



Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example [☆]



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ABSTRACT

This article discusses the shift from regarding illegal fishing as a fisheries management problem towards viewing it as 'fisheries crime', locating it within the South African and broader African context. It introduces the new fisheries crime paradigm, identifying the reasons for its emergence and outlining the legal challenges and opportunities that it presents in efforts to halt illegal fishing with reference to South Africa as an illustrative African example.

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1. Introduction

1.1. Overview of the problem

Fish and fishery products are the most traded food commodity globally and are of great importance to developing countries, in some cases representing more than half of the total value of traded commodities. For many developing nations, fish trade therefore represents a significant source of foreign currency earnings in addition to the sector's important role as a generator of household income and employment [1]. A recent United Nations Food and Agriculture Organisation (FAO) study estimates that the value added by the marine fisheries sector in Africa amounts to just under USD 15 billion, a significant 0.70% of the GDP of all African countries [2]. Worryingly, however, Africa's export of fish and fishery products has not shown significant improvement in the past decade, a trend attributed to an increasing rise in illegal activities in Africa's Maritime Domain [2]. Fish remains a vital contribution to the food and nutritional security of over 200 million Africans and provides income for over 10 million [3]. Yet globally fish stocks are severely over-utilised; 85% of such stocks worldwide are now over and fully exploited. Of this, 53% are fully exploited, meaning that these fisheries cannot be expanded [1].

Illegal fishing is a key contributor to overfishing yet despite

significant effort worldwide to date to stem illegal fishing it has continued unabated. It is estimated that each year between USD 11 and 23.5 billion is lost to illegal fishing, the majority of fish being stolen from the maritime zones of developing countries, with West African waters estimated to have the highest rates of illegal fishing globally. The illegal catch in the Eastern Central Atlantic alone is currently estimated to be worth between USD 828 million and USD 1.6 billion annually [4;5]. The African Union's 2015 'Integrated Maritime Strategy' recognises the devastating impact of illegal fishing on the continent and supports imposing measures to actively deter such activities [3]. Illegal fishing is further cited by the FAO as one of the greatest threats to marine ecosystems, 'undermining national and regional efforts to manage fisheries sustainably and conserve marine biodiversity' [1]. In fact, its adverse impact is extensive, ranging from biological to economic and extending into the political domain. The recent joint UNEP and INTERPOL 'Environmental Crime Crises' report describes illegal fishing as comprising a 'rapidly rising threat to the environment, to revenues from natural resources, to state security, and to sustainable development' [6].

Illegal fishing refers not only to the actual harvesting of fish, but encompasses all aspects and stages of the capture and utilisation of fish [1]. Accordingly, it involves a multitude of persons, corporations and government agencies, ranging from the fishers themselves, to the masters of the fishing vessels, to the vessel owners, to vessel financiers and insurers. Commonly, these key actors are of different nationalities – for example, the vessel may be registered in one state, the vessel owner domiciled in another

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and the fishing crew originating from yet numerous other jurisdictions. By their nature illegal fishing operations are thus almost always transnational. In order to be successful, that is, profitable, and avoid detection detailed and careful organisation of these fishing operations is a necessity. It is therefore not surprising that many illegal fishing operations form links with, and become part of, broader transnational organised criminal networks.

1.2. The South African situation

In South Africa, illegal fishing takes place in both the commercial sector as well as in small-scale fisheries. Poaching in the abalone sector provides an apt example of the latter category. The abalone fishery in South Africa is recognised as one of the most difficult fisheries to manage [7] due to a combination of factors including its inshore nature, the adverse impact of ecological factors on its stock, its high value and, importantly, the increasing organised black market trade in abalone since the 1990s [8]. The combined effects of these factors led to an 88% decrease in the total allowable catch (TAC) of the species from the 1995/1996 season to the 2007/2008 season and culminated in the complete closure of the fishery in 2008 [9]. Attempts to curb illegal harvest in this sector have been largely unsuccessful not least in part due to the problematic socio-political history of abalone rights in the country in terms of which traditional fishers were deprived of legal harvesting rights under the former Apartheid regime [10,11]. Further, links with organised criminal networks, with resultant entrenchment of criminal elements in local fishing communities, have complicated the matter, demanding that solutions be sought outside the normal fisheries management sphere. Initial efforts, which focused primarily on bolstering enforcement, were subsequently supplemented by increasingly progressive (at least theoretically) access policies that sought to facilitate community involvement in, and (partial) ownership of, the management of coastal resources.

A well-known example of organised illegal fishing activity in the commercial sector off the South African coast is the subject matter of the Bengis case [12]. The case involved the gross over-harvesting of rock lobster in terms of domestic law and the violation of the US Lacey Act 1900 for illegal import of the lobster into the United States in contravention of South African fisheries law. On 14 June 2013 the US District Court of the Southern District of New York ordered Bengis and his accomplice Noll to pay just under US\$ 22.5 million in restitution to South Africa for the West Coast Rock Lobsters they illegally harvested from the South African coastal waters between 1987 and 2001. The case is noteworthy from a jurisprudential perspective (with regards to, for example, the issue of state ownership of marine resources and the quantification of damage arising from loss of natural resources) as well as acting as a showcase for the potential benefits of a synergy between investigative police work and fisheries enforcement officials in tackling illegal fishing activities [13].

2. The illegal fishing paradigm to date

By far the most dominant paradigm to date internationally and in South Africa has been to address illegal fishing through an IUU (Illegal, Unreported and Unregulated) fishing lens. This paradigm regards transgressions of fisheries-related laws and rules as (primarily) an administrative law matter and seeks to prevent such behaviour by strengthening fisheries management and conservation rules and stepping up compliance via increased monitoring, control and surveillance (MCS) of vessel activities and complementary port state measures.

In practise, 'IUU fishing' is a catch-all term used to describe all

instances of evasion and avoidance of global and domestic fisheries management and conservation regulations within and beyond national jurisdiction. Legally speaking, the term 'IUU' fishing was officially coined in the FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) [14]. It is important to note that within the term 'IUU fishing' the sub-categories of 'unreported' and 'unregulated' fishing are clearly distinguished from that of 'illegal' fishing, leading to the logical conclusion that not all 'IUU fishing' activity is illegal [15]. 'Illegal fishing' refers to fishing in the jurisdictional waters of a state without that state's permission or in violation of its laws and regulations or in the area of competence of a Regional Fisheries Management Organisation (RFMO) in a vessel flagged to a state which is a member of the body, or a co-operating state, in violation of the RFMO's conservation and management measures. Not all forms of illegal fishing are regarded as criminal offences [16]; only those forms of illegal fishing that are expressly cited in domestic law will fall into this category. Additionally, various activities associated with otherwise non-criminal illegal fishing, such as corruption in the issuing of access rights, may be classified as criminal. So, for example, a vessel may be legally fishing on the face of it in accordance with the terms and conditions of a fishing licence but, on further investigation, it may be revealed that a corrupt official issued the fishing access rights that preceded the granting of the licence. 'Unreported fishing', on the other hand, is not concerned with illegally caught fish per se but, rather, fishing activities that amount to circumvention of either national laws or regulations by misreporting or non-reporting on fishing activities to the relevant national authority (for example, with regards to by catch, discards, landings or transshipment or irregularities regarding keeping of logbooks) or are in contravention of the reporting procedures of an RFMO. 'Unregulated fishing' refers to fishing in the area of an RFMO by vessels without nationality or flying the flag of a non-party state in a manner inconsistent with the RFMO's conservation and management measures or in areas or for fish stocks in relation to which there are no applicable conservation or management measures in a manner inconsistent with state responsibilities for the conservation of living marine resources under international law. This would include, for example, small-scale or artisanal fishing in waters where no fisheries management system is in place and thus no access control operates and fishing on the high seas by vessels flying a flag of convenience. To complicate matters, the term 'illegal fishing' is (confusingly) frequently also used in literature and international documents as an abbreviation referring to the broad range of fishing activities covered by the IUU concept.

Fish and fishery products play a critical role in global food security and nutritional needs of people in developing and developed countries (discussed further below in the context of the right to food) [1]. Tackling IUU fishing, in the context of ensuring the sustainable use of marine resources towards greater food security, falls internationally under the mandate of the United Nations Food and Agriculture Organisation (FAO). The FAO has traditionally taken the lead role in facilitating the negotiation of key international hard and soft law instruments geared at tackling IUU fishing via fisheries management regimes. The most important of these agreements include the 1993 FAO Compliance Agreement [17], the 1995 FAO Code of Conduct for Responsible Fisheries [18], with its ambitious aim of setting international standards and norms for the management and use of fisheries, and the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) [19]. As endorsed by the IPOA-IUU (para 66) and the FAO's Responsible Fish Trade Guidelines supplementing the 1995 Code of Conduct for Responsible Fisheries [20] trade and market measures to prevent illegally

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