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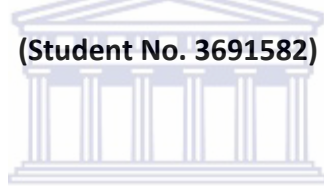
**FACULTY OF LAW**

**ILLEGAL, UNREPORTED, AND UNREGULATED FISHING: A PARADIGM SHIFT FROM A  
REGULATORY ISSUE TO A TRANSNATIONAL ORGANISED CRIME**

**by**

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**Research paper submitted in partial fulfilment of the requirements for the award of the  
LLM  
degree**

**Supervised**

**by**

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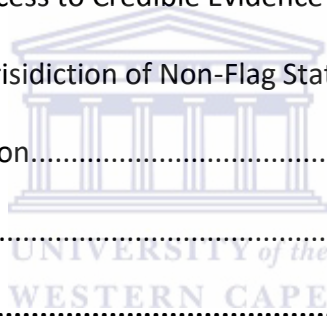
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**Declaration**

I, **Winjie Siwale**, declare that *Illegal, Unreported, and Unregulated Fishing: A Paradigm Shift from a Regulatory Issue to a Transnational Organised Crime* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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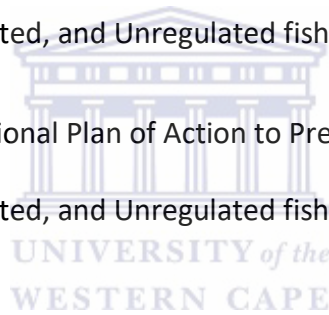
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### **List of Abbreviations and Acronyms**

IUU fishing	Illegal, unreported, and unregulated fishing
FAO	Food and Agriculture Organisation
UNODC	United Nations Office on Drugs and Crime
UNCTOC	United Nations Convention against Transnational Organised Crime
RFMO	Regional Fisheries Management Organisation
NPOA-IUU	National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated fishing
IPOA-IUU	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated fishing



## Key Words

Illegal, Unreported, and Unregulated fishing

Fisheries crime

High Seas

Marine Living Resources Crime

Transnational organised crime

Criminalisation

Flag States

Transshipping

Flag hopping

Flag of Convenience

Port of Convenience

Beneficial Ownership





## Chapter One

### The Concept of Illegal, Unregulated, and Unreported Fishing

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#### 1.1 General Background

The importance of the fisheries sector to world sustenance is extensive, ranging from being a source of employment and protein for subsistence farmers, particularly in developing countries, to providing social and economic opportunities for food security and environmental protection.<sup>1</sup> It is estimated that the fisheries sector assures the livelihoods of 10 per cent to 12 per cent of the world's population.<sup>2</sup> Most countries have, however, neglected to formulate effective policies to manage this sector and to give it adequate attention, despite its value to the health and wealth of a nation. The need to devote more attention to the fisheries sector is pressing, given the rising demand for fish, which has resulted in over-exploitation of fish reserves. De Coning and Witbooi postulate that '85% of worldwide fish stocks are now over and fully exploited, with 53% being fully exploited, therefore these fisheries cannot be expanded'.<sup>3</sup> This, in turn, has led to difficulties in maintaining ecosystems.<sup>4</sup> This over-exploitation of fish and other edible fresh water

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<sup>1</sup> Finegold C 'The importance of fisheries and aquaculture to development' (2009), available at [http://pubs.iclarm.net/resource\\_centre/WF\\_2546.pdf](http://pubs.iclarm.net/resource_centre/WF_2546.pdf) (accessed 17 April 2016).

<sup>2</sup> Bondaroff T, van der Werf W & Reitano T *The Illegal Fishing and Organized Crime nexus: Illegal Fishing as a Transnational Organized Crime* (2015) 14 Global Initiative Against Transnational Crime, available at [http://theblackfish.org/Fishing\\_Crime.pdf](http://theblackfish.org/Fishing_Crime.pdf) (accessed 17 April 2016).

<sup>3</sup> De Coning E and Witbooi E 'Towards a new fisheries crime paradigm: South Africa as an illustrative example' (2015) *Marine Policy*, available at <http://www.sciencedirect.com/science/article/pii/S0308597X1500189X> (accessed 8 July 2016).

<sup>4</sup> See generally FAO 'The State of World Fisheries and Aquaculture Opportunities and challenges' FAO (2014), available at <http://www.fao.org/3/a-i3720e.pdf> (accessed 15 April 2016).

resources is not restricted to small-scale inland fishing activities, but extends also to the oceans.

The issue goes beyond depletion of fish populations and the adverse impact this has on the environment, as stated in various reports by agencies such as the Food and Agriculture Organisation (FAO) of the United Nations (UN), which indicate the increasing threat of illegal, unreported and unregulated (IUU) fishing.<sup>5</sup> This threat is heightened to the extent that IUU fishing is usually connected with other crime in the fishing industry, such as drug smuggling and human trafficking, commonly referred to as fisheries crime, which has come to assume a transnational nature. Fisheries-related crime has been characterised as a low-risk, high-reward undertaking with an economic incentive, thus increasingly attracting the participation of organised criminal groups.<sup>6</sup> Consequently, there is an increased global need to curb IUU fishing and give it a legal definition, determining which type of conduct constitutes IUU fishing and how it is related to other transnational organised fisheries crime.

## **1.2 What is IUU Fishing?**

The phrase IUU fishing was coined by the Commission for Conservation of Antarctic Marine Living Resources (CCAMLR) in its 1997 report.<sup>7</sup> It recognised the problem of non-compliant fishers, classifying their activity as ‘illegal, unreported and unregulated’. A narrow definition of IUU fishing is fishing which does not comply with national, regional or global fisheries

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<sup>5</sup> FAO (2014) 1.

<sup>6</sup> Baird RJ *Aspects of Illegal, Unreported, and Unregulated Fishing* (2006) 8.

<sup>7</sup> Baird (2006) 8.

conservation and management obligations',<sup>8</sup> occurring both on the high seas and inland coastal fisheries. Often, the term IUU fishing is generic in nature. It is used to describe the fishing activity which contravenes conservation and management obligations, rather than drawing a distinction between the various activities. This is evident in the FAO's International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU),<sup>9</sup> the first international legal instrument seeking to regulate IUU fishing. It does not define IUU fishing or give it any form of legal characterisation; rather it gives the broad scope and nature of illegal, unreported, and unregulated fishing.<sup>10</sup>

Illegal fishing entails contravention of existing, sanctioned activity at national, regional, or international level by national or foreign vessels.<sup>11</sup> Unreported fishing includes misreporting or failing to report activities where there is an obligation to do so, nationally or regionally.<sup>12</sup>

This includes failure to adhere to the reporting procedures of a regional fisheries

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<sup>8</sup> Stølsvik CG 'Transnational organised fisheries crime as a maritime security issue' (2008), available at [http://www.un.org/depts/los/consultative\\_process/documents/9\\_gunnarstolsvikabstract.pdf](http://www.un.org/depts/los/consultative_process/documents/9_gunnarstolsvikabstract.pdf) (accessed 14 April 2016).

<sup>9</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU) adopted by the 25th session of the FAO Committee on Fisheries on 2 March 2001.

<sup>10</sup> Section 3, of the IPOA-IUU.

<sup>11</sup> "3.1 Illegal fishing refers to activities:  
3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;  
3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or  
3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization."

<sup>12</sup> "3.2 Unreported fishing refers to fishing activities:  
3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or  
3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization."

management organization (RFMO).<sup>13</sup> The third component of IUU fishing is unregulated fishing. It includes the contravention of conservation and management obligations of an RFMO by stateless vessels or vessels of states that are not parties to the relevant RFMO, as well as activities which are beyond the jurisdiction of any RFMO or state but which threaten marine living resources.<sup>14</sup>

The IPOA-IUU is beneficial, despite its non-binding nature, as it reiterates IUU fishing obligations and provides a broader scope for classifying IUU fishing activities. Essentially, its effectiveness lies in the comprehensive regulations for preventing, deterring, and eliminating IUU fishing, particularly the ability of national and RFMOs to detect IUU fishing activity and sanction it. This is discussed further in the next chapter. One of its limitations, however, is its lack of consistency in drawing a distinction between illegal, unreported, and unregulated fishing. Thus, proposed measures to address each component are conflated and unclear. IUU fishing is not only used generically to refer to any of the three components, but in practice is also often conflated with fisheries crime, which is not addressed in the IPOA-IUU. There is, however, a need to draw a distinction, if possible, as well as to identify which activity constitutes IUU fishing.

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<sup>13</sup> RFMOs are a collection of countries within a proximity that have shared fishing or financial interest.

<sup>14</sup> “3.3 Unregulated fishing refers to fishing activities:  
3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or  
3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.”

### 1.3 Nexus with Fisheries Crime

The actual legal characterisation of IUU fishing as a proposed transnational crime has yet to be settled. A detailed issue paper by the United Nations Office on Drugs and Crime (UNODC) formulates a link between IUU fishing and other organised crime, particularly trafficking in persons, smuggling of migrants and illicit trafficking in narcotics.<sup>15</sup> The link between IUU fishing and organised crime is said to be twofold: engagement in fisheries crime such as the case of abalone poaching in South Africa by transnational organised crime syndicates; and legally present fishing operators engaging in parallel criminal fishing activities such as underreporting of blue tuna fish catches.<sup>16</sup> This evidences the use of the fishing industry as a target of organised crime. It is, however, uncertain to what extent IUU fishing violates a protected interest which justifies making it a crime, or whether such violation is dependent on the link with organised crime, which will be explored further in Chapter 3 of the study.

Fisheries crime is a concept that is legally ill-defined but can be said to be an all-encompassing term that includes illegal fishing activities and other known organised crime such as money laundering, document fraud, and narcotics and human trafficking conducted through the fisheries sector.<sup>17</sup> For instance, drug trafficking by a vessel in an RFMO is criminalised because drug trafficking is internationally branded as a crime, and is subject to criminal sanction. By contrast, where vessels of states belonging to an RFMO engaging in parallel criminal activity such as fish laundering and misreporting catches, this practice

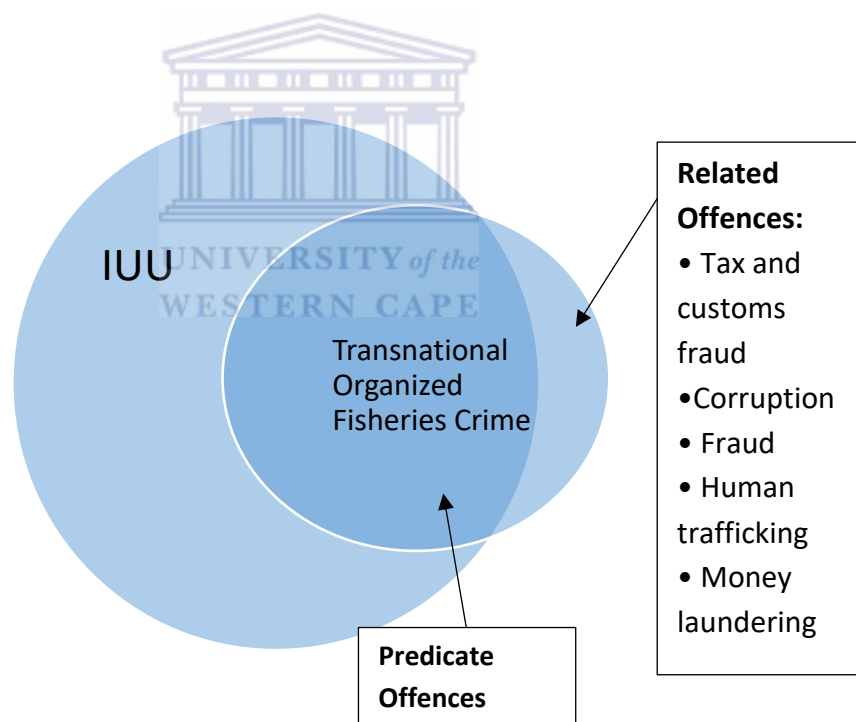
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<sup>15</sup> United Nations Office on Drugs and Crime *Report on Transnational Organized Crime in the Fishing Industry* (2011) UNODC.

<sup>16</sup> De Coning (2015) 211.

<sup>17</sup> United Nations Office on Drugs and Crime *Fisheries crime: bringing to light the perfect storm of illegal activities in the fishing sector* (2016), available at <http://www.unodc.org/unodc/en/frontpage/2016/May/fisheries-crime-bringing-to-light-the-perfect-storm-of-illegal-activities-in-the-fishing-sector.html> (accessed 18 June 2016).

would constitute IUU fishing under the auspices of the IPOA-IUU and subject to a civil fine. The IPOA-IUU does not prescribe specific sanctions for IUU fishing, but leaves it up to states to impose sanctions. This, suggests the use of a civil sanction regime,<sup>18</sup> indicating that IUU fishing activities are subject to administrative regulation as opposed to the criminal sanctions imposed on its ancillary crimes. These examples indicate the importance of classifying to know which instrument applies and what sanctions are applicable. The leading school of thought, however, advocates for a classification of IUU fishing as part of fisheries crime, together with transnational organised fishing activities and related offences, as illustrated in the diagram overleaf.<sup>19</sup>



Source: de Coning E 'Transnational organized fisheries crime'

<sup>18</sup> Section 21 of the IPOA-IUU.

<sup>19</sup> De Coning E 'Transnational organized fisheries crime: INTERPOL project SCALE and INTERPOL *ad hoc* Working Group on Fisheries Crime', available at <https://www.ccamlr.org/en/system/files/Day%202%20-%20Session%203%20-%20Transnational%20Organized%20Fisheries%20Crime%20-%20Eve%20de%20Conning.pdf> (accessed 20 June 2016).

The lacuna in this approach is the continued use of IUU fishing generically and the lack of clarity as to which activities particularly are already criminalised and which are regulatory. Perhaps an examination of the national strategies adopted by various countries may offer better guidance on this. Currently, illegal fishing is within the mandate of the FAO's IPOA-IUU, as the principal international instrument, while transnational crime falls under the auspices of the United Nations Office on Drugs and Crime (UNDOC) and is regulated by a multilateral convention, the United Nations Convention against Transnational Organized Crime (UNTOC).<sup>20</sup>

#### 1.4 IUU fishing a Regulatory Issue

IUU fishing constitutes a threat to sustainable development by reducing the profitability for legitimate fishers. According to one Global Initiative Report on IUU fishing, treating IUU fishing as a regulatory issue, that is, as “different actors violating regulations”, fails to capture the true nature of the problem.<sup>21</sup> The Report posits that there is evidence of systematic transnational violation of fishing laws, imparting to it the nature of a transnational organised crime. A notable problem and driver of IUU fishing is the misuse of flags of convenience which enable operators to choose and change a vessel's registration, as there is no regulation or monitoring that keeps vessels bound to the registration of the country of origin.<sup>22</sup> This makes it difficult to identify beneficial owners of vessels or to establish which states have jurisdiction over which vessels.

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<sup>20</sup> The United Nations Convention Against Transnational Organized Crime (2003) requires States Parties to criminalize, *inter alia*, participation in an organized group (article 5), the laundering of the proceeds of crime (article 6), and corruption (article 8).

<sup>21</sup> Generally, see Bondaroff (2015).

<sup>22</sup> Martini M 'Illegal, unreported and unregulated fishing and corruption' (2013) *Transparency International* 5 September 2013, available at

A case in point is that of the *FV Viking*, a stateless vessel that was sought by 13 nations for carrying out tooth-fish poaching in the Southern Ocean for over a decade. Indonesia eventually sank the ship. 'The Viking was operating as a so-called ghost ship, frequently changing its name and registration and not broadcasting any type of satellite signal to establish its whereabouts.'<sup>23</sup> What can be noted from this is how easily vessels operate transnationally, undetected, because states are either unwilling or unable to monitor and enforce existing regulations. The length of time taken to capture the *Viking* is evidence of both how ineffective state regulation on its own is and the gaps that exist in international law.

Other than making it easy for transnational operations, flags of convenience further aid illegal activities such as transshipping – a form of 'fish laundering' where fish is transferred at sea by mixing legal and illegal fish, and then using vessels that carry cargo directly to a port of convenience where it is sold legally.<sup>24</sup> The impact of IUU fishing is thus not only on the natural environmental, but also on economies of states and the livelihood of people.

It bears noting that illegal fishing is within the mandate of the FAO, which adopted the IPOA-IUU as the principal international instrument aimed at addressing the problem. The IPOA-IUU has been endorsed by 110 countries so far. The IPOA-IUU, and several other

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[https://www.google.co.bw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ah\\_UKEwjq1d3ujOLRAhVnCsAKHZ\\_fAsQQFggaMAA&url=http%3A%2F%2Fwww.u4.no%2Fpublications%2Fillegal-unreported-and-unregulated-fishing-and-corruption%2Fdownloadasset%2F3261&usg=AFQjCNHj\\_M90f3KRkepzWF-UIm3i1jwQRQ](https://www.google.co.bw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ah_UKEwjq1d3ujOLRAhVnCsAKHZ_fAsQQFggaMAA&url=http%3A%2F%2Fwww.u4.no%2Fpublications%2Fillegal-unreported-and-unregulated-fishing-and-corruption%2Fdownloadasset%2F3261&usg=AFQjCNHj_M90f3KRkepzWF-UIm3i1jwQRQ) (accessed on 10 April 2016).

<sup>23</sup> Jatmiko A "Indonesian authorities bombed the last major ship internationally wanted for years of illegally taking tooth fish from southern waters, reiterating a strong message to would-be poachers who enter the country's waters" US News, available at <http://www.usnews.com/news/world/articles/2016-03-14/indonesia-blows-up-illegal-toothfish-ship-sought-by-interpol> (accessed 14 April 2016).

<sup>24</sup> Martini (2013) 3.



instruments adopted to deal with IUU fishing, are soft law approaches, that is, they have no legally binding obligations on signatories. By contrast, the regulation of transnational crime under UNCTOC follows a hard law approach, creating legally binding obligations on signatories. Criminalisation of IUU fishing thus entails a resolution of how the different institutions can be co-ordinated, particularly in cases where there is a link to organised crime. For instance, in a case involving the trafficking of cocaine by a fishing vessel, the question that arises is how the different mandates of the relevant institutions and instruments will be brought into effect?

Literature in the form of reports and issue papers argues that IUU fishing can no longer be regarded as a regulatory issue by attempting to establish a nexus between the illicit practice and transnational organised crime. Despite a systematic study exploring IUU fishing as a transnational organised crime, gaps remain in the actual legal conceptualisation of the crime. This is traceable to the existing international legal framework for marine resources, environmental law and transnational criminal law.

### **1.5 Research Objectives**

This study seeks to determine whether the characterisation of IUU fishing as a transnational organised crime can help regulate fishing operations and have an effective global reach for curbing organised crime in this area, in the light of the vulnerabilities of the fishing industry. It further investigates whether the mandates of the different, relevant institutions and instruments can be integrated to curb IUU fishing as a transnational crime, particularly where IUU fishing is made a transnational organised crime.

## **1.6 Research Questions**

The study seeks to answer two questions:

- First, can the characterisation of IUU fishing as a transnational organised crime help to regulate fishing operations and have an effective global reach for curbing organised crime in this area?
- Second, how can the mandates of the different, relevant institutions and instruments be integrated to curb IUU fishing as a transnational organised crime?

## **1.7 Methodology**

This research paper will be a qualitative desk-study which will review both primary and secondary texts. The primary sources that will be consulted are international legal instruments, national laws, case law, UN reports, as well as reports by inter-governmental and governmental commissions. The secondary sources will consist mainly of journal articles, chapters in books and media reports.

## **1.8 Scope of the Study**

The study analyses the existing regulatory frameworks of South Africa, Ghana, the European Union Regulation on Illegal, Unreported, and Unregulated Fishing (EU IUU Regulation), and the recently adopted African Union Lomé Charter. These regulatory frameworks and instruments will be compared, noting their similarities, differences, strengths and weaknesses. These countries and region are chosen because they are coastal countries and have also taken significant regulatory measures to address IUU fishing. They provide a good contrast of measures on the demand side and the supply side of IUU fishing, as well as the distinction in technical capacities. Nevertheless, they remain vulnerable to threats of

fisheries crime. To provide more clarity, the study further identifies the common conduct that is criminalised as part of IUU fishing.

### **1.9 Outline of Remaining Chapters**

Chapter two will focus on illegal, unreported, and unregulated fishing as a regulatory issue and analyse its existing national and international management framework. It will include a comparative study of Ghana, South Africa, the European Union's National Plans of Action (NPOA) towards IUU fishing, and the Lomé Charter, to consider the lack of standardised governance and law enforcement in the fishing industry. This is in furtherance of the contention that the current regulatory approach is ineffective and that there is need for more stringent means to curb this vice.

Chapter 3 draws upon the nexus between IUU fishing and other organised crime. It expounds on the question of whether IUU fishing can and should be established as a transnational organised crime, what the legally protected interest may be, and how this could be reconciled with the role of other international regulatory institutions such as the FAO and UNODC.

Chapter four discusses the conclusions to be drawn from the study and submits recommendations.

## Chapter Two

### Fisheries Legislative, Policy and Management Framework

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#### 2.1 Introduction

Chapter One introduced the study by defining IUU fishing and explaining its extent. More importantly, it highlighted the increased global efforts being made to curb the vice, with a shift in the perception of it as merely a fisheries management problem. The chapter provided evidence of IUU fishing as a transnational organised crime (TOC), emphasising the emergent problem of fisheries crime, and justified the need to standardise transnational criminalisation as a supplement to existing efforts.

This chapter explores this possibility by investigating current responses to IUU fishing internationally and domestically. The national legal frameworks of South Africa and Ghana, as well as the regional instruments, The European Union Regulation on IUU Fishing and the Lomé Charter, which have been selected are analysed. Through comparative analysis, gaps in the current position are identified as well as policies and measures proposed to address these gaps. Essentially, Chapter Two attempts to provide evidence of deficiencies in the existing fisheries management and conservation paradigm, internationally and domestically. It includes an analysis of how effective responses to IUU fishing have been so far, and highlights the prevalent challenges.

#### 2.2 International Legal Framework

Effective conservation and management of marine living resources has been on the global agenda for over three decades. A myriad of instruments and frameworks, ranging from

those that are binding to voluntary measures, have been adopted over the years to address fisheries management problems, both on the high seas and within national waters. The instruments and conventions summarily discussed below address the need to achieve responsible fishing by improving flag state compliance. They evidently illustrate that the call for global co-operation among states and organisations has been a recurring theme throughout the fisheries management discourse.

### **2.2.1 The United Nations Convention on the Laws of the Sea (1982)**

The United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS)<sup>25</sup> emanates from a United Nations General Assembly resolution which declared that 'the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states'.<sup>26</sup>

UNCLOS is a binding international instrument that establishes the sovereign rights of coastal states to exploit, conserve and manage marine living resources within their jurisdiction. It is the first attempt at codifying the law of the sea, therefore, generally accepted as the basic legal order for the seas and oceans. UNCLOS is instrumental in facilitating efficient and equitable conservation and management of the seas and ocean resources. It addresses the balancing of rights and interests to access marine living resources, and the conservation of the marine environment. The role of flag states in enforcing maritime protection provisions is emphasised under the Convention. Its most significant innovation is the Exclusive

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<sup>25</sup> United Nations Convention on the Law of the Sea, adopted on 10 December 1982 and entered into force on 14 November 1994.

<sup>26</sup> Preamble to UNCLOS.

Economic Zone (EEZ), standardised as '200 nautical miles from the baselines from which the breadth of the territorial sea is measured',<sup>27</sup> which gives coastal states exclusive jurisdiction and exclusive rights to the resources in its EEZ. This, however, has accompanying responsibilities and obligations regarding their use and exploitation, such as determining the total allowable catch.<sup>28</sup>

UNCLOS has contributed to the discourse on conservation and management of marine living resources, which is essential to curbing IUU fishing by setting out clear objectives on their use and preservation. These objectives, however, lack specific guidelines on how to achieve them. Nonetheless, they have been the bedrock upon which further policies and initiatives to conserve and manage marine resources have been formulated.

### **2.2.2 The FAO Compliance Agreement (1993)**

The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, or the Compliance Agreement, was adopted at the FAO conference in November 1993.<sup>29</sup> It was developed in order to ensure that states comply with UNCLOS obligations by taking all measures necessary to conserve and manage the high seas, and it applies 'to all fishing vessels that are used or intended for fishing on the high seas'.<sup>30</sup> It is significant as the first international legally

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<sup>27</sup> Article 57 of UNCLOS.

<sup>28</sup> Kwadjosse T 'The Law of the Sea: Impacts on the Conservation and Management of Fisheries Resources of Developing Coastal States – The Ghana Case Study' (2009) The United Nations 9.

<sup>29</sup> The FAO Compliance Agreement of 1993, adopted on 23 April 2003 and entered into force in November 2003.

<sup>30</sup> Article II(1).

binding instrument to address solely flag state compliance and responsibility.<sup>31</sup> It reinforces particularly the duty imposed on flag states to regulate fishing vessels on the high seas by addressing the practice of reflagging,<sup>32</sup> and qualifies the right of flag states to exercise jurisdiction and control over their flag vessels. Unlike UNCLOS, the Compliance Agreement provides some guidelines on how the high seas can better be regulated. Article 4 of the Agreement, for example, requires states parties to maintain a record of fishing vessels entitled to fly their flag and authorised for use on the high seas. The obligation to co-operate in the implementation of the Agreement is augmented under article 5. Bilateral, regional and multi-organisational co-operation is encouraged, as well as the provision of technical assistance to meet obligations of the Agreement.<sup>33</sup> Nevertheless, it has failed to gain widespread acceptance among states.<sup>34</sup>

### 2.2.3 The UN Fish Stocks Agreement (1995)

The UN Fish Stocks Agreement<sup>35</sup> was enforced in 2001 as a measure to strengthen the legal framework for the conservation and management of straddling and highly migratory fish stocks. It complements the FAO Compliance Agreement in facilitating the implementation of UNCLOS provisions, but focuses on conservation and management of straddling and highly migratory fish stocks. In practice, the occurrence of straddling stock in both the EEZ and the

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<sup>31</sup> Rigg K 'Halting IUU Fishing: Enforcing International Fisheries Agreements' (2003), available at [http://www.imcsnet.org/imcs/docs/halting\\_iuu\\_fishing\\_oceana.pdf](http://www.imcsnet.org/imcs/docs/halting_iuu_fishing_oceana.pdf) (accessed 15 May 2016).

<sup>32</sup> Reflagging is practised when ships change their national registration, thereby obscuring their identity and avoiding compliance with conservation regulations for fishing activities on the high seas.

<sup>33</sup> Art 7.

<sup>34</sup> Rigg K (2003).

<sup>35</sup> 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.

high seas has significant transboundary effects for fisheries management.<sup>36</sup> As such, the Fish Stocks Agreement establishes a list of general principles of conservation and management under article 5. Notably, it introduces precautionary and ecosystem system approaches, expressly required in fisheries management.<sup>37</sup> It requires compatibility in conservation and management measures adopted for EEZs and for the high seas. Regional fisheries management organisations (RFMOs) are thus used as the primary vehicles to enhance co-operation among coastal states and the regulation of high seas fishing stocks. The Agreement incorporates principles established in UNCLOS, such as co-operation in fisheries conservation and management, strengthening them further with new implementation norms. It further contains provisions that break new ground. However, its ambit is focused on straddling and highly migratory fish stocks.

#### **2.2.4 The FAO Code of Conduct for Responsible Fisheries (1995)**

The Code of Conduct for Responsible Fisheries, though voluntary in nature, was unanimously adopted by the 1995 FAO Conference. It is global and broad in application, extending to every stage and process of fisheries production as well as market-related measures. It sets out a framework for international and national standards of behaviour for sustainable exploitation, conservation, management and development of aquatic living resources. The system of monitoring, control and surveillance (MCS) is given importance under the Code. As will be noted below under the discussion of national frameworks, this

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<sup>36</sup> United Nations 'DOALOS/UNITAR Briefing on Developments in Ocean Affairs and the Law of the Sea 20 years After the Conclusion of the United Nations Convention on the Law of the Sea' (2002) United Nations available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_20years/1995FishStockAgreement\\_ATahindro.pdf](http://www.un.org/depts/los/convention_agreements/convention_20years/1995FishStockAgreement_ATahindro.pdf) (accessed 14 April 2016).

<sup>37</sup> Arts 5(c) and 6.



system is the leading approach to fisheries management. The 1996 FAO Technical Guidelines for Responsible Fisheries No.1<sup>38</sup> provides technical guidelines for the implementation of the Code.

### **2.2.5 The IPOA-IUU (2001)**

Combatting IUU fishing has been a topic of discussion in a number of international fora since the late 1990s.<sup>39</sup> However, It only became a matter of high priority and serious concern in 1999, following information presented to the FAO Committee on Fisheries (COFI) about fishing vessels flying ‘flags of convenience’ and the threat this poses to achieving sustainable fisheries.<sup>40</sup> In the light of this phenomenon, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) was adopted in 2001 as a global plan of action. It was conceived within the framework of the Code of Conduct as a comprehensive toolbox with a diverse set of measures to guide states in the fight against IUU fishing problems.<sup>41</sup> It outlines the responsibilities of states in detail, including measures tailored for flag, coastal and port states. Actions under the IPOA-IUU are divided into eight categories: All State Responsibilities; Flag State Responsibilities; Coastal State Measures; Market-related Measures; Research; Regional Fisheries Management Organisations (RFMOs); and Special Requirements of Developing Countries. Under the

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<sup>38</sup> Baird (2006) 85.

<sup>39</sup> IPOA-IUU Introduction.

<sup>40</sup> Article 1(1) of the IPOA-IUU.

<sup>41</sup> House of Ocean ‘IUU: Is it a bird or a plane? Is it illegal fishing, unregulated fishing or crime? Look to the Fish Stocks Agreement for answers’ (2015), available at <http://iuufishing.ideasonerope.eu/2015/10/04/iuu-bird-plane-illegal-fishing-unregulated-fishing-crime-look-fish-stocks-agreement-answers/> (accessed on 15 May 2016).

objectives and principles of the IPOA-IUU, the role of RFMOs in curbing IUU fishing through effective and transparent measures is emphasised.<sup>42</sup>

The IPOA-IUU defines the nature and scope of the distinct, though overlapping components of illegal, unreported, and unregulated fishing, elaborated in the preceding chapter of this study. This definition has been incorporated into treaties, national legislation and European legislation. This is problematic because the definition lacks legal clarity: 'the IPOA-IUU does not specify which measures address illegal fishing, unreported fishing, or unregulated fishing,' but rather generically addresses IUU fishing.<sup>43</sup> The nexus between the nature and scope of IUU fishing and the implementation measures to combat it is thus obscured.

Because of this ambiguity, Palma notes that states fail to examine how the international definition of IUU fishing applies within a national context, especially where IPOA-IUU measures are implemented under National Plans of Action (NPOAs).<sup>44</sup> This may be evident under the discussion of specific national measures and contexts later in the chapter.

Despite its shortcomings, the IPOA-IUU is key to preventing, deterring, and eliminating IUU fishing. The FAO has the primary mandate to promote its implementation at regional and national level through a comprehensive and integrated approach.<sup>45</sup> It bears noting that the success of the IPOA-IUU in fulfilling its objectives is dependent on state implementation and effective use of the tools available. The chapter later investigates the legal and institutional frameworks of Ghana, South Africa and the European Union.

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<sup>42</sup> Art 3(8) of the IPOA-IUU.

<sup>43</sup> Palma MA 'Combatting IUU Fishing: International Legal Developments' in Hanich Q & Tsamenyi M (eds) *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments on the Western and Central Pacific Region* (2009) 74.

<sup>44</sup> Palma MA (2009) 74.

<sup>45</sup> Art 3(9).

## 2.2.6 Port State Measures Agreement (2009)

The Agreement on Port State Measures to Prevent and Eliminate Illegal, Unreported, and Unregulated Fishing (Port State Measures Agreement) is the first legally binding instrument addressing IUU fishing. The UN FAO Conference adopted the Agreement in 2009, but it only came into force mid-2016 after 30 ratifications. Though the threshold of 25 ratifications was exceeded, the 30 states are only a small fraction of Port States, and the delay in ratifications is concerning as it may be an indication of state reluctance to enforce the Agreement.

Notwithstanding this apparent reluctance, the Agreement is a necessary addition to the global fisheries management conversation as it standardises Port State measures by setting out minimum requirements for their use by foreign vessels.

Port States are required to designate and publicise specific ports to which foreign vessels may request entry.<sup>46</sup> Prior application for entry ought to be made, and a Port State will decide whether to grant entry, considering specified measures, such as the vessel's engagement in IUU fishing.<sup>47</sup> Illegality in the Agreement is restricted to IUU fishing and related activity, without specification of what this 'related activity' may be. One could argue that where organised crime is committed, it could fall under the auspices of the Agreement if there is a nexus with IUU fishing operations. This, however, remains open to interpretation. Article 11 requires Port States to restrict the use of their ports for 'landing, transshipping, packaging and processing of fish'. A reasonable suspicion of a vessel's engagement in or support of IUU fishing and related activities suffices as grounds for such

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<sup>46</sup> Port State Measures Agreement Art 7.

<sup>47</sup> Art 9.

restriction, thus, negating the need for actual knowledge.<sup>48</sup> Prior to this provision, Port States could allow vessels to land and process illegal fish through their ports, only to discover that some vessels had been complicit in IUU fishing or related activity. Article 11 eliminates time lags of investigation and obtaining actual knowledge before Port States can act against vessels.

Essentially, the general idea is to make it difficult for IUU fishing operators to circumvent laws, by ensuring uniformity in regulation. To this end, the Agreement requires states to cooperate and exchange information.<sup>49</sup> The role of flag states is reiterated, especially the duty to investigate and enforce action against their vessels.<sup>50</sup> Nevertheless, the Agreement places no obligation on Port States to investigate or take enforcement action against foreign vessels seeking entry that are known, or reasonably suspected of having engaged in, or supported IUU fishing. This forms grounds to deny entry awaiting flag state action.

Ultimately, the likely effect is that IUU fishing operators will have more incentive to make use of ports of convenience, further deterring detection of illegal activity. Criminal enterprises logically pursue flags of convenience due to lax law enforcement. The Agreement falls short of addressing and resolving the issue of flags and ports of convenience, despite standardising port State measures. Until these measures are widely implemented, and the reality of organised crime is included in the fisheries management discourse, a lacuna exists.

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<sup>48</sup> Art 11(e).

<sup>49</sup> Art 6(1).

<sup>50</sup> Art 20.

## 2.3 National Legislative, Policy and Management Frameworks

### 2.3.1 Ghana

The Republic of Ghana is a developing coastal state situated along the Gulf of Guinea, bordering the Atlantic Ocean, with a coastline measuring about 550 km in extent.<sup>51</sup> The Ghanaian fisheries sector accounts for at least 4.5 per cent of the national GDP and for the employment of about 10 per cent of the population who work in the marine, inland and lagoon environments and who also benefit from aquaculture.<sup>52</sup> Fish accounts for an estimated 60 per cent of animal protein in the Ghanaian diet.<sup>53</sup> However, like most coastal and port states, the fisheries sector is vulnerable to illegal, unreported and unregulated fishing activities, as well as organised crime. Ghana is said to lose about US\$100 million annually in catches.<sup>54</sup> West African countries, Ghana inclusive, serve as supply and transit zones and destination countries for what can collectively be classified as fisheries crime.<sup>55</sup>

#### 2.3.1.1 Historical development

The significance of the fisheries sector in Ghana can be traced as far back as the 1800s and 1900s when fishing was mainly a subsistence activity, with the commercial sector emerging later, as demand for fish increased.<sup>56</sup> Until the 1970s, fishing activity was restricted to

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<sup>51</sup> National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (2014) 9.

<sup>52</sup> NPOA-IUU (2014) 10.

<sup>53</sup> Nunoo F, Asiedu B, Amador K, Belhabhb K, Lam V, Sumaila R & Pauly D 'Marine Fisheries Catches in Ghana: Historic Reconstruction for 1950 to 2010 and Current Economic Impacts' *Reviews in Fisheries Science & Aquaculture* (2014) 22 274.

<sup>54</sup> Bondaroff (2015) 48.

<sup>55</sup> Bondaroff (2015) 49.

<sup>56</sup> Kwadjosse (2009) 12.

inshore waters. A surge of investment into the fisheries sector prompted expansion of commercial fishing activities, venturing into offshore waters in the 1970s and 1980s. However, despite the expanding fisheries sector, Ghana still lacked a comprehensive regulatory framework to manage investment and conserve marine resources.

Mismanagement of investments and political instability in the 1970s and 1980s, among other reasons, unfortunately led to the collapse of the industry.<sup>57</sup> Following the adoption of UNCLOS in 1982 and the subsequent declaration of EEZs by states, Ghanaian fishing vessels were shut out from offshore waters and had to return to inland waters.<sup>58</sup> Inshore marine resources were overexploited by the 1990s, which led to a continued decline of the Ghana fishing industry and need for reconstruction.<sup>59</sup>

Ghana ratified UNCLOS in 1983. The Convention is not only a significant milestone for international fisheries law, but also a source of various important instruments for fisheries management in Ghana. Kwadjosse states that prior to UNCLOS, fisheries legislation 'focused on building and importation of fishing craft and manning of the craft'<sup>60</sup> as opposed to effective conservation of fisheries resources. The tide changed in 1991 with the Provisional National Defence Council (PNDC) Law<sup>61</sup> which had management and conservation of fishery resources as its primary objective, establishing licensing measures and Monitoring Control and Surveillance (MCS).<sup>62</sup> After the PNDC Law was enacted the Fisheries Commission was

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<sup>57</sup> Kwadjosse (2009) 13.

<sup>58</sup> Nunoo (2015) 274.

<sup>59</sup> Kwadjosse (2009) 14.

<sup>60</sup> For example, the Wholesale Fish Marketing Act of 1963.

<sup>61</sup> PNDC Law 256 of 1991.

<sup>62</sup> Kwadjosse (2009) 22.

established. It was tasked with regulating, managing fishery resources and co-ordinating policy using an array of administrative powers under the Fisheries Commission Act.<sup>63</sup>

The Fisheries Act of 2002<sup>64</sup> reaffirmed the importance of the Fisheries Commission, as it became the mainstay of Ghanaian fisheries management effort. More significantly, the Act establishes a Monitoring, Control, and Surveillance (MCS) division<sup>65</sup> with an Enforcement Unit.<sup>66</sup> The Minister is allowed in terms of the Act to request assistance and support from personnel in other departments and competent bodies that have police powers to assist the Enforcement Unit.<sup>67</sup> This was a vital development, indicative of acknowledgement of the need for enforcement within the Ghanaian fisheries management framework. This perhaps stems from the IPOA-IUU which was adopted a year before the Fisheries Act and which urges states to encourage multi-stakeholder involvement ‘including industry, fishing communities and non-governmental organizations’.<sup>68</sup> Nonetheless, the powers entrusted to the Enforcement Unit relate to monitoring, control and surveillance.<sup>69</sup> The Act, however, entrusts authorised officers with the power of arrest, search and seizure, which are important for facilitating the prosecution of offenders.<sup>70</sup> The appointment of such authorised officers is, unfortunately, a voluntary exercise.<sup>71</sup> This may suggest that Ghanaian

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<sup>63</sup> Fisheries Commission Act 457 of 1993.

<sup>64</sup> Fisheries Act 625 of 2002.

<sup>65</sup> Section 15.

<sup>66</sup> Section 94(1).

<sup>67</sup> Kwadjosse (2009) 40.

<sup>68</sup> Article 25 IPOA-IUU.

<sup>69</sup> Section 94(2).

<sup>70</sup> Section 96.

<sup>71</sup> Section 95(1).

fisheries management prioritises conservation as opposed to building a case for successful prosecution of IUU fishing cases and related parallel activity.

Notwithstanding these shortcomings, the Fisheries Act is an attempt to integrate international fisheries agreements into the Ghanaian domestic framework. The IPOA-IUU obligates member states to adopt national plans of action as the primary vehicle for implementing the IPOA-IUU domestically. The aim of the domestic implementation is to target specifically prevention, detection and deterrence of IUU fishing.<sup>72</sup> Ghana is one of the few countries that has adopted a national plan of action to prevent, deter and eliminate illegal, unreported, and unregulated fishing (NPOA-IUU).

### **2.3.1.2 NPOA-IUU**

The Ghanaian NPOA-IUU is meant to fight illegal, unreported, and unregulated fishing, using the IPOA-IUU as a template. It gives a profile of Ghana's fisheries, identifying the gaps in its fisheries management practice, and gives a synopsis of IUU fishing in the Ghanaian context, recognising that the IPOA-IUU is not a one-size-fits-all approach. It is thus a toolbox to address IUU fishing, providing national responses that are tailor-suited to address Ghanaian gaps in fisheries management. For example, it focuses more on detection and action against foreign vessels, addressing the historical challenge of "border hopping" into Ghanaian waters by foreign vessels.<sup>73</sup>

The NPOA-IUU adopts the IPOA-IUU definition of IUU fishing, and its action responses are based on the IPOA-IUU. It unfortunately also inherits the challenge and shortcomings of the

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<sup>72</sup> Article 25 of the IPOA-IUU.

<sup>73</sup> Kwadjosse (2009) 63.



IPOA-IUU by addressing IUU fishing only generically. The actions to combat IUU fishing are divided into eight categories as per the IPOA-IUU, namely: All State Responsibilities; Flag State Responsibilities; Coastal State Measures; Port State Measures; Market-related Measures; Research; Regional Fisheries Management Organisations and Special requirements of developing countries.<sup>74</sup> These responses are blanket responses to IUU fishing and are not tailored to addressing the various components. Moreover, there are no national implementation guidelines. As an illustration, action 9 under Flag State Responsibilities requires Ghana to ‘enforce relevant fisheries regulations for Ghana-flagged vessels on the high seas and in the jurisdiction of other States.’<sup>75</sup> Action 9, however, neglects to state which fisheries regulations are of relevance and what the enabling legislation of this action is. The NPOA-IUU fails to include issues not addressed by the IPOA-IUU, such as the presence of organised crime in the fishing industry.



### **2.3.2 South Africa**

South Africa’s coastline is more than 3200 km long, stretching from the coral reefs of Northern KwaZulu Natal to the Northern Cape. The coastal waters contain approximately 10 000 species of marine plants and animals.<sup>76</sup> According to the Annual Report of the Ministry of Agriculture, Forestry, and Fisheries, the South African fisheries sector contributes about 0.1 per cent of the nation’s gross domestic product (GDP), with a total

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<sup>74</sup> Para 29 NPOA-IUU.

<sup>75</sup> Para 30.

<sup>76</sup> Department of Environmental Affairs and Tourism ‘Marine and Coastal Management - Seas of Change’ 32 available at [https://www.environment.gov.za/sites/default/files/docs/10yyearsreview\\_marine\\_coast.pdf](https://www.environment.gov.za/sites/default/files/docs/10yyearsreview_marine_coast.pdf) (accessed on 17 May 2016).

output estimated at approximately R6 billion.<sup>77</sup> The Industry Code of Conduct for Responsible Fisheries in South Africa, however, provides a different estimation, stating that the 'commercial fishing industry contributes about 0.5 per cent of the GDP with an annual turnover of approximately R80 billion'.<sup>78</sup> This disparity suggests that reported catches have either dropped drastically in the last two years, or that available records are inconsistent and/or inaccurate.

Although the fisheries sector's contribution to GDP is proportionally smaller than that of Ghana, the contribution of the fisheries sector to economic output, skills development and employment through commercial, subsistence and recreational fishing cannot be overlooked.<sup>79</sup> It accounts for an estimated 108 000 jobs directly and indirectly.<sup>80</sup> Due consideration ought to be given to the fact that output is determined by the health and management of stocks, which in turn influence catch volumes.<sup>81</sup> Current output is, however, limited due to overexploitation of fish stocks through IUU fishing activities, particularly inshore species.<sup>82</sup> South African fisheries management is thus premised on administration of 'fishing rights, permits, exemptions and licences'.<sup>83</sup>

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<sup>77</sup> Ministry of Agriculture, Forestry, and Fisheries *Annual Report – Agriculture, Forestry, and Fisheries* (2016) 32.

<sup>78</sup> Industry Code of Conduct for Responsible Fisheries in South Africa (2014) 4.

<sup>79</sup> Ministry of Water and Environmental Affairs *Working Paper on Socio-economic Contribution of South African Fisheries and their Current Legal, Policy, and Management Frameworks* (2008) 8.

<sup>80</sup> Forestry and Fisheries Annual Report (2016) 32.

<sup>81</sup> Forestry and Fisheries Annual Report (2016) 32.

<sup>82</sup> Forestry and Fisheries Annual Report (2016) 32.

<sup>83</sup> 'Contribution of SA Fisheries' (2008) 5.

### 2.3.2.1.1 Historical Development of Fisheries Management

Fisheries conservation and management efforts in South Africa date as far back as the 1890s.<sup>84</sup> The 1960s were characterised by a considerable presence of foreign vessel activities in South African national waters, a phenomenon that resulted in unfettered profiteering from marine resources. This unchecked fishing activity resulted in the collapse of fish stocks in the 1970s.<sup>85</sup> The government declared a 200-nautical mile fishing zone limit in 1977, and enacted the Territorial Waters Act in response to the collapse of the fishing industry.<sup>86</sup> These were initial steps towards regulation of fish stocks and protection from severe international fishing expeditions.<sup>87</sup> Nevertheless, stocks continued to decline in the 1970s and 1980s despite the limited presence of foreign fleets accessing South African waters.<sup>88</sup> This prompted the introduction of Total Allowable Catch (TAC) and Total Allowable Effort (TAE) restrictions, used individually or jointly in commercial fisheries.<sup>89</sup> These are presently used in the fisheries management efforts.

Prior to 1994, the fisheries industry was dominated by white-owned companies, while most black South Africans were denied access to marine resources, due to racially exclusionary laws and policies of the apartheid system that focused on the growing commercial fisheries

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<sup>84</sup> DAFF 'Policy for the Small-Scale Fisheries Sector in South Africa' (2012) 2.

<sup>85</sup> DEAT 'Seas of Change' 24.

<sup>86</sup> Territorial Waters Act 1977 (Republic of South Africa, 1977).

<sup>87</sup> DEAT 'Seas of Change' 24.

<sup>88</sup> The continued reduction in stocks in this period coincides with the collapse of the Ghanaian fishing industry, and can be attributed to political instability at the time.

<sup>89</sup> DEAT 'Seas of Change' 24.

trade.<sup>90</sup> Unlike in Ghana, small-scale fishers were initially not recognised legally as participants in fishing activity, with many dispossessed of their land adjacent to the coast.<sup>91</sup> Following the new democratic dispensation of 1994, and based on the values enshrined in the Constitution, the challenge was to establish fishing equity. A shift in fisheries policy sought to reallocate fishing quotas in an equitable way, ensuring that historically disadvantaged individuals (HDIs) can also participate in the industry.<sup>92</sup>

The Marine Living Resources Act<sup>93</sup> was passed in 1998. It has become the fundamental regulatory framework for fishing in South Africa. It provides redress and recognises the rights of small-scale fishers under section 19. Notwithstanding this development, the expectation of increased efforts to augment access to marine resources between 1994 and 2000 resulted in a “rush” for fishing rights.<sup>94</sup> This created a need for a revised strategy on how to achieve fishing equity in a rational and transparent manner. In 2001, investment and experience in the fishing industry, black economic empowerment and employment equity were identified as key criteria for the allocation of fishing rights.<sup>95</sup> Opening access of marine resources to many more players was not without its side effects, for it strained the fisheries administration and resulted in a surge of new threats to resource sustainability.<sup>96</sup> A case in point is the extensive poaching of abalone and non-reporting of catches that assumed

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<sup>90</sup> Kleinschmidt H, Sauer W & Britz P ‘Commercial Fishing Rights Allocation in Post-apartheid South Africa: Reconciling Equity and Stability’ *African Journal of Marine Science* (2003) 25 25.

<sup>91</sup> DAFF (2012) 2.

<sup>92</sup> DEAT ‘Seas of Change’ 25.

<sup>93</sup> Marine Living Resources Act 18 of 1998.

<sup>94</sup> DEAT ‘Seas of Change’ 25.

<sup>95</sup> DEAT ‘Seas of Change’ 26.

<sup>96</sup> Kleinschmidt (2003) 26.

threatening proportions, necessitating a more robust compliance system.<sup>97</sup> An environmental court was set up in the coastal town of Hermanus in the Western Cape to prosecute primarily abalone poachers.<sup>98</sup>

The Hermanus Environmental Court was established in 2003 as the first South African specialised environmental crimes court. Unfortunately, its operation was short-lived. It was closed in 2006 following a political decision to shut down specialised courts that lacked a legislative mandate.<sup>99</sup> Despite its fleeting existence, a discussion of the court is imperative for this study, as it provides useful lessons for criminalisation and prosecution of illegal fishing offences. The court boasted a 70% success rate. A total of 74 cases were heard in its first year of existence. Apart from poachers, other key players in the fisheries chain such as transporters and processors were prosecuted as well.<sup>100</sup> Lessons to be learnt from the court include: prioritised attention to environmental cases; multi-stakeholder collaboration; combining resources and expertise; use of prison penalties as opposed to fines which are easily considered as costs of doing business; and developing appropriate structures for forfeiture of assets to prevent furthering criminal interests.<sup>101</sup> These lessons will be discussed further in the following Chapter in the context of transnational criminalisation.

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<sup>97</sup> Kleinschmidt (2003) 26.

<sup>98</sup> 'Contribution of SA Fisheries' (2008) 6.

<sup>99</sup> Stop Illegal Fishing 'Environmental Courts Prove to be Effective' 2, available at <http://static1.1.sqspcdn.com/static/f/157301/9458990/1290011218400/Stop-illegal-fishing-case-study-1.pdf?token=EutwPkm61ocw5XE3E4gg518noF0%3D> (accessed 26 July 2016).

<sup>100</sup> Stop Illegal Fishing 'Environmental Courts Prove to be Effective' 2.

<sup>101</sup> Use of prison penalties also effectively shifts focus onto the individual who commits the crime as opposed to vessels and abstract entities. The threat of imprisonment could serve as an effective deterrent.

### 2.3.2.1.2 Fisheries Management Framework

'Fisheries policy is founded on two fundamental principles, namely, that fisheries resources belong to all of South Africa's people and that these resources should be utilised on a sustainable basis so that both present and future generations may benefit from them.'<sup>102</sup> The South African fisheries management dispensation is largely premised on the UNCLOS approach – by way of Total Allowable Catch quotas for single species and access rights assigned to individual fishers.<sup>103</sup> Fishing rights are granted on the basis that rights holders abide by a code of conduct which obligates them to fish responsibly and to adhere to the laws and regulations.<sup>104</sup>

The Marine Living Resources Act<sup>105</sup> and its regulations provide the core basis of fisheries management in South Africa. The prevalent management system treats violations of the Act as administrative law matters. The idea is to encourage compliance through increased monitoring, surveillance and control of vessel activities.<sup>106</sup> Six primary types of management controls are used: restricting the number of vessels or individuals through TACs and TAE;<sup>107</sup> seasonal closures, marine protected areas;<sup>108</sup> gear size restrictions and gear mesh size restrictions.<sup>109</sup> The MLRA criminalises contravention of almost all its provisions,<sup>110</sup> and

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<sup>102</sup> 'Contribution of SA Fisheries' (2008) 1.

<sup>103</sup> De Coning (2015) 211.

<sup>104</sup> Industry Code of Conduct for Responsible Fisheries in South Africa (2014) 4.

<sup>105</sup> Marine Living Resources Act 18 of 1998, amended as Marine Living Resources Amendment Act 68 of 2000.

<sup>106</sup> De Coning (2015) 209.

<sup>107</sup> The Minister determines limits as per s24 of the Act.

<sup>108</sup> S43(2) provides for the declaration of MPAs where fishing might be prohibited.

<sup>109</sup> 'Contribution of SA Fisheries' (2008) 5.

dedicates an entire chapter to law enforcement.<sup>111</sup> Section 9 of the Act entrusts Fisheries Control Officers with the duties of peace officers, granting them extensive powers to enforce compliance.<sup>112</sup> They are empowered to enter and search any vessel, to seize property and arrest persons on any reasonable grounds.<sup>113</sup> The challenge, however, is that the provision empowering their appointment is hortatory, as is the case with Ghanaian authorised officers, suggesting that enforcement is inconsistent and lax. It further supports the view that the current dispensation prioritises and focuses more on fisheries regulation through conservation efforts for maintaining optimal levels, as opposed to detection of parallel activity on fishing vessels and in the industry. In addition, the effect on deterrence is negligible because sanctions imposed are minimal: the heftiest fine payable in terms of section 58 of the Act is five million rand and the longest prison sentence is five years.

One of the notable findings from studies investigating the nexus between IUU fishing and organised crime is the distinction in institutions under whose mandate they are and different legislative instruments governing them. The same holds true in the South African context – fisheries management is under the auspices of the Department of Agriculture, Forestry and Fisheries (DAFF), while organised crime falls under the South African Police Service (SAPS) with the Prevention of Organised Crime (POCA) as the primary legislative instrument.<sup>114</sup> De Coning refers to the *Bengis* case<sup>115</sup> as an illustration of the need for co-

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<sup>110</sup> Sec 58 of the MLRA.

<sup>111</sup> Chapter 6.

<sup>112</sup> Sec 51.

<sup>113</sup> Sec 51.

<sup>114</sup> De Coning (2015) 213.

<sup>115</sup> *Bengis and Others v Government of South Africa and Others* [2016] 2 All SA 459 (WCC).

ordinated efforts between multiple, relevant agencies in order to tackle both IUU fishing and organised crime successfully.<sup>116</sup> The practical implications of this case are discussed in the following chapter.

## 2.4 Regional Legal Framework

### 2.4.1 EU IUU Regulation

The European Union Regulation on Illegal, Unreported, and Unregulated Fishing (EU IUU Regulation)<sup>117</sup> is a unilateral, regional measure that aims to prevent, deter, and eliminate the entry of IUU fishery products into the European Union market and international waters.<sup>118</sup> The European Union which is, *inter alia*, a customs union, is composed of 28 member states which apply the same rules governing imports.<sup>119</sup> The EU Regulation endorses the FAO's IPOA-IUU and its definition of IUU Fishing.<sup>120</sup> It, however, supplements this general definition with an ostensive definition, that is, by way of listing conduct that is to be presumed as IUU fishing.<sup>121</sup> For instance, 'fishing without a valid license, authorisation or permit issued by the flag State or the relevant coastal State' constitutes IUU fishing.<sup>122</sup>

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<sup>116</sup> De Coning (2015) 213.

<sup>117</sup> EU IUU Regulation (2010). Council Regulation (EC) No 1005/2008 of 29 September 2008.

<sup>118</sup> EU IUU Art 1(1).

<sup>119</sup> Interpol 'Study on Fisheries Crime in the West African Coastal Region' (2014) 31, available at [https://www.google.co.bw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKewjZ2vSequDRAhUCKCYKH78D98QFggaMAA&url=https%3A%2F%2Fwww.interpol.int%2Fcontent%2Fdownload%2F27590%2F369574%2F...%2FWACS%2520EN.pdf&usg=AFQjCNFGqRK8oK70\\_P-ymvM5lo2HzckJwg](https://www.google.co.bw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKewjZ2vSequDRAhUCKCYKH78D98QFggaMAA&url=https%3A%2F%2Fwww.interpol.int%2Fcontent%2Fdownload%2F27590%2F369574%2F...%2FWACS%2520EN.pdf&usg=AFQjCNFGqRK8oK70_P-ymvM5lo2HzckJwg) (accessed on 29 July 2016).

<sup>120</sup> EU IUU Regulation Arts 2(1) -(4).

<sup>121</sup> Article 3.

<sup>122</sup> Art 3(1)(a).



This approach gives the definition clarity, fulfilling the legality aspect of criminal liability as it makes clear what conduct exactly is prohibited and liable to sanction. Using market-related measures, the EU Regulation aspires to thwart entry of IUU fishing products so that the economic incentive for IUU fishing is abated.<sup>123</sup> To achieve this outcome, the Regulation employs three core components: a catch certification scheme, a third-country carding process, and penalties for EU nationals.<sup>124</sup>

The choice of these measures comes against the backdrop of the EU as the world's largest importer of fishery products and because the EU states lend their flags to vessels operating in distant waters under the Fishing Authorisation Regulation.<sup>125</sup> The latter Regulation enables EU flagged vessels to operate in non-EU waters by way of agreements between the EU and third countries; or through direct private and charter agreements between private EU companies/citizens and authorities/companies in coastal countries.<sup>126</sup> This arrangement, particularly the use of charter agreements, creates room for the obscurity of beneficial ownership of vessels, enabling re-flagging of vessels and subsequently allowing IUU fishing and parallel activities to flourish undetected. The current Fishing Authorisation Regulation has been criticised for not requiring vessels that operate outside official EU agreements to comply with fisheries management standards contained in these agreements.<sup>127</sup> It follows

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<sup>123</sup> Elvestad C and Kvalvik I 'Implementing the EU-IUU Regulation: Enhancing Flag State Performance Through Trade Measures, *Ocean Development & International Law*, (2015) 243.

<sup>124</sup> Oceana 'The EU IUU Regulation - Building on success: EU progress in the global fight against illegal fishing' (2015) 6, available at [http://oceana.org/sites/default/files/oceana\\_iuu\\_report\\_01\\_02\\_16\\_web.pdf](http://oceana.org/sites/default/files/oceana_iuu_report_01_02_16_web.pdf) (accessed 30 August 2016).

<sup>125</sup> The EU IUU Regulation (2015) 5.

<sup>126</sup> The EU IUU Regulation (2015) 5.

<sup>127</sup> The EU IUU Regulation (2015) 5.

that, while the EU Regulation is progressive, it is not without its shortcomings, as will become apparent below.

## **2.4.2 The EU Regulation Measures**

### **2.4.2.1.1 Catch Certification Scheme**

Article 12 of the Regulation is the enabling provision for the use of a certification scheme that ensures the prohibition of trade in IUU fishery products. Catch certification scheme measures aim to provide assurance that a vessel's catches were made in accordance with applicable conservation and management rules, as validated by a competent authority of the flag state of the vessel.<sup>128</sup> 'The validated catch certificate shall be submitted by the importer to the competent authorities of the Member State in which the product is intended to be imported at least three working days before the estimated time of arrival at the place of entry into the territory of the Community',<sup>129</sup> the deadline being adaptable. Verification of catch certificates is done on a risk-based approach with respect to imports that face the greatest risk of being IUU fishing products.<sup>130</sup> This is a loophole for organised crime syndicates as shipments of imports perceived as being less at risk of IUU fishing activity could be used to transport contraband and to facilitate trade misinvoicing practices. The use of a paper-based system for certificates further hinders the effectiveness of verification, detection of illegal catches, and monitoring, a challenge that has been countered by a few member states that have developed an electronic system.<sup>131</sup> The paper-

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<sup>128</sup> Interpol (2014) 31.

<sup>129</sup> Article 16(1) of the EU IUU Regulation.

<sup>130</sup> The EU IUU Regulation (2015) 7.

<sup>131</sup> Elvestad (2015) 249.

based system also creates opportunities to perpetrate document fraud. To illustrate the practicality of these challenges, let us consider the following scenario:<sup>132</sup>

‘Country X issues a catch certificate for 200 tonnes of tuna destined for the EU, with a unique reference number MX234. The batch is split into three to go to three different EU countries. 100 tonnes are sent to France, 50 tonnes to Italy, and 50 tonnes to Portugal. All three batches carry the same CC MX234 (the original and two photocopies), which states that each batch is 200 tonnes. This means it is possible for each batch to be ‘topped up’ to 200 tonnes: part original legally caught tuna, and part illegally caught tuna: 100+150 +150 (400) illegal. As countries have no centralised means of comparing their CCs, the illegal portion of each consignment goes undetected.’

The above example not only shows the loopholes of the paper-based system of catch certification but further indicates that the system focuses on verification of legitimacy of catches, but omits possible detection of parallel activity. Considering the impossibility of verifying the accuracy of the information on each certificate, it is possible that the batch ‘top-up’ may not be fish products per se but contraband such as drugs, and allows for laundering of illegal fish. Trade-based money laundering techniques could be used to transfer value of the excess illegitimate 400 tonnes, but with an appearance of legitimacy. These challenges undermine the effectiveness of the EU IUU Regulation and need to be addressed.

#### **2.4.2.1.2 Third-Country Carding Process**

‘A third country may be identified as a non-co-operating third country if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, and if it fails to take action to prevent, deter and eliminate IUU fishing.’<sup>133</sup> This component of the EU Regulation is a process. Initially, the Commission examines the measures taken by

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<sup>132</sup> The EU IUU Regulation (2016) 16.

<sup>133</sup> Art 31(2) of the EU IUU Regulation.

a 'third country' to curb IUU fishing against a list of set, but non-exhaustive criteria.<sup>134</sup>

Where the country is found to have inadequate measures in place, or is not co-operating, the Commission may issue a yellow card, as a formal warning of pre-identification.<sup>135</sup> There is room for dialogue at this point between the Commission and the relevant country's authorities concerning resolution of compliance issues.<sup>136</sup> A red card is issued in the event that the country does not carry out reforms, resulting in a ban of trade in fisheries between the red carded country and EU countries.<sup>137</sup> Pursuant to article 34, both yellow and red cards may be lifted and a country removed from the list of non-cooperating third countries if 'the situation that warranted its listing has been rectified'. Ghana was yellow-carded in November 2013 due to inadequate measures to curb IUU fishing. It was delisted in 2015 after taking several steps to strengthen its fisheries management and legal framework.<sup>138</sup> This highlights the impact of 'peer-pressure' in eliciting responsible action. Unfortunately, having adequate measures is one thing, and effectively using them for their intended purpose is another. The notion that success cannot be imported holds true, particularly in the absence of political will.

#### **2.4.2.1.3 Penalties for EU Nationals and Operators**

Article 39 of the EU Regulation prohibits nationals of EU Member States from supporting or engaging in IUU fishing. Punitive measures can be taken against national legal and juristic persons in the form of 'a maximum sanction of at least five times the value of the fishery

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<sup>134</sup> Art 31(5) of the EU IUU Regulation.

<sup>135</sup> Interpol (2014) 31.

<sup>136</sup> Art 32 of the EU IUU Regulation.

<sup>137</sup> The EU IUU Regulation (2016) 9.

<sup>138</sup> The EU IUU Regulation (2016) 9.

products obtained through committing the offence, and eight times the value of the fishery products in case of a repeated infringement within a five-year period'.<sup>139</sup> These sanctions, compared to the pre-determined amounts provided under the Ghanaian and South African legal framework are effective, proportionate and dissuasive, to the extent that they account for the value of fishery products, thereby depriving the offender of the economic incentive of IUU fishing. Such action is 'without prejudice to the primary responsibility of the flag State'.<sup>140</sup>

### 2.4.3 The Lomé Charter (2016)

The African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter)<sup>141</sup> was adopted by the Extraordinary Session of the Assembly of the Union in Lomé, Togo, on 15 October 2016. It aims to 'prevent and suppress national and transnational crime',<sup>142</sup> and, to 'promote a flourishing and sustainable blue economy',<sup>143</sup> among others. 38 of 54 AU member countries are coastal or island states, with over 90 per cent of Africa's exports and imports being transported by sea.<sup>144</sup> The adoption of the Charter thus indicates the primacy of maritime security, safety and development on the African agenda. The Charter is, however, yet to come into force after 15 ratifications.<sup>145</sup>

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<sup>139</sup> The EU IUU Regulation (2016) 10.

<sup>140</sup> Article 39.

<sup>141</sup> African Union Charter on Maritime Security and Safety and Development in Africa, 2016 AU Doc. Ext/Assembly/AU/1(VI) (2016).

<sup>142</sup> Article 3(a) of the Lomé Charter.

<sup>143</sup> Article 3(c).

<sup>144</sup> Togo 2016 'Africa Says Yes to the Lomé Charter', available at <http://www.african-union-togo2015.com/en/accueil> (accessed 20 January 2017).

<sup>145</sup> Art 50(1).

Like several other regional and national instruments, the Lomé Charter adopts the IPOA-IUU definition of IUU fishing. Arguably, the Charter is more of an instrument advancing the agenda of sustainable development and optimal use of the blue economy, than it is an instrument to address IUU fishing. It has no chapter or provision dedicated to IUU fishing, but rather takes a holistic view towards all transnational organised crime at sea. It recognises the prevalence of transnational organised crime at sea, but unfortunately provides broad means to curb these. Chapter two of the Charter proposes a myriad of measures to combat crime at sea, including socio-economic measures, establishing national co-ordinating structures, and use of law enforcement to prosecute perpetrators. States parties ought to ensure that perpetrators are denied advantages of the proceeds of their crimes.<sup>146</sup> By implication, fisheries crime, especially IUU fishing, ought to be perceived and addressed as an enterprise crime that threatens the development of the blue economy.

Notwithstanding its shortcomings, the Lomé Charter has made serious inroads as the first treaty to recognise IUU fishing as a transnational organised crime,<sup>147</sup> and is in many respects progressive. Although it makes no mention of flag and port state responsibility, it requires co-operation of flag and coastal states, sharing financial obligations of security and safety in the spirit of co-responsibility.<sup>148</sup> This is a significant addition to the fisheries crime discourse, as the transboundary nature of the vice requires different actors concerned to share the burden and responsibility, rather than solely giving flag states such an onerous task. Further, the lack of monitoring mechanisms and accountability for addressing

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<sup>146</sup> Art 32(2).

<sup>147</sup> See, Arts 3(a) and 32(1).

<sup>148</sup> Art 10.

transnational organised crime have been a significant gap. The Charter attempts to rectify this by establishing a 15-member Committee of states parties responsible for monitoring its implementation and recommend follow-up actions.<sup>149</sup> States parties are required to submit to the Committee ‘a report on the measures that they have undertaken to give effect to the provisions of the Charter’.<sup>150</sup> In turn, the Committee ought to present a report on the progress made in implementing the Charter to the Assembly bi-annually.<sup>151</sup> Effectively, a system of accountability is created, which is imperative not only regionally but internationally as well.

The Charter confers dispute resolution authority on a non-existent court, the African Court of Justice and Human and People’s Rights.<sup>152</sup> The latter reflects African leaders’ tendency to adopt theoretically sound or progressive treaties and protocols, but not to give effect to them once the initial political will is extinguished. It follows that the Lomé Charter is not merely fine print, but could have significant bearing on enforcing regional responsibility and action for curbing fisheries crime.

#### **2.4.4 Chapter Conclusion**

Measures to address IUU fishing have so far been ineffective due to lax enforcement and disparate implementation. The pitfalls of the IPOA-IUU as the primary instrument, notably, the elusive legal definition of IUU fishing, among others, have been inherited and transposed into domestic legal frameworks. At national level, historical challenges of states inform the fisheries management discourse and subsequent resource allocation. Ghana, for

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<sup>149</sup> Art 41(1).

<sup>150</sup> Art 42.

<sup>151</sup> Art 43.

<sup>152</sup> Art 45(2)(a).

example, is primarily concerned with restricting foreign vessel entry into national waters, while South Africa is fixated on undoing the apartheid legacy through equitable allocation of fishing rights. The EU Regulation aims to correct demand side deficiencies through market-related measures. This distinction is not quite the issue, as is the lack of co-ordination of efforts and the need to find common ground to address similar threats.

The reality of organised crime in the fisheries sector had for a long time not been acknowledged or addressed in leading international fisheries management instruments. However, the Lomé Charter departs from this trend by being the first treaty to acknowledge IUU fishing as a transnational organised crime. It, however, provides no guidance on how IUU fishing fits into the broader, existing legal dispensation as a transnational organised crime. Domestically, IUU fishing has been criminalised in several states. The consensus is that criminalisation has not achieved its desired effects due to lack of technical capacity and resources, particularly in third world countries. Some of these challenges are addressed in the next chapter. Notwithstanding this, major pitfalls both at domestic, regional, and international level are lack of political will and varying levels of commitment. While it is imperative to explore IUU fishing as a transnational organised crime, it is worth noting that legal tools are only as effective as our reasons and methods for using them.



## Chapter Three

### Conceptualising IUU Fishing as a Transnational Organised Crime

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#### 3.1 Introduction

The deficiencies of the current fisheries management paradigm are manifest in the international and domestic responses to IUU fishing mentioned in the preceding chapter. Efforts made so far have neglected addressing parallel organised crime activities associated with the fishing industry. The fact of the matter is that IUU fishing is still rife. It is a lucrative enterprise crime driven by opportunity for large profits. It is therefore unquestionable that there is need for more stringent means to curb 'fisheries crime' as it is known colloquially.

This chapter explores the proposed new approach to IUU fishing as a transnational organised crime. It identifies protected interests that justify the criminalisation of IUU fishing and considers whether transnational criminalisation would require a nexus between IUU fishing and traditional organised crime. The chapter considers the factors that impel IUU fishing and fish laundering, namely, the availability of flags and ports of convenience, obscure beneficial ownership and illegal transshipping. More importantly, the chapter acknowledges that effective transnational criminalisation entails a resolution of how the mandates of distinct legal, institutional and policy frameworks designed to address IUU fishing, on the one hand, and organised crime, on the other hand, can be co-ordinated.

#### 3.2 Drivers of IUU Fishing

Before venturing into whether transnational criminalisation of IUU fishing is the appropriate response to the scourge, it is necessary to identify and examine some of its drivers. IUU

fishing is a low-capital, low-risk, and high-reward venture. Its prevalence is heightened by what Liddick refers to as 'criminogenic asymmetries' - weak governance, lack of political will, dearth of resources, and incompetent monitoring and enforcement.<sup>153</sup> Corruption is the Achilles heel, 'seen as both result and cause that maintains or increases asymmetries'.<sup>154</sup> IUU fishing, however, is primarily attractive to transnational criminal networks and flourishes due to a myriad of conditions unique to fishing, that are distinct from traditional transnational organised crime.

To begin with, there is a low chance of detecting illegal activity due to the vastness of oceans and limited capacity of states to deploy patrol boats.<sup>155</sup> Unlike narcotics crimes, illegal fishing activity occurs alongside licit fishing, and there is no total prohibition, which makes detection of specific illegal fishing activity a challenge.<sup>156</sup> Fish are easily transformable, unlike many other smuggled goods. Tactics such as filleting and relabelling are used to conceal the original identity.<sup>157</sup> International law gives flexibility to vessel owners to choose the flag state that will exercise jurisdiction over a vessel.<sup>158</sup> Article 94(6) of UNCLOS obligates flag states to exercise jurisdiction and control on vessels flying their flags. Astonishingly, landlocked countries such as Mongolia have also been operating as flag

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<sup>153</sup> Liddick D 'Dimensions of a Transnational Organised Crime Problem: the case of IUU fishing' (2014) 17 *Trends in Organised Crime* 308.

<sup>154</sup> Liddick (2014) 308.

<sup>155</sup> Telesetsky A 'Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime' (2015) 41 *Ecology Quarterly* 951.

<sup>156</sup> Wright G 'Conceptualising Transnational Environmental Crime' (2011) 14 *Trends in Organised Crime* 337.

<sup>157</sup> Telesetsky (2015) 951.

<sup>158</sup> Telesetsky (2015) 952; Art 91 of UNCLOS.

states, offering flags of convenience to ship-owners.<sup>159</sup> This obscures the link between the vessel and any immediate owners or users, creating the possibility for shell companies to apply for vessel registrations and to conceal the identity of the beneficial owners of ships. Law enforcement networks are then faced with the onerous task of tracing the chain of ownership through shell companies and back to the beneficial owners.<sup>160</sup> This task is unfortunately almost never achieved due to the lack of transparency, tedious investigative procedures, distorted information networks and the lack of technical capacity.

In addition, it is mainly vessels carrying flags of convenience that engage in transshipment and fish laundering at sea. There is no homogeneity in the regulation of transshipments under domestic legal frameworks. For instance, the Ghanaian Fisheries Act prohibits transshipping by foreign vessels in national waters,<sup>161</sup> while the Marine Living Resources Act of South Africa has no provision expressly prohibiting transshipment. 'Fish are collected by a refrigerator vessel from numerous individual fishing vessels, and because they do not fish, these collection vessels (or reefers) are often exempt from catch documentation and monitoring.'<sup>162</sup> The legally obtained fish and illegally captured fish are mixed and then brought into the market through ports of convenience, which are typically ports with low inspection rates and lax enforcement. Proceeds of the sale of the fish are then transferred

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<sup>159</sup> Alexander G 'Mongolia's Dubious Merchant Navy' *The Diplomat* 20 March 2015, available at <http://thediplomat.com/2015/03/mongolias-dubious-merchant-navy/> (accessed 20 December 2016).

<sup>160</sup> Telesetsky (2015) 955.

<sup>161</sup> Sec 61(4)(b) of the Ghanaian Fisheries Act.

<sup>162</sup> Bondaroff (2015) 24.

through complex financial transactions to tax havens with strict banking secrecy laws, thus further obscuring detection.<sup>163</sup>

Therefore, simply put, IUU fishing persists because ‘of expansion into new “business ventures” by transnational organised groups that are easily facilitated within the margins of the law by unregulated access to flags of convenience, little regulation of transshipments, existence of ports of convenience, and an active business in offshore shell companies and tax havens’.<sup>164</sup> Law enforcement asymmetries result in a ‘hydraulic effect’, that is, displacement of illegal activities from one region to another due to pressure on illegal fishers in one region.<sup>165</sup> In this regard, exploring IUU fishing as a transnational organised crime is imperative as a means to harmonise enforcement and protect violated interests.

### **3.3 Rationale for Transnational Criminalisation**

IUU fishing, as a compared to other traditional forms of transnational organised crime such as human and drug trafficking has been trivialised and placed low on the priority list of law enforcement actions. This low prioritisation is, perhaps, reinforced by the perception that it is a victimless crime which does not have obvious victims who will readily complain to the authorities, even though the crime has long-lasting detrimental effects on the persons affected.<sup>166</sup> What has emerged is a governance landscape comprised of multiple, uncoordinated, international agreements to address this multifaceted crime. Alongside these are domestic regulations that serve as symbolic laws, holding more promise than they deliver.

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<sup>163</sup> Telesetsky (2015) 959.

<sup>164</sup> Telesetsky (2015) 939.

<sup>165</sup> Liddick (2014) 308.

<sup>166</sup> Wright (2011) 338.

This discourse echoes the ‘war on drugs’ archetype of the 1970s in the United States, a campaign of prohibition of drugs that saw a dramatic increase in policing efforts through an increased number and size of federal drug control agencies.<sup>167</sup> Wright remarks that the ‘war on’ paradigm has not worked on drugs but has instead increased their price, which is more profitable for organised crime syndicates.<sup>168</sup> Given the multifaceted nature of transnational environmental crime (like IUU fishing), combating it requires a distinct approach to policing. It is imperative to ensure that transnational criminalisation, though proposed as a supplementary tool, is indeed an appropriate and justifiable tool before creating a crisis of ‘over-criminalisation’.

Zoppei, in an article that debates the effect of the use of criminal law to tackle economic problems,<sup>169</sup> reiterates that ‘the harm principle is of fundamental importance when resorting to criminal law’.<sup>170</sup> Essentially, ‘harm to a legally protected interest is a *conditio sine qua non* for criminalisation’ - ‘there cannot be an offence without the harm to a legally protected interest’.<sup>171</sup> It was noted in Chapter One that IUU fishing violates sustainable marine resources, but the extent to which IUU fishing violates a protected interest justifying making it a crime needs clarification. The prodigious nature of IUU fishing causes environmental harm by threatening and destroying fisheries resources, thereby reducing

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<sup>167</sup> Drug Policy Alliance ‘A Brief History of the Drug War’, available at <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> (accessed 22 December 2016).

<sup>168</sup> Wright (2011) 343.

<sup>169</sup> Zoppei V ‘Money Laundering: A New Perspective in Assessing the Effectiveness of the AML Regime’ *The European Review of Organised Crime* (2015) 2 130, available at [http://sgocnet.org/site/wp-content/uploads/2014/06/7\\_Verena-Zoppei\\_pp130-148.pdf](http://sgocnet.org/site/wp-content/uploads/2014/06/7_Verena-Zoppei_pp130-148.pdf) (accessed 18 October 2016).

<sup>170</sup> Zoppei (2015) 139.

<sup>171</sup> Zoppei (2015) 139.

future options for the use of resources.<sup>172</sup> The environment is recognised as new a collective interest protected by law, whereas, previously only individual rights were recognised as classic interests protected by law.<sup>173</sup> Ancillary to environmental harm is the threat to food security and sustainability of vulnerable populations, particularly those engaged in subsistence fishing.<sup>174</sup> Furthermore, IUU fishing causes economic harm arising from tax evasion and illicit financial flows, depriving states of funds - an effect not given much attention until recently.<sup>175</sup>

The line between the collective and individual interests has been blurred over the years as both are dimensions of sustainable development.<sup>176</sup> This means that the three identified interests of IUU fishing are legally protected interests despite their abstract nature. Based on the harm principle, one may posit that transnational criminalisation of IUU fishing without a nexus to traditional organised crime is justifiable to the extent that harm to a legally protected interest is imminent. Nevertheless, establishing IUU fishing as a transnational organised crime needs to meet the scope and ambit of application of the United Nations Convention on Transnational Organised Crime (UNTOC). This is discussed below.

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<sup>172</sup> Coppens L 'Transnational environmental crime – A common crime in need of better enforcement' (2013), available at <http://www.illegallogging.info/sites/files/chlogging/uploads/GEASJan2013EnvCrime.pdf> (accessed 20 October 2016) 109.

<sup>173</sup> Zopei (2015) 139.

<sup>174</sup> Telesetsky (2015) 969.

<sup>175</sup> Telesetsky (2015) 968.

<sup>176</sup> Folkesson E 'Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest' (2013) *Erasmus Law Review* 142.

### 3.4 IUU Fishing as a Transnational Organised Crime

Proponents of making IUU fishing a transnational organised crime have written quite extensively on the justifications of such an action and the need for a holistic approach to IUU fishing, yet there is insufficient literature on how to put this into effect. Coppens suggests the conception of a single international criminal law convention ‘with comparable obligations of criminalisation’, but provides no further guidance on this.<sup>177</sup> This would, however, eliminate the problem of ‘too many actors involved in IUU fishing efforts, resulting in little individual accountability and no chain of command in terms of strategy and decision making’.<sup>178</sup> Wright advocates the use of existing policies, calling for further research on whether they can be expanded to other areas facing similar problems,<sup>179</sup> for example, extending the current anti-money laundering and anti-corruption framework to the fishing industry. The latter proposition is not far-fetched as it would allow for better use of existing frameworks and requires less resources compared to establishing a new framework altogether. Telesetsky delves into a more comprehensive discussion of the UNCTOC and IUU fishing, augmenting the above two propositions. UNCTOC is put forward as the most viable legal framework for linking IUU fishing and organised crime and for harmonising domestic fisheries’ laws.<sup>180</sup> The discussion that follows will analyse the viability of this proposition.

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<sup>177</sup> Coppens (2013) 114.

<sup>178</sup> Telesetsky (2015) 945.

<sup>179</sup> Wright (2011) 345.

<sup>180</sup> Telesetsky (2015) 965.

### 3.4.1 Criminalisation

UNCTOC is preferred as the most viable legal framework because, unlike the FAO Agreement and the IPOA, it has far greater global reach, binding 179 parties.<sup>181</sup> It obligates states parties to criminalise participation in an organised criminal group,<sup>182</sup> and criminalises other forms of traditional organised crime, such as corruption<sup>183</sup> and money laundering<sup>184</sup> that are said to be rife in the fishing industry. Criminalising IUU fishing under this Convention would thus bring 'fisheries crime' within the same ambit, standardising obligations towards its criminalisation under national laws. Article 3(1)(b) of UNCTOC applies to 'serious crime where the offence is transnational in nature and involves an organised criminal group'. In this regard, while IUU fishing is transnational in nature, it ought to be characterised as a 'serious crime' under domestic laws. This is premised on the understanding that UNCTOC has a vertical relationship with the laws of states, and its provisions need to be implemented at a domestic level for effective prosecution.

Serious crime is defined as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.<sup>185</sup> Currently, most domestic frameworks do not regard IUU fishing as a serious crime, reflected in the sanctions imposed and reluctance to resort to prison sentences. The Ghanaian Fisheries Act, for example, prescribes mainly fines and penalty units which are too low to be considered serious penalties. Where imprisonment is an option, the maximum deprivation of liberty is

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<sup>181</sup> Telesetsky (2015) 965.

<sup>182</sup> Art 5.

<sup>183</sup> Art 8.

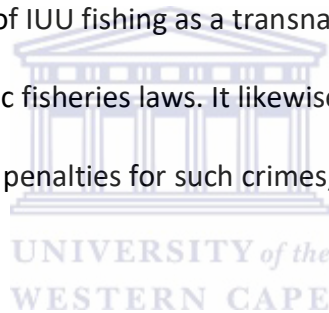
<sup>184</sup> Art 6.

<sup>185</sup> Art 2(b).



at most two years.<sup>186</sup> South Africa, by contrast, under its offences and penalties provisions, prescribes at most five years' imprisonment as an option. Where the sentence imposed is at least four years, and the punished conduct is committed by an organised group, such conduct constitutes transnational organised crime. There is thus no need for a nexus with transnational organised crime *per se*, though it would make for a stronger case.

It can be deduced that the drafters of domestic fisheries law, particularly the ones discussed in this paper, did not have the view to formulate IUU fishing activity as a 'serious crime', as UNCTOC does. Thus, what is needed is a conscious formulation of IUU fishing as a 'serious crime' under domestic frameworks, using article 2(b) of UNCTOC as a model. Doing so would allow for the prosecution of IUU fishing as a transnational organised crime and ensure harmonisation of domestic fisheries laws. It likewise would create an opportunity to prescribe more suitable, uniform penalties for such crimes, the severity of which has been overlooked historically.<sup>187</sup>



### 3.4.2 Legal Definition

A clear and globally accepted definition of IUU fishing ought to be devised. While the term IUU fishing is currently used without specification of what conduct constitutes a particular component, actions such as use of prohibited gear and fishing without a licence, can be found in most national fisheries laws. Acknowledging that it is difficult to separate the components as they sometimes tend to overlap, the global definition should identify common prohibited conduct rather than generically criminalise the contravention of IUU

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<sup>186</sup> See, for example, arts 83(9) and 99(4).

<sup>187</sup> Telesetsky (2015) 969.

fishing laws. In so doing, satisfying the criminal law principles of legality and certainty, expressed by the Latin maxim *nulla poena sine lege certa*.<sup>188</sup>

In the light of this, key acts such as flag hopping and fish laundering, which are recognised globally as threatening effective fisheries management, will need to be included in the definition as expressly criminalised conduct. Contraventions of IUU fishing, such as those stemming from recreational fishing, for instance, may not be grave enough to warrant deprivation of liberty for at least four years. Also, as noted in Chapter Two, states tend to focus on acts that have historically shaped their fisheries management system, which may not be the case for all states. Owing to this, the definition to be adopted under UNCTOC should be restricted to conduct generally accepted by all parties to have transnational implications and to be of such severity as to warrant stringent punishment. Discretion should be given to states on how to regulate and sanction conduct falling out of the scope.

### **3.4.3 Prosecuting IUU Fishing as a Transnational Organised Crime**

The challenges that prosecuting IUU fishing cases currently pose and the prospects for prosecution of IUU fishing as a transnational organised crime are discussed below.

#### **3.4.3.1 Access to Information**

Access to information is crucial to building up a case for eventual prosecution. However, prosecution of IUU fishing cases is challenging because, as in most transnational crime cases, available information is spread across the fisheries network, often across multiple jurisdictions.<sup>189</sup> The IPOA-IUU identifies participation and co-ordination between states and

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<sup>188</sup> There is to be no penalty without definite law.

<sup>189</sup> Telesetsky (2015) 981.

RFMOs as a primary principle for its effective implementation.<sup>190</sup> It requires states to co-operate directly and through RFMOs, to facilitate information sharing and verification regarding fishing.<sup>191</sup> These provisions unfortunately do not obligate states to take such action, given the non-binding nature of the entire instrument. Information sharing is thus left to be taken at states' own initiative through bilateral and multilateral agreements. In the absence of such agreements, the problem of access to information inhibits investigation and prosecution of IUU fishing cases.

Additionally, UNCTOC provides a flexible framework for inter-state legal co-operation. Criminalisation of IUU fishing under UNCTOC would allow for increased co-operation because it has established mechanisms that provide for information sharing, mutual legal assistance, joint investigations, law enforcement co-operation, extradition and witness protection, *inter alia*.<sup>192</sup> More importantly, these mechanisms exist within a framework that would allow linking IUU fishing investigations to other forms of traditional organised crime. This, however, requires domestication of UNCTOC for effective implementation. Lack of political will remains a significant challenge to effective co-operation and enforcement of relevant provisions. Countries have different levels of commitment to detecting, suppressing, and combating fisheries crime, which may not easily be countered through the criminal justice system. Peer pressure through the threat of economic sanction has so far

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<sup>190</sup> Sec 9.1 of the IPOA-IUU.

<sup>191</sup> Sec 28.

<sup>192</sup> Generally, See: Arts 16, 18, 19, 27, and 28 of UNTOC.

proven to be a more effective tool in eliciting commitment and engagement, compelling states into action.<sup>193</sup> Therefore, legal tools are only as effective as their being used.

### 3.4.3.2 Beneficial Ownership

The 'lack of transparency of the identity of the beneficial ownership of fishing vessels and a lack of international records of fishing vessels' identity and history' is one of the identified vulnerabilities of the fishing industry to transnational organised crime.<sup>194</sup> The Financial Action Task Force (FATF) is a standard-setting, inter-governmental body established to promote effective implementation of policies to combat money laundering and terrorist financing.<sup>195</sup> It defines a beneficial owner as 'the natural person(s) who ultimately owns or controls a customer, and/or the natural person on whose behalf a transaction is being conducted, including those persons who exercise ultimate effective control over a legal person or arrangement'.<sup>196</sup> The controlling interest and ownership (beneficial ownership) of an entity, in this case of a vessel, are obscured through a myriad of techniques such as re-flagging and use of flags of convenience, as well as more complex corporate structures. This presents the challenge of determining who profits from the IUU fishing enterprise.<sup>197</sup> If a vessel is apprehended for engaging in IUU fishing or parallel activity, often criminal entities opt to surrender the vessel than to disclose the beneficial owner. The criminal enterprise continues to thrive under obscurity and the illegal profits continue to fund its operation.

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<sup>193</sup> See for example, EU Third Country Carding Process.

<sup>194</sup> United Nations *Transnational Organised Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling in of Persons* (2011) 4.

<sup>195</sup> Generally, see, Financial Action Task Force, available at <http://www.fatf-gafi.org/about/> (accessed 10 August 2016).

<sup>196</sup> FATF *Guidance on Transparency and Beneficial Ownership* (2014) 8.

<sup>197</sup> Telesetsky (2015) 988.

A Fisheries Crime Expert Group meeting recommends that there is need to ‘make greater use of financial mechanisms within the context of enhancing transparency and traceability, to investigate and punish fisheries crimes, in particular with reference to uncovering beneficial ownership of vessels and companies throughout supply and value chains’.<sup>198</sup> The FATF Recommendations on combating money laundering and terrorist financing require countries to ‘ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities’.<sup>199</sup> Designated non-financial businesses and professions (DNFBPs), are required to conduct customer due diligence (CDD), keep records and report suspicious transactions to competent authorities requirements.<sup>200</sup> This paper proposes the inclusion of domestic vessel registration offices as DNFBPs under relevant domestic anti-money laundering legal frameworks, subject to CDD, record-keeping and reporting suspicious transaction requirements. This would allow them to obtain relevant information about vessels to assist competent authorities in ‘identifying the beneficial owner, identifying, and managing ML/TF risks, and implementing AML/CFT controls based on those risks’.<sup>201</sup> Article 7(1)(a) of UNCTOC could serve as the empowering provision for this proposal.<sup>202</sup>

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<sup>198</sup> UNODC ‘World crime trends and emerging Issues and responses in the field of crime prevention and criminal justice’ (2016) 11.

<sup>199</sup> FATF Recommendation 25.

<sup>200</sup> FATF Recommendation 22.

<sup>201</sup> FATF *Guidance* (2014) 3.

<sup>202</sup> 1. Each State Party: (a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

### **3.4.3.3 Whistle blower Protection**

Pertinent to the issue of access to information is whistle-blower protection. IUU fishing operations remain clandestine, elusive and difficult to detect because the *modus operandi* is not known to law enforcement officers. Consider, as an example, forced labour and human trafficking on the high seas. They flourish because of the isolation of the workplace.<sup>203</sup> In addition, the lack of anonymity and protection for whistle blowers in the fishing industry does not encourage victims to report and provide insight on the ongoing nefarious activities.<sup>204</sup>

The benefits that could flow from prioritising whistle blower protection as a preventative measure for organised crime in general have greatly been overlooked and poorly attended to by the transnational organised crime policing discourse. UNCTOC provides for witness protection under article 24, but this is a measure after the fact – after detection of criminal conduct. Whistle blower protection ought to be prioritised as a core measure to detect fisheries crime and deter organised criminal syndicates in the fisheries industry.

### **3.4.3.4 Access to Credible Evidence**

A further hindrance to the successful prosecution of IUU fishing cases is the unavailability of credible evidence because evidentiary material like logbooks, computers and navigation equipment can quickly be discarded.<sup>205</sup> This makes it difficult for prosecutors to discharge the onus of proof to the required standard. Telesetsky presupposes that courts may, in

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<sup>203</sup> Bondaroff (2015) 49.

<sup>204</sup> Fishcrime 'Record of The First International Symposium on FishCRIME' (2016) 17, available at <http://fishcrime.info/assets/FishCRIME2015Record.pdf> (accessed 16 November 2016).

<sup>205</sup> Telesetsky (2015) 979.

future, overlook the reliability of isotopic analyses to prove the geographic origin of marine cargo. The feasibility of this is uncertain and raises obvious technical challenges for developing states.

Another view to overcome evidentiary challenges is that perhaps the burden of proof could be shifted to IUU fishing operators, requiring them to demonstrate the lawful origin of alleged proceeds of crime.<sup>206</sup> The basic rule in most jurisdictions, if not all, is that *he who alleges must prove*. Reverse onus provisions are contentious in criminal law, on the premise that they violate fair trial rights of an accused person, particularly the presumption of innocence and the right against self-incrimination. Despite this, they have passed constitutional muster in certain jurisdictions, based on the contention that only the evidential burden is being shifted and not the burden of proving the constituent elements of an offence.<sup>207</sup> A case in point is Hong Kong where 'balancing the interests of the individual against those of society in eradicating corruption tipped in favour of society'.<sup>208</sup>

Under the United Nations Convention against Corruption (UNCAC), the reverse onus applies to the offence of illicit enrichment, requiring a public official to explain a significant increase in his or her wealth in relation to his or her lawful income.<sup>209</sup> States are, however, not obligated to criminalise illicit enrichment in view of differences in their domestic constitutional principles. Following this example, establishing IUU fishing as a transnational organised crime gives states the option of including the reverse onus provision under their

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<sup>206</sup> Telesetsky (2015) 980.

<sup>207</sup> United Nations *Technical Guide to the United Nations Convention Against Corruption* (2009) 98.

<sup>208</sup> Boister N *An Introduction to Transnational Criminal Law* (2012) 96.

<sup>209</sup> Art 20 of UNCAC.

national fisheries laws.<sup>210</sup> Its inclusion could allow judicial expediency and perhaps increase prosecutions of IUU fishing cases.

### **3.4.3.5 Jurisdiction of Non-Flag States**

The basic tenets of international customary law, later codified in UNCLOS<sup>211</sup> and subsequent instruments,<sup>212</sup> give flag states the primary duty to exercise effective jurisdiction and control over their vessels. Section 59 of the IPOA-IUU, for example, requires port states to seek the consent of flag states before taking any action against a flag state's vessel that is reasonably suspected of engaging in, or supporting IUU fishing beyond a port state's jurisdiction. The authority and ability of port states to take effective action against IUU fishing is limited to territorial jurisdiction, or consent from the flag state. This impedes quick action against IUU fishing operators, considering how complex requests for action can be, and the reluctance of flag states to enforce their responsibility on vessels.

A valuable alternative would be extending the jurisdiction of both port and coastal states.

Article 15 of UNCTOC provides for territorial, active, and passive personality jurisdiction. On the assumption that IUU fishing is a transnational organised crime, this article extends the jurisdiction by allowing port and coastal states to prosecute IUU fishing offences based on the conduct occurring on their territory, or their national being involved. The latter is beneficial to states for regulation of their nationals in IUU fishing activities. However, there is a limitation on asserting passive personality jurisdiction because IUU fishing is perceived

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<sup>210</sup> Art 12(7) of UNCTOC: "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings."

<sup>211</sup> See art 94.

<sup>212</sup> The FAO Compliance Agreement, IPOA-IUU.



as a victimless crime.<sup>213</sup> To this end, Telesetsky submits that concurrent extraterritorial jurisdiction should be used for serious IUU fishing offences, thus allowing for the prosecution of non-nationals even when territorial or active personality jurisdiction do not apply.<sup>214</sup>

The justification to end impunity is made with reference to the US Foreign Corrupt Practices Act<sup>215</sup> as an example of 'extraterritorial jurisdiction over corrupt acts by both U.S. nationals and non-nationals who have some nexus with the United States'.<sup>216</sup> In the context of IUU fishing, national fisheries laws would need to be amended to include an extra-territorial provision that allows for the prosecution of non-nationals for serious IUU fishing offences, based on the assertion that illegal fish or funds therefrom passed through the particular jurisdiction or were destined to be moved there.<sup>217</sup> The need for such action can further be supported by examples like the smuggling of poached South African abalone into jurisdictions that have not criminalised transportation of abalone without a permit, like Mozambique.<sup>218</sup> It follows that enactment of the provision under domestic fisheries law and its subsequent implementation is imperative to deter IUU fishing operators and criminal organisations from finding solace in safe havens that lack legislation, reflecting the serious

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<sup>213</sup> Telesetsky (2015) 990.

<sup>214</sup> Telesetsky (2015) 986.

<sup>215</sup> Foreign Corrupt Practices Act of 1977.

<sup>216</sup> Telesetsky (2015) 987.

<sup>217</sup> Telesetsky (2015) 987.

<sup>218</sup> Steinberg J 'The illicit abalone trade in South Africa' (2005) 4, available at <http://www.dlist.org/sites/default/files/doclib/Abalone%20Trade%20in%20South%20Africa.pdf> (accessed 2 January 2017).

nature of IUU fishing.<sup>219</sup> While this is theoretically sound, the unfortunate reality of lack of political will may deter states from following through, unless coerced to do so. States that do not suffer the direct consequences of IUU fishing may be reluctant to include such a provision as resources would rather be focused on more pertinent issues. But it remains a useful suggestion for consideration by policy makers.

### 3.5 Multilateral Co-operation

Multilateral co-operation has always been an important aspect of the fisheries management and conservation discourse, with articles dedicated to it, extending from UNCLOS<sup>220</sup> to the recent IPOA-IUU. However, co-ordinated efforts to conserve marine living resources, let alone curb IUU fishing, have been rare. In instances where prosecution and conviction of IUU fishing offences have been successful, bilateral or multilateral co-operation has been a keystone. In *USA v Bengis*,<sup>221</sup> one of the widely cited IUU fishing cases, the US government successfully prosecuted the accused for importing into the USA unlawfully harvested rock lobsters. This not only violated South African marine conservation regulations<sup>222</sup> but also violated provisions of the US Lacey Act,<sup>223</sup> which prohibits trade in illegally harvested fish and wildlife.<sup>224</sup>

Prior to the institution of criminal proceedings in the USA, South African authorities had declined to prosecute the individuals, based on a plea bargain concluded, opting to charge

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<sup>219</sup> Telesetsky (2015) 986.

<sup>220</sup> See Arts 197 and 220.

<sup>221</sup> *United States v. Bengis*, No. 13-2543 (2d Cir. 2015).

<sup>222</sup> Violation of Marine Living Resources Act 18 of 1998.

<sup>223</sup> United States of America Lacey Act of 1900.

<sup>224</sup> § 42(a)(1) of the Lacey Act.

the corporation, Hout Bay, with overfishing.<sup>225</sup> US authorities submitted a request for mutual legal assistance (MLA) to South African authorities, which was premised on a bilateral treaty between the two states, as they intended to charge Bengis under the Lacey Act. A restitution order was made, requiring the accused to pay jointly and severally an amount of \$54,883,550 to South Africa.<sup>226</sup> This case embodies the far-reaching benefits of co-operation in curbing IUU fishing, as the subsequent prosecution of Bengis in the US was facilitated by the Mutual Legal Assistance Treaty (MLAT) for asset recovery. It further demonstrates the rewards of concurrent jurisdiction, illustrating that a plea bargain concluded in South Africa with the accused does not preclude his prosecution in the USA.<sup>227</sup> The latter point establishes the *Bengis* case as a beacon for future fisheries crime law enforcement efforts, not only to end impunity, but also in the use of concurrent jurisdiction (where one state is unwilling or unable to prosecute) as a deterrent. Furthermore, the restitution order made in favour of South Africa proves that IUU fishing is not a victimless crime.

The nature of co-operation has evolved over time, as the urgency in curbing fisheries crime as well as gaps in fisheries enforcement propel greater involvement of non-governmental organisations (NGOs) and civil society. The role of the Sea Shepherd Conservation Society, an international non-profit, marine wildlife conservation organisation, in the eventual capture of the F/V Thunder is a notable example. Through Operation Ice fish, which specifically targeted IUU fishing in the Southern Ocean, Sea Shepherd's ship, Sam Simon, rescued 40 crew of the F/V Thunder before the vessel sank in Sao Tome and Principe's

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<sup>225</sup> *Bengis v Government of South Africa* para 1.

<sup>226</sup> *USA v Bengis*.

<sup>227</sup> As decided by the High Court of South Africa in *Bengis v Government of South Africa*.

waters.<sup>228</sup> This resulted in the eventual conviction of the crew in Sao Tome and Principe courts.<sup>229</sup>

Recent discussions among States and relevant stakeholders acknowledge the challenge of achieving inter-agency co-operation both at national and international level, and agree that co-operation is the key to changing the tide, to avoid misusing resources and duplicating efforts.<sup>230</sup> As noted, IUU fishing is multifaceted, transcending fisheries conservation and the auspices of FAO. The unique features of IUU fishing distinguish it from other forms of organised crime. IUU fishing, even as a transnational organised crime, cannot be effectively addressed using the traditional organised crime framework of UNCTOC. A multidisciplinary approach is required that incorporates relevant institutional and legislative aspects. For clarity's sake, this paper therefore proposes the adoption of a Protocol to Prevent, Deter and Eliminate IUU Fishing. Such a Protocol will supplement the Convention against Transnational Organised Crime, as a primary and legally binding instrument addressing IUU fishing as well as organised crime in the fishing industry. The Protocol should be incorporated into the existing fisheries management concept which focuses on MCS. It should also provide for policing and intelligence gathering, which would fill the existing gap. This by no means suggests that the FAO is neglecting its role; it needs to work more closely

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<sup>228</sup> Sea Shepherd 'Victory Against Illegal Fishing in Antarctica' 14 March 2016, available at <http://www.seashepherd.org/news-and-commentary/news/victory-against-illegal-fishing-in-antarctica.html> (accessed 11 January 2017).

<sup>229</sup> Urbina I 'African Court Convicts Captain of Renegade Ship in Illegal Fishing Case' New York Times 12 October 2015, available at <https://www.nytimes.com/2015/10/13/world/africa/african-court-convicts-captain-of-renegade-ship-in-illegal-fishing-case.html> (accessed 11 January 2017).

<sup>230</sup> FishCRIME 'Recommendations of the 2nd International Symposium on Fisheries Crime' (2016), available at <http://fishcrime.com/recommendations-of-the-2nd-international-symposium-on-fisheries-crime/> (accessed 28 November 2016).

with the UNODC and other institutions with overlapping mandates in the effort to curb IUU fishing.

States and international bodies alike are urged to co-operate by using existing law enforcement platforms such as the International Criminal Police Organisation (Interpol), which also has a criminal law mandate.<sup>231</sup> Interpol is the world's largest police organisation, with high-tech infrastructure, a global presence<sup>232</sup> and expertise. More significantly, Interpol has a fisheries crime arm, Project Scale, which is significant as an initiative to 'support member countries in identifying, deterring, and disrupting transnational fisheries crime'.<sup>233</sup> It seeks, amongst other things, to establish National Environmental Security Task Forces (NESTs) that would facilitate institutional and technical co-operation among national agencies (such as customs and tax authorities, police, fisheries departments) and international partners.<sup>234</sup> Interpol notices, that is, international requests allowing inter-state police agencies to share critical crime-related information, have so far been an invaluable tool. A purple notice had been issued in the case of the *Thunder*, prompting relevant agencies to be on alert until its eventual capture by Sea Shepherd.<sup>235</sup> In the light of the

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<sup>231</sup> UNODC 'World Crime Report' (2016) 6.

<sup>232</sup> Interpol has 190 member countries and representation in key international agencies such as the United Nations and the European Union.

<sup>233</sup> Interpol 'Project Scale', available at <https://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Scale> (accessed 12 December 2016).

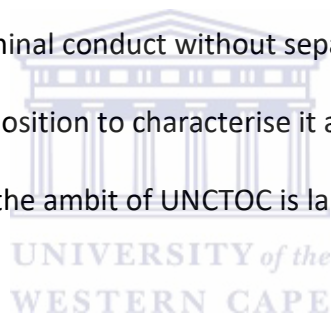
<sup>234</sup> Martini (2013) 7.

<sup>235</sup> Sea Shepherd (2016).

above, Interpol is better placed to harmonise UNODC, FAO and national efforts, ensuring a comprehensive, global criminal justice network.<sup>236</sup>

### **3.6 Chapter Conclusion**

To sum up, the concept of IUU fishing as a transnational organised crime, under the United Nations Convention against Organised Crime (UNTOC) framework is feasible and desirable. This concept is justified through identification of environmental, economic, and social interests as legally protected interests based on the harm principle. The adoption of a globally accepted definition of IUU fishing is imperative, and should include, but not be limited to, key acts such as flag hopping and transshipping. It follows that IUU fishing activities can be identified as criminal conduct without separating the various components as they tend to overlap. The proposition to characterise it as a 'serious crime,' under domestic law and bring it within the ambit of UNTOC is laudable.



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<sup>236</sup> De Coning 'Interpol Project Scale' 10.

## Chapter Four

### Conclusion and Recommendations

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#### 4.1 Conclusion

This paper has shown that the existing legal, policy and institutional fisheries management discourse has been ineffective in addressing IUU fishing. This can be attributed to 'criminogenic asymmetries' such as weak governance, unco-ordinated efforts, and the lack of resources, *inter alia*. However, what is more evident is that the current dispensation does not capture the true nature of the twofold problem in the fisheries sector, namely, IUU fishing, on the one hand, and organised crime, on the other. IUU fishing has traditionally been addressed in the context of optimal utilisation of marine resources through monitoring, control, surveillance and allocation of fishing rights. Although the EU IUU Regulation addresses the economic aspect of IUU fishing through market-related measures, the reality of the fishing industry as a target for organised crime has been ignored. Particularly, document fraud, tax evasion and corruption which have plagued the fisheries chain have not been prioritised.

Academic and institutional research identifies IUU fishing as multifarious and transnational, acknowledging that there is need for more stringent measures to address it. There has thus been a paradigm shift in perception of IUU fishing as a regulatory issue and greater justification for it as a transnational organised crime. Significantly, a recently adopted African treaty, the Lomé Charter, expressly acknowledges IUU fishing as a transnational organised crime, threatening maritime security, safety and development, together with other transnational organised crime. It follows from the research that characterising IUU fishing as a transnational organised crime is imperative to fill the lacuna and to supplement

current efforts. Environmental, social and economic interests have been identified as legally protected interests, justifying making IUU fishing a criminal offence. The nefarious and transnational nature of IUU fishing justifies its criminalisation. Therefore, establishing a nexus between IUU fishing and traditional organised crime is not a prerequisite for criminalisation, though it could make a stronger case for prosecution. Several challenges to successful prosecution such as access to information, limited jurisdiction, credible evidence and identifying the beneficial owner of vessels, were identified. Perhaps the biggest challenge that needs further research is the existence of illicit trade alongside licit trade in fishery products. Undoubtedly, a comprehensive, co-ordinated mechanism is required to address the above-mentioned challenges and curb organised crime.

The paper analysed the conceptualisation of IUU fishing as a transnational organised crime under the UNTOC framework. Formulating IUU fishing and its ancillary key acts as a 'serious crime' under domestic frameworks using UNCTOC as a model is highly desirable as it would inform the proposed global definition of IUU fishing and attain legal certainty. UNCTOC is arguably the most effective way to bring IUU fishing and other forms of traditional organised crime within a single framework as it would standardise their criminalisation. It is also the most viable option to integrate the mandates of the UNODC and the FAO, the two principal international agencies tasked with curbing organised crime and ensuring sustainable use of fishery resources, respectively. This will allow co-ordination between the UNODC and the FAO, preventing them from having overlapping mandates that result in resource wastage. In this regard, the need for multilateral co-operation as a cornerstone of efforts to curb fisheries crime, is emphasised. Interpol, through its fisheries crime arm,



Project Scale, and owing to its extensive expertise, is singled out as the lynchpin for accomplishing a comprehensive, global, criminal justice network.

Notwithstanding the above, for this framework to be effective, further considerations ought to be made.

#### **4.2 Recommendations**

This paper proposes the adoption of a Protocol to Prevent, Deter and Eliminate IUU Fishing, to supplement the United Nations Convention against Transnational Organised Crime. The Protocol would be a primary and legally binding instrument addressing IUU fishing as well as organised crime in the fishing industry. The recommendation is based on the multifarious nature of IUU fishing, which necessitates augmenting the current MCS paradigm and the criminalisation of IUU fishing conduct. The protocol should contain a globally accepted legal definition of IUU fishing that reflects its true nature as a vice that transcends traditional fisheries management, and as an economic enterprise. The paper recommends the use of the EU IUU Regulation approach for defining IUU fishing – both an ostensive, that is, definition by example, and a general approach.

Given the obscurity surrounding beneficial vessel ownership and the risk of money laundering, the paper recommends that domestic vessel registration offices be included as designated non-financial businesses and professions (DNFBPs). Doing so would bring them within the ambit of anti-money laundering legislation. Competent authorities will have ease of access to information that may enable them identify the beneficial owners of vessels. They would further be better placed to identify and manage ML/TF risks, and implement AML/CFT controls based on those risks. It is important for enforcement authorities to

deflect attention away from the individual and the vessel, and seek to disclose the controlling interest behind the criminal enterprise. In the wider scheme of things, the rationale for transnational criminalisation ought to be ending the perpetuity of transnational organised criminal syndicates and denying them the advantage of the proceeds of their crimes.

The existing legal tools have been underutilised. Dearth of resources is often cited as a convenient excuse for lack of political will. In other instances, inaction is due to other pressing commitments stemming from historical inequities. In view of the historical underdevelopment of some countries, nearly every instrument addressing IUU fishing contains a provision for supporting developing states with technical capacity. This paper submits that the aid received through these provisions should be used to set up environmental courts as champions of sustainable development. They are advantageous as they process cases quickly and capacitate prosecutors with the skills needed to prosecute environmental cases. Such specialised courts would contribute hugely to combating fisheries crime. Uganda is on the road to establishing environmental courts and overcoming the traditional bureaucracy associated with creating new courts.<sup>237</sup> More states, particularly on the African continent, need to follow suit.

Clarity is needed on the *modus operandi* of IUU fishing operators and organised crime syndicates in order to formulate more adequate responses to the vices. In view of this, the inclusion of a whistle blower protection provision in the Protocol is strongly recommended. Greater focus should be placed on identifying potential victims and giving them legal

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<sup>237</sup> Kivabulaya F 'Government To Establish Environmental Courts', available at <https://ugandaradionetwork.com/story/government-on-the-move-to-establish-environmental-courts> (accessed 17 January 2016).

protection. Effective whistle blower protection could further help secure witnesses for prosecution of these cases.

Furthermore, effective monitoring of implementation of UNCTOC at domestic level and the proposed Protocol is imperative in the fight against IUU fishing as a transnational organised crime. There is thus a need for a mechanism at international level to fulfil this role and enhance accountability. The paper proposes amending UNCTOC to establish a Committee of states parties responsible for monitoring its implementation.

These recommendations would ensure effective use of transnational criminalisation as a tool to curb fisheries crime.



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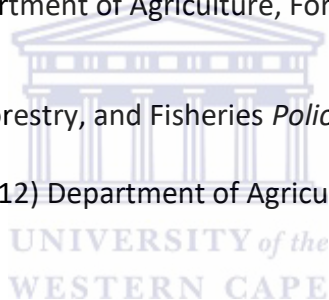
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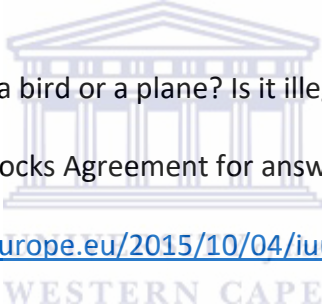
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