, and which results in varying degrees of legal protection, measures, proceedings, and guarantees.⁶²⁹ I refer to most states because in effect most states are not bound by the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention),⁶³⁰ adopted under the auspices of the UN Economic Commission for Europe (UNECE). This treaty binds 47 parties, including the EU and practically all state parties are in Europe, except Guinea-Bissau and certain states in central Asia.⁶³¹ Nevertheless, the Aarhus Convention is the main multilateral treaty that details the rules and procedures for public participation in environmental-related decision-making. Boyle convincingly argues that this treaty is, in fact, a human

⁶²⁵ UN Declaration on Environment and Development (Rio Declaration) (adopted at the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26 (n 212).

⁶²⁶ UN, Agenda 21: Programme of Action for Sustainable Development (adopted at the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992) (Agenda 21).

⁶²⁷ These are the typical three elements of participatory rights or public participation. See Wisner (n 624) 96; Jonas Ebbesson, 'Principle 10: Public Participation' in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015); Razzaque (n 620).

⁶²⁸ IUCN, 10 Principles for High Seas Governance (5-14 October 2008).

⁶²⁹ Razzaque (n 620) 139.

⁶³⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (adopted 25 June 1998, entered into force 30 October 2001) (2161 UNTS 447).

⁶³¹ UN, 'United Nations Treaty Collections, "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters"' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27> accessed 2 February 2024.

rights treaty, for building upon the human right of access to justice and procedural requirements essential to protect other human rights, for conferring ‘rights directly on individuals and not simply on states’, and due to the recognition of the treaty’s core elements by the European Court of Human Rights.⁶³² I will not deepen the analysis on the acclaimed legal significance and detailed content of the Aarhus Convention,⁶³³ but rather draw attention to an important provision of this treaty, which brings insights to this thesis.

Article 3(7) requires state parties to ‘promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment’.⁶³⁴ Commentators have highlighted this provision as a signal that the treaty, ‘from the start, was aimed at influencing international practice beyond the limits of the UNECE region’,⁶³⁵ and taking ‘a definitive stand on the importance of participatory rights in international matters.’⁶³⁶ Dannenmaier makes an important observation on article 3(7), noting that it could be used by state parties to ‘move the forum’ – forum meaning other conventions or institutions to which the same states are also parties – ‘in a more democratic way’.⁶³⁷ This means that, where state parties to the Aarhus Convention are also members of an RFB,⁶³⁸ for example, such states could foster the application of the principles or, in effect, the requirements under the Convention in the decision-making processes of the RFB concerned. Consequently, based on that provision, the

⁶³² Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 22 *The European Journal of International Law* 613, 622–623.

⁶³³ For this, see Elisa Morgera, ‘An Update on the Aarhus Convention and Its Continued Global Relevance’ (2005) 14 138; Eric Dannenmaier, ‘A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums’, *Yearbook of international environmental law* (Oxford University Press 2008); Duncan Weaver, *The Aarhus Convention - Towards Environmental Solidarisation* (Springer 2023).

⁶³⁴ Aarhus Convention art 3(7).

⁶³⁵ Morgera, ‘An Update on the Aarhus Convention and Its Continued Global Relevance’ (n 633) 138.

⁶³⁶ It is worth noting that the wording ‘promote principles’ in article 3(7) replaced ‘support provisions’, which was in an earlier version of the Convention’s text. As Dannenmaier explains, ‘promote principles’ gave more flexibility to domestic application but also a ‘less concrete promise’. See Dannenmaier (n 633) 46 and 49.

⁶³⁷ *ibid* 50.

⁶³⁸ While article 3(7) refers to ‘international *environmental* decision-making processes’ and ‘framework of international organizations in matters relating to the *environment*’, the environment encompasses fish and fisheries resources, thus, the provision apply to RFBs.

14 parties to the Aarhus Convention, which are also members of the GFCM, including the EU, could promote the treaty's principles in the decision-making processes of the GFCM. This is to say that the Aarhus Convention is, evidently, a fundamental treaty for public participation in environmental decision-making processes of its 47 parties, but could also be used as an entry-point for promoting public participation in RFBs whose members include the parties to the Aarhus Convention.

From the human rights perspective, the right to participate in natural resources management is not explicitly enshrined in the ICESCR nor in the ICCPR, which rather provide for, respectively, the human right to 'take part in cultural life',⁶³⁹ and the right of minority groups to 'enjoy their own culture'.⁶⁴⁰ Article 27, ICCPR, has gained considerable attention due to the broad interpretation given to it by human rights' judicial and quasi-judicial bodies. The HRC has consistently recognized that the reference to 'culture' in article 27 encompasses the enjoyment of 'aboriginal fishing rights',⁶⁴¹ or the engagement of members of a riverside community in traditional 'economic and social activities', such as inland fishing.⁶⁴² Yet, this evolved and broad interpretation of the human right to culture has contributed to the protection of rights and allowing right holders to continue fishing, rather than the protection of their right to participate in fisheries management and conservation. In turn, the I/ACHR has given broad interpretation to the right to property, provided in article 21 of the *American Convention on Human Rights* (ACHR),⁶⁴³ recognizing, based on the right to property, the right of Indigenous peoples, individually or collectively, to have access and use their lands and fishing grounds.⁶⁴⁴

⁶³⁹ ICESCR art 15(1)(a).

⁶⁴⁰ ICCPR art 27.

⁶⁴¹ *George Howard v Canada (Adoption of Views of 26 July 2005) Communication No 879/1999, CCPR/C/84/D/879/1999* (UNHRC) [12.4].

⁶⁴² *Chief Bernard Ominayak and the Lubicon Lake Band v Canada (Adoption of Views) Communication No 167/1984, CCPR/C/84/D/879/1999* (UNHRC) [27.4].

⁶⁴³ American Convention on Human Rights (ACHR) (adopted 11 November 1969, entered into force 18 July 1978) (1144 UNTS 123).

⁶⁴⁴ Nakamura, 'The Fundamental Rights of Small-Scale Fishers and Their Communities in the International Jurisprudence' (n 111).

For its part, the UNDROP contains relevant provisions for participatory fisheries management which stem from generic references to decision-making processes that affect their lives, as in article 10(1), which provides:

“Peasants and other people working in rural areas have the *right* to *active* and *free* participation, directly and/or through their representative organization, in the *preparation* and *implementation* of *policies*, programmes and projects that may affect their lives, land and livelihoods’ (emphasis added).

In certain provisions of the UNDROP, fisheries-related terms are explicitly mentioned, such as article 16 on the right to ‘engage freely, individually and/or collectively, in association with others or as a community, in traditional ways of farming, fishing’. Importantly, article 17(1) affirms the rights of small-scale fisheries peoples to have access to, sustainably use and manage ‘coastal seas, fisheries’, linking such right to the enjoyment of cultural rights. In turn, article 21(2) recognizes the contributions of small-scale fisheries peoples, through ‘traditional knowledge, innovation and practices’, to biodiversity conservation and sustainable use.

Nothing in the UNDROP prevents one from interpreting its generic provisions on participation in decision-making processes and those on participatory natural resources management in the context of international fisheries management. Article 2(3), UNDROP, mirrors article 19, UNDRIP, and, in effect, requires states to consult and cooperate in good faith with small-scale fisheries peoples, including Indigenous people, through their representative institutions, in decision-making processes affecting them, generally. Article 5(1) further affirms the rights of small-scale fisheries peoples to participate in the management of natural resources, and paragraph 2 provides for associated safeguards, enshrined in the obligation of states to duly conduct social and environmental impact assessment, consult in good faith, and ensure equitable and fair benefit-sharing of the exploitation of those resources.⁶⁴⁵

It is important to underline that the normative foundation for the participation of small-scale fisheries peoples in international fisheries management does not solely rely

⁶⁴⁵ UNHRC UNDROP (n 41) art 5(2).

on the foreseen international principles and instruments, but also relies on the enabling national legal framework. Therefore, one would need to examine the extent to which the relevant national legislation provides for the principles and provisions on public participation in natural resource management generally, and participatory rights in fisheries management specifically. The fisheries legislation of certain African countries, for instance, provide for participatory fisheries management based on the EAF,⁶⁴⁶ enabling the participation of local fishers in fisheries management and conservation at the local and national levels. If legislation does not restrict such participation to these levels of governance, then this normative basis could also arguably substantiate the participation of small-scale fisheries peoples in international fisheries management. The actual realization of such participation would, in any case, depend on political decisions, and governments' financial and technical capacity. Additionally, one needs to examine the extent to which RFBs' frameworks also enable such participation, as I will discuss in detail in chapter 6.

Having seen the principles and participatory rights, let me now move on to examine states' obligations in key treaties linked to participation in international fisheries management.

4.3.2. Giving effect to states' duty to 'take into account' small-scale fisheries

As anticipated above, article 5(i), UNFSA, provides, as a guiding principle, for the inter-states cooperation in the management and conservation of straddling fish stocks and highly migratory fish stocks, 'taking into account the interest of artisanal and subsistence fishers'.⁶⁴⁷ This principle is enshrined in the agreement's article 24(2)(b), requiring states to, in giving effect to the duty to cooperate in the management and conservation of said stocks, take into account the need to avoid potential adverse impacts on and ensure access rights by subsistence, small-scale and artisanal fishers, women fisher workers, Indigenous and Tribal peoples in developing states. Again, 'taking into account' in these provisions can be translated into ensuring

⁶⁴⁶ For instance, in the fisheries legislation of Angola, Gabon, Kenya, Liberia, Madagascar, Mozambique, and Senegal. See Julia Nakamura, 'Legislating for an Ecosystem Approach to Fisheries – Revisited: An Update of the 2011 Legal Study on the Ecosystem Approach to Fisheries' (FAO 2021) 36 <<https://www.fao.org/3/cb6750en/cb6750en.pdf>>.

⁶⁴⁷ UNFSA art 5(i).

‘that the tenure rights of small-scale fishing communities that are granted are protected’, pursuant to the SSF Guidelines, paragraph 5.19, which specifically applies to the contexts of ‘shared waters and fishery resources’. While the guidelines do not explicitly call for ensuring participation of small-scale fisheries peoples in decision-making processes that affect them in such particular context, states have reiterated support to complementary standards that elaborate on ways through which they may take due account of small-scale fisheries peoples in the adoption of conservation and management measures. As such, in the process review for assessing the UNFSA’s effectiveness,⁶⁴⁸ states have fostered the implementation of the SSF Guidelines while ensuring that the ecosystem approach is respected.⁶⁴⁹ Moreover, states, international, regional, and national organizations have been urged by UNGA to ‘provide for the participation of small-scale fishery stakeholders in related policy development and fisheries management strategies’.⁶⁵⁰

Based on the foregoing, the duty to ‘take into account’ small-scale fisheries, enshrined in article 24(2)(b), could arguably entail ensuring the participation of small-scale fisheries peoples in international fisheries management, by applying this provision in conjunction with relevant provisions of the CCRF and the SSF Guidelines, which I detail in the subsequent paragraphs.

For its part, the CCRF, article 6.13, enshrines the principle of ensuring transparent decision-making processes, based on which states should facilitate consultation and effective participation of the fishing industry, fishworkers, and other interested organizations in decision-making relating to the development of fisheries management laws and policies. Article 7.2.2(c) mirrors the mentioned article 5(i), UNFSA, but more precisely refers to adoption of conservation and management measures taking into account ‘the interests of fishers, including those engaged in subsistence, small-scale and artisanal fisheries’. Article 7.6.6, CCRF, elaborates that ‘due recognition should

⁶⁴⁸ *ibid* 36.

⁶⁴⁹ UN, ‘Report of the Resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks’ (n 72) Recommendations 2 and 5.

⁶⁵⁰ This recommendation dates back to 2005. See UNGA Resolution 60/31 of 29 November 2005, ‘Sustainable Fisheries’ (n 68) para 8.

be given (...) to the traditional practices, needs and interests of Indigenous peoples and local fishing communities which are highly dependent on fishery resources for their livelihood'. Then, article 7.6.7 further suggests that the evaluation of alternative conservation and management measures should consider their cost-effectiveness and social impact generally. Importantly, the CCRF calls upon states to ensure consultation with representatives of the fisheries sector and fishing communities in the decision-making processes related to coastal area management, planning and development (article 10.1.2), while providing for public awareness and participation in the management processes by those affected (article 10.2.1). Based on the EAF, coastal area management include the management of aquatic species, which move to and from a coastal area, justifying the possibility to apply said provisions in conjunction with the foreseen articles 7.2.2(c), 7.6.7 and 7.6.7, CCRF.

In turn, the SSF Guidelines' provisions that arguably support the participation of small-scale fisheries peoples in international fisheries management include the guiding principles of consultation and participation (paragraph 3.1(6)), which, as noted above, underscores Indigenous peoples and ethnic minorities' active, free, effective, meaningful and informed participation, as well as requirements for states to: facilitate, train and support small-scale fisheries peoples in fisheries management as well as in the design, planning and implementation of management measures affecting them (paragraph 5.15); ensure small-scale fisheries peoples are represented in local and national professional associations and bodies and 'actively take part in relevant decision-making and fisheries policymaking processes' (paragraph 5.17); contribute with their 'particular knowledge, perspectives and needs' to participatory fisheries management, as well as the need to adopt special measures to ensure equitable participation of women (paragraph 5.18).⁶⁵¹ Additionally, states are required to ensure small-scale fisheries peoples have access to 'relevant, transparent, timely and adequate information in language and for and through means adequate to their cultural methods' (paragraph 11(2)). Nothing in these provisions limit the level of governance in which participation should be promoted and secured, which makes them applicable to international fisheries management.

⁶⁵¹ FAO SSF Guidelines (n 25) para 5.18.

Importantly, the participation of local communities and Indigenous peoples has already been part of the practice of certain international forums, or at least promoted to a certain extent. To this I turn in the next section.

4.3.3. Avenues for small-scale fisheries peoples' participation in international forums

Let me go back to the CBD framework. In addition to the considerations made in relation to the CBD Malawi principles and respective detailed rationale analysed in chapter 2, it merits to say that the CBD decisions significantly contribute to orientate the interpretation and implementation of international human rights law and standards, particularly in respect of Indigenous peoples and traditional communities, and their participation in decision-making processes affecting their lives.⁶⁵² Undoubtedly, participatory management and conservation of biodiversity, which include marine biodiversity and fishery resources,⁶⁵³ is fostered by the CBD framework. One key provision of the CBD Convention is article 8(j), which require state parties to, inter alia, promote wide application of knowledge, innovations and practices of Indigenous peoples and local communities for the conservation and sustainable use of biodiversity, 'with the approval and involvement of the holders of such knowledge'. Importantly, the historical negotiating practices in the CBD CoPs over the years have featured a progressive and concrete avenue for the participation of Indigenous peoples and local communities in the CBD negotiations and working groups in this respect.⁶⁵⁴ Parks and Schröder found a 'high point for discussion' of such participation at the CBD CoP7, in 2004,⁶⁵⁵ when state parties adopted the *Addis Ababa Principles and*

⁶⁵² Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (n 420) 694 and 700.

⁶⁵³ The protection of marine biodiversity is also supported by the LOSC, which addresses estuaries, living resources, marine life, rare or fragile ecosystems, habitat of depleted, threatened or endangered species and other forms of life. See Wolfrum and Matz (n 222).

⁶⁵⁴ Natasha Affolder, 'Non-State Actors' in Elisa Morgera and Jona Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar Publishing 2017) 390.

⁶⁵⁵ Louisa Parks and Mika Schröder, 'What We Talk about When We Talk about "local" Participation in International Biodiversity Law: The Changing Scope of Indigenous Peoples and Local Communities' Participation under the Convention on Biological Diversity' (2019) 11 *Partecipazione e Conflitto* 743, 761.

Guidelines,⁶⁵⁶ and the *Akwé: Kon Voluntary Guidelines* on the incorporation of cultural, environmental and social considerations of Indigenous peoples and local communities into existing or new impact assessment procedures.⁶⁵⁷ Researchers have noted a ‘developing sensibility in the CBD’ in ‘valorising the world views’ of Indigenous peoples and local communities across time, which indeed seems to be reflected in recently adopted CBD CoP decisions. For instance, CBD CoP14 adopted decision 14/34, which invites Indigenous peoples and local communities to consider dedicated sessions to facilitate discussions for developing the post-2020 global biodiversity framework, while encouraging these groups to develop biodiversity commitments that can feed into such an effective framework.⁶⁵⁸ These past experiences in the CBD forum can inspire participation of small-scale fisheries peoples in RFBs’ forums. Such active participation in the CBD fora and the increasing developments under the CBD framework – which provide culturally-sensitive and participatory approaches that concretely enabled those groups to participate in the decision-making processes affecting them – offer concrete examples based on which small-scale fisheries peoples could draw from to participate in international fisheries management decision-making.

In a different vein, the Ramsar Convention is another treaty worth examining in respect of the participatory decision-making processes for the designation and management of Ramsar sites. The text of the Ramsar Convention does not detail such processes,⁶⁵⁹ leaving to states’ discretion the inclusion of non-state actors. While the Ramsar framework, including the relevant resolutions and guidance documents, are

⁶⁵⁶ CBD, CoP7, ‘Sustainable Use (Article 10)’, Annex II ‘Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity’, UNEP/CBD/COP/DEC/VII/12 (13 April 2004) Decision VII/12. See in particular the practical principles 2, 4 and 9, and respective operational guidelines.

⁶⁵⁷ CBD, CoP7, ‘Article 8(j) and related provisions’, ‘F. Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities’, UNEP/CBD/COP/DEC/VII/16 (13 April 2004) Decision VII/16.

⁶⁵⁸ CBD, CoP14, ‘Comprehensive and participatory process for the preparation of the post-2020 global biodiversity framework’, CBD/COP/DEC/14/34 (30 November 2018) Decision 14/34.

⁶⁵⁹ The Convention requires each Party to ‘designate suitable wetlands within its territory for inclusion in the List of Wetlands of International Importance’; further requiring States to ‘formulate and implement their planning so as to promote the conservation of wetlands included in the List’, and requiring all those responsible at all levels for wetlands management to be informed of and consider recommendations. See Ramsar Convention art 2.2, 3.1 and 6.3.

more attentive to broader participation with respect to wetlands management at the national level, concerns with the participation of non-state actors in international decision-making have not escaped the parties' scrutiny. For instance, the *resolution VII/8 of 1999 on the guidelines for establishing and strengthening local communities' and Indigenous peoples' participation in the management of wetlands* (Ramsar LCIP Guidelines)⁶⁶⁰ encourages state parties to: ensure local communities and Indigenous peoples are, with the caveat 'where possible', represented in the national delegations to future CoP meetings (paragraph 16); 'provide for transparency in decision-making with respect to wetlands and their conservation', and provide the full participation of stakeholders in the process (paragraph 17). These are two provisions arguably supporting the participation of small-scale fisheries peoples in international decision-making under the Ramsar Convention, as other provisions relate to participatory management of wetlands at the national level.⁶⁶¹ The *resolution VIII.19 of 2022 on the guiding principles for taking into account the cultural values of wetlands for the effective management of sites* (Ramsar Cultural Values Guiding Principles)⁶⁶² is also relevant to participatory management of Ramsar sites at the national level, with emphasis on the cultural values of Indigenous peoples and local communities for wetlands conservation and wise use.⁶⁶³ It is worth noting that the competent national authorities remain the primary decisionmakers for the designation of Ramsar sites,

⁶⁶⁰ Ramsar Convention, 'CoP7, "Resolution VII/8, Guidelines for Establishing and Strengthening Local Communities" and Indigenous People's Participation in the Management of Wetlands' (LCIP Guidelines) (10-18 May 1999)' Annex.

⁶⁶¹ The relevant guidelines recommend, for instance, adoption of management partnerships when stakeholders' collaboration and access to wetland's natural resources for local livelihood, security and cultural heritage are considered essential, with the expressed strong interest of local and Indigenous people in participating in such management. Note that in establishing participatory management, the possession of beliefs and values in support of sustainable utilization is considered as one consistent factor. Benefits of co-management are highlighted, including increased equitable access to wetland resources, local capacity, monitoring, ecosystems functions; reduced conflicts, management costs, infringements. The LCIP Guidelines outline indicators for such co-management scheme, noting, inter alia, the need for financial incentives, stakeholders' trust-building, flexibility, knowledge-exchange and capacity-building. See *ibid* Annex, s 1.4, 1.6, 1.10(a)(b)(c), 11–14, and 16–21.

⁶⁶² Ramsar Convention, CoP8, 'Resolution VIII.19, Guiding principles for taking into account the cultural values of wetlands for the effective management of sites' (18-26 November 2002).

⁶⁶³ For instance, the guidelines call upon stakeholders to maintain traditional sustainable self-management practices, incorporate cultural aspects in wetlands management planning, include cultural values in wetland monitoring processes. See *ibid* Annex, Guiding Principles 5, 21, 22 and 26.

based on the Ramsar sites criteria and other applicable requirements.⁶⁶⁴ Consequently, such authorities may or not consider consultation and participatory mechanisms that could involve small-scale fisheries peoples, or ultimately include them in the national delegation attending the Ramsar CoP meetings, for example.

Finally, the CITES regime also fosters the participation of rural communities in: the national debate around the amendment proposals and other documents submitted to CITES CoP; the national delegations attending CITES CoP meetings, and; in developing and implementing national CITES-related policies.⁶⁶⁵ The resolution Conf. 16.6 (Rev. CoP18) on CITES and livelihoods also urges parties to ‘enable the rights of indigenous and local communities’ as an integral part of ‘strengthening community voices’, by ensuring their involvement in decision-making processes on combatting illegal wildlife trade, and allowing them to benefit from wildlife conservation.⁶⁶⁶ This is a very promising enabling framework to support small-scale fisheries peoples’ participation in decision-making on, for instance, the listing or de-listing of sharks species in CITES Appendix II, at least at the national level, further influencing or contributing to the knowledge-base for decisions adopted at the international level. Nevertheless, the implementation of CITES in the fisheries sector is challenging, as fisheries authorities are often not aware about CITES, nor the CITES relevant authorities are aware of the implications that commercially exploited aquatic species listed in CITES have on the fisheries sector, as well as of the usefulness of fisheries management tools to support legal acquisition finding in the CITES regime for those species.⁶⁶⁷ Consequently, taking on a further step of engaging with small-scale

⁶⁶⁴ Ramsar Convention, CoP11, ‘Resolution XI.8, Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands (Ramsar, Iran, 1971) – 2012 revision’ (6-13 July 2012).

⁶⁶⁵ CITES, CoP16, ‘CITES and livelihoods’ (March 2013, revised in 2019) Resolution Conf. 16.6 (Rev. CoP18) para 3(a). That resolution also calls for, inter alia, public awareness and education to ensure the realization of potential benefits to rural communities; and mitigation strategies to avoid negative impacts on them, such as financial assistance and provision of alternative livelihoods. See *ibid* 3(c).

⁶⁶⁶ CITES CoP16, ‘CITES and livelihoods’ (March 2013, revised in 2019) Resolution Conf. 16.6 (Rev. CoP18) (n 665) para 7(c)(d).

⁶⁶⁷ I have been closely involved in the work of raising awareness of fisheries authorities and CITES authorities about the implementation of CITES in the fisheries sector. This work has led to the publication Nakamura and Kuemlangan (n 79).

fisheries peoples in this context seems unrealistic, yet certainly an important endeavour to promote.

4.1. Conclusion

This chapter examined in detail the international law for small-scale fisheries, placing a greater focus on principles and provisions that support their participation in fisheries management. Departing from a comparative analysis of the two principal instruments for small-scale fisheries in international law, namely, the SSF Guidelines and the UNDROP, I demonstrated the similarities and differences of their processes of development and adoption, content, and mutual supportiveness. Then, my analytical exercise of key international fisheries instruments showed the limitations as regards the soft concerns, if any, placed on small-scale fisheries issues in the LOSC, UNFSA, Compliance Agreement, and PSMA. Limitation were also noted in other regimes, for different reasons, either due to the flexible applicability that allow state parties not to apply the treaties to small-scale fisheries, as in the case of ILO and IMO treaties, or due to the limited normative content relevant to small-scale fisheries, as in the case of the CBD, UNFCCC, CITES, Ramsar Convention, and the WHC. Consequently, the international law for small-scale fisheries is much richer when interpreting the framework systemically, applying the relevant instruments in conjunction with non-formally binding instruments, which, in turn, provide a much richer enabling framework for the participation of small-scale fisheries peoples in the international fora.

This chapter also showed the challenges of defining small-scale fisheries and its related terms in international law instruments, and that such definitions can be useful in specific instruments, like those adopted under the auspices of the EU and ICCAT, but may not be necessarily crucial in others, such as in the PSMA. I also noted that certain instruments may define generic fisheries terms that may include small-scale fisheries, and, again, defining such terms are also pertinent for the purpose and use in specific instruments. Notwithstanding, based on SRFC's approach of characterizing criteria small-scale fisheries, I carried out a preliminary analysis and identified four international legal criteria that could serve as potential basis for such characterization, bringing more legal certainty to the interpretation of international instruments referring

to small-scale fisheries or its related terms, as well as help in delineating the scope of small-scale fisheries peoples in international fisheries management. These criteria were drawn from the UNDROP (reliance on family labour or other non-monetised way of organizing labour, and special dependency on and attachment to the (marine or inland) fishing grounds), the IWC (specifically applied to small-scale fisheries peoples engaged in subsistence fishing: strong community, familial, social, and cultural ties to fishing and on the use of fish), and the South China Sea Arbitration (small-scale fisheries peoples engage in traditional customary fishing practice across generations).

As showed in this chapter, the normative foundation for public participation in the management of natural resources, including fisheries, is grounded in international environmental law (principle 10 of the Rio Declaration, Agenda 21, and Aarhus Convention), and arguably supported by human rights law (article 27, ICCPR, article 15(1)(a), ICESCR, and article 21, ACHR). However, the right of small-scale fisheries peoples to participate in international fisheries management and the states' duty to ensure such participation demands a systemic analysis of the relevant instruments. The normative foundation for the right of small-scale fisheries peoples to participate in international fisheries management is under different international legal regimes, notably on the environment,⁶⁶⁸ human rights,⁶⁶⁹ and fisheries.⁶⁷⁰ The duty to ensure participation of small-scale fisheries peoples in international fisheries management is not explicit in the UNFSA, article 24(2)(b), but this provision arguably serves as an entry point, by expanding the meaning of 'take into account' in such provision with the detailed measures provided for participatory fisheries management in CCRF⁶⁷¹ and the SSF Guidelines.⁶⁷² Nothing in these instruments prevent one from interpreting such participation as including participation of small-scale fisheries peoples in international fisheries management processes.

⁶⁶⁸ UN Declaration on Environment and Development (Rio Declaration) (adopted at the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26 (n 212) Principle 10; UN Agenda 21 (n 626); Aarhus Convention.

⁶⁶⁹ As part of the right to culture, but also as explicitly enshrined in the UNDROP. See ICCPR art 27; ICESCR art 15(1)(a); UNHRC UNDROP (n 41) arts 10 and 17(1).

⁶⁷⁰ FAO SSF Guidelines (n 25) para 3.1(6), 5.15 and 5.17.

⁶⁷¹ FAO CCRF (n 225) art 6.13, 7.2.2(c), 10.1.2 and 10.2.1.

⁶⁷² FAO SSF Guidelines (n 25) para 5.15, 5.17 and 5.18.

Participatory fisheries management can empower small-scale fisheries peoples at the national level,⁶⁷³ and facilitate their participation at the international level, based on the EAF and human rights considerations. The question that follows is whether the contemporary international fisheries governance system welcomes or the extent to which it supports this possibility. I turn to this matter in the next chapter.

⁶⁷³ In Jentoft's words: 'empowerment is about enabling and authorizing. Fishing people are empowered when it becomes possible for them to sustainably manage their fishery. (...) People are also empowered when they are allowed to do something from which they were previously barred, for instance when institutions are established that facilitate participation and secure rights'. See Svein Jentoft, 'Fisheries Co-Management as Empowerment' (2005) 29 *Marine Policy* 1, 4.

TABLE 1: List of international instruments relevant to small-scale fisheries

International law instruments relevant to small-scale fisheries (Binding ones in bold)

1945 Charter of the United Nations

1948 Universal Declaration on Human Rights

1949 Convention concerning Migration for Employment Convention

1957 Convention concerning Abolition of Forced Labour

1965 Convention on the Elimination of All Forms of Racial Discrimination

1966 International Covenant on Civil and Political Rights

1966 International Covenant on Economic, Social and Cultural Rights

1966 International Convention on the Elimination of All Forms of Racial Discrimination

1968 Code of Safety for Fishermen and Fishing Vessels (revised)

1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat

1972 Convention concerning the Protection of the World Cultural and Natural Heritage

1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora

1979 World Conference on Agrarian Reform and Rural Development's outcome document and the Peasants Charter

1979 Convention on the Elimination of All Forms of Discrimination Against Women

1980 FAO/ILO/IMO Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels

1982 Convention on the Law of the Sea

1986 UNGA Declaration on the Right to Development

1989 Convention concerning Indigenous and Tribal in Independent Countries

1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

1990 Convention on the Rights of the Child

1992 Convention on Biological Diversity

1992 UNGA Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

1992 UN Framework Convention on Climate Change

1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

1995 UN Fourth World Conference for Women's Beijing Declaration and Platform for Action

1995 FAO Code of Conduct for Responsible Fisheries

1999 ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour

1999 Ramsar Resolution VII/8, Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands

2000 United Nations Convention against Transnational Organized Crime

2001 Treaty on Plant Genetic Resources for Food and Agriculture

2002 Ramsar Resolution VIII.19 Guiding principles for taking into account the cultural values of wetlands for the effective management of sites'

2004 Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities

2004 Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity

2004 FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security

2005 FAO Technical Guidelines for Responsible Fisheries No. 10 "Increasing the Contribution of Small-Scale Fisheries to Poverty Alleviation and Food Security"

2007 UNGA Declaration on the Rights of Indigenous Peoples

2007 ILO Convention Concerning the Work in the Fishing Sector

2009 FAO Agreement on Port States Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing

2010 FAO/ILO/IMO Safety Recommendations for Decked Fishing Vessels of Less than 12 Metres in Length and Undecked Fishing Vessels

2010 Tkarihwaié:ri Code of Ethical Conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities

2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity

2012 UN Conference on Sustainable Development' outcome document 'The Future We Want'

2012 FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forestry in the Context of National Food Security

2013 CITES Resolution Conf. 16.6 (Rev. CoP18) 'CITES and livelihoods'

2013 FAO/ILO Guidance on addressing child labour in fisheries and aquaculture

2014 Principles for Responsible Investment in Agriculture and Food Systems

2014 FAO Principles for Responsible Investment in Agriculture and Food Systems

2014 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization

2015 UNGA 2030 Agenda for Sustainable Development

International law instruments relevant to small-scale fisheries (Binding ones in bold)

2015 Framework for Action for Food Security and Nutrition in Protracted Crises

2015 The Sendai Framework for Disaster Risk Reduction 2015-2030

2015 Paris Agreement on Climate Change

2017 UNESCO Operational Guidelines for the Implementation of the World Heritage Convention

2018 John Knox Framework Principles on Human Rights and the Environment

2018 Ministerial Declaration on a Regional Plan of Action for Small-Scale Fisheries in the Mediterranean and the Black Sea

2020 Caribbean Community Common Fisheries Policy

2021 UN Human Rights Council Resolution on The Human Right to a Safe, Clean, Healthy and Sustainable Environment

2022 WTO Agreement on Fisheries Subsidies

2023 Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction

2023 Bali Strategy to Improve the Effectiveness of the Agreement on Port States Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing

CHAPTER 5

Examining international fisheries governance and management, and integrating small-scale fisheries peoples' contributions

Having examined the international law for small-scale fisheries, specifically the normative foundations for their participation in international fisheries management, this chapter proceeds with investigating the trends and opportunities in contemporary global fisheries governance discourse to advancing and broadening participation in international fisheries management. Global fisheries governance is about the multiple interactions among various different actors, from states to fishers, and which are based on, and functions through a complex set of multilevel policy, legal, and institutional frameworks, and networks, each of which operating separately, interactively, and/or jointly, often conflictive, shaping values, principles, and rules.⁶⁷⁴ It is a broad concept that opens one mind to thinking beyond the enabling international legal system, which, while fundamental, is not sufficient on its own to operationalize the participation of small-scale fisheries peoples in RFBs in a meaningful and equitable manner, enshrining the EAF and the HRBA.

As the previous chapters demonstrate, the enabling international legal framework supporting such participation is rich and complex, relying on a systemic interpretation of principles, binding and non-formally binding instruments of different legal regimes. Therefore, in the absence of a clear obligation requiring states to ensure the meaningful and equitable participation of small-scale fisheries peoples in international fisheries

⁶⁷⁴ Fisheries governance differs from fisheries management in that the former is a broader effort involving multiple types of stakeholders (e.g., government, private actors, NGOs, CSOs, academia, media and the general public) and discussions around principles, values, rules, and institutional functioning, whereas the latter is a technical matter involving targeted stakeholders (e.g., practitioners, experts, planners, scientists) working toward solving a problem and achieving goals based on measurable outcomes. See Ratana Chuenpagdee and Svein Jentoft, 'Fisheries and Coastal Governance as a Wicked Problem' [2009] *Marine Policy* 553, 554–555.

management, it is pertinent to think of ways through which such participation can be fostered and operationalized in practice. For instance, states and non-state actors may bring the matter of participation to the discussions held in RFB meetings, which may lead to the establishment of working groups or other relevant activities that facilitate a more focused debate on the matter, and which can contribute to changes toward broad participation in RFBs practice.⁶⁷⁵ These efforts may be promoted not only by states and non-state actors attending RFBs meetings but may be stimulated or influenced by governance processes that are initiated at the local level. Therefore, it is pertinent to explore the potential of these governance processes in contributing to multilevel institutional and legal developments that can foster small-scale fisheries peoples' participation in international fisheries management.

This chapter begins by reflecting on participation from a governance perspective, specifically examining polycentricity and deliberative democracy, their use in the fisheries context, and their contributions to addressing fragmentation and advancing participatory international fisheries management (*section 5.1*). I then elaborate on the notion of broadening the knowledgebase for global fisheries governance, analysing the extent to which the knowledge system informing fisheries management is democratic, and the normative foundations for the adequate integration of small-scale fisheries peoples' knowledge contributions to international fisheries management (*section 5.2*). I continue by briefly articulating social justice as the driving force that can promote greater transformation in international fisheries governance through the participation of small-scale fisheries peoples in international fisheries management (*section 5.3*). Finally, I conclude (*section 5.4*).

5.1. Reflections on participation from a governance perspective

In participatory fisheries governance mode, legitimacy lies in stakeholders involvement in decision-making, with consensus-seeking negotiation, operating

⁶⁷⁵ The GFCM, for instance, has established a Working Group on Small-Scale Fisheries, which meets to discuss fisheries management and related matters of interest to small-scale fisheries, as well as the implementation of the Regional Plan of Action for Small-Scale Fisheries. See the documents of the two meetings held in 2019 and 2022 in FAO, 'General Fisheries Commission for the Mediterranean - GFCM' (2023) <<https://www.fao.org/gfcm/meetings/en/>> accessed 11 March 2023.

between the state and civil society levels.⁶⁷⁶ This leads me to think of an ideal scenario in which small-scale fisheries peoples participate in a country's delegation at an RFB meeting or so. In effect, as revealed later in this thesis, the participation of small-scale fisheries peoples in RFBs' meetings is already perceived in certain RFBs, though limited (meaning, not actually influential), and far from ideal (meaning, without the equitable participation of women and Indigenous peoples, for instance). In addition to the enabling policy and legal framework, the question that follows is whether the institutional functioning and processes can support the effective, equitable, and meaningful participation of small-scale fisheries peoples in those fora. As small-scale fisheries peoples predominately work at the national and local levels, one needs to reflect on such levels of governance in the first place, which may then contribute or facilitate their integration in international fisheries management. Participatory fisheries governance can enable the integration of the voices of different communities, traditional knowledge, practical experiences and world views that enrich and diversify the basis for decision-making at all levels, toward a common goal of conserving, sustainably using and managing the environment and species at stake.

As this thesis explains from the onset, the issue of participation of small-scale fisheries peoples in international fisheries management addresses both inland and marine spaces where transboundary aquatic species are subject to management by different states. I recognize that there may be specificities in the inland transboundary watercourses' context, but my analysis in this chapter draws from the literature that has explored governance theories in the environmental, ocean, and marine fisheries contexts, which, I find, is sufficient in bringing useful insights for the thesis. Reflecting on participation from a governance perspective has led me to research polycentricity and deliberative democracy, which resonate with the complex and fragmented fisheries governance system, and each of which will be discussed in the subsequent sections. This reflection has helped me to examine the ways through which the multiple stakeholders involved in fisheries governance operate, interact, and

⁶⁷⁶ Tim S Gray, 'Theorising about Participatory Fisheries Governance' in Tim S Gray (ed), *Participation in Fisheries Governance* (Springer 2005) 7.

contribute to strengthening shared understandings and shaping common goals, as well as coordinating toward meeting such goals at multi governance levels.

5.1.1. Polycentric governance in fisheries

Theories of polycentricity originated in the 1950s/60s.⁶⁷⁷ Political scientists Vincent Ostrom and others characterized a ‘polycentric’ or ‘multinucleated’ political system as one which does not enjoy a single dominant authority, but which rather functions through multiple independent and self-organized decision-making centres.⁶⁷⁸ These, in turn, interact and desirably function in a cooperative, coherent and consistent manner, with recourse to conflict resolution mechanisms.⁶⁷⁹ This seminal study of a polycentric political system was later used as a basis for research by Andersson and Elinor Ostrom on the governance of common pool natural resources, where numerous goods and services are produced, interact with each other, and cover different spatial ranges at any point in time, making for a complex and variable regime.⁶⁸⁰ In this context, which covers the governance of complex fisheries systems, a polycentric perspective is considered useful to examine institutional fragmentation at regional and international levels, and to enable transformation from citizens’ self-organization into multiple governing authorities.⁶⁸¹ In turn, these ‘self-governing capabilities of groups’ serve as the ‘basis for the design of wider-scale institutional arrangements’.⁶⁸² As such, the polycentric perspective can aid the understanding of actor complexity while explaining decentralization outcomes, which are achievable

⁶⁷⁷ For a historical overview and development of the concept, see Keith Carlisle and Rebecca L Gruby, ‘Polycentric Systems of Governance: A Theoretical Model for the Commons’ (2019) 47 *Policy Studies Journal* 927, 930–931.

⁶⁷⁸ Vincent Ostrom, Charles M Tiebout and Warren Robert, ‘The Organization of Government in Metropolitan Areas: A Theoretical Inquiry’ (1961) 55 *The American Political Science Review* 831.

⁶⁷⁹ *ibid.*

⁶⁸⁰ Krister P Andersson and Elinor Ostrom, ‘Analyzing Decentralized Resource Regimes from a Polycentric Perspective’ (2008) 41 *Policy Sciences* 71.

⁶⁸¹ *ibid.* 78–79. See also Victor Galaz and others, ‘Polycentric Systems and Interacting Planetary Boundaries – Emerging Governance of Climate Change – Ocean Acidification – Marine Biodiversity’ (2012) 81 *Ecological Economics* 21, 21–25.

⁶⁸² Andersson and Ostrom (n 680) 77–79. See also Galaz and others (n 681) 21–25.

based on the relationships between multiscale governance actors, their learning experiences, and adaptive institutional arrangements.⁶⁸³

Polycentric systems can involve multiple stakeholders from various levels, local to global, with a view to addressing a given common concern and enabling adaptation towards positive impacts on each of the levels simultaneously.⁶⁸⁴ The overarching common concern in fisheries governance is essentially centred on long-term fisheries sustainability. In polycentric fisheries governance, the global and regional levels are intertwined, as inter-states' cooperation are facilitated through different and interconnected networks of arrangements, notably the FAO and RFBs.⁶⁸⁵ In this context, the connectivity between the global/regional and national/local levels of governance is imbedded in participatory international fisheries management, which integrates small-scale fisheries peoples (local levels networks) into RFBs (regional levels networks). This integration is very complex, which make polycentric systems a highly relevant alternative to these networks of global and multilateral negotiation processes dealing with complex and uncertain global environmental cross-sectoral problems, as polycentricity can incite experimentation and learning across scales.⁶⁸⁶ Let me then examine certain case studies that have explored polycentricity in fisheries and the effect of polycentric systems on small-scale fisheries specifically.

Scientists Gruby and Basurto, for instance, studied the national marine protected area (MPA) network in the western Palau, where a polycentric system of 'collective choice rules' has been formed with the informal involvement of chiefs and states self-governing their resources and NGOs, resulting in 'context-specific rule-making' and

⁶⁸³ Andersson and Ostrom (n 680) 77–79.

⁶⁸⁴ As Ostrom explains, '[w]hen governance systems are arranged polycentrically from small to very large, collective action problems at multiple scales can be tackled'. See Elinor Ostrom, 'Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations' in Eric Brousseau and others (eds), *Global Environmental Commons: Analytical and Political Changes in Building Governance Mechanisms* (Oxford Scholarship Online 2012) 3. See also Andrew Jordan and others, 'Governing Climate Change: The Promise and Limits of Polycentric Governance' in Andrew Jordan and others (eds), *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press 2018).

⁶⁸⁵ Lucia Fanning and Robin Mahon, 'Governance of the Ocean Commons: Hopelessly Fragmented or Fixable?' (2020) 48 *Coastal Management* 527, 528.

⁶⁸⁶ Galaz and others (n 681) 25–29.

‘institutional diversity’.⁶⁸⁷ Such initiative was introduced by the government and NGOs aimed at scaling-up pre-existing and new MPAs into a national network. An important point Gruby and Basurto make is the necessary caution that stakeholders leading this initiative and similar ones should have, or the critical reflection in necessarily considering the trade-offs and potential negative impacts on existing systems governing the resources at stake and the resource users.⁶⁸⁸ This is because scaling-up marine conservation efforts for accommodating high-level goals of biodiversity conservation and sustainable use have led to, in such case, or could contribute, in other similar cases, to less polycentrism in the nested system and decrease in resource users’ autonomy, ‘[e]ngendering feelings of lost local autonomy and devalued knowledge systems’.⁶⁸⁹ Consequently, institutional innovation and diversity could be negatively affected and hinder the socioecological balance for achieving common goals.⁶⁹⁰ In another study, Carlisle and Gruby evaluated the extent to which a small-scale fisheries governance system in the northern reef region of Palau exhibits two attributes of polycentricity, namely, the ‘multiples, overlapping decision-making centres with some degree of autonomy’, and the practice of ‘choosing to act in ways that take into account of others through processes of cooperation, competition, conflict and conflict resolution’.⁶⁹¹ By examining the functional aspect of polycentric governance system in the case-study, they identified deficiencies in the polycentric system emerged in the area studied, including the lack of village communities’ capacity to enforce rules, poor institutional fit and compliance, and inadequate representation of fisher groups in deliberative forums.⁶⁹² Similarly to the previous study, Carlisle and Gruby also alert to the necessary ‘loss of power and control at the local level’ in the transition from community-based to polycentric system, but they

⁶⁸⁷ Rebecca L Gruby and Xavier Basurto, ‘Multi-Level Governance for Large Marine Commons: Politics and Polycentricity in Palau’s Protected Area Network’ (2013) 33 *Environmental Science & Policy* 260.

⁶⁸⁸ *ibid* 57–58.

⁶⁸⁹ *ibid*.

⁶⁹⁰ *ibid*.

⁶⁹¹ Keith Carlisle and Rebecca L Gruby, ‘Why the Path to Polycentricity Matters: Evidence from Fisheries Governance in Palau’ (2018) 28 *Environmental Policy and Governance* 223.

⁶⁹² *ibid* 232–234.

also find that governance actors are willing and capable to adapt to resource decline by keeping on trying new strategies to address insufficient ones.⁶⁹³

These analyses shed light on potential undesirable effects that polycentric systems may have on small-scale fisheries peoples. While scaling-up participatory fisheries management to regional and international scales can empower and support the small-scale fisheries sector at these governance levels, such possibility may also result in inadequately shifting the power and control that small-scale fisheries peoples exercise at the local level. Therefore, any considerations on bringing to effect their participation in international fisheries management should be attentive to the need of not hindering small-scale fisheries peoples' autonomy and the recognition of their ownership over the fisheries they conserve, manage, and depend on locally. The ways through which participation in international fisheries management are considered should represent, in effect, additional opportunities for small-scale fisheries peoples to contribute to the management and conservation of transboundary aquatic species they depend on for their livelihoods.

The two case studies above examine polycentricity at the national level, thus contrasting with the study led by political scientist Galaz, who examined polycentricity in an international multistakeholder initiative built to address global stresses relating to marine biodiversity loss, climate change, and ocean acidification.⁶⁹⁴ Galaz and others illustrated how 'polycentric governance of planetary boundaries' can function to address those complex cross-sectoral global concerns that are typically discussed in different forums and consequently disconnected. Their analysis showed that, while this 'polycentric order' in 'institutionally fragmented settings' can foster adaptive and coordinated collaboration within and between self-organized actors, and facilitate access to and sharing of information and learning at governance multilevel, there remain challenges in conciliating the diverse mandates of actors and their operational modes, in keeping the long-term continuity and consistency of the interactions within the institutional network, and in securing financial funding to maintain the network.⁶⁹⁵ These perceptions of the potential contributions of polycentric governance and

⁶⁹³ *ibid* 233.

⁶⁹⁴ Galaz and others (n 681).

⁶⁹⁵ *ibid* 30–31.

associated challenges to addressing global problems can also be noted in states' efforts to coordinate RFMOs' activities in international fisheries governance. The joint tuna-RFMOs network, for instance, facilitates 'cross-fertilization of measures' of tuna RFMOs, as well as the undertaking of joint meetings, activities, and sharing of information.⁶⁹⁶ Such network is an important initiative in fostering coordinated action on tuna fisheries management. However, without financial support and consistency in the holding of joint tuna-RFMOs meetings, and in the provision of information from all tuna RFMOs involved, the network fails to realize its full potential.⁶⁹⁷ The same problem would likely occur in efforts toward realizing the participation of small-scale fisheries in international fisheries management. These efforts would face challenges in ensuring consistent and sufficient technical and financial capacity of small-scale fisheries peoples, through their professional organizations, associations, cooperatives, and other forms of self-organization, as to enable them to participate in RFB meetings as advisors to a country's delegation, or as observers.

While the effectiveness of polycentric systems is not fully understood and depends on empirical studies, global environmental governance scholar Kim notes that the decentralization, diversity, and multiplicity in such systems enable 'experimentation, out of which successful institutions are selected, diffused, or scaled up'.⁶⁹⁸ One can thus envision both the operationalization of participatory fisheries management locally and the organization of small-scale fisheries peoples being expanded to different governance levels through experimentation and promising learning outcomes. Such experimentation could gradually consolidate opportunities for small-scale fisheries peoples to participate, or at least be aware of their option to participate in international fisheries management. Polycentric global governance in fisheries can be associated

⁶⁹⁶ Pio Manoa, 'The Contribution of Tuna Regional Fisheries Management Organisations to International Law' (Thesis, Doctoral of Philosophy in Law, University of Wollongong 2016) 70 <<https://ro.uow.edu.au/theses/4913/>> accessed 5 January 2023.

⁶⁹⁷ The meetings of the joint tuna-RFMOs initiated in 2007 on a biannual basis, the last one held in 2011. More recent ones were held in 2018 and 2019, addressing specific fisheries management issues of bycatch, the use of fishing aggregating devices, and management strategy evaluation. See 'Tuna-Org' <<https://www.tuna-org.org/index.htm>> accessed 10 March 2023.

⁶⁹⁸ Kim proposes a framework, based on network science, to address fragmentation, polycentricity and complexity in global governance. See Rakhyun E Kim, 'Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach' (2019) 22 *International Studies Review* 903.

with both marine and inland fisheries, due to the interconnectivity among these global common natural resource pools through the ocean's landscape and transboundary watercourses.⁶⁹⁹ Therefore, the experimentation mentioned above could be initially applied to the context of transboundary watercourses, which would involve fewer states, and could be later considered in broader regimes of governance.

Useful lessons can also be drawn from the work of natural scientists' articulations on polycentric ocean governance. Mahon and Fanning focus on regional ocean governance, which include the governance performed through RFBs and RFMOs.⁷⁰⁰ They identified 20 ocean regions, most of which they understood as having a 'high degree of multilevel polycentricity', with ten or more subregional and regional arrangements.⁷⁰¹ Five theoretical propositions that characterize polycentric climate governance systems (i.e., local action, mutual adjustments, experimentation, trust, and overarching rules)⁷⁰² were used to classify regional ocean governance arrangements. This distinction was situated across a 'governance modality spectrum', ranging from 'polycentric fragmented', which has few or no interaction between arrangements, to 'functional polycentric', which fully aligns with the five theoretical propositions, having 'multiple centres of authority among which there is a functioning codesigned integration mechanism'.⁷⁰³ Mahon and Fanning understood that moving towards functional polycentricity lead to a more integrated system, consistent with the ecosystem approach, and toward more effective governance.⁷⁰⁴ However, of the 20 ocean regions, only the Arctic and the Pacific Islands regions were identified as

⁶⁹⁹ 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.

⁷⁰⁰ These authors identified 166 regional ocean governance arrangements, including RFBs. See Robin Mahon and Lucia Fanning, 'Regional Ocean Governance: Integrating and Coordinating Mechanisms for Polycentric Systems' (2019) 107 *Marine Policy* 1; Robin Mahon and Lucia Fanning, 'Regional Ocean Governance: Polycentric Arrangements and Their Role in Global Ocean Governance' (2019) 107 *Marine Policy* 1.

⁷⁰¹ Mahon and Fanning, 'Regional Ocean Governance: Integrating and Coordinating Mechanisms for Polycentric Systems' (n 700). Another point submitted by these authors is that ocean governance should be promoted as a 'fixable', 'single interconnected system, with vertical and lateral linkages spread across the 20 global ocean regions'. See Fanning and Mahon (n 685) 528–532.

⁷⁰² Jordan and others (n 684).

⁷⁰³ Mahon and Fanning, 'Regional Ocean Governance: Integrating and Coordinating Mechanisms for Polycentric Systems' (n 700).

⁷⁰⁴ *ibid* 3.

‘functioning polycentric’ with an integration mechanism in place, respectively the Arctic Council and the Pacific Islands Forum.⁷⁰⁵ Drawing from this study’s findings, Gjerde and Yadav identified, with respect to marine biodiversity governance in ABNJ, weak coordination and integration processes, lack of overarching rules to guide and structure collaborative and coordinated actions, as well as lack of conflict resolution mechanisms, and global and regional mechanisms to advance integrated ecosystem-based management.⁷⁰⁶ They suggest that large marine ecosystems provide a useful model for enhancing integration, as these typically include transboundary diagnostic assessments, which enable collaboration between different stakeholders, from local people to international experts, in learning-sharing activities and in developing comprehensive environmental assessments.⁷⁰⁷

The foregoing provides insights for the integration of small-scale fisheries peoples in RFBs decision-making processes. There is need for advancing the knowledge and empirical work on the functionality and efficiency of polycentric systems in fisheries governance, taking due account of public participation and meaningful stakeholder engagement and the coordinated collaboration among multi-stakeholders, which are ‘core tenets of the ecosystem approach in ocean governance’, as Langlet and Rayfuse recall, ‘not least due to their contribution to acceptance, ownership and support for management measures’.⁷⁰⁸ The procedural aspect of these systems is fundamental, and the normative foundations can be drawn from this thesis. Kirk explains that ‘process-based solutions for holistic governance’ entail procedural requirements such as participatory decision-making, transparency and equity, which must be combined with an objective or set of principal objectives to guide such process for holistic ocean governance.⁷⁰⁹ Opportunities exist, as Charles notes, for ‘scaling-up’ from initiatives of small-scale fisheries peoples to large-scale ocean management, which could occur through ‘embedding within larger marine ecosystems the capability to carry out local-

⁷⁰⁵ *ibid* 1 and 2.

⁷⁰⁶ Kristina Gjerde and Siddharth Shekhar Yadav, ‘Polycentricity and Regional Ocean Governance: Implications for the Emerging UN Agreement on Marine Biodiversity Beyond National Jurisdiction’ (2021) 8 *Frontiers in Marine Science* 1, 8–9.

⁷⁰⁷ *ibid* 9–10.

⁷⁰⁸ Langlet and Rayfuse (n 292) 9–10.

⁷⁰⁹ Kirk, ‘The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance’ (n 175) 36–37.

level efforts supportive of higher-level goals'.⁷¹⁰ This holistic trend in ocean governance thinking seems indeed to pave the way for current and future systems for the benefit of small-scale fisheries peoples as well. Accordingly, Chuenpagdee argues that the decision-making process on the use of the oceans, including relating to the establishment of MPAs and fisheries management, must consider the principles of social justice, equality, equity, human rights, and others in the SSF Guidelines and the SDG 14 targets.⁷¹¹ Decision-making processes should be based on a transdisciplinary approach, focused on deliberative and concerted efforts to understand and identify problems, pathways 'and, in some cases, the co-implementation, of agreed-upon solutions'.⁷¹²

With these important considerations in mind, let me then pass on to engage with deliberative democracy as a propelling governance theory to advance participation of small-scale fisheries peoples in international fisheries management.

5.1.2. Deliberative democracy in fisheries governance

About two decades ago, international governance was critically portrayed by Nanz and Steffek as 'remote from citizens' with 'opaque' procedures, and as 'dominated by diplomats, bureaucrats and functional specialists'.⁷¹³ The political scientists attributed merits to deliberation for adding quality and legitimacy to global governance regimes, and promoting mutual learning and policy choices that are geared toward the public interest.⁷¹⁴ For them, the public concern must feed into the policy-making, as 'deliberative democracy relies on certain participatory conditions for rule-making',⁷¹⁵ which include the provision of access to information by international organizations, incorporation of public concerns into the relevant agendas, and the constant adaptation

⁷¹⁰ Anthony Charles, 'The Big Role of Coastal Communities and Small-Scale Fishers in Ocean Conservation' in Philip S Levin and Melissa R Poe (eds), *Conservation for the Anthropocene Ocean* (Academic Press 2017) 457.

⁷¹¹ Chuenpagdee (n 90) 24.

⁷¹² *ibid* 26.

⁷¹³ Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39 *Government and Opposition* 314, 317.

⁷¹⁴ *ibid* 319.

⁷¹⁵ *ibid* 320.

of civil society to emerging issues, especially of marginalized groups.⁷¹⁶ This proposition relates to the use of deliberation as a means to democratize global policymaking and the related process of policy adoption.⁷¹⁷ While one cannot equate policy to the decisions adopted by RFBs, which are technical in nature and, in the case of RFMOs, can be binding on its members,⁷¹⁸ the decision-making process leading to the adoption of such decisions can be as opaque and dominated by a small group of government representatives and experts as the policy-making procedures. It is thus pertinent to examine the thinking and scholarly debate around deliberative democracy and its influences on participatory fisheries governance.

Political scientist Dryzek is known for his work in the areas of democratic theory and environmental politics. He introduced the general conceptual framework for a deliberative system, composed by five features, namely: the ‘public space’, where diverse opinions freely interact; the ‘empowered space’, where multiple actors produce authoritative decisions collectively; ‘transmission’, through which information is passed to the public; ‘accountability’, for holding empowered space accountable by the public space, and; ‘decisiveness’, for influencing collective decisions based on the four previous features.⁷¹⁹ Dryzek and Stevenson assessed this system, and added the feature of ‘meta-deliberation’⁷²⁰ in the global governance of climate change.⁷²¹ They found shortcomings relating to deliberative democracy therein, especially regarding accountability, meta-deliberative capacity, and decisiveness.⁷²² These assessments could be made to evaluate the level of deliberative democracy in international fisheries

⁷¹⁶ *ibid* 322.

⁷¹⁷ See also Rodger A Payne and Nayef H Samhat, *Democratizing Global Politics: Discourse Norms, International Regimes, and Political Community* (SUNY Press 2004).; John S Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World* (Polity 2006).; Karin Bäckstrand, ‘Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development’ (2006) 12 *European Journal of International Relations* 467.

⁷¹⁸ See Harrison, ‘Key Challenges Relating to the Governance of Regional Fisheries’ (n 66) 81.

⁷¹⁹ John S Dryzek, ‘Democratization as Deliberative Capacity Building’ (2009) 42 *Comparative Political Studies* 1379.

⁷²⁰ Described as the ‘reflexive capacity of those in the deliberative system to contemplate the way that system is itself organised’. See John S Dryzek and Hayley Stevenson, ‘Global Democracy and Earth System Governance’ (2011) 70 *Ecological Economics* 1865, 1867.

⁷²¹ As they note, the global civil society in this context is formed by ‘business leaders, entrepreneurs, activists, church groups, youth groups, trade unions, non-government organisations, journalists, and bloggers’. See *ibid* 1868.

⁷²² See *ibid* 1871–1873.

governance processes, including RFBs' decision-making processes for developing and adopting conservation and management measures. Such evaluation, however, depends on civil society reaching these forums in the first place, and whether the conditions for participation of non-state actors actually enable the effective interaction among civil society, states agencies and other stakeholders. As chapter 6 demonstrates, while certain regional fisheries frameworks provide an enabling framework for non-state actors' participation, their actual presence and influence in decision-making is yet to be fully assessed.

To address the apparent deficits of deliberative democracy in RFMOs, Klinke suggests a normative analytical design of public deliberation and participation in regional transboundary environmental governance.⁷²³ For him, public deliberation and participation in such context needs 'to vertically and horizontally interlock different political levels of action' so that the 'public opinion and will-formation process' are channelled in 'discursive arenas' while 'communication, understanding, and learning effect' are generated.⁷²⁴ It is a valuable suggestion, elaborated in the institutional design of public deliberation and participation procedures, which, as Klinke explains, are comprised of three vertically and horizontally interlocked components, based on normative structures, procedures and practical examples.⁷²⁵ Klinke unpacks each of the components. The first is the *public advisory committees*, which capture the public discourse in the meetings of delegates representing the local or inter-municipal units, which facilitate cooperation and articulate interests and claims.⁷²⁶ The second is the *supranational deliberative body* representing the 'democratically legitimized' public advisory committees, and, as such, acting as a transboundary policy-making authority of epistemic communities with system, target, and transformation knowledge.⁷²⁷ The

⁷²³ Andreas Klinke, 'Democratizing Regional Environmental Governance: Public Deliberation and Participation in Transboundary Ecoregions' (2012) 12 *Global Environmental Politics* 79.

⁷²⁴ *ibid* 85–86.

⁷²⁵ *ibid* 87.

⁷²⁶ *ibid* 87–89.

⁷²⁷ *ibid* 89–93. Klinke explains that '*system knowledge* sheds light on the sources, the difficulties of identifying and mapping cause-effect relationships, the remaining scientific uncertainties, and the current and possible future development of environmental systems. Second, *target knowledge* provides information about norms and values based on beliefs and worldviews and their influence on priority setting. This can be particularly important when ambiguity emerges, such as when there are different interpretations of an environmental problem or risk, or when divergent normative justifications arise in terms of what can be regarded as tolerable with regard to the common good.

third component is the *transnational executive body*, appointed by the supranational deliberative body, responsible for implementing and managing the policies, and examining and settling disputes.⁷²⁸ The second component can be perceived through the practice of the Advisory Councils under the EU's Common Fisheries Policy,⁷²⁹ which I examine in section 6.2.1. Klinke's proposition for achieving deliberative democracy in RFMOs signals reflections for operationalizing small-scale fisheries peoples' participation in international fisheries management. In this particular case, small-scale fisheries peoples would integrate local or inter-municipal public advisory committees, the first component of the framework, to discuss and articulate common views; small-scale fisheries cooperatives, organizations, associations, or guilds would then act as the supranational deliberative body, coordinating and consolidating the common views and knowledge contributions, and; such entities would then nominate a transnational executive body to represent small-scale fisheries peoples in RFBs meetings, and articulate their views and knowledge contributions in these fora, later bringing back to the national and local levels the decisions agreed upon and furthering their implementation. Such scenario could function well in places where there is strong organization of small-scale fisheries peoples, but even in this case, the transmission of the inputs from local units to the supranational deliberative body runs the risk of not adequately capturing small-scale fisheries peoples' views and contributions.

Therefore, an additional point to explore in these theoretical reflections is the extent to which the knowledgebase that informs fisheries management, generally, can be considered broad or democratic enough.

5.2. Broadening the knowledgebase for global fisheries governance

The participation of multiple stakeholders, representing different interests, offer an added value to international negotiations, a 'wider knowledge base' or expertise, a 'larger consensus' that ultimately can lead to an 'increased legitimacy of the normative

Third, *transformation knowledge* offers valuable clues to sociopolitical, economic, legal, technical, and cultural options that might be appropriate to achieve desired goals, to overcome deacits, and to meet new challenges'.

⁷²⁸ *ibid* 93–94.

⁷²⁹ *ibid* 90.

outcome and more effective implementation'.⁷³⁰ The large number of and diversity within stakeholders participating in international decision-making processes also strengthens the 'democratic legitimacy' in international law, being a driving force to tackle global environmental and human rights-related challenges.⁷³¹ Similarly, one can think of global fisheries governance as being informed by knowledge that comes from a wide range of different stakeholders, including governments, fishers and the general public. The various ways through which the public perceives scientific knowledge are fundamental in ensuring that decision-making is attentive to local variations and particular cultural claims. Jasanoff termed as 'civic epistemology' 'these culturally specific, historically and politically grounded, public knowledge-ways',⁷³² which, in other words, are 'shared understandings about what credible claims should look like and how they ought to be articulated, represented, and defended'.⁷³³ Jasanoff's theory relates to questions of knowledge and scientific claims to be authoritative in a political setting, which runs the risk of being a reductionist and one-dimensional expression of 'public understanding of science', diminishing civic agency, erasing history, neglecting culture, and privileging people's knowledge of isolated facts over more complex meanings.⁷³⁴ These are relevant considerations that bring insights to the need of deepening the understanding about democratizing science in the context of fisheries management, and, importantly, the adequate integration of fishers' knowledge contributions into these processes, as I discuss in the next section.

5.2.1. A democratic knowledge system for fisheries management

Enhancing deliberation in global fisheries governance can also be achieved through democratizing science, with a view to avoiding marginalization of knowledge and exclusion.⁷³⁵ Political scientists Berg and Lidskog explain that both policy and

⁷³⁰ Wolfgang Benedek, 'Multi-Stakeholderism in the Development of International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 201–202.

⁷³¹ *ibid* 203–204.

⁷³² Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton University Press 2005) 249.

⁷³³ *ibid*.

⁷³⁴ *ibid* 270–271.

⁷³⁵ The special issue of *Science and Public Policy* edited by Angela Liberatore and Silvio Funtowicz provided seminal contributions from scholars working on these topics. Some 'conceptual models

science are inter-dependent and mutually shaped in global environmental governance, aiming toward more democratic, legitimate, and effective decisions.⁷³⁶ For them, ‘[p]olicy influences the production and stabilisation of knowledge, while knowledge supports and justifies policy’.⁷³⁷ And that the current deliberative systems theory does not build on a ‘detailed understanding of the science-policy interface’, but rather sees the role of science and expertise as a deliberators’ optional resource.⁷³⁸ Berg and Lidskog argue for ‘enhanced deliberations in the scientific sphere’, linked to decision-making processes and potentially strengthen deliberative democracy systems in global environmental governance.⁷³⁹ They suggest the inclusion of the *who* and *what* in this democratized knowledge-making. They point out to various groups: people directly affected by an issue, holders of local knowledge and personal experiences; theoretical and experimental science experts, holders of specific knowledge that is based on technical and experience competence; and the general public that holds knowledge of public concerns and diverse ways of thinking.⁷⁴⁰ Berg and Lidskog further investigate *how* to structure and organize the space so that the various groups can act and their contributions be ‘transferred to the scientific sphere’.⁷⁴¹ For this aspect, they suggest the technological decision-making process of producing democratized science, with both the external interactions between science and other knowledge systems and the internal ways through which the former refines and validates the latter.⁷⁴²

This study of Berg and Lidskog deals with environmental governance, and can similarly apply to fisheries governance, where there is also a need to integrate the policy-science interface within processes of institutionalizing deliberation and questioning dominant discourses⁷⁴³ in fisheries governance. Such need stumbles on

of interaction between science, expertise and policy’ were identified therein. See Angela Liberatore and Silvio Funtowicz, “‘Democratising’ Expertise, “‘Expertising’ Democracy: What Does This Mean, and Why Bother?’ (2003) 30 *Science and Public Policy* 146.

⁷³⁶ Monika Berg and Rolf Lidstog, ‘Deliberative Democracy Meets Democratized Science: A Deliberative Systems Approach to Global Environmental Governance’ (2017) 27 *Environmental Politics* 1.

⁷³⁷ *ibid* 2.

⁷³⁸ *ibid* 4.

⁷³⁹ *ibid* 5–6.

⁷⁴⁰ *ibid* 6–8.

⁷⁴¹ *ibid* 8.

⁷⁴² *ibid*.

⁷⁴³ *ibid* 11.

another debate underpinning fishers' knowledge and fisheries science. As Gray rightly notes, both sources of knowledge support fisheries management and conservation decisions, but are in most cases disconnected, used in silos, often with competing and conflicting claims.⁷⁴⁴ Gray recognizes that there are at least three ways of relating fishers' knowledge and fisheries science. First, as entirely different knowledge fields that are used irreconcilably, one prevailing over another ('political hierarchy'). Second, as complementary fields that can be used reconcilably, being equally valid, with traditional knowledge being incorporated into scientific knowledge ('epistemological synthesis'). Third, as both resulting from a constructive meaningful dialogue, mutual learning, and collaborative research and analytical teamwork between fishers and scientists ('social integration').⁷⁴⁵ Both fisheries governance and fisheries management can benefit from these contributions if scientists recognize the valuable inputs of small-scale fisheries peoples to both marine ecosystems' knowledge and their 'critical insights into research direction and design'.⁷⁴⁶ At the same time, small-scale fisheries peoples would need to assume full responsibility in supporting scientists in environmental conservation and effectively partnering with them.⁷⁴⁷

To the extent of principles and regulatory framework, as I explain further below, contemporary international fisheries management reflects a more democratic way of producing the knowledgebase for the related decision-making processes. From a fisheries science technical standpoint, there is increasing recognition that broadening knowledgebase that informs fisheries management necessarily includes 'knowledge and insights of the users of the resource, including traditional knowledge'.⁷⁴⁸ It is important to note, as Cochrane alerts, the risks of advocacy that selectively uses science for a particular cause or position, and proposes 'full and transparent participation of all stakeholders in the provision and application of scientific results', coupled with a 'culture of transparency, participation and mutual respect' for obtaining

⁷⁴⁴ See for example Saima May Sidik, 'Weaving the Lore of the Land into the Scientific Method' (2022) 601 *Nature* 285.

⁷⁴⁵ Gray, 'Theorising about Participatory Fisheries Governance' (n 676) 351-352.

⁷⁴⁶ *ibid* 354.

⁷⁴⁷ *ibid*.

⁷⁴⁸ Kevern L Cochrane, 'The Use of Scientific Information' in Kevern L Cochrane and Serge M Garcia (eds), *A Fishery Manager's Guidebook* (2nd edn, FAO and Wiley-Blackwell 2009) 339-341.

the best means of ensuring high quality of scientific information.⁷⁴⁹ Cochrane underlines the essential role of traditional knowledge, which is passed across generations and based on local practical experiences.⁷⁵⁰ In this respect, he alerts to the need of separating ‘in a careful and socially sensitive way’ the ‘underlying valid (or empirical) knowledge within the broader traditional or local knowledge’ from the ‘underlying beliefs’ that may be either not applicable to the given fisheries management issued or biased.⁷⁵¹ Importantly, Cochrane raises the need for scientists to work with relevant stakeholders in the ‘co-production of knowledge’, which informs decision-making on a given management measure that is required to address a problem in fisheries management or enhance the system.⁷⁵² Such understanding resonates with the ‘social integration’ that Gray refers to, involving constructive and meaningful analytical teamwork between fishers and scientists.⁷⁵³

The participation of small-scale fisheries peoples in fisheries management is generally valued because of their unique knowledge, which is built on customary traditions, practices, and cultural experiences. Fisheries scientists assert that fishers are holders of traditional knowledge that ‘accumulates by cultural transmission’, and which ‘may be extremely detailed and relevant for resource management’.⁷⁵⁴ Fishers’ knowledge is considered, as Gray describes, ‘small-scale, qualitative and empirical knowledge, sometimes intuitive, invariably subjective, always particularistic if not *ad hominem*, and often anecdotal’, whereas fisheries science is large-scale, ‘quantitative and rational knowledge, largely statistical, ostensibly objective, apparently universalistic, and highly systematic’.⁷⁵⁵ A broad and contemporary notion of fishers’ knowledge was pertinently put forward by Fischer and others, to whom fishers’

⁷⁴⁹ *ibid* 342–343.

⁷⁵⁰ *ibid* 343.

⁷⁵¹ *ibid*.

⁷⁵² *ibid* 362–363.

⁷⁵³ Gray, ‘Theorising about Participatory Fisheries Governance’ (n 676) 351–352.

⁷⁵⁴ Pomeroy and Berkes (n 92) 467. See also Fikret Berkes, Carl Folke and Madhav Gadgil, ‘Traditional Ecological Knowledge, Biodiversity, Resilience and Sustainability’ in Charles Perrings and others (eds), *Biodiversity Conservation: Policy Issues and Options* (Kluwer Academic Publishers 1995).

⁷⁵⁵ Gray, ‘Theorising about Participatory Fisheries Governance’ (n 676) 351.

knowledge includes traditional, local, or Indigenous, ecological knowledge.⁷⁵⁶ As such, fishers' knowledge is formed by a 'body of experiential knowledge', which include 'ecological, resource-based, ecosystem, fishing practices, fishing communities and livelihoods, governance and markets, and their dynamic relationships'.⁷⁵⁷ The incorporation of fishers' knowledge and expertise into fisheries management is, in effect, part of the decentralised participatory and multi-stakeholder management process promoted by the EAF,⁷⁵⁸ particularly reflecting the approach's human dimensions.⁷⁵⁹

As anticipated above, fishers' knowledge complements the findings of scientific assessments,⁷⁶⁰ adding information that is either unavailable, unclear or insufficient in formal scientific sources. Importantly, the adequate integration of fishers' knowledge into fisheries management relies on culturally and socially sensitive approaches, which can promote fishers' engagement with the existing management systems, offering them the opportunity to actively participate in the development and adoption of subsequent management and conservation decisions.⁷⁶¹ This ultimately leads to greater legitimacy and broader support to management rules.⁷⁶² Research on participatory fisheries management suggests that the efforts of fishers groups in documenting their collected information, based on scientific procedures, is of great value when fishers 'understand the valid concerns of managers, and when managers examine the fisher[s]' information honestly and carefully'.⁷⁶³ This can be quite challenging in management systems used to centralized and non-adaptive approaches, and which may see scientific assessments as necessarily better. In this case, where science-based findings diverge

⁷⁵⁶ 'Fishers' Knowledge and the Ecosystem Approach to Fisheries: Applications, Experiences and Lessons in Latin America' (FAO 2015) FAO Fisheries and Aquaculture Technical Paper 591 4.

⁷⁵⁷ *ibid.*

⁷⁵⁸ *ibid* 3–4.

⁷⁵⁹ FAO The human dimensions of the ecosystem approach to fisheries (FAO Technical Guidelines for Responsible Fisheries No 4, Suppl 2, Add. 2, Rome, 2009) (n 281) 43–44.

⁷⁶⁰ Cochrane (n 748) 343–344; Diz and Morgera (n 103) 291; 'Fishers' Knowledge and the Ecosystem Approach to Fisheries: Applications, Experiences and Lessons in Latin America' (n 756) 4.

⁷⁶¹ Diz and Morgera (n 103) 291.

⁷⁶² Margrethe Aanesen and others, 'What Does Stakeholder Involvement Means for Fisheries Management' (2014) 19 *Ecology & Society* 35.

⁷⁶³ Bruce R Rettig, Berkes Fikret and Evelyn Pinkerton, 'The Future of Fisheries Co-Management: A Multi-Disciplinary Assessment' in Evelyn Pinkerton (ed), *Co-operative Management of Local Fisheries: New Directions for Improved Management and Community Development* (UBC Press 1989) 285.

from findings based on traditional knowledge, researchers have rightly prompted that new studies would be needed instead of using only one knowledge system as presumably correct.⁷⁶⁴ Developing these new studies offer the opportunity to realize knowledge co-production. In Schreiber, Chuenpagdee and Jentoft words, the ‘co-production of hermeneutical resources for small-scale fisheries’,⁷⁶⁵ which entails participatory action in transdisciplinary research that can foster and facilitate the dialogue between the concerned stakeholders, especially the interactions with small-scale fisheries peoples through the development and use of an appropriate vocabulary and language that are sensitive to particular backgrounds and cultures.⁷⁶⁶

In practice, fisheries scientists have also been developing, proposing, and testing different methodologies and processes for collecting and integrating fishers’ knowledge into fisheries management across governance levels.⁷⁶⁷ Local fishing communities can be very diverse, imbedded on different culture and customs, which inform and are informed by traditional knowledge, and which demand appropriate and cultural sensitive engagement when being integrated to scientific knowledge. Consequently, fishers’ knowledge has been and could be used differently in each fisheries management system, depending on the country. This also leads to different approaches and perceptions taken from researchers in examining countries in different case studies.⁷⁶⁸ Additional challenges to adequately integrating fishers’ knowledge into management systems includes, generally, the lack of small-scale fisheries peoples’ self-organization, poor educational and technical capacity.⁷⁶⁹ There is also

⁷⁶⁴ Renato AM Silvano and John Valbo-Jørgensen, ‘Beyond Fishermen’s Tales: Contributions of Fishers’ Local Ecological Knowledge to Fish Ecology and Fisheries Management’ 10 *Environment, Development and Sustainability* 657.

⁷⁶⁵ Schreiber, Chuenpagdee and Jentoft (n 305).

⁷⁶⁶ *ibid.*

⁷⁶⁷ William D Heyman and Granados-Dieseldorff, ‘The Voice of the Fishermen of the Gulf of Honduras: Improving Regional Fisheries Management through Fisher Participation’ (2012) 125–126 *Fisheries Research* 129; Robert L Stephenson and others, ‘Integrating Fishers’ Knowledge Research in Science and Management’ (2016) 73 *ICES Journal of Marine Science* 1459.

⁷⁶⁸ Thomas F Thornton and Adela Maciejewski Scheer, ‘Collaborative Engagement of Local and Traditional Knowledge and Science in Marine Environments: A Review’ (2012) 17 *Ecology & Society* 8.

⁷⁶⁹ Pomeroy and Berkes (n 92) 467.

concern on how fishers' knowledge and perceptions can be biased and driven by their self-interest.⁷⁷⁰

Despite the challenges and complexities, the relevance of integrating fishers' knowledge in the design of management rules, and even policies, continues to grow, as more attention is given to threats imposed by climate-related environmental changes.⁷⁷¹ The adequate integration of fishers' knowledge into fisheries management has multiple benefits for the fishers themselves, for the resources, and for the overall beneficiaries of fisheries and ecosystems services. Fishers' knowledge can be particularly useful to tackle the lack of or uncertainty in the existing scientific data, especially in developing countries with limited technical and financial capacity to collect and analyse this data.⁷⁷² Small-scale fishing communities are empowered when their views and contributions are adequately and effectively considered, and this can attract more visibility of the small-scale fisheries sector from governments and other relevant stakeholders.⁷⁷³ As traditional knowledge is rooted and construed based on fishers' experiences, and their communities' customary practices and culture, protecting and ensuring the adequate use of traditional knowledge also means protecting small-scale fisheries peoples' culture and ensuring the realization of their cultural rights. Consequently, coastal communities and users' rights can be entitled the proper recognition of their traditional knowledge contributions to better fisheries management.⁷⁷⁴ Additionally, the participation of fishing communities in impact

⁷⁷⁰ Liam M Carr and William D Heyman, "It's About Seeing What's Actually Out There": Quantifying Fishers' Ecological Knowledge and Biases in a Small-Scale Fishery as a Path Toward Co-Management' (2012) 69 *Ocean & Coastal Management* 118.

⁷⁷¹ The alteration in aquatic species distributions due to ocean warming lead small-scale fishing communities to being deprived from fishing, affecting their coasts, also due to sea level rise and coastal erosion aggravated by climate change. See Daniela Kalikoski and others, 'Understanding the Impacts of Climate Change for Fisheries and Aquaculture: Applying a Poverty Lens' in Manuel Barange and others (eds), *Impacts of climate change on fisheries and aquaculture: synthesis of current knowledge, adaptation and mitigation options* (FAO 2018) 21; William K Oestreich and others, 'The Impact of Environmental Change on Small-Scale Fishing Communities: Moving beyond Adaptive Capacity to Community Response' in Andrés M Cisneros-Montemayor, William WL Cheung and Yoshitaka Ota (eds), *Predicting Future Oceans: sustainability of oceans and humans systems amidst global environmental change* (Elsevier 2019).

⁷⁷² Diz and Morgera (n 103) 289.

⁷⁷³ As Berkes and Nayak argued, this empowerment through participatory approaches is 'an essential strategy to overcome vulnerability and for healthy and viable communities'. See Fikret Berkes and Prateep Kumar Nayak, 'Role of Communities in Fisheries Management: "One Would First Need to Imagine It"' (2018) 17 *Maritime Studies* 241, 244–245.

⁷⁷⁴ Charles (n 710) 452.

assessments of climate change is also crucial.⁷⁷⁵ As climate change considerations have already reached the conservation and management measures adopted by certain RFBs,⁷⁷⁶ small-scale fisheries peoples could also contribute with their knowledge and experiences in responding to unforeseen environmental changing conditions, based on their own methods of resilience and adaptation.⁷⁷⁷

Having seen the challenges and opportunities for adequate integration of small-scale fisheries peoples' knowledge contributions into fisheries management, let me move on to reengage with international law and explore the normative foundations for the integration of small-scale fisheries peoples' knowledge into fisheries management in the next section.

5.2.2. Normative foundations for fishers' knowledge integration into fisheries management

According with international fisheries law and standards, including the LOSC, UNFSA, and CCRF, responsible fisheries management by coastal states in their respective EEZ, and by flag states on the high seas, requires best scientific evidence or knowledge available,⁷⁷⁸ and sharing of scientific information available.⁷⁷⁹ The UNFSA, articles 3(3) and 6(3)(a), and the CCRF, article 7.5, further require the application of the precautionary principle in any maritime zone as to improve fisheries management decision-making, collecting, and sharing best scientific information available. As demonstrated above, such scientific information in fisheries management is no longer purely drawn from formal science, but also includes fishers' knowledge. Accordingly, the CCRF, article 6.4, recommends that fisheries conservation and

⁷⁷⁵ Such assessments, however, tend to focus on large-scale industrial fisheries. See Lauren V Weatherdon and others, 'Projected Scenarios for Coastal First Nations' Fisheries Catch Potential under Climate Change: Management Challenges and Opportunities' (2016) 11 PLoS ONE 1.

⁷⁷⁶ Either mainstreamed in various conservation and management measures, as seen in the GFCM, or in specific measures as in the case of WCPFC. See GFCM, 'Decisions Adopted by the General Fisheries Commission for the Mediterranean' (n 249); WCPFC, Resolution on climate change as it relates to the Western and Central Pacific Fisheries Commission (adopted at the 16th Regular Session of the WCPFC, 5-11 December 2019, Port Moresby, Papua New Guinea) 2019.

⁷⁷⁷ See analytical framework for community response and mediating factors in Oestreich and others (n 771).

⁷⁷⁸ LOSC art 61(2) and 119(1)(a); UNFSA art 5(b); FAO CCRF (n 225) art 6.4, 6.5, 7.1, 7.2.1, 7.3.1, 7.4.1.

⁷⁷⁹ LOSC art 61(3) and 119(2); UNFSA art 14; FAO CCRF (n 225) art 7.4.6.

management decisions are based on the best scientific knowledge available, ‘taking into account of traditional knowledge of the resources and their habitat’. While this provision contains soft language, article 7.6.6 further provides for the recognition of traditional practices, needs and interests of Indigenous people and local fishing communities in decision-making on the use, conservation and management of fisheries resources. Similarly, the SSF Guidelines encourage the recognition of the ‘knowledge, culture, tradition and practices’ of small-scale fisheries peoples to support and inform ‘sustainable development processes’ (paragraph 11.6), and the use of small-scale fisheries peoples’ particular knowledge and perspectives in participatory fisheries management contexts (paragraph 5.18). In this connection, it is also worth noting that, from the small-scale fisheries peoples’ rights perspective, the UNDROP requires states to promote and protect traditional knowledge, innovation and practices, including traditional fisheries ‘systems relevant to the conservation and sustainable use of biological diversity’ (article 20(1)), and affirms the right of small-scale fisheries peoples to ‘maintain, express, control, protect and develop their traditional and local knowledge’ (article 26(1)).

These specific provisions of the CCRF, the SSF Guidelines, and the UNDROP support the recognition and protection of small-scale fisheries peoples’ knowledge to inform fisheries management and conservation decision-making processes. Reading these provisions in conjunction with those in the LOSC, UNFSA, and CCRF leads to a more comprehensive requirement upon states to use best scientific knowledge available that includes small-scale fisheries peoples’ knowledge. In turn, the integration of such knowledge into the scientific knowledgebase for international fisheries management would need to observe the principles of respect of cultures, equitable participation of women, transparency, consultation and participation,⁷⁸⁰ in order to ensure socially and culturally sensitive integration.

Other specific international legal requirements that contribute to the recognition and protection of small-scale fisheries’ peoples knowledge include: to investigate and document traditional knowledge and technologies applied to small-scale fisheries and assess their application to sustainable fisheries management and conservation (CCRF,

⁷⁸⁰ FAO SSF Guidelines (n 25) para 3.1(2)(4)(6)(8).

article 12.12); to recognize and protect the rights of small-scale fisheries peoples relating to their traditional knowledge, and eliminate discrimination against such knowledge, practices and technologies (UNDROP, article 26(3)).

Specifically in respect of Indigenous peoples, the UNDRIP, article 3(1), affirms their right to maintain, control, protect and develop their traditional knowledge, the manifestations of their sciences, technologies, and cultures, as well as their intellectual property over such knowledge and traditional cultural expressions. In this respect, it is important to recall the CBD, article 8(j), which requires states to ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities’, and to ‘promote their wider application with the approval and involvement of the holders’ concerned. Pursuant to CBD Malawi principle 11, the ecosystem approach should consider ‘all forms of relevant information, including scientific and indigenous and local knowledge, innovations and practices’. In turn, the *Addis Ababa Principles and Guidelines* provide, in practical principle 4 and operational guidelines, that adaptive management should be practiced based on science and traditional and local knowledge, subjecting the use of such knowledge to prior approval of that knowledge’s holder.⁷⁸¹ The *Tkarihwaí:ri Code of Ethical Conduct* provides that traditional knowledge is ‘valued equally with and complementary to scientific knowledge’.⁷⁸² On this point, Morgera notes the relative progress within the CBD framework to integrate traditional knowledge into the scientific and technological debates relating to the implementation of the Convention, given that questions of sufficiency (in terms of access to decision-making processes) and adequacy (in imposing unfair burdens to traditional knowledge holders) come to play.⁷⁸³

Despite the practical challenges, the international legal framework examined demonstrates that a systemic interpretation of the relevant instruments can strengthen the recognition and protection of traditional knowledge of small-scale fisheries

⁷⁸¹ CBD CoP7, ‘Sustainable Use (Article 10)’, Annex II ‘Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity’, UNEP/CBD/COP/DEC/VII/12 (13 April 2004) Decision VII/12 (n 656).

⁷⁸² CBD, CoP10, ‘The Tkarihwaí:ri Code of Ethical Conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities’, UNEP/CBD/COP/DEC/X/42 (29 October 2010) Decision X/42 preamble.

⁷⁸³ Elisa Morgera, ‘Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law’ (2015) 4 *Laws* 803, 820.

peoples. With these considerations, I move on to briefly reflect on social justice as the driving force that can promote greater transformation in international fisheries governance and management, and more fair outcomes to small-scale fisheries peoples.

5.3. Social justice and fair outcomes in global fisheries governance and management

For centuries, theories and ideas of justice have contributed to shape legal, ethical, and philosophical discourse on a variety of contexts.⁷⁸⁴ It goes beyond this thesis scope to deepen the analysis on this vast literature. I rather adopt the concept of social justice, which researchers working on sustainability in ocean and fisheries contexts have unpacked into three dimensions, namely, recognitional justice, procedural justice, and distributional justice.⁷⁸⁵ Accordingly, these researchers explain that recognitional justice entails acknowledging and respecting ‘pre-existing governance arrangements as well as the distinct rights, worldviews, knowledge, needs, livelihoods, histories and cultures of different groups in decisions’; procedural justice refers to the ‘level of participation and inclusiveness of decision making and the quality of governance processes’, and; distributional justice is about the ‘fairness in the distribution of benefits and harms of decisions and actions to different groups across space and time’.⁷⁸⁶ Bennet and others further identify ten main categories of injustices resulting from blue growth, blue economy, and ocean development initiatives, among which are injustices arising from the exclusion of local peoples’ voices, especially women, from decision-making and governance.⁷⁸⁷ Bennet and others propose inclusive and participatory planning and governance processes in ocean development context.⁷⁸⁸ Importantly, they contend that achieving justice would rely on a ‘substantial change to ocean governance, a rethinking of our fundamental assumptions regarding development, a reimagining of novel or

⁷⁸⁴ Nathan James Bennett and others, ‘Just Transformations to Sustainability’ (2019) 11 Sustainability 1.

⁷⁸⁵ Specifically on social justice in fisheries, with special account of small-scale fisheries peoples, see Svein Jentoft, ‘Social Justice in the Context of Fisheries – A Governability Challenge’ in Maarten Bavinck and others (eds), *Governability of Fisheries and Aquaculture: Theory and Applications*, vol 7 (2013).

⁷⁸⁶ Bennett and others (n 784) 4–5.

⁷⁸⁷ Nathan James Bennett and others, ‘Blue Growth and Blue Justice: Ten Risks and Solutions for the Ocean Economy’ (2021) 125 Marine Policy 1.

⁷⁸⁸ *ibid* 6.

alternative development models, or a paradigm shift regarding the need for growth'.⁷⁸⁹ Moreover, that such substantial change would be needed in respect of 'who is involved in decision-making processes and in the way decisions are made', as to ensure greater representation of and influence from civil society and Indigenous peoples in global decision-making bodies.⁷⁹⁰

Similarly, in participatory international fisheries governance and management, recognitional justice could be achieved through the identification of the small-scale fisheries peoples affected by and interested in taking part in such processes, including women and Indigenous peoples, and the recognition of existing fishing and tenure rights that are impacted by international fisheries management. In turn, procedural justice could be achieved through an inclusive, participatory, transparent, and accountable planning and management process in international fisheries management, which would likely entail institutional and legal reform in RFBs to make this process more accessible to small-scale fisheries peoples, considering the lack of space for civil society generally in these forums. Evaluating the last dimension, distributional justice, is more complex, as it depends on assessing the social, economic, and cultural benefits and costs that participation of small-scale fisheries peoples in international fisheries management entail, and the related equitable distribution of such benefits and costs for small-scale fisheries peoples. Something to be considered for future research.

For small-scale fisheries researchers, the call for justice to small-scale fisheries peoples have also been raised in the context of blue economy and blue growth planning, development, and implementation initiatives, has been termed as 'blue justice', described as 'a critical approach', which examines how coastal communities and small-scale fisheries are affected by such initiatives.⁷⁹¹ Several cases of injustices in small-scale fisheries caused by blue economy, across the world, brought to light the need for persevering this advocacy and realizing that 'blue justice is a precondition for

⁷⁸⁹ *ibid* 7.

⁷⁹⁰ *ibid*.

⁷⁹¹ The Too Big To Ignore global partnership for small-scale fisheries entered a Wikipedia webpage dedicated to 'blue justice', proposing such description. Yet, it is also acknowledged that there is no single definition of blue justice, as scholars have termed their own understanding about the concept. See Wikipedia, 'Blue Justice' <https://en.wikipedia.org/wiki/Blue_justice> accessed 26 January 2023.

blue growth’, without which the latter is counterproductive.⁷⁹² This advocacy entails a ‘justice-oriented transformation’ in how blue justice is perceived, institutionalized and practiced on the ground.⁷⁹³ Accordingly, small-scale fisheries researchers propose that blue justice is established a core principle of the system governing blue economy and its interactions with small-scale fisheries, and that ‘co-governance procedures’ are institutionalized, transdisciplinary knowledge is practiced, and customary systems are legally recognized.⁷⁹⁴ Schreiber, Chuenpagdee and Jentoft also conceptualize the term ‘epistemic blue injustice’, which they describe as ‘injustices that cause harm to small-scale fisheries peoples in their capacity as knowers’, and which they relate with ‘co-production of hermeneutical resources for small-scale fisheries’ mentioned above.⁷⁹⁵ This concept is linked to the discussion above around the need to adequately integrate fishers’ knowledge into the international fisheries management knowledgebase and promote the co-creation of such knowledge. Such endeavour would then also contribute to achieving epistemic blue justice for small-scale fisheries.

Creating opportunities to avoid and tackle the marginalization of small-scale fisheries peoples toward social justice (and blue justice) entails ensuring their adequate participation in international fisheries management, not only in the ocean but also in management of inland transboundary aquatic species. These reflections on justice pertinently strengthen the linkages across this thesis’ research, from the ecosystem approach, human rights, international law to deliberative governance and democratic knowledgebase for participatory international fisheries management. In this respect, I end this brief but necessary reflection on social justice (and blue justice) for small-scale fisheries with the considerations rightly pondered by Salzmann and Cocciolo, that articulating human rights in international environmental regimes can limit and counterbalance traditional ways of states regulating development and implementation processes, by ‘devising more deliberative patterns’ in these processes, and ultimately

⁷⁹² Svein Jentoft and others (eds), *Blue Justice: Small-Scale Fisheries in a Sustainable Ocean Economy*, vol 26 (Springer 2022).

⁷⁹³ Ratana Chuenpagdee and others, ‘Towards Blue Justice for Small-Scale Fisheries’ in Svein Jentoft and others (eds), *Blue Justice: Small-Scale Fisheries in a Sustainable Ocean Economy*, vol 26 (Springer 2022) 689.

⁷⁹⁴ *ibid.*

⁷⁹⁵ Schreiber, Chuenpagdee and Jentoft (n 305).

contributing to distributive and procedural justice.⁷⁹⁶ The scholars agree on the usefulness of using the ecosystem approach to support the realization of human rights approaches and, as such, contributing ‘to accommodate the fair and equitable internalization of material limits [of ecosystems] across global regulatory regimes’, and more just outcomes.⁷⁹⁷

5.4. Conclusion

This chapter navigated and explained the contemporary trend that drives global environmental governance, and which influences global fisheries governance, from a states-centred system toward polycentric and deliberative governance systems, where the democratization of both policy and science decision-making process becomes increasingly more relevant and needed. Studying polycentricity in fisheries shed light on the need for caution when considering efforts of scaling-up participatory fisheries management to regional and international levels, as not to run the risk of hindering small-scale fisheries peoples’ autonomy and recognition of their ownership over fisheries they conserve, manage, and depend on. Moreover, advancing participation of small-scale fisheries peoples in international fisheries management faces challenges of governments or NGOs in ensuring consistent and sufficient technical and financial capacity of small-scale fisheries peoples, through their professional organizations and cooperatives, as to enable them to participate in RFBs meetings as advisors to a national delegation, or as observers. My analysis also found the need for more empirical work on the functionality and efficiency of polycentric systems in fisheries governance, and suggested initiating experimentation in contexts involving fewer states in transboundary watercourses, which can bring about learning outcomes for RFBs in marine spaces. Assessing existing conceptual frameworks for deliberate systems may take longer in the RFB realm, considering the absence or minimal presence of civil society participation in these forums.

⁷⁹⁶ Antonio Cardesa-Salzmann and Endrius Cocciolo, ‘Global Governance, Sustainability and the Earth System: Critical Reflections on the Role of Global Law’ (2019) 8 *Transnational Environmental Law* 437, 458.

⁷⁹⁷ *ibid* 458–460.

In articulating deliberative democracy in fisheries, I suggested a potential scheme for operationalizing deliberative participation of small-scale fisheries peoples in international fisheries management. Starting from organizing small-scale fisheries peoples in local or inter-municipal public advisory committees, to firm up their common views, then having small-scale fisheries cooperatives, for instance, in charge of coordinating and consolidating the common views and knowledge contributions, to further result in the participation of a small-scale fisheries peoples' representative in RFBs meetings. As demonstrated in this chapter, interpreting international law systemically allows one to find the international normative foundations for the adequate integration of fishers' knowledge, specifically in support of the recognition and protection of small-scale fisheries peoples' knowledge contributions, with special account for Indigenous peoples' traditional knowledge.

Notwithstanding this enabling legal framework, and considering the practical challenges for realizing participation of a small-scale fisheries peoples' representative in RFBs meetings, the narratives underpinning social justice in ocean and small-scale fisheries contexts can serve to propel empowerment and advocacy of small-scale fisheries peoples interested in participating in international fisheries management, enabling them to self-organize and mobilize their representation in fisheries management decision-making bodies and ultimately influence RFBs processes from the bottom-up. Empirical research is needed to understand the interests of small-scale fisheries peoples around this topic, identify the groups specifically affected by RFBs' decision-making, and further experiment the participation of such groups in RFBs' meetings.

This chapter, while shorter in comparison to the previous ones, originally contributes to literature by examining participation in fisheries management from the global governance angle, and linking this to broadening the knowledge system that informs fisheries management through adequate integration of small-scale fisheries peoples' contributions, as anchored in the applicable international law instruments. Multi-scale participatory processes of decision-making for international fisheries management that includes small-scale fisheries peoples can foster and strengthen deliberative democracy in fisheries governance, ultimately bringing more just outcomes in all the governance levels concerned.

With this I move to the next chapter for an analysis of the extent to which the participation of small-scale fisheries peoples has been realized in different fisheries management contexts involving two or more states.

CHAPTER 6

Assessing current practices and opportunities for the participation of small-scale fisheries peoples in regional fishery bodies

This thesis has so far: linked the EAF with human rights for strengthening the human or social considerations in participatory fisheries management; unravelled the international law for small-scale fisheries, focusing on demonstrating the international legal foundations for the adequate participation of small-scale fisheries peoples in international fisheries management, and; demonstrated that such participation can be advanced through experimenting polycentricity in fisheries at multi governance levels, enhancing deliberative democracy frameworks and democratic knowledgebase systems with adequate integration of small-scale fisheries peoples into international fisheries management decision-making, which ultimately leads to more just outcomes for small-scale fisheries. It is left for this research to investigate the extent to which small-scale fisheries peoples have been considered in fisheries management decision-making processes involving two or more states. This examination fills another gap in scientific and legal literature, as very little attention, if any, has been paid to the participation of small-scale fisheries peoples in RFBs.⁷⁹⁸

This chapter begins by assessing selected regional fisheries management practices, based on their relevance to small-scale fisheries, including RFBs whose coverage area include coastal fisheries and those dedicated to inland fisheries in

⁷⁹⁸ Studies on participation of local communities and Indigenous peoples in international forums have mostly examined environmental regimes, notably, the CBD, UNFCCC, and multilateral environmental agreements. See for instance Andreas Nordang Uhre, 'Exploring the Diversity of Transnational Actors in Global Environmental Governance' (2014) 3 *Interest Groups & Advocacy* 59; Elizabeth A Kirk, 'The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar Publishing 2016); Jessica F Green, 'Transnational Delegation in Global Environmental Governance: When Do Non-State Actors Govern?' (2018) 12 *Regulation & Governance* 263; Parks and Schröder (n 655).

transboundary water courses (*section 6.1*). Then, I analyse participatory approaches to fisheries management decision-making in an inter-state's arrangement for marine fisheries, in the EU, and in inter-tribal arrangements for inland fisheries with Indigenous communities from Canada, USA and New Zealand (*section 6.2*). I continue focusing on RFMOs and situating the scholarly debate on 'transparency' in RFMOs, followed by an assessment of the normative framework of selected RFMOs to better understand the procedures for the participation of non-state actors in the decision-making process of developing and adopting conservation and management measures (*section 6.3*). Finally, I conclude (*section 6.4*).

6.1. The relevance of small-scale fisheries to regional fishery bodies

As noted at the onset of this thesis, section 1.2, there has been an unintentional disconnection between international legal scholars and small-scale fisheries scientists, in respect of how the two epistemic communities address fisheries management and conservation by international law. Indeed, there is not a single study or piece of literature putting RFBs and small-scale fisheries peoples in scrutiny. Case studies examining regional fisheries governance and management in marine and inland waters shared by two or more states have served to reiterate the importance of participatory decision-making processes for setting out plans and management rules, and the need to enhance the integration of fishers' knowledge into the relevant processes.⁷⁹⁹ Or to assess the extent and trends in participation of non-state actors, essentially NGOs, in certain international fisheries forums.⁸⁰⁰ Let me start by examining RFBs created under the FAO's auspices, as FAO is the leading UN agency working on small-scale fisheries issues and promoting the implementation of the SSF Guidelines.

⁷⁹⁹ Heyman and Granados-Dieseldorff (n 767); Carolina RC Doria and others, 'Challenges for the Governance of Small-Scale Fisheries on the Brazil-Bolivia Transboundary Region' (2020) 33 *Society & Natural Resources* 1213.

⁸⁰⁰ Kirk, 'The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity' (n 798); Matilda Petersson and others, 'Patterns and Trends in Non-State Actor Participation in Regional Fisheries Management Organizations' (2019) 104 *Marine Policy* 146; Lisa Maria Dellmuth and others, 'Empowering NGOs? Long-Term Effects of Ecological and Institutional Change on Regional Fisheries Management Organizations' (2020) 65 *Global Environmental Change* 1.

6.1.1. Regional fishery bodies established under the auspices of the FAO

Based on the FAO Constitution, article XIV, which provides for the competence of the Organization, through its Conference and Council, to approve conventions and agreements,⁸⁰¹ the following RFBs have been established: the Asia-Pacific Fishery Commission (APFIC), CACFish, GFCM, IOTC, and RECOFI. Additionally, pursuant to article VI, which provides for the competence of the Organization, through its Conference or Council, to establish regional commissions and committees, other RFBs have been established, such as the Commission for Small-Scale, Artisanal Fisheries and Aquaculture of Latin America and the Caribbean (COPPESAALC), the Fishery Committee for the Eastern Central Atlantic (CECAF),⁸⁰² and the Western Central Atlantic Fishery Commission (WECAFC). Some initiatives led by these RFBs have been contributing to empower the small-scale fisheries sector in their respective regions, with different degrees of support. Let me give some examples.

The APFIC sessions gather stakeholders working on small-scale fisheries in the region, thus facilitating the sharing of information, experiences and innovations on, *inter alia*, technologies for small-scale fisheries, safety at sea, business insurance for small-scale aquaculture farmers, and responses to COVID-19.⁸⁰³ In turn, CACFish has developed a dedicated programme for implementing the SSF Guidelines, which encourages its members to collect, analyse and disseminate data and information on small-scale fisheries.⁸⁰⁴ Notably, the COPPESAALC went through a statutory reform which led its members⁸⁰⁵ to agree by consensus on revised statutes in 2018, with

⁸⁰¹ This competence is shared between the FAO Conference and the FAO Council. Pursuant to the rules of the Conference, the Conference may, by a two-third majority of the votes cast, approve and submit to the members conventions and agreements relating to food and agriculture, whereas the Council may, by a vote concurred in by at least two thirds of the membership of the Council, approve and submit to the members agreements relating to food and agriculture, which are of particular interest to the members of geographical areas specified in such agreements and are designed to apply only to such areas, as well as supplementary conventions or agreements. See FAO, 'Basic Texts of the Food and Agriculture Organization of the United Nations' (n 242) FAO Constitution, art XIV(1)(2).

⁸⁰² Others include the Committee on Inland Fisheries and Aquaculture of Africa (CIFAA), the European Inland Fisheries Advisory Committee (EIFAAC), and the South West Indian Ocean Fisheries Commission (SWIOFC).

⁸⁰³ See the report of the latest session in APFIC, 'Report of the Thirty-Sixth Session of the Asia-Pacific Fishery Commission (APFIC)' (APFIC 2021).

⁸⁰⁴ Løbach and others (n 66).

⁸⁰⁵ Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname,

enhanced provisions on small-scale fisheries. These provisions refer to the purpose of the commission (to ‘promote the management and sustainable development of small-scale and artisanal fisheries and aquaculture’), its duties (including fostering the development of and paying special attention to small-scale and artisanal fisheries and aquaculture), and the multiple functions that relate to these purpose and duties.⁸⁰⁶ However, the revised provisions do not cover the participation of small-scale fisheries peoples in relevant decision-making processes. CECAF, in turn, has a dedicated Artisanal Fisheries Working Group aimed at improving regional knowledge on artisanal fisheries of CECAF members.⁸⁰⁷ In the latest report of this working group’s meeting, in 2019, members encouraged ‘the participation, as an observer, of stakeholders involved in small-scale fisheries in the area’, acknowledging the added value and relevant information provided by such stakeholders.⁸⁰⁸ The WECAFC, for its part, has adopted a Strategic Plan 2022-2027, which draws special attention to SSF in fisheries and aquaculture development and management, and has been fostering the implementation of the SSF Guidelines.⁸⁰⁹ These RFBs have an advisory role, and some face issues of periods of inactivity, and meetings that are held on an irregular basis,⁸¹⁰ often with low level of attendance.⁸¹¹ These matters hinder consistent efforts for effectively realizing the RFBs objectives, including the mentioned initiatives in support of small-scale fisheries.

Differently, the GFCM seems to bring a more promising scenario for small-scale fisheries. Article 5(a), GFCM Agreement, mirrors articles 5(i) and 24(2)(b), UNFSA,

Uruguay and Venezuela. See FAO, ‘Commission for Small-Scale, Artisanal Fisheries and Aquaculture of Latin America and the Caribbean (COPPESAALC)/Comisión de Pesca En Pequeña Escala, Artesanal y Acuicultura de América Latina y El Caribe (COPPESAALC)’ (6 January 2023) <<https://www.fao.org/fishery/en/organization/rfb/coppesaalc>>.

⁸⁰⁶ FAO, Statutes of the Commission for Small-Scale and Artisanal Fisheries and Aquaculture of Latin America and the Caribbean (COPPESAALC) (adopted by FAO Council Resolution 1/159 of 2018) arts 1 and 3.

⁸⁰⁷ FAO, ‘Report of the FAO/CECAF Working Group for Artisanal Fisheries’ (FAO 2020) 20/82.

⁸⁰⁸ *ibid* 29.

⁸⁰⁹ WECAFC, WECAFC Strategic Plan 2022-2027 (Eleventh (Virtual) Session of the Scientific Advisory Group, 25-27 April 2022).

⁸¹⁰ For instance, COPPESAALC was established in 1976, but has only been holding meetings since 2000 in an irregular basis. See Løbach and others (n 66) 83–84.

⁸¹¹ For instance, the attendance in the Committee on Inland Fisheries and Aquaculture of Africa’s meetings held in 2008 and 2010 had, respectively, between 30 and 40 percent of members. See *ibid* 81–82.

requiring the GFCM to adopt recommendations on conservation and management measures with particular attention to the potential impacts on small-scale fisheries and local communities.⁸¹² The GFCM has gone beyond this requirement with initiatives that support small-scale fisheries, greatly by influence of the SSF Guidelines. As such, in 2016, the GFCM contracting parties adopted the resolution on sustainable small-scale fisheries in the GFCM area of application, and in 2018, the Regional Plan of Action for Small-Scale Fisheries (RPOA-SSF).⁸¹³ This plan outlines actions to be taken in nine main areas, one of which concerning the ‘participation of small-scale fisheries in decision-making processes’, calling for small-scale fisheries peoples’ integration in a range of fisheries-related activities, such as the creation and implementation of marine development strategies, MPAs, marine spatial planning at the regional level, and co-management systems.⁸¹⁴ In 2020, the GFCM recommendations were issued under the monitoring framework for the implementation of the RPOA-SSF, in response to which the GFCM has been co-organizing annual dedicated forums, which serve as a platform for the general public interested in small-scale fisheries to engage in the sharing of information, knowledge and experiences on small-scale fisheries.⁸¹⁵ A GFCM 2030 Strategy was adopted in 2021, reinforcing the promotion of policies that support and recognize small-scale fisheries’ contributions to food security, employment and income for coastal communities.⁸¹⁶ Additionally, in 2022, the third meeting of the GFCM Working Group on Small-Scale Fisheries resulted in the adoption of a workplan, which include the follow-up action of identifying and implementing best practices in participatory processes.⁸¹⁷

⁸¹² GFCM Agreement art 5(a).

⁸¹³ GFCM, Ministerial Declaration on a Regional Plan of Action for Small-Scale Fisheries in the Mediterranean and the Black Sea (Malta, 26 September 2018).

⁸¹⁴ *ibid* 29–37.

⁸¹⁵ GFCM, ‘SSF Forum’ <<https://www.fao.org/gfcm/activities/fisheries/small-scale-fisheries/ssfforum/en/>> accessed 6 January 2023.

⁸¹⁶ GFCM, Resolution GFCM/44/2021/12 on a GFCM 2030 Strategy for sustainable fisheries and aquaculture in the Mediterranean and the Black Sea.

⁸¹⁷ GFCM, ‘Report of the Working Group on Small-Scale Fisheries (WGSSF)’ <<https://www.fao.org/gfcm/technical-meetings/detail/en/c/1504474/>> accessed 6 January 2023.

These activities promoted by the GFCM empowers the small-scale fisheries sector in the region, but it remains unclear the extent to which such work has effectively enabled small-scale fisheries peoples to participate in the GFCM meetings and contribute to the decisions adopted by the GFCM members. The GFCM has conducted ‘ad hoc trainings and workshops’ through the Small-Scale Fisheries Forum to enhance opportunities for participation of small-scale fisheries organizations in the GFCM initiatives,⁸¹⁸ but the progress made in relation to participatory decision-making process with small-scale fisheries peoples seem to be primarily, if not only, at the national and local levels.⁸¹⁹ Nevertheless, the GFCM dedicated work on small-scale fisheries represents good practice which other RFBs can learn from, while illustrating how RFBs can promote the law-making effects of the SSF Guidelines, through the RPOA-SSF, ultimately supporting states to enhance the way they address small-scale fisheries issues at the national level as well.⁸²⁰

In continuing the analysis of RFBs, I proceed to examine certain RFBs established outside the auspices of the FAO, and which are relevant to small-scale fisheries.

6.1.2. Coastal fisheries in other regional fishery bodies

RFBs whose application area covers tropical marine areas where most small-scale fisheries operate include RFABs such as the Pacific Islands Forum Fisheries Agency (FFA), the Secretariat of the Pacific Community (SPC), and the Caribbean Regional Fisheries Mechanism (CRFM). It also includes RFMOs such as the IATTC, ICCAT, and WCPFC. Let me explain each of their relevance to small-scale fisheries.

In the case of the FFA, while its vision is centred on the socioeconomic benefits arising from sustainable *offshore* fishing, the FFA’s strategic plan generally refers to strategies of improving ‘national capacity’ to support regional management of offshore fisheries, and to facilitate ‘stakeholders’ engagement and participation in offshore

⁸¹⁸ FAO, ‘The State of Mediterranean and Black Sea Fisheries 2022. General Fisheries Commission for the Mediterranean’ (FAO 2022) 115 <<https://www.fao.org/3/cc3370en/cc3370en.pdf>> accessed 27 January 2023.

⁸¹⁹ Participation in decision-making processes was indicated as one of the areas where contracting parties have noted most progress, through continued and new participatory schemes and fisheries co-management. See *ibid* 114 and 117.

⁸²⁰ Nakamura, ‘Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries’ (n 26) 61–62.

fisheries management decisions'.⁸²¹ Part of the FFA's action programme on oceanic fisheries management includes specific actions designed to small-scale fisheries, such as developing new strategies to support island communities' subsistence and small-scale fisheries, due to the growing dependence on offshore fisheries and continuous coastal fisheries' decline.⁸²² The FFA also has a Gender Equity Framework, which calls upon the FFA member states to 'engage in both the offshore and *onshore* sectors of the industry as they apply to catching, processing, marketing, management and IUU enforcement operations'.⁸²³ The link between offshore tuna fisheries and small-scale fisheries is noted in the FFA's work on climate change impacts as well. A recent report noted that the sustainability in tuna fisheries can effectively 'contribute to the food security of Pacific Island communities given the predicted declines in coastal fisheries resources'.⁸²⁴ This shows the importance given by the FFA to the participatory management and conservation of tuna fisheries, most valuable to both offshore and onshore fisheries, thus demanding the involvement of both fisheries in the process of adopting management decisions.

In turn, the SPC has a broad vision for a 'resilient Pacific', addressing the social, cultural, environmental and climate change aspects of the region, where sustainable fisheries are one of the various sectors covered.⁸²⁵ A dedicated programme on coastal fisheries has led important legal activities, notably facilitating the adoption of the 'New Song' for coastal fisheries' policy,⁸²⁶ guiding the drafting of coastal fisheries legislation,⁸²⁷ and ensuring supportive legal frameworks for scaling-up community-based fisheries management at national and sub-national levels.⁸²⁸ The New Song was

⁸²¹ FFA, Strategic Plan 2020-2025.

⁸²² FFA, Strategic Action Programme for the Sustainable Management of Living Oceanic Resources by the Small Island Developing States of the Western and Central Pacific, 2018 22 and 58.

⁸²³ FFA Gender Equity Framework para 15 emphasis added.

⁸²⁴ FFA, 'Pacific Islands Forum Fisheries Agency Annual Report FY 2020-2021' 19 <<https://www.ffa.int/system/files/2020-2021%20FFA%20Annual%20Report.pdf>>.

⁸²⁵ SPC, Strategic Plan 2022-2031: sustainable Pacific development through science, knowledge and innovation.

⁸²⁶ SPC, A new song for coastal fisheries – pathways to change' (endorsed by the 11th Ministerial Forum Fisheries Committee Meeting, Tuvalu, 2015).

⁸²⁷ SPC, 'Drafting Coastal Fisheries Legislation: A New Training Course Available Online! (Newsletter #167)'.
⁸²⁸ SPC, Pacific Framework for Action for Scaling up Community-based Fisheries Management 2021-2025 objective 3.

considered ‘a workable operationalisation’ of the SSF Guidelines in the Pacific, as both policies follow similar principles and recommendations, but the New Song has a strong emphasis on community-based approaches to fisheries, which is in line with the regions’ needs and particularities.⁸²⁹ The SPC initiative on community-based fisheries management aims to strengthen the capacity of coastal communities and community leaders, and their participation in decision-making within the Pacific Island countries and territories.⁸³⁰ This empowers the communities at local level, consolidating their resources ownership and traditional knowledge, and can lead to more powerful participation in regional fisheries decision-making processes. Yet, similarly to the GFCM, it is not clear if the participation of trained individuals or groups is realized in RFBs’ meetings.

In the CRFM, the 2020 Common Fisheries Policy provides for a guiding principle on ‘participatory approach’, which takes into account the ‘special needs of traditional, subsistence, artisanal and small-scale fishers’.⁸³¹ It also calls upon CRFM member states to support and protect the rights of such fishers,⁸³² providing a Protocol on Securing Sustainable Small-Scale Fisheries for Caribbean Community Fisherfolk and Societies, by which the members ‘agree to incorporate the SSF Guidelines into the Policy, and into programmes, plans and other initiatives of their fisheries authorities’.⁸³³ Notably, this Protocol encourages the regional implementation of the SSF Guidelines based on ‘meaningful and substantive participatory, consultative, multi-level, inter-sectoral and objective-oriented’ governance and management processes, which integrate the ‘voices and perspectives of all stakeholders, including men and women, and young people and the elderly’, based on the EAF.⁸³⁴

⁸²⁹ Andrew Song, Philippa J Cohen and Tiffany H Morrison, ‘Policies in Harmony? Does the New Song Agree with the Small-Scale Fisheries Guidelines?’ 38 SPC Traditional Marine Resource Management and Knowledge Information Bulletin 26.

⁸³⁰ SPC Pacific Framework for Action for Scaling up Community-based Fisheries Management 2021-2025 (n 828) objectives 1 and 2.

⁸³¹ CRFM, Caribbean Common Fisheries Policy (CRFM Special Publication No. 26, 2020). at para 5(d). This is also enshrined in CRFM, CRFM Third Strategic Plan 2022-2030 (CRFM Administrative Report, 2021) 8.

⁸³² CRFM Caribbean Common Fisheries Policy (CRFM Special Publication No. 26, 2020) (n 831) para 10(f).

⁸³³ *ibid* annex 1, art 2.1.

⁸³⁴ *ibid* annex 1, art 3.1.

Notwithstanding this enabling framework, it remains to be seen whether member states are actually implementing these commitments.

In the RFMOs' regime, there has been some legal developments relevant to small-scale fisheries, pursuant to certain RFMOs' constituent instruments or in the conservation and management measures adopted, but these developments have not provided or fostered small-scale fisheries peoples' participation in decision-making processes. As I will demonstrate in section 6.3, the participatory approach covered in certain RFMOs regimes is limited, linked to the transparency principle. Specific conservation and management measures for small-scale fisheries have been adopted by ICCAT members, through the ICCAT Recommendation 21-08, which amends recommendations establishing the multi-annual management plan for bluefin tuna in the Eastern Atlantic and Mediterranean.⁸³⁵ Members agreed for the application of 'sectorial quotas', which can be 'alternatively applied' to 'small-scale coastal vessels',⁸³⁶ pursuant to two conditions: that the small-scale coastal vessel is authorized to fish for bluefin tuna and that the concerned state applies the additional measures to closely monitor the fleet's quota consumption.⁸³⁷ Small-scale coastal fleet fishery in the Mediterranean, which fish by baitboats, longliners and handliners are restricted to the minimum size control of bluefin tuna of eight kg or 75 cm.⁸³⁸ A limit of two percent of the member's quota can be allocated for bluefin tuna among the small-scale coastal vessels for fresh fish in the Mediterranean.⁸³⁹ These ICCAT measures impose direct restrictions and requirements for small-scale fisheries, thus raising the interest and need for participation of small-scale fisheries peoples in ICCAT meetings. Due to time constraints, it was not possible to investigate the extent of small-scale fisheries peoples' participation in this forum.

Differently, in the IATTC regime, the Resolution C-15-04, concerning the conservation of *mobulid rays* caught in association with fisheries in the IATTC

⁸³⁵ ICCAT Recommendation 21-08 by ICCAT amending the Recommendation 19-04 amending the Recommendation 18-02 establishing a multi-annual management plan for bluefin tuna in the Eastern Atlantic and the Mediterranean (entered into force 17 June 2022) (n 595).

⁸³⁶ See the definition provided in footnote n 606 and *ibid* 3(dd).

⁸³⁷ *ibid* 17(a).

⁸³⁸ *ibid* 34(b).

⁸³⁹ *ibid* annex 1, para 3.

Convention area, contains a provision that exempts the application of the measures to small-scale fisheries ‘exclusively for domestic consumption’ in members’ developing countries.⁸⁴⁰ IATTC members have also acknowledged the need for improved data and understanding of the impacts on fishing mortality of sharks by multi-species longline fishing vessels that include artisanal and industrial fleets.⁸⁴¹ In turn, the WCPFC’s Convention⁸⁴² contains two provisions explicitly referring to small-scale fisheries: article 5(h), which mirrors article 5(i), UNFSA, thus requiring WCPFC members to, in giving effect to their duty to cooperate for conserving and managing highly migratory fish stocks under its scope to ‘take into account the interests of artisanal and subsistence fishers’; and article 30(2)(b), which sheds light on ‘the need to avoid adverse impacts on, and ensure access to fisheries, by subsistence, small-scale and artisanal fishers and fishworkers, as well as indigenous peoples’, with particular attention to developing (including small islands) state parties, territories and possessions.

While the advisory RFBs seen above are advancing the policy work and capacity-building support to small-scale fisheries peoples, there is little coverage of these peoples’ issues in the RFMOs’ legal instruments, except for ICCAT, which has a more elaborated system in place that includes quotas and other requirements for small-scale fisheries. Let me move on to analyse subregional fishery bodies and RFBs through which states cooperate for fisheries management and conservation in transboundary watercourses.

6.1.3. Subregional and regional fisheries management in inland waters

While the term ‘small-scale fisheries’ has been used widely in fisheries, the differentiation of this sector as a standalone fisheries subsector is not evident (nor even perhaps necessary) in RFBs for which small-scale fisheries are inherently important.

⁸⁴⁰ IATTC, Resolution C-15-04 on the Conservation of Mobulid Rays caught in Association with Fisheries in the IATTC Convention Area (89th IATTC Meeting, Guayaquil, 22 June – 3 July 2015) para 5.

⁸⁴¹ IATTC, Resolution C-21-06 amendment to Resolution C-19-05 on the Conservation Measures for Shark Species, with special emphasis on the Silky Shark (*Carcharhinus falciformis*), for the years 2022 and 2023 (98th IATTC Meeting (resumed), by videoconference, 18-22 October 2021).

⁸⁴² WCPFC Convention.

This is due to the RFB's geographical coverage, which may include states' EEZs and influence the management and conservation of transboundary aquatic species that span EEZs and territorial waters. Consequently, for RFBs that govern subregions across the EEZs of few states, it is likely that the RFBs' strategies, policies, and activities cover small-scale fisheries, falling under the general term 'fisheries' and without receiving a special focus. The same rationale applies to RFBs whose area of application covers a transboundary watercourse (e.g., river or lake) shared by two or more states. I therefore proceed to examine cases where either small-scale fisheries are explicitly addressed or, if not, the participatory mechanism is in place to enable the participation of small-scale fisheries peoples in the relevant RFBs' meetings.

The SRFC is an example of subregional fishery body that provides for explicit legal requirements for small-scale fisheries. Let me provide a quick overview of this subregional fishery body first. The SRFC covers a marine coastal area of 1.6 million km², comprising its seven Western African member States: Cabo Verde, Mauritania, Senegal, Gambia, Guinea-Bissau, Guinea, and Sierra Leone.⁸⁴³ The SRFC fleet roughly includes '36,000 *boats* and more than 1,200 industrial vessels',⁸⁴⁴ thus with most boats being artisanal. Estimates point to nearly 40 percent of share of small-scale fisheries in the subregional catch.⁸⁴⁵ As such, the studies, recommendations, and guidelines issued by the SRFC are important to the small-scale fisheries of this subregion. The SRFC is an advisory body, thus without the mandate to adopt legally binding measures. The SRFC Convention, revised in 2012 following the ITLOS Advisory Opinion,⁸⁴⁶ applies to the marine areas under jurisdiction of the SRFC member states,⁸⁴⁷ providing general requirements for the fisheries sector, and specific ones for small-scale fisheries.⁸⁴⁸ For instance, when entering into fishing access

⁸⁴³ SRFC, 'Presentation' (2016) <<http://spcsrcp.org/en/presentation>> accessed 6 January 2023.

⁸⁴⁴ This is according to the information provided in 2013, as supporting documentation to the request for an advisory opinion to the ITLOS. See *ibid*.

⁸⁴⁵ SRFC (n 553) 24.

⁸⁴⁶ SRFC (n 553).

⁸⁴⁷ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the SRFC's Members (adopted 8 June 2012, entered into force 16 September 2012) art 1(2).

⁸⁴⁸ The delineation of what SSF are, pursuant to the SRFC Convention, is explained in its article 20 on the characterization of artisanal fisheries. See subchapter 4.3.

agreements or other arrangements with non-member states, the SRFC member states are required to consider the ‘legitimate interests’ of local fishers and communities ‘which survive exclusively or mainly on fishing’.⁸⁴⁹ Additionally, a reliable system for data collection for artisanal fisheries must be put in place by states ‘jointly with all the stakeholders involved’.⁸⁵⁰ SRFC member states are required to regulate small-scale fisheries as regards: identification and registration of vessels; catch reporting; safety at sea; conditions of access for artisanal fishing; monitoring, control and surveillance for protecting reserved areas for artisanal fishing.⁸⁵¹

Moving on to the transboundary watercourses fisheries context, the Mekong River Commission (MRC) offers an important participatory mechanism for small-scale fisheries peoples’ participation that is worth noting. The MRC covers the Mekong River Basin, which is the longest river in Southeast Asia.⁸⁵² The Commission has four member states: Cambodia, Lao Peoples’ Democratic Republic, Thailand, and Viet Nam, which cooperate in a range of fields of sustainable development, utilization, management and conservation of the Mekong River Basin’s resources, including fisheries.⁸⁵³ Observers may be invited to the meetings of the consultative bodies of the MRC, namely, those of the Summit and of the Council, and the sessions of the Joint Committee.⁸⁵⁴ The approval of an observer status must be granted by unanimous consent of the Council members, and are restricted to organizations and international bodies that meet specified requirements.⁸⁵⁵ Since 2017, the MRC has been organizing

⁸⁴⁹ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the SRFC’s Members (adopted 8 June 2012, entered into force 16 September 2012) art 3(4).

⁸⁵⁰ *ibid* 10(2).

⁸⁵¹ *ibid* 21–24.

⁸⁵² MRC, ‘Geography (Mekong River Commission for Sustainable Development)’ (2023) <<https://www.mrcmekong.org/about/mekong-basin/geography/>> accessed 6 January 2023.

⁸⁵³ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (Mekong Agreement) (adopted and entered into force 5 April 1995, last amended on 4 March 2011) art 1.

⁸⁵⁴ *ibid* 17 and 23.

⁸⁵⁵ That is, they must have an MoU or partnership agreement with the MRC; be UN agencies and international financial institutions that strengthen regional cooperation; qualified NGOs working on environment, water resources management, nutrition, community development and humanitarian issues at local, national and regional levels; organizations and bodies with specialized technical or scientific competences relating to the goals of the MRC; and research and scientific institutions conducting researchers on a range of environmental and social issues applicable to the sectors MRC is working to address. See MRC, Revised Rules of Procedures of

meetings of its Regional Stakeholder Forum, which is open to the wide public, for sharing of information and discussions on matters related to the equitable use of the Mekong River Basin's resources, and transboundary fisheries management.⁸⁵⁶ For the MRC, 'stakeholders' include NGOs and CSOs, and the involvement of citizens is being explored through a 'multi-stakeholder platform' for the direct engagement and periodic dialogue with MRC management.⁸⁵⁷ There are four stages for engaging with stakeholders, which include information gathering, dissemination, consultation (which can involve community meetings at national level), and participation (with active collaboration in decision-making at national and regional levels).⁸⁵⁸ The concern of the MRC with stakeholder engagement and the efforts made through the Regional Stakeholder Forum illustrates good initiatives in facilitating the participation of local communities and small-scale fisheries peoples in the issues dealt by the Commission, but it also shows that for these people to effectively participate in the relevant meetings, an organizational arrangement must be in place to represent them and, yet, their participation would be limited to the observer status, without decision-making powers.

Let me now give a brief overview of the Lake Chad Basin Commission (LCBC). This Commission was established in 1964, originally composed by four countries bordering the Lake Chad (Cameroon, Niger, Nigeria and Chad) and later expanded with the admission of the Central Africa Republic in 1996 and Libya in 2008.⁸⁵⁹ Multiple species ranging between 120 and 140 species of fish are in the Lake Chad and its tributaries, including migratory species of marsh and pond-dwelling species from rivers and lakes.⁸⁶⁰ Artisanal fishing is the main economic activity in the

the Council of the Mekong River Commission' (originally signed by the Council on 3 August 1995, Phnom Penh) r 12.

⁸⁵⁶ Topic part of the meeting in June 2022. See information on all the meetings since 2017 in MRC, 'Regional Stakeholder Forums (Mekong River Commission for Sustainable Development, 2022)' <<https://www.mrcmekong.org/news-and-events/consultations/regional-stakeholder-forums?start=10>> accessed 6 January 2023.

⁸⁵⁷ MRC, 'Handbook for Stakeholder Engagement at the Mekong River Commission (MRC, Version 2)' s 2.2.8.1.

⁸⁵⁸ *ibid* 3.3.

⁸⁵⁹ CBLT, 'About Us (Lake Chad Basin Commission, 2021)' <<https://cblt.org/about-us/>> accessed 6 January 2023.

⁸⁶⁰ LCBC, 'Report on the State of the Lake Chad Basin Ecosystem (GIZ, 2016)' 53.

subregion, attracting professional fishers from Nigeria, Mali, Ghana and Benin, non-professional seasonal fishers and occasional fishers, which sustain livelihoods of fishing communities around the Lake Chad.⁸⁶¹ Fisheries management is regulated differently by countries, for instance, led by traditional authorities in Cameroon, and through co-management or exclusively managed by government authorities in Chad and Nigeria.⁸⁶² Under the Lake Chad Basin Water Charter, the state parties have committed to ensuring sustainable utilisation of the Basin's fisheries resources and, in cooperation through the LCBC, to establish fisheries conservation reserves and harmonised national legislation and institutions for fishing in the Lake and associated watercourses.⁸⁶³ Intergovernmental organizations (IGOs) and NGOs interested or working in the Basin can participate in the LCBC's activities as observers,⁸⁶⁴ but the conditions for admission of observers in LCBC's meetings have not been detailed in rules of procedures or guidelines.

Finally, the Lake Victoria Fisheries Organization (LVFO) is considered a sub-RFMO,⁸⁶⁵ dedicated to coordinate fisheries and aquaculture management and development in the East African Community subregion, involving riparian states of Lake Victoria, originally three (Kenya, Uganda, and the United Republic of Tanzania), as established in 1994, then Burundi and Rwanda.⁸⁶⁶ The Lake Victoria is the largest inland water fishery in Africa, with more than 200 different fish species and providing direct employment to over 800,000 people.⁸⁶⁷ Since 2009, the LVFO adopts fishery management plans for a 5-year period.⁸⁶⁸ The process for developing the plan for 2016-2020 seemed to have followed a participatory approach, as it was reviewed and updated with inputs from national stakeholder consultations, and explicitly follows the

⁸⁶¹ *ibid* 73, 100–101.

⁸⁶² *ibid* 100.

⁸⁶³ Water Charter for the Lake Chad Basin (adopted April 2012) arts 33 and 34.

⁸⁶⁴ *ibid* 93.

⁸⁶⁵ The categorization of RFBs under RFABs or RFMOs follow that given by Løbach and others (n 66).

⁸⁶⁶ 'Background (Lake Victoria Fisheries Organization, 2018)' <<https://lvfo.org/content/background>> accessed 6 January 2023.

⁸⁶⁷ LVFO, Fisheries Management Plan III (FMP III) for Lake Victoria Fisheries 2016-2020 (LVFO Secretariat, 2016) 2–3.

⁸⁶⁸ LVFO Fisheries Management Plan III (FMP III) for Lake Victoria Fisheries 2016-2020 (LVFO Secretariat, 2016) (n 867).

EAF, the CCRF and the SSF Guidelines.⁸⁶⁹ Differently from the previously examined RFMOs, the conservation and management measures of this sub-RFMO are provided in the fisheries management plan, developed through a participatory process prior to being subjected to the approval of the LVFO Council of Ministers. Participation, without vote in the discussions, in sessions of the LVFO Sectoral Council of Ministers, can be granted to IGOs, NGOs or any other entity with special competence in the field of the LVFO's activities, pursuant to invitation by the Coordination Committee and the Senior Officials.⁸⁷⁰

Having examined these subregional fishery bodies, and the extent to which they have addressed small-scale fisheries, the next section continues with an analysis of two case studies, which more concretely illustrate participation of small-scale fisheries peoples in international fisheries management.

6.2. Participatory fisheries management involving two or more states

Before starting the first case study, it is important to mention that the EU, Canada, and New Zealand were selected and examined in this section for their valuable experiences in advancing the notions of participatory fisheries management, which bring useful insights to the participation of small-scale fisheries peoples in RFBs.

6.2.1. Inter-State: the European fisheries management practice

Following the revision of the EU's Common Fisheries Policy, in 2002, scientists and practitioners thoroughly examined and criticized the issue of participation in the EU fisheries governance context.⁸⁷¹ At that time, Hawkins argued for 'wider participation in the process of assembling and producing expert advice', with a view to 'extending and enriching the process of gathering information', based on new institutional arrangements, multidisciplinary and interactive broad public

⁸⁶⁹ *ibid* iv and 4.

⁸⁷⁰ Convention for the Establishment of the Lake Victoria Fisheries Organization (LVFO Convention) (adopted 30 June 1994, entered into force 24 May 1996, last amended on 29 January 2016) (LVFO Convention) art XII.

⁸⁷¹ Tim S Gray, *Participation in Fisheries Governance* (Springer 2005).

participation.⁸⁷² He illustrated his point by referring to the North Sea Commission Fisheries Partnership, which was represented by members of fishers organizations and fisheries research institutes from eight countries in the North Sea, and, as such, generated trust-based discussions on sensitive and controversial subjects, and improved the process of stocks assessment in the North Sea.⁸⁷³ This Partnership counted with support from the European Commission and the International Council for the Exploration of the Sea, and the shared understanding of all parties on commonly agreed goals, measures to achieve them, all which built mutual trust on the performed collaboration.⁸⁷⁴ With this also came challenges of, for instance, continuing coordinative efforts, funding, administrative and entrepreneurial services. That Partnership became the North Sea Regional Advisory Council, one of the first so-called ‘Regional Advisory Councils’, currently known as Advisory Councils (ACs) established in 2004.⁸⁷⁵

The ACs assist the European Commission (EC) and EU member states in developing regionally sensitive and sustainable fisheries management policies.⁸⁷⁶ They complement the work of the Advisory Committee on Fisheries and Aquaculture, which advises the EC’s proposals relating to the CFP.⁸⁷⁷ In turn, the ACs’ mandate is to advise the EC on fisheries management of specific areas and stocks, through the issuance of independent advisory opinions that are consistent with the CFP objective of ensuring sustainable fisheries based on the EAF.⁸⁷⁸ These advisory bodies have a multisector membership, with representatives from the fishing industry and other

⁸⁷² Tony Hawkins, ‘The Role of Partnerships in the Governance of Fisheries within the European Union’ in Tim S Gray (ed), *Participation in Fisheries Governance* (Springer 2005) 75.

⁸⁷³ Participation of fishers in data collection was also perceived in annual surveys about the state of the main North Sea stocks. See *ibid* 76–77.

⁸⁷⁴ *ibid* 78.

⁸⁷⁵ Five ACs were created (for Baltic Sea, Mediterranean Sea, North Sea, North Western waters, South Western waters) and two Sectoral Councils, respectively for Pelagic stocks (herring, mackerel, horse mackerel and blue whiting), and High seas/long distance fleet. See *ibid* 79; David Symes, ‘Regionalisation of Fisheries Governance: An Empty Vessel or a Cornucopia of Opportunity’ in Tim S Gray (ed), *Participation in Fisheries Governance* (Springer 2005) 100.

⁸⁷⁶ Symes (n 875) 85.

⁸⁷⁷ Hawkins (n 872) 74.

⁸⁷⁸ Ronan Long, ‘The Role of Regional Advisory Councils in the European Common Fisheries Policy: Legal Constraints and Future Options’ (2010) 25 *The International Journal of Marine and Coastal Law* 289, 291.

industries' stakeholders.⁸⁷⁹ The AC's fisheries management and conservation advice is non-binding, but unlikely ignored if adopted by consensus.⁸⁸⁰ Symes alerted that the AC's full potential was hindered by its pre-assigned limited roles, related to advice on management plans, emergency measures and management measures in the territorial sea.⁸⁸¹ Thus, if ACs were to take the opportunity to set their own terms of reference, they would need to be portrayed beyond technical advisory bodies, 'part of an essential apparatus for strategic regionalized management of marine resources', thus 'able to exercise real influence over issues of sustainability, environmental integration and the future of fishing dependent communities'.⁸⁸² Symes also recognized that involving representatives from the fishing industry is complex, due to the fissions, diverging opinions frequently seen in the sector, for instance, having to choose between a professional fisher with practical experience and an official of a fishers' organization with negotiation skills.⁸⁸³

For Gray, the EU model was an example of 'cosmetic participatory practice' in fisheries governance, enabling the EC to 'milk the RACs of all their participatory worth, while retaining the real power'.⁸⁸⁴ Participation needed 'transformation', 'endowing participants with civil and political rights' and 'genuinely integrating stakeholders and/or communities into the decision-making system'.⁸⁸⁵ Gray already suggested that this should be done through 'embed[ding] fisher's knowledge and expertise into the management process'.⁸⁸⁶ Following these harsh critiques over the participatory model of the EU, assessments from early 2010's showed different opinions. For Long, the ability of ACs to broaden stakeholder inputs was an 'excellent value for money', which improved stakeholder participation in the formulation process of the CFP policy. This was sought in the better dialogue and flow of information, more numbers of ACs' advisory opinions issued, enhanced transparency and working

⁸⁷⁹ *ibid* 293.

⁸⁸⁰ Hawkins (n 872) 79.

⁸⁸¹ Symes (n 875) 90.

⁸⁸² *ibid* 94.

⁸⁸³ *ibid* 96–97.

⁸⁸⁴ Tim S Gray, 'Participatory Fisheries Governance – Three Central Themes' in Tim S Gray (ed), *Participation in Fisheries Governance* (Springer 2005) 346.

⁸⁸⁵ *ibid* 347.

⁸⁸⁶ *ibid*.

relationship between ACs and other regulatory and advisory bodies related to the CFP.⁸⁸⁷ On the other hand, Ounanian and Hegland noted that the ACs advisory role was hindered by its own internal requirements, such as the need to gather sufficient scientific knowledge to support their advice and reaching consensus-based decisions.⁸⁸⁸ As Aanesen and others rightly pointed out, while consensus can be difficult, a diversifying level of representation in ACs would ensure more alignment of ACs and the CFP framework with the EAF.⁸⁸⁹ More involvement of ACs in integrated marine management would also be desirable.⁸⁹⁰

The ACs were reformulated in 2013 toward regionalization and bettering the fishing industry's influence over management decisions.⁸⁹¹ While most fishers group represented in the ACs are from the large-scale sector,⁸⁹² the AC reform resulted in the inclusion of additional five seats in the AC's executive committee.⁸⁹³ Yet, for small-scale fisheries researchers Leite and Pita, the ACs consist of a type of participatory arrangement that follows 'participation by consultation', where fishers and their representatives are merely consulted by management decisions and their ability to influence decision-making depend on the EC's discretion, with no mandatory power-sharing in the decision-making process.⁸⁹⁴ Additionally, the predominance of representatives from the fisheries sector in the ACs, which amounts to two-thirds, in turn, have led to another criticism on the ACs being 'dominated by economic

⁸⁸⁷ Long (n 878) 316–320.

⁸⁸⁸ Kristen Ounanian and Troels Jacob Hegland, 'The Regional Advisory Councils' Current Capacities and Unforeseen Benefits' (2012) 11 *Maritime Studies* 1.

⁸⁸⁹ Aanesen and others (n 762).

⁸⁹⁰ *ibid* 127.

⁸⁹¹ Laura Leite and Cristina Pita, 'Review of Participatory Fisheries Management Arrangements in the European Union' (2016) 74 *Marine Policy* 268, 274.

⁸⁹² Jeremy Percy and Brian O'Riordan, 'The EU Common Fisheries Policy and Small-Scale Fisheries: A Forgotten Fleet Fishing for Recognition' in José Pascual-Fernández, Cristina Pita and Maarten Bavinck (eds), *Small-Scale Fisheries in Europe: Status, Resilience and Governance* (Springer 2020) 28.

⁸⁹³ Sebastian Linke, Maris Boyd Gillette and Svein Jentoft, 'Institutionalizing Injustice? Aligning Governance Orders in Swedish Small-Scale Fisheries' in Svein Jentoft and others (eds), *Blue Justice: Small-Scale Fisheries in a Sustainable Blue Economy* (Springer 2022) 535.

⁸⁹⁴ A recent systematic review of 40 cases of 'participatory fisheries management arrangements' in the EU demonstrated that most cases concerned a single country, and the seven cases involving various States, through the EU, included ACs, found to perform 'participation by consultation'. See Leite and Pita (n 891) 269–272 and Table 3.

interests’, leaving environmental concerns aside,⁸⁹⁵ and overlooking ‘grassroots interests’.⁸⁹⁶ Since the CFP reform process, small-scale fisheries peoples began to echo their voices in the European fisheries governance landscape, with their participation as a distinct and united group, ultimately culminating in the establishment of the ‘Low Impact Fishers of Europe’.⁸⁹⁷ With the support of this platform, additional four small-scale fisheries organizations joined the Baltic Sea Advisory Council’s executive committee in 2018, but from the concerned small-scale fisheries peoples’ perspective, their effective and meaningful participation in the overall AC’s fisheries governance decision-making remains unsatisfactory.⁸⁹⁸ In December 2021, the EC amended the Delegated Regulation (EU) 2015/242 with a view to improve ACs functioning and representation.⁸⁹⁹ However, the text of paragraphs 4 and 7 of article 4, which are relevant to small-scale fisheries, either grant discretionary power to the ACs’ general assembly to consider small-scale fisheries’ needs, or use qualified language with soft requirements. As such, article 4(4) of the Delegated Regulation empowers the AC’s general assembly to potentially add representatives (up to five) in the executive committee for appropriate representation of small-scale fleets. In turn, article 4(7) requires (in qualified language) the ACs’ general assembly and executive committee to ensure ‘balanced and wide representation of all stakeholders, with emphasis on other interest groups and, *where appropriate*, small-scale fleets’. This provision also recommends the number of small-scale fleets’ representatives to reflect the share of small-scale fleets of the concerned states’ fisheries sector. It remains to be seen

⁸⁹⁵ Marion Dryer and Piet Sellke, ‘The Regional Advisory Councils in European Fisheries: An Appropriate Approach to Stakeholder Involvement in an EU Integrated Marine Governance’ in Michael Gilek and Kristine Kern (eds), *Governing Europe’s Marine Environment: Europeranization of Regional Seas or Regionalization of EU Policies* (EBSCO Publishing 2015) 126.

⁸⁹⁶ *ibid* 317.

⁸⁹⁷ Called ‘LIFE’, it functions as ‘a professional, member-based organisation engaged in decision-making processes’. At the time of writing, it is constituted by 33 organizations in 15 EU Member States. See Percy and O’Riordan (n 892) 28–30.

⁸⁹⁸ Linke, Gillette and Jentoft (n 893) 535–544. Gray and Catchpole also recently reiterated the limited advisory role performed by the ACs, which ‘do not share any executive decision-making authority with the European Commission’. See Tim S Gray and Thomas L Catchpole, ‘The Relation between Fisheries-Science Partnerships and Co-Management: A Case Study of EU Discards Survival Work’ 13 *Sustainability* 1, 6.

⁸⁹⁹ European Commission Delegated Regulation (EU) of 8 December 2021 amending the Delegated Regulation (EU) No 2015/242 laying down detailed rules on the functioning of the Advisory Councils under the Common Fisheries Policy para 1.

whether this amendment will result in enhanced participation of small-scale fisheries organizations in the relevant decision-making processes of the EU fisheries governance.

Another criticism recently posed to the EU context regards the fisheries-science partnership (FSP).⁹⁰⁰ Gray and Catchpole criticize the way FSP has been conducted by the EU, where the reports developed by the Scientific, Technical and Economic Committee for Fisheries (STECF) are drafted and revised primarily by the scientists, considered as ‘experts’, without the actual participation of fishers, who are rather invited to the STECF as ACs members with an ‘observer’ status.⁹⁰¹ For Gray and Catchpole, the lack of power-sharing in the EU rapid research exercise on discard survival signals a persisting unsatisfactory outcome for participatory fisheries management approaches under the CFP.⁹⁰² The authors’ analysis adds another unpromising take on the EU fisheries governance experiences, which, despite having changed to address the needs for enhanced participatory arrangements, remains insufficiently participatory in practice. While this scenario shows greater challenges than effective change for the benefit of small-scale fisheries, the EU seems to be at least moving toward integrating small-scale fisheries peoples in fisheries management decision-making.

There is more to learn from other case studies, so let me turn to the next one, involving Indigenous peoples and tribes.

6.2.2. Tribes and fisheries organizations in Canada, USA, and New Zealand

I start with the case concerning transboundary aquatic species in inland waters shared by two states. The so-called ‘Columbia River’ spans the Canada-USA border. This river has been subject of a long history of contentious relationships between, on the one hand, governments and private actors aimed at exploiting the river, and, on the other hand, the Indigenous peoples and riverside communities whose livelihoods,

⁹⁰⁰ Described as ‘an arrangement whereby fishers work with scientists on joint projects to co-produce knowledge that is of mutual interest, and each party treats the other with equal respect, but the leading role is normally taken by scientists’. See Gray and Catchpole (n 898) 5.

⁹⁰¹ *ibid.* at 5.

⁹⁰² *ibid.* 14–15.

culture and fishing traditions rely on the river's resources.⁹⁰³ Salmon, an anadromous species subject to article 66, LOSC,⁹⁰⁴ is one of the species present in the Columbia River, and is considered fundamental to the cultural identity, ceremonies, story-telling, and practices of Indigenous peoples and riverside communities along that river.⁹⁰⁵ In 1977, four tribes established the Columbia River Inter-tribal Fish Commission (CRITFC)⁹⁰⁶ with the view, in part, to 'hold the state accountable for its commitment to Indigenous Peoples' as regards the Columbia River.⁹⁰⁷ The CRITFC is one of the various inter-tribal organizations that have been construed based on linguistic or cultural boundaries.⁹⁰⁸ As such, it has been contributing to the development of regional recommendations put forward in the process of renegotiating the Columbia River Treaty between Canada and the USA.⁹⁰⁹ Commentators have recognized significant contributions of the CRITFC to the fisheries management and conservation decisions, considering the Commission's 'highly sophisticated science and policy agency', which have allowed the Indigenous peoples concerned to engage in the restoration of salmon and other species in the Columbia River, and manage Tribal harvest allocation on the river.⁹¹⁰ Importantly, as Cantzler notes, the CRITFC and the Northwest Indian Fisheries Commission (NWIFC) cooperate with state and federal fisheries regulatory regimes, while being able 'to operate independently for the benefit of tribal fishing rights on terms that are defined by the tribes themselves', providing scientific, legal and political assistance to tribes.⁹¹¹ As such, inter-tribal organizations preserve and maintain their own tactics and ways of deciding upon fishing rights of their concern,

⁹⁰³ Alice Cohen and Emma S Norman, 'Renegotiating the Columbia River Treaty: Transboundary Governance and Indigenous Rights' 18 *Global Environmental Politics* 4, 4.

⁹⁰⁴ See subchapter 1.1.2.

⁹⁰⁵ Cohen and Norman (n 903) 15–16.

⁹⁰⁶ See 'We Are All Salmon People (Columbia River Inter-Tribal Fish Commission, 2022)' <<https://critfc.org>> accessed 6 January 2023.

⁹⁰⁷ *ibid* 15.

⁹⁰⁸ Not on ecological or state boundaries. See *ibid* 18.

⁹⁰⁹ 'We Are All Salmon People (Columbia River Inter-Tribal Fish Commission, 2022)' (n 906).

⁹¹⁰ Barbara Cosens and others, 'Reconciliation of Development and Ecosystems: The Ecology and Governance in the International Columbia River Basin' (2018) 18 *Regional Environmental Change* 1679, 1686.

⁹¹¹ Julia Miller Cantzler, *Environmental Justice as Decolonization. Political Contention, Innovation and Resistance Over Indigenous Fishing Rights in Australia, New Zealand, and the United States* (Routledge 2022) 117.

in close interaction with the governmental counterparts and relevant stakeholders. Other important contributions these inter-tribal organizations bring to the Columbia River basin's sustainable management are their knowledge and activities on fisheries restoration, mitigation, and adaptation efforts to address climate change impacts.⁹¹²

Another example of good practice in participatory fisheries management, which connects government stakeholders and representatives from Indigenous peoples is perceived in the New Zealand's Māori fisheries governance. Memon and Kirk explain the Māori commercial fisheries landscape as governed by a multi-scalar framework, which includes both national and regional settings.⁹¹³ The latter places Māori as either a commercial quota stakeholder in co-management arrangements to collectively manage commercial fisheries, or as pan-tribal, iwi and hapu institutional settings, which allocate them a commercial quota on a collective basis.⁹¹⁴ Cantzler further explains that regional forums have been created for coordinating Māori people's inputs to the Ministry of Fisheries with respect to customary fisheries management.⁹¹⁵ These regional forums support Māori in building their regulatory capacity through a range of activities, such as legal training, exchange of scientific and customary knowledge, awareness-raising of Māori's management practices, and ultimately contributes to developing a trust-based relationship between the New Zealand government and the Māori.⁹¹⁶ Among the fisheries organizations, the most powerful ones are the Te Ohu Kaimoana and the Aotearoa Fisheries Limited, which support their communities' representatives in the negotiations about fishing rights and investments.⁹¹⁷ A notable example of regional forum is the Hokianga Accord, aimed at broadening the participation of Māori non-commercial claimants into fisheries management decisions.⁹¹⁸ Their advocacy also contributes to strengthening Māori fisheries

⁹¹² Kyle Dittmer, 'Changing Streamflow on Columbia Basin Tribal Lands – Climate Change and Salmon' 120 *Climatic Change* 627.

⁹¹³ P Ali Memon and Nicholas A Kirk, 'Maori Commercial Fisheries Governance in Aotearoa / New Zealand within the Bounds of a Neoliberal Fisheries Management Regime' (2011) 52 *Asia Pacific Viewpoint* 106.

⁹¹⁴ *ibid.*

⁹¹⁵ Cantzler (n 911) 100.

⁹¹⁶ *ibid.*

⁹¹⁷ *ibid* 101.

⁹¹⁸ *ibid* 141.

management methods, which are argued to be ‘better suited for rebuilding and protecting local fisheries than any unilateral allocation regime imposed by the national government’.⁹¹⁹

The two experiences examined above demonstrate the potential for effective and powerful impact of inter-tribal organizations and fisheries organizations at subregional or regional settings, and the concrete benefits they can bring to small-scale fisheries peoples, who are capacitated to negotiate with governments while being able to maintain their traditions, tactics, knowledge, for better management and conservation of transboundary aquatic species at stake. Importantly, it was useful to learn that the participation of small-scale fisheries peoples may be, in effect, operationalized through other forms of representation, such as customary arrangements and Indigenous peoples organizations. These experiences, coupled with the EU practice, reflect opportunities in international fisheries management for advancing the participation of small-scale fisheries peoples in RFBs.

I now pass on to focus the analysis on examining transparency in the RFMOs frameworks as an entry point for small-scale fisheries peoples’ participation.

6.3. The debate on transparency in regional fisheries management organizations

A recent topic of concern illuminated by international fisheries law scholarship relates to the rules of transparency in this domain.⁹²⁰ As Harrison notes, transparency is a concept with multiple definitions, but, in international fisheries law, it is generally associated with the provisions of access to and sharing of information on fisheries management, conservation, monitoring, control, surveillance, as well as on effective participation in fisheries decision-making processes.⁹²¹ Transparency contributes to enhancing fisheries good governance by facilitating trust-building, strengthening confidence and compliance with fisheries rules.⁹²² Wisner expands on the benefits from public participation in the RFMOs’ context, by identifying a range of these benefits

⁹¹⁹ *ibid* 142.

⁹²⁰ James Harrison, ‘International Transparency Obligations in Fisheries Conservation and Management: Inter-State and Intra-State Dimensions’ (2022) 136 *Marine Policy* 1.

⁹²¹ *ibid*.

⁹²² *ibid*.

such as greater levels of legitimacy and ease in public acceptance of decisions, better quality of decision-making, increased accountability and deterrent to non-compliance, and the possibility to usefully assist developing states in their capacities to negotiate and defend their interests.⁹²³ Additionally, and in consonance with what I suggest in section 5.1.2, Guggisberg, Jaeckel, and Stephens contend that the ‘involvement of a broader range of participants including non-state actors may contribute to a form of “deliberative democracy” (...),’ and that ‘providing governments and citizens with opportunities to communicate and reflect upon preferences, judgements, and values on matters of common concern improves the quality of governance’.⁹²⁴

The UNFSA, article 12(1), requires state parties to ‘provide for transparency in the decision-making process and other activities of subregional and regional fisheries management organizations and arrangements’.⁹²⁵ Paragraph 2 of that provision further encourages representatives from IGOs and NGOs concerned to ‘be afforded the opportunity to take part in meetings’ of RFMOs as *observers*, subject to the RFMOs’ procedures.⁹²⁶ This provision also states that such procedures ‘shall not be unduly restrictive’ in respect of observers’ admissions, and the concerned organizations ‘shall have timely access to the records and reports’ of RFMOs, pursuant to RFMOs’ procedural rules on access to information.⁹²⁷ Evidently, it is under the scrutiny of RFMOs to detail the level of transparency in the decision-making processes, including the criteria and requirements for observers’ selection and admission, the powers of observers and the degree of their influence in decision-making. While such discretion allows for a wide leeway for RFMO members to decide based on their interests and preferences, there seems to be a trend in how the requirements usually provided for admitting non-states’ actors, as it will become evident from the analysis below. In general, one could assume that this trend does not favour openness and transparency in practice, because the decisions made in RFMOs plenary sessions are generally still based on power imbalances, from both the perspectives of developing states and non-

⁹²³ Wiser (n 624) 100–103.

⁹²⁴ Solène Guggisberg, Aline Jaeckel and Tim Stephens, ‘Transparency in Fisheries Governance: Achievements to Date and Challenges Ahead’ (2022) 136 *Marine Policy* 1, 3.

⁹²⁵ UNFSA art 12(1) emphasis added.

⁹²⁶ *ibid* 12(2).

⁹²⁷ UNFSA.

state actors that cannot afford to participate in such meetings.⁹²⁸ This may not be the case in all RFMOs, as small island developing states play a significant role in the negotiations of the WCPFC, for example. I will get back to this when exploring the RFMOs' procedures in detail.

Studies assessing the level of transparency in RFMOs decision-making highlight important aspects of non-state actors' participation. Clark, Ardron and Pendleton found that eleven RFMOs⁹²⁹ allow for NGOs to make comments during the meetings, but in only five of these RFMOs, the NGOs concerned could actually participate in sub-committees or working groups.⁹³⁰ This study, however, does not detail the composition of the representatives of the fishing industry, let alone the extent, if any, of representatives from the small-scale fisheries sector. In turn, the study of Petersson and others on the participation of non-state actors in the meetings of five tuna RFMOs,⁹³¹ between 2004 and 2011, noted that the proportion of non-state actors attending these meetings is high but vary across RFMOs and over time,⁹³² and that non-state actors are mostly representatives from the fishing industry (companies and associations), followed by NGOs and research institutions, with a few portion of law firms and consultancies, and 'no representatives from coastal communities or fishing boat crews', likely due to the lack or poor financial and organizational capacities of these groups.⁹³³ Unsurprisingly, the representation of non-state actors from high-income countries was found to be far more often than that from developing countries.⁹³⁴ Petersson and others also highlighted that fishing industry representatives have historically influenced RFMOs decision-making processes by participation in the delegations of member states or cooperating non-member states, but the study does not differentiate the fishing industry within those delegations, whether it included both

⁹²⁸ Guggisberg, Jaeckel and Stephens (n 924) 4.

⁹²⁹ The examined RFMOs were CCAMLR, Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Inter-American Tropical Tuna Commission (IATTC), ICCAT, IOTC, IWC, NAFO, NEAFC, SEAFO, SPRFMO and WCPFC. See Clark, Ardron and Pendleton (n 115) 162–163.

⁹³⁰ CCAMLR, IATTC, IOTC and SEAFO. See *ibid*.

⁹³¹ The selected RFMOs were the CCSBT, IATTC, ICCAT, IOTC and WCPFC. See Petersson and others (n 800).

⁹³² *ibid* 149.

⁹³³ *ibid* 149–151.

⁹³⁴ *ibid* 152.

small-scale and large-scale fisheries sectors.⁹³⁵ While the study is relevant, one would need to investigate the RFMOs meetings with a focus on small-scale fisheries peoples to understand their level of participation, considering that these could take part as either members of states' delegation, or as part of NGOs or other form of participation as observer. Additionally, one would need to clarify the extent to which states' delegation and observers in effect consider and defend small-scale fisheries peoples' interests in the negotiations.

Dellmuth and others focused on environmental NGOs participation, showing that the meetings of seven RFMOs⁹³⁶ have included the participation of such non-state actors (as well as fishing companies, fishing industry associations, private research institutes, and consultancies), but the density of environmental NGOs in the annual meetings vary by RFMO and largely depend on the respective state's democratic systems in recognizing NGOs' roles, national capacity to support technical expertise and the availability of funds.⁹³⁷ Moreover, the discretionary power of RFMO's members in respect of the admission of observers in RFMOs meetings is reflected in the possibility of members rejecting the observer's request, leading to a minority or majority of objections and possibly denying the observer's participation, depending on the RFMOs rules of procedures.⁹³⁸ These procedures have reasonably led to the impression that, as Fischer rightly notes, 'observers are more tolerated than valued, and that worries about possible misrepresentation have shaped some of the more rigid RFMO rules for observer participation'.⁹³⁹

These studies are limited to a certain timeframe, specific RFMOs, and NGOs' participation. However, the findings provide useful information on the level of participation of small-scale fisheries peoples in RFMOs meetings. Petersson and others note the absence of representatives from coastal communities in five tuna-

⁹³⁵ *ibid* 151.

⁹³⁶ These were selected based on the information found by the researchers on non-State actor participation in meetings and stock assessment data, in meetings occurring from 1980 to 2014. These RFMOs included: CCAMLR, CCSBT, IATTC, ICCAT, IOTC, NAFO and WCPFC). See Dellmuth and others (n 800).

⁹³⁷ *ibid* 7 and 9.

⁹³⁸ Johanne Fischer, 'How Transparent Are RFMOs? Achievements and Challenges' (2022) 136 *Marine Policy* 1.

⁹³⁹ *ibid* 8.

RFMOs studies until 2011, which shows the deficit in ‘public space’, as those RFMOs’ meetings were restricted to participants with access to funds or high financial and technical capacities that enable their participation in these forums.⁹⁴⁰ Moreover, the admission of non-state actors in RFMOs’ meetings do not mean they can participate under similar conditions. Dellmuth and others note that CSOs have access to these meetings mostly through accreditation as observers, whereas fishing industry representatives participate in either the delegation of member states or of cooperating non-member states, being in a better position to mobilize and influence the RFMOs decision-making.⁹⁴¹ Hence, RFMOs’ meetings purport a rather biased ‘empowered space’, which is restricted to those able to reach or influence national delegations entitled to voting powers. Without sufficient ‘public space’ and ‘empowered space’, other features of deliberative democracy cannot be realized, at least at the concerned regional levels. Let me now examine transparency in the RFMOs normative instruments.

6.4. Assessing transparency in selected regional fisheries legal frameworks

The RFMOs’ decision-making processes are led by governments and fishing entities,⁹⁴² members of or contracting parties to RFMOs. Other states may participate as cooperating non-members or non-contracting parties,⁹⁴³ and, like IGOs, NGOs, CSOs and other non-state actors, may act as observers in these forums. The participation of small-scale fisheries peoples could, thus, occur where it is possible for them to take part in a state’s delegation, or to attend the meeting as an observer. Exploring the requirements for the admission of non-state actors as observers in certain RFMOs is helpful to clarifying the possibilities and challenges for operationalizing the

⁹⁴⁰ Petersson and others (n 800).

⁹⁴¹ *ibid* 147–148.

⁹⁴² The explicit reference to ‘fishing entities’ in the UNFSA has paved the way for the participation of Taiwan, a major player in fisheries. See Nien-Tsu Alfred Hu, ‘Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan’s Perspective’ (2006) 37 *Ocean Development & International Law* 149.

⁹⁴³ This cooperating status grants States and fishing entities with the opportunity to enrol in fishing related activities with members, but it does not entitle the cooperating non-members the right to participate in decision-making processes. See Erik Molenaar, ‘Participation in Regional Fisheries Management Organizations’ in Richard Caddell and Erik Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019) 127–128.

participation of small-scale fisheries peoples in these forums. Each RFMO has its constituent instrument and rules of procedures that detail certain matters, including the requirements for admitting observers in the RFMO's meetings. These requirements elaborate on article 12(2), UNFSA, mentioned above, which provides for the right of representatives from IGOs and NGOs to participate in RFMOs' meetings as observers in accordance with the RFMOs' rules of procedures, not 'unduly restrictive'. I proceed to examining the requirements of certain RFMOs covering whale species, then tuna, sharks and salmon.

Pursuant to the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS), 'any other body qualified in cetacean conservation and management' can apply to the Secretariat of the Agreement (not less than 90 days in advance of the MoP, or not less than 60 days in advance of the Meeting of the Advisory Committee) and be entitled to participate as observers in the MoP, provided that no opposition is made in writing at least 30 days before any of such meetings by at minimum one third of the Parties.⁹⁴⁴ In those occasions, observers have the right to participate but not to vote.⁹⁴⁵ In the *Agreement for the Conservation of Cetaceans of the Black Sea, Mediterranean and contiguous Atlantic Area* (ACCOBAMS), 'any Body or Agency technically concerned inter alia with the conservation of cetaceans and fisheries management' can, prior to the opening of the meeting, inform to the Secretariat of the Agreement about its interest in participating in the MoP as observers and be allowed to participate as such unless at least one third of the Parties present object.⁹⁴⁶ The observers, once admitted to a session, are entitled to participate in future sessions if at least one third of the Parties do not object thirty

⁹⁴⁴ Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (New York, 17 March 1992, in force 1994, amended in 2003) (ASCOBANS Agreement) art 6.2.2; ASCOBANS, 'Report of the 9th Meeting of the Parties to ASCOBANS (Virtual/Online, 7-11 September 2020) ASCOBANS/MOP9/Report' (2020) annex 1 'Rules of Procedure for the Meeting of the Parties to ASCOBANS', rule 2(2); ASCOBANS, Rules of Procedure for the ASCOBANS Advisory Committee (26th Meeting of the Advisory Committee, Online, 8-12 November 2021) ASCOBANS/AC26/Doc.1.3a r 2(2).

⁹⁴⁵ ASCOBANS, 'Report of the 9th Meeting of the Parties to ASCOBANS (Virtual/Online, 7-11 September 2020) ASCOBANS/MOP9/Report' (2020) r 2(3).

⁹⁴⁶ Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 24 November 1996, in force 1 June 2001) (ACCOBAMS Agreement) art III(4); ACCOBAMS, 'Report of the 7th Meeting of the Parties to ACCOBAMS (Istanbul, 5-8 November 2019) ACCOBAMS-MOP7/2019/Doc38' art 5(2).

days before the start of the session.⁹⁴⁷ Voting is restricted to the Parties of the Agreement.⁹⁴⁸

In the *Agreement on the Cooperation in Research, Conservation and Management of Marine Mammal in the North Atlantic* (NAMMCO), the Council can invite non-contracting parties, IGOs and inter-parliamentary organisations to attend, as observers, the Commissions' meetings,⁹⁴⁹ and the Council's meetings, while NGOs may submit application for observer status to the Secretariat no later than 90 days before the Council's meeting.⁹⁵⁰ In the IWC, states non-parties to the ICRW, as well as IGOs and NGOs that 'express an interest in matters covered by the Convention' can be admitted as observers to the meetings of the IWC, the Technical Committee, and those involving subsidiary groups of the Commission and the Committee, in the occasion of which observers hold 'speaking rights during Plenary sessions' and may 'submit documents for information to the delegations and observers', as cleared by the IWC Secretariat.⁹⁵¹ For NGOs, admission is granted by request for accreditation in writing to the Commission 60 days before the start of the meeting, or by the Commission's invitation.⁹⁵² The IWC Secretariat can impose seating limitations per NGO, and the Commission defines the registration fee and if the observer remains as such throughout the process.⁹⁵³

In the IATTC, the Director can invite representatives of non-parties and IGOs to participate as observers in the meetings of the Commission and of its subsidiary organs, while NGOs can be eligible to participate in such meetings by notifying the Director at least 50 days in advance of the meeting, and if there is no objection in

⁹⁴⁷ ACCOBAMS Agreement art III(4).

⁹⁴⁸ Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area art III(5).

⁹⁴⁹ Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic (Nuuk, 9 April 1992, entered into force 8 July 1992) (NAMMCO Agreement) art 8; NAMMCO, Procedures & Rules for Observers attending NAMMCO Meetings (adopted at NAMMCO 24 February 2016).

⁹⁵⁰ NAMMCO, Rules of Procedure for the NAMMCO Council (Adopted at NAMMCO 10 September 2000) paras 21–25.

⁹⁵¹ IWC, Rules of Procedures and Financial Regulations (as amended at the 67th Commissions' Meeting, September 2018). r C.2 and C.3.

⁹⁵² *ibid* C.1(a)(b).

⁹⁵³ *ibid* C.1(b)(c).

writing of at least one-third of the Commission's members.⁹⁵⁴ Observers cannot vote and may participate through oral statements if the Chairman invites, or approves in respect of distributing documents at the meeting and engaging in other activities.⁹⁵⁵ In the ICCAT, the Commission can invite, as observers, the representatives of IGOs, UN member states and UN agencies that are non-members of the Commission to attend and participate in its meetings and works, but not to vote.⁹⁵⁶ NGOs can also be eligible to participate as observers in the meetings of ICCAT and its subsidiary bodies, as long as the NGOs 'support the objectives of ICCAT and with a demonstrated interest in the species'.⁹⁵⁷ For such, it is required: prior notification to the Secretariat at least 50 days in advance of the meeting; an application with information listed by ICCAT (e.g., organization's details, objectives and its links with ICCAT's objectives, papers produced on conservation, management or science of tunas or tuna-like species) and payment of fees.⁹⁵⁸ One-third of ICCAT's members can object in writing the participation of NGOs at least 30 days prior to the meeting.⁹⁵⁹ Their participation allows them to distribute documents, make oral statements and engage in other activities as agreed with the presiding officer.⁹⁶⁰

In the IOTC, the Commission can invite, upon their request, IGOs and NGOS that have special competence in the field of activity of the Commission to attend its meetings, but the list of NGOs interested in participating in such meetings must be submitted by the Executive Secretary to the members of the Commission no later than 60 days before the session, and members may object in writing within 30 days.⁹⁶¹ Observers may be invited by the Commission to submit memoranda and deliver oral

⁹⁵⁴ Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (IATTC Antigua Convention)(adopted 14 November 2003, entered into force 27 August 2010) art XVI(2) and annex 2.

⁹⁵⁵ *ibid* annex 2.

⁹⁵⁶ Rules of Procedure of the ICCAT, in ICCAT, Basic Texts (2019) 7th Revision r 5.

⁹⁵⁷ ICCAT, Guidelines and criteria for granting observer status at ICCAT meetings (adopted at 11th Special Meeting of the Commission, Santiago de Compostela, November 1998, amended at the 19th Regular Meeting (Seville, November 2005) para 2.

⁹⁵⁸ *ibid* 3.

⁹⁵⁹ *ibid* 4 and 6.

⁹⁶⁰ *ibid* 5.

⁹⁶¹ IOTC, Rules of Procedure of the IOTC (2014) 25p. r XIV(4)(5).

statements.⁹⁶² The Commission may invite consultants or experts to attend the meetings or participate in the work of the Commission and its subsidiary bodies.⁹⁶³ In turn, the meetings of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and its subsidiary bodies, may be attended by accredited observers, which may include IGOs upon the Commission's invitation, and NGOs (with special competence on southern bluefin tuna or competent to contribute to the Convention's objective), upon approval of all the CCSBT members.⁹⁶⁴ Requests for observer status must be submitted at least 50 days before the meeting, and their participation is restricted to sharing of information and addressing the Commission, without any voting powers.⁹⁶⁵

As for the WCPFC, its Convention's article 21 draws from the foreseen article 12(1), UNFSA, requiring the Commission to 'promote transparency in its decision-making processes and other activities'. It further ensures the participation, as observers, of IGOs and NGOs concerned with the matters relevant to the Convention's implementation in the meetings of the Commission and its subsidiary bodies.⁹⁶⁶ The Executive Director must be notified of the request for observer status, in writing, at least 50 days in advance of the session.⁹⁶⁷ The majority of the Commission's members may object to this request in writing at least 20 days before the session's opening.⁹⁶⁸ The participation of NGOs is restricted to the Commission's deliberations and its subsidiary bodies upon the Chairman's request, and written statements distributed by the Secretariat to the Commission's members, but NGOs are not 'entitled to participate in the taking of decisions'.⁹⁶⁹ In the GFCM, the Commission can invite or allow the participation of regional or IGOs, and NGOs, including from the private sector, with

⁹⁶² *ibid* XIV(8).

⁹⁶³ *ibid* XIV(9).

⁹⁶⁴ Convention for the Conservation of Southern Bluefin Tuna (CCSBT Convention) (adopted 10 May 1993, entered into force 20 May 1994) art 14(2); CCSBT, Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna (as amended in October 2018) r 3.

⁹⁶⁵ CCSBT Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna (as amended in October 2018) (n 964) r 3(9)(10).

⁹⁶⁶ WCPFC Convention art 21.

⁹⁶⁷ WCPFC, Rules of Procedure (adopted at the Inaugural Session, Pohnpei, December 2004, amended at the 16th Regular Session, Port Moresby, December 2019) r 36(4).

⁹⁶⁸ *ibid*.

⁹⁶⁹ *ibid* 36(3).

‘interests and objectives common with those of the Commission or whose activities are pertinent to the work of the Commission or its subsidiary bodies’.⁹⁷⁰ Participation of observers do not entitle them to vote, but join plenary meetings of the Commission and participate in discussions at the sessions of committee and subsidiary bodies.⁹⁷¹

Specific provisions on observers are not found in the constituent instruments of the Pacific Salmon Commission (PSC),⁹⁷² North Atlantic Salmon Conservation Organization (NASCO),⁹⁷³ nor of the North Pacific Anadromous Fish Commission (NPAFC).⁹⁷⁴ In the case of the latter two, requirements for observers are detailed in their rules of procedure and other guidelines. For NASCO, the conditions for observers’ attendance at the Council’s plenary sessions and the Commissions’ annual or intersessional meetings are, inter alia, as follows: the NGO must apply at least 15 days before the Council’s meeting, demonstrate a ‘legitimate interest in the proceedings’, and, if the NGO’s application is approved by the NASCO Secretary, the NGO can attend with a maximum of two representatives.⁹⁷⁵ For NPFAC, IGOs or other organizations may participate by notifying the Executive Director at least 90 days in advance of the meeting, and the admission is granted by consensus-based decision of NPAFC members.⁹⁷⁶

The foreseen analysis demonstrates that, while each RFMO has its own requirements for admitting non-state actors as observers in their meetings, these requirements follow in general similar procedures for such non-states actors’ admission, that is: justifying the interest of the NGO in the RFMOs’ scope and objectives; submitting an application to participate, in a minimum period that can be from 15 up to 60 days prior to the meeting; having the application approved by the

⁹⁷⁰ GFCM Agreement art 15.

⁹⁷¹ GFCM, Rules of Procedure r XII(3)(4).

⁹⁷² Treaty between the Government of Canada and the Government of the United States of America concerning Pacific Salmon (Pacific Salmon Treaty)(adopted and entered into force 17 March 1985).

⁹⁷³ Convention for the Conservation of Salmon in the North Atlantic Ocean (NASCO Convention) (adopted and entered into force 1 October 1983).

⁹⁷⁴ Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (NPAFC Convention) (adopted 11 February 1992, entered into force 16 February 1993).

⁹⁷⁵ NASCO, CNL(06) 49 Revised Conditions for Attendance by Observers at NASCO Meetings following amendment at the Twenty-Third Annual Meeting in June 2006.

⁹⁷⁶ NPAFC, Rules of Procedure (adopted 24 February 1993, last amended on 15 February 2015) r 5.

relevant RFMO; and, when authorized to participate, taking part in the deliberations without the right to vote, and, only when authorized by the concerned RFMO authority, being able to submit oral and written statements. This shows the limitations faced by observers participating in RFMOs' meetings, which is similar to other inter-governmental meetings, where the ultimate decision-making powers rely on states. If small-scale fisheries peoples wish to participate in RFMOs' meetings as observers, they would thus need to face these procedures and restrictions, and, in certain cases, possibly being rejected admission to the meeting by RFMO members. These administrative barriers, coupled with the lack of financial and technical capacity of small-scale fisheries peoples, and the limited powers of observers to effectively influence the negotiations make the participation of small-scale fisheries peoples very difficult. Alternatively, they could be represented in national delegations, where at least they could enjoy participation in the meetings, and advise on states' interventions. Yet, this option largely depends on each state member to ensure small-scale fisheries peoples are adequately integrated in the states processes of preparing for and participating in the RFMOs meetings.

6.5. Conclusion

This chapter demonstrated that not only it is possible to imagine and construe the idea of international fisheries management with participation of small-scale fisheries peoples, but that this is already occurring in practice with some variation of states' reluctance, as the case studies demonstrate. The degree of participation of small-scale fisheries peoples is higher in subregional fishery bodies and inter-Tribal arrangements, as these govern areas closer to the fishing communities. Important achievements and progress have been made, for instance, with the growing stakeholder engagement in the MRC, participatory development of fisheries management plans of the LVFO, and capacity-building of Māori in New Zealand through regional forums, facilitating their participation in fisheries management decision-making processes.

In the case of the EU, it was seen that the ACs have been subject to criticism for its limited ability to influence decisions and there remains room for much improvement in ensuring participation of stakeholders from the fisheries sector is sufficiently broad and include representatives from the small-scale fisheries sector.

However, the EU experience can serve as a model based on which improved participatory schemes can be construed in other regions. As Hawkins argued, the ‘further devolution of management powers’ and responsibilities to stakeholders is justified by the democratic deficit in the fisheries management decision-making process, the narrow and poorly representative advice that does not include the wider perspectives of fishers and fishing communities, and the absence of broader ecosystems-based considerations.⁹⁷⁷ These problems are also evident in the international context and other regional ones, thus demanding the same fisheries managerial mode change.

In furthering the understanding on participation of small-scale fisheries peoples in RFMOs meetings, I examined the procedures for the admission of observers in such meetings. While this could be a venue for small-scale fisheries peoples’ participation, it inevitably comes with the administrative, financial, and logistical constraints, which make practically impossible for small-scale fisheries peoples to attend the relevant meetings, and, even if so, the potential is minimal for them to influence decision-making and ensure the adequate integration of their knowledge and contributions to inform the decisions being adopted. It may thus be desirable that small-scale fisheries peoples participate as part of states’ delegations in RFBs meetings, or through other appropriate means, as explained in the next chapter, as their physical presence in such meetings may not be feasible in practice.⁹⁷⁸ With this note, I move to the final chapter of the thesis.

⁹⁷⁷ Hawkins (n 872) 81.

⁹⁷⁸ Petersson and others (n 800) 149–151.

CHAPTER 7

Conclusion

This thesis has demonstrated how connecting the ecosystem approach to fisheries with human rights can strengthen international fisheries management by shifting the concerns centred on the management measures and fishing activities to the recognition and protection of small-scale fisheries peoples affected by such management. This consequently led me to interpret international law systemically to demonstrate its relevance to small-scale fisheries peoples, and the normative foundation for their meaningful participation in international fisheries management. With the increasing attention given to small-scale fisheries across governance levels, and considering the evolving debates in RFBs forums toward inclusion of environmental and social issues of particular concern to small-scale fisheries peoples, their meaningful participation in international fisheries management is not only pertinent, but must be taken seriously, despite all practical challenges that securing such participation entail.

To conclude this thesis, I will re-state the research question based on the findings of the previous chapters (*section 7.1*), provide some recommendations for future research (*section 7.2*), and raise some additional considerations found in this thesis as a way forward (*section 7.3*).

7.1. Re-stating the research question based on the thesis' findings

This thesis posed the following research question: *to what extent can international law contribute to secure the participation of small-scale fisheries peoples in international fisheries management?*

My conclusion is that international law provides a robust, yet complex, enabling framework for securing the meaningful participation of small-scale fisheries peoples in international fisheries management through at least eight main fronts.

First, as the introductory chapter of this thesis demonstrates, international law has been instrumental in formalizing the growing recognition by states of the importance of small-scale fisheries, its valuable contributions to sustainable development, and, yet, the persisting challenges and vulnerabilities they face, which underscore the need for securing small-scale fisheries peoples' participation in international fisheries management. Specifically, the linkages between small-scale fisheries and international fisheries management are based on the state's duty to cooperate, through RFBs, in the management and conservation of transboundary aquatic species,⁹⁷⁹ the latter which include species of sharks, tuna, whales, and salmon that are harvested by small-scale fisheries as targeted species or as bycatch in marine waters, and (for salmon) in inland waters, and which small-scale fisheries peoples depend on for livelihoods and culture.

Second, as I submit in chapter 2, the ecosystem approach to fisheries has gained significant level of recognition as a principle of international fisheries law, enshrined in instruments of binding and non-formally binding nature, especially in the realm of RFMOs.⁹⁸⁰ The ecosystem approach to fisheries, as a principle of international fisheries law, and based on its normative content under the CBD,⁹⁸¹ and the FAO,⁹⁸² contributes to guiding the equitable participation of small-scale fisheries peoples in international fisheries management, fostering the integration of their knowledge and inputs. Consequently, the state's duty to cooperate in international fisheries management taking into account small-scale fisheries peoples,⁹⁸³ entails ensuring their meaningful and effective participation in international fisheries management.

Third, as argued in chapter 3, the human rights regime significantly contributes to enhance the human dimensions of the ecosystem approach to fisheries drawing the attention to the need to protect small-scale fisheries peoples, and duly consider their needs and interests in international fisheries management. Consequently, connecting this approach with human rights provides a more comprehensive understanding of the adequate participation of small-scale fisheries peoples in international fisheries

⁹⁷⁹ LOSC art 61(2), 63 to 65, and 118.

⁹⁸⁰ Including the expressions of the EAF, to different extents, in the regulatory frameworks of CCAMLR, GFCM, SPRFMO, NPFC, SIOFA, NAFO, SRFC, SEAFO, WCPFC, and NEAFC.

⁹⁸¹ CBD Malawi principles 2, 11 and 12.

⁹⁸² FAO EAF legal components 4, 5 and 6.

⁹⁸³ LOSC art 61(3); UNFSA art 5(i) and 24(2)(b).

management, not only in respect of their equitable and meaningful participation, but also in shedding light on the benefits that such participation bring to the realization of small-scale fisheries peoples' fundamental rights to adequate food⁹⁸⁴ and culture,⁹⁸⁵ intrinsically linked to their fishing and tenure rights,⁹⁸⁶ and ultimately the human right of all to a clean, healthy and sustainable environment.⁹⁸⁷ This becomes even more pertinent given the growing interests of states at RFBs in addressing decent work and safety standards in fisheries, matters of particular relevance to small-scale fisheries peoples.

Fourth, human rights law affirms participatory rights of certain groups in small-scale fisheries peoples that are particularly vulnerable. The duty to protect procedural rights of Indigenous peoples in the fisheries context is grounded on human rights law instruments,⁹⁸⁸ read in conjunction with international fisheries law instruments.⁹⁸⁹ I found an international case *Apirana Mahuika et al v. New Zealand*,⁹⁹⁰ in which the decision held by the ICCPR Committee recognizes the right of the small-scale fisheries peoples concerned to participate in decision-making processes affecting them, as instrumental for the realization of their cultural rights.⁹⁹¹ The equitable participation of women in decision-making affecting them is anchored in human rights law,⁹⁹² and certain fisheries instruments.⁹⁹³

Fifth, as demonstrated in chapter 4, international law contributes to protect small-scale fisheries peoples, as I elaborate further below, and, importantly, arguably

⁹⁸⁴ UNDHR art 25(1); ICESCR art 11.

⁹⁸⁵ ICCPR art 27; *ibid* 15(1)(a).

⁹⁸⁶ FAO SSF Guidelines (n 25) para 5.1; UNHRC UNDROP (n 41) arts 15, 17 and 26.

⁹⁸⁷ UNHRC Resolution 48/13 of 8 October 2021, 'The Human Right to a Safe, Clean, Healthy and Sustainable Environment' (n 483) para 1; UNGA Resolution 76/300 of 28 July 2022, 'The human right to a clean, healthy and sustainable environment' (n 484).

⁹⁸⁸ ILO C-169 art 6(1)(a), 7, 15 and 16; UNGA UNDRIP (n 378) art 19; UNHRC UNDROP (n 41) art 2(3).

⁹⁸⁹ UNFSA art 24(2)(b); FAO CCRF (n 225) art 7.6.6; FAO SSF Guidelines (n 25) art 3.1(6).

⁹⁹⁰ *Apirana Mahuika et al v. New Zealand (Adoption of Views) Communication No. 547/1993, CCPR/C/70/D/547/1993* (n 390).

⁹⁹¹ ICCPR art 27.

⁹⁹² CEDAW art 8; Beijing Declaration and Platform for Action (27 October 1995) A/CONF.177/20/Add.1 (adopted at the 4th World Conference on Women) (n 415) paras 13 and 16; CEDAW, 'General Recommendation No. 39 on the Rights of Indigenous Women and Girls' (n 416) para 43; UNHRC UNDROP (n 41) art 4(2)(a).

⁹⁹³ UNFSA art 24(2)(b); FAO SSF Guidelines (n 25) art 3.1(4)(6) and 5.15.

provides four criteria, based on the UNDROP, IWC, and the decision held under the South China Sea Arbitration, for characterizing small-scale fisheries peoples in international law, which can be useful to delineate the scope of small-scale fisheries peoples' participation in international fisheries management. These criteria are: reliance on family labour or other non-monetised way of organizing labour; special dependency on and attachment to the (marine or inland) fishing grounds; strong community, familial, social and cultural ties to fishing and on the use of fish; and engagement in traditional customary fishing practice across generations.

Sixth, I argued that the normative foundations for the right of small-scale fisheries peoples to participate in decision-making processes affecting them are provided in different international law regimes, notably on the environment,⁹⁹⁴ human rights,⁹⁹⁵ and fisheries,⁹⁹⁶ which should be applied in conjunction. Specifically, my findings highlighted the promising framework under the Aarhus Convention,⁹⁹⁷ which requires its parties to promote this treaty's principles in other international forums, and which could arguably entail promoting this treaty's requirements in RFBs decision-making. While the duty of state parties to the UNFSA to ensure the participation of small-scale fisheries peoples in international fisheries management is not explicit in the text of this Agreement, I argued that the meaning of 'take into account' small-scale fisheries peoples in article 24(2)(b), UNFSA, gain meaning when reading in conjunction with the CCRF⁹⁹⁸ and the SSF Guidelines,⁹⁹⁹ which provide requirements for participation of small-scale fisheries peoples in fisheries management applicable at the regional level as well.

Seventh, international fisheries law standards that require decisions adopted at the RFB level to be based on best scientific evidence or knowledge available¹⁰⁰⁰ include,

⁹⁹⁴ UN Declaration on Environment and Development (Rio Declaration) (adopted at the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26 (n 212) Principle 10; UN Agenda 21 (n 626); Aarhus Convention.

⁹⁹⁵ As part of the right to culture, but also as explicitly enshrined in the UNDROP. See ICCPR art 27; ICESCR art 15(1)(a); UNHRC UNDROP (n 41) arts 10 and 17(1).

⁹⁹⁶ FAO SSF Guidelines (n 25) para 3.1(6), 5.15 and 5.17.

⁹⁹⁷ Aarhus Convention art 3(7).

⁹⁹⁸ FAO CCRF (n 225) art 6.13, 7.2.2(c), 10.1.2 and 10.2.1.

⁹⁹⁹ FAO SSF Guidelines (n 25) para 5.15, 5.17 and 5.18.

¹⁰⁰⁰ LOSC art 61(2) and 119(1)(a); UNFSA art 5(b); FAO CCRF (n 225) art 6.4, 6.5, 7.1, 7.2.1, 7.3.1, 7.4.1.

pursuant to a systemic interpretation of such standards with the SSF Guidelines,¹⁰⁰¹ CCRF,¹⁰⁰² and UNDROP,¹⁰⁰³ the adequate integration of small-scale fisheries peoples' knowledge.

Eighth, as demonstrated in chapter six, certain RFBs frameworks, namely CECAF, GFCM, FFA, SPC and CRFM, have addressed the issue of participation of small-scale fisheries peoples in the respective RFBs' policies or programmes, which signal at least the intention to promote such participation in these forums.

In addition to the reasons explained above, my research has also demonstrated the importance of systemically interpreting different international law regimes for enhanced protection of small-scale fisheries. For instance, I found that the few provisions of the LOSC relevant to small-scale fisheries, which relate to states' duties to adopt conservation and management measures in their EEZ and to enter into fishing access agreements,¹⁰⁰⁴ gain meaning when interpreted in conjunction with the SSF Guidelines provisions that detail the measures states should take to protect small-scale fisheries (e.g., preferential access, exclusive zones) in those contexts.¹⁰⁰⁵

Similarly, the provisions of the UNFSA relevant to small-scale fisheries, which specifically relate to inter-state cooperation for managing and conserving straddling fish stocks and highly migratory fish stocks,¹⁰⁰⁶ gain meaning with the SSF Guidelines provision requiring states, in this specific context, to cooperate in protecting legitimate small-scale fisheries tenure rights.¹⁰⁰⁷

I also found that the Compliance Agreement, despite its limited applicability to small-scale fisheries,¹⁰⁰⁸ is pertinent to certain parties that involve cases where small-scale fishing vessels are licensed to fish on the high seas, as seen in Peru, or where small-scale fishing vessels may be found operating on the pockets of high seas in the Mediterranean sea, which is relevant for the EU and its member states.

¹⁰⁰¹ FAO SSF Guidelines (n 25) para 5.18 and 11.6.

¹⁰⁰² FAO CCRF (n 225) art 6.4 and 7.6.6.

¹⁰⁰³ UNHRC UNDROP (n 41) art 20(1) and 26(1).

¹⁰⁰⁴ LOSC arts 17–19, 61(3), 69(2)(a) and 70(3)(a).

¹⁰⁰⁵ FAO SSF Guidelines (n 25) para 5.7.

¹⁰⁰⁶ UNFSA art 5(i), 11(d) and 24(2)(b).

¹⁰⁰⁷ FAO SSF Guidelines (n 25) para 5.19.

¹⁰⁰⁸ Compliance Agreement art II(2).

In a different matter, I argued that, following certain SSF Guidelines recommendations can support the fight against IUU fishing,¹⁰⁰⁹ providing additional measures to those under the PSMA, which, for its part, apply only to foreign commercial small-scale fishing vessels.

My findings also pointed to the challenges of securing international minimum standards for decent work and safety on board small-scale fishing vessels, given the flexibility clauses in the SCTW-F,¹⁰¹⁰ Cape Town Agreement,¹⁰¹¹ and ILO C188,¹⁰¹² which leave to parties' discretion the application of these instruments to fishing vessels measuring less than 24 metres in length.

In examining treaties from other legal regimes, I also found mutual supportiveness between the Paris Agreement,¹⁰¹³ the SSF Guidelines,¹⁰¹⁴ and the UNDROP,¹⁰¹⁵ in requiring states to adopt climate change mitigation and adaptation strategies with the participation of small-scale fisheries peoples and the use of their traditional knowledge.

Regarding the definition of small-scale fisheries and related terms in international law instruments, I demonstrated that, while such definitions exist in instruments adopted, for instance, by the EU,¹⁰¹⁶ and ICCAT,¹⁰¹⁷ the lack of a definition in a given instrument may not necessarily mean a problem, as in the case of the PSMA, whose application to subsistence small-scale fishing vessels is unrealistic in practice, thus the provision exempting subsistence small-scale fishing vessels¹⁰¹⁸ seems to reiterate the obvious.

¹⁰⁰⁹ FAO SSF Guidelines (n 25) para 5.16.

¹⁰¹⁰ STCW-F art 24.

¹⁰¹¹ Cape Town Agreement rr 1 and 3.

¹⁰¹² ILO C188 art 2.

¹⁰¹³ Paris Agreement art 7(5).

¹⁰¹⁴ FAO SSF Guidelines (n 25) para 9.2.

¹⁰¹⁵ UNHRC UNDROP (n 41) art 18(3).

¹⁰¹⁶ European Parliament and European Council Regulation (EU) No 2017/1004 of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004 art 2(14).

¹⁰¹⁷ ICCAT Recommendation 21-08 by ICCAT amending the Recommendation 19-04 amending the Recommendation 18-02 establishing a multi-annual management plan for bluefin tuna in the Eastern Atlantic and the Mediterranean (entered into force 17 June 2022) (n 595) Recommendation 3(dd).

¹⁰¹⁸ PSMA art 3(1)(a).

These are some of the key findings of the thesis. Let me continue with some ideas that this thesis brought to future research.

7.2. New questions for future research

Future research on the topic of participation of small-scale fisheries peoples in international fisheries management can strengthen greater synergies between two areas of research (international law and small-scale fisheries), enriching the research and approximating respective epistemic communities that unintentionally work in silos to investigate participatory approaches that can effectively secure the participation of small-scale fisheries peoples in international fisheries management.

Research could explore other ‘small-scale fisheries burden’ that states would need to factor in when giving effect to their duty to cooperate in international fisheries management, and the need to ‘take into account’ small-scale fisheries peoples. This could entail applying systemic interpretation of international law instruments in other regimes relevant to small-scale fisheries, which were not covered by this thesis, such as the WTO Fisheries Subsidies Agreement and the BBNJ Agreement.

My analysis also found the need for more empirical work on the functionality and efficiency of polycentric systems in fisheries governance, and suggested initiating experimentation in contexts involving fewer states in transboundary watercourses, which can bring about learning outcomes for RFBs in marine spaces.

Empirical research could be carried out to clarify which small-scale fisheries peoples groups are most affected by RFBs’ decision-making, and further experiment the participation of such groups in RFBs’ meetings, starting with those involving fewer states.

Research could also explore the challenges and opportunities for advancing participation of small-scale fisheries peoples in certain RFBs (namely, CECAF, GFCM, FFA, SPC and CRFM) which already foster such participation in their policies and programmes. Specifically, research could also investigate the extent to which the Aarhus Convention, article 3(7), has had influence in public participation in GFCM decision-making.

In addition to fisheries management topics and social issues of decent work and safety at sea, research could also explore the extent to which other relevant topics for

small-scale fisheries, such as access to technology as well as for receiving the benefits arising from their knowledge contributions to the use of technology, are covered in the RFBs fora.

7.3. Some ways forward for advancing participation

This thesis also brought additional insights on the way forward.

As seen in chapter 5, my findings on studying polycentricity in fisheries shed light on the need for caution when considering efforts of scaling-up participatory fisheries management to regional and international levels, as not to run the risk of hindering small-scale fisheries peoples' autonomy and recognition of their ownership over fisheries they conserve, manage, and depend on. Moreover, advancing participation of small-scale fisheries peoples in international fisheries management faces challenges of governments or NGOs in ensuring consistent and sufficient technical and financial capacity of small-scale fisheries peoples, through their professional organizations and cooperatives, as to enable them to participate in RFB meetings as advisors to a national delegation, or as observers.

In articulating deliberative democracy in fisheries, I suggested a potential scheme for operationalizing deliberative participation of small-scale fisheries peoples in international fisheries management. This would entail organizing small-scale fisheries peoples in local or inter-municipal public advisory committees, to firm up their common views, then having small-scale fisheries cooperatives, for instance, in charge of coordinating and consolidating the common views and knowledge contributions, to further result in the participation of a small-scale fisheries peoples representative in RFBs meetings.

In this respect, I also found that democratizing science theory can pertinently support the integration of small-scale fisheries peoples' knowledge into all levels of fisheries governance, by questioning the dominant discourse, and avoiding marginalization of knowledge and exclusion. While democratizing fisheries science broadens the knowledgebase for fisheries management, the integration of small-scale fisheries peoples' knowledge into fisheries science depends on culturally and socially sensitive approaches to be adequate, and potential conflicts between fishers'

knowledge and formal science could be addressed by new studies co-produced by fishers and scientists.

I also suggested that social justice (and blue justice) narratives can serve to empower small-scale fisheries peoples interested in participating in international fisheries management to mobilize their representation in fisheries management decision-making bodies and ultimately influence RFBs processes from the bottom-up.

As regards inland RFBs, I found promising avenues for advancing the participation of small-scale fisheries peoples in the MRC, which provides a regional multistakeholder forum for dialogue with the public and knowledge-sharing on fisheries management, and in the LVFO's fisheries management plan, which follows a participatory approach and the involvement of multi-stakeholders in the process.

In the EU, I found that, while research has promoted participatory fisheries management over the past twenty years, and institutional progress was seen through the ACs and policy and regulatory frameworks based on the EAF, there remain strong criticism on whether these advisory bodies in practice allow for effective and influential participation of small-scale fisheries peoples.

Good practices were found in the inter-tribal organizations in the USA and Canada, where these organizations are able to collaborate with governments in the management and conservation of the Columbia River and its resources, while keeping their own identities, views, negotiation, and decision-making tactics. Another example of good practice was found in the New Zealand's regional forums, which have been building the Māori people's regulatory capacity, supporting fisheries organizations to negotiate fishing rights and investments with government counterparts, while strengthening the Māori people's own management methods. These experiences from the USA, Canada and New Zealand provide evidence of good practice through customary arrangements led by Indigenous peoples that firm relationships with governments in managing transboundary aquatic species.

My findings showed that, despite the growing interest in research on transparency in RFMOs and non-state actors participation in these forums, there is lack of public space and empowered space in RFMOs' meetings. This means lack of representatives from coastal communities, and lack of power to influence decision-making. Based on selected RFMOs' regulatory requirements for admission of non-state actors as

observers, I found very difficult for small-scale fisheries peoples to overcome administrative, financial, and technical difficulties if they wish to participate in such forums.

Notwithstanding the practical challenges, opportunities do exist and should be explored to advance the participation of small-scale fisheries peoples in international fisheries management, with a view to giving them the opportunity to meaningfully exercise their rights to participate and influence decision-making affecting them, as well as the opportunity to contribute with their valuable and unique knowledge. Giving effect to the meaningful participation of small-scale fisheries peoples in RFBs decision-making can enhance the democratic legitimacy of these processes, contribute to the overall goal of fisheries sustainability in fisheries management, and bring about more justice and fair outcomes to small-scale fisheries peoples.

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