Proposals to Reform the Minister's Power to Promulgate Fisheries-Related Offences in South Africa: Perspectives From Selected Jurisdictions – Part I

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SUMMARY

The role of Cabinet in the implementation of fisheries legislation and the promulgation of regulations relating to fishery-related offences remains under-studied. This is a global phenomenon and entails instances where the relevant Minister promulgates regulations for the outlawing of fishery-related activities that are not sanctioned by law. However, this approach does not explain why primary legislation, instead of regulations, should not be the mechanism used to combat IUU fishing. By relying on ministerial regulations, instead of treating IUU-related offences as criminal conduct, countries handle such matters in terms of administrative law principles, resulting in lesser penalties for perpetrators. This article examines the role of the executive authority in the implementation of fisheries legislation and the promulgation of regulations relating to fishery-related offences. Four jurisdictions are selected for comparison, and the conclusions drawn from each jurisdiction are then used as the basis for proposals for legal reform in South Africa in relation to fishery-related crimes.

KEYWORDS: fisheries legislation, fishery-related offences, IUU fishing, ministerial regulations, executive authority, legal reform

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1 INTRODUCTION

Most jurisdictions face the phenomenon of illegal, unreported and unregulated (IUU) fishing. The member states of the Southern African Development Community (SADC) are not unaffected by the scourge, as up to USD10 billion is lost annually due to IUU fishing in the SADC region.[1] The rest of the African continent is equally affected, with up to USD25 billion (over R450 million) in revenue lost annually owing to organised crime syndicates operating illegally in the fisheries sector.[2] This data highlights the urgent need to curb illegal activities in the industry, as it remains a strategic area for economic growth. Worldwide, the sector employs up to 260 million people, either on a full-time or part-time basis.[3] This explains why countries such as Botswana, which are heavily dependent on single commodities, are currently exploring fish farming in efforts aimed at diversifying their economies.[4] The impact of IUU fishing is not only monetary in nature, as it has also led to depleted fish stocks,[5] the involvement of organised criminal syndicates in threatening the rule of law,[6] and the criminalisation of marginalised communities.[7]

Protecting the fisheries sector against the threats posed by IUU fishing is also a means for the State to show its commitment to the ideals sought to be achieved by the signatories to the Sustainable Development Goals (SDGs). SDG 13 calls upon the global community to "take urgent action to combat climate change and its impacts". Overfishing directly contributes towards climate change.[8] In addition, SDG 14 encourages signatories to "conserve and sustainably use the oceans, seas and marine resources for sustainable development". In the same vein, SDG 16 mandates states to "promote peaceful and inclusive societies for sustainable development, the provision of

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1 Stop Illegal Fishing "Stepping Up South Africa's Regional Engagement to Stop IUU Fishing Through SADC Atlantic Project" (27 February 2023) https://stopillegalfishing.com/news-articles/stepping-up-south-africas-regional-engagement-to-stop-iuu-fishing-through-sadc-atlantic-project/ (accessed 2024-11-12).

2 Van As "Billions Lost to Organised Fisheries Crime in Ocean Emergency" (30 March 2023) https://www.news24.com/fin24/opinion/opinion-billions-lost-to-organised-fisheries-crime-in-ocean-emergency-20230330 (accessed 2024-11-12).

3 Teh and Sumaila "Contribution of Marine Fisheries to Worldwide Employment" 2013 14 *Fish and Fisheries* 1 1.

4 CCARDESA "Botswana Explores Fish Farming" (28 August 2019) https://www.ccardesa.org/botswana-explores-fish-farming (accessed 2024-11-12).

5 Food and Agriculture Organisation of the United Nations "Gambia and FAO Strengthens the Fight Against IUU Fishing: Key Stakeholders Unite in Technical Working Group Workshop" (20 August 2024). See also Ionescu "Fish Stocks Are Collapsing Globally as Overfishing Continues" (28 August 2024) https://www.earth.com/news/fish-stocks-are-collapsing-globally-as-overfishing-continues/ (accessed 2024-11-13).

6 Van As "The Link Between Marine Living Resources and Organised Crime" (June 2019) *Servamus* 25.

7 Auld and Feris "South Africa's Small-Scale Fishers Have Been Marginalised Since Apartheid – What Needs to Change" (23 November 2022) https://theconversation.com/south-africas-small-scale-fishers-have-been-marginalised-since-apartheid-what-needs-to-change-194742 (accessed 2024-11-13).

8 United Nations "Plenty of Fish?" (10 June 2022) https://unfccc.int/news/plenty-of-fish (accessed 2025-02-17).

access to justice for all and building effective, accountable and inclusive institutions at all levels".

As part of global efforts to combat IUU fishing, over the years, South Africa has signed various treaties and conventions. These include the United Nations Convention Against Transnational Organised Crime[9] (UNTOC or Palermo Convention) and the United Nations Convention on the Law of the Sea[10] (UNCLOS). To give effect to these international commitments, it has enacted various Acts of Parliament, including the Prevention of Organised Crime Act,[11] the Prevention and Combating of Corrupt Activities Act[12] (PRECCA), the Marine Living Resources Act (MLRA),[13] and the Regulations in terms of the Marine Living Resources Act,[14] all of which set out various objectives aimed at eliminating unlawful activities in the fisheries sector.

According to the long title of the MLRA, its purpose is

> "[t]o provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa."

Despite all these regulatory tools, the looting of marine living resources continues unabated. For example, it was estimated that between 2001 and 2008, the illegal catch of abalone was more than 2 000 tons per year, equating to an illicit annual revenue of USD70 million.[15] Recently, it was reported that the value of the illegal trade in abalone is approximately £100 million per year.[16] In 2015, an estimated 1 475 tons of West Coast rock lobster was poached.[17] A total of 370 742 lobsters were confiscated between 2008 and 2019. The figures exclude the numbers confiscated by two of the biggest fisheries stations, as their records were destroyed in fires.[18] Both inland and coastal states have taken steps to combat the scourge of IUU fishing, including legislative interventions aimed at regulating and managing the resource, creating transgressions, establishing systems for monitoring, control and surveillance, and strengthening the capacity of state organs to

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9 United Nations General Assembly A/RES/55/25. Adopted 15/11/2000; EIF: 29/09/2003.

10 1833 UNTS 3 (1982). Adopted: 10/12/1982; EIF: 16/11/1994.

11 121 of 1998.

12 12 of 2004.

13 18 of 1998. Some of the provisions of the MLRA's predecessor, the Sea Fishery Act 12 of 1988, are still valid as the Act was not repealed as a whole.

14 Published under GN R1111 in *GG* 19205 of 1998-09-02.

15 Raemaekers, Hauck, Bürgener, Mackenzie, Maharaj, Plagánya and Briitz "Review of the Causes of the Rise of the Illegal South African Abalone Fishery and Consequent Closure of the Rights-Based Fishery" 2011 *Ocean & Coastal Management* 433–445 439.

16 Farmer "How the Illicit Trade in Sea Snails Came to Rival Rhino Poaching" (4 August 2024) The Telegraph How the illicit trade in sea snails came to rival rhino poaching (telegraph.co.uk) (accessed 2024-08-22).

17 *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* 2019 (2) SA 403 (WCC) par 36.

18 Van As "Poaching of Marine Living Resources: Can the Tide Be Turned?" 2020 *SA Crime Quarterly* 2–34.

prosecute the perpetrators of IUU fishing successfully.[19] However, the legislation is often implemented in a blanket fashion, without distinguishing between those who carry out fishing as a livelihood and *ex facie* perpetrators of IUU fishing.[20]

In South Africa, an abundance of legislation, including the MLRA, governs the marine fisheries sector. Such legislation[21] imposes various responsibilities on the Minister to spearhead the implementation of its provisions.

While the Constitution of the Republic of South Africa, 1996 (the Constitution) gives the responsibility of implementing legislation to members of the national executive authority,[22] the Minister's role in the implementation of fisheries legislation *vis-à-vis* the determination of fisheries-related offences remains under-studied. In the same vein, most jurisdictions treat IUU fishing as an administrative-law matter, as opposed to penalising it in terms of criminal-law provisions. Consequently, the national executive authority largely determines the sanctions to be imposed in the event of non-compliance with fisheries legislation.

Against this backdrop, this article examines the Minister's role in the implementation of fisheries legislation and the promulgation of regulations relating to fishery-related offences. Four jurisdictions are selected for comparison, and the conclusions drawn from each jurisdiction are then used as the basis for proposals for legal reform in South Africa in relation to fishery-related crimes.

2 IUU FISHING AS A LEGAL CONCEPT: BRIEF OVERVIEW

There is no fixed definition of IUU fishing. However, a universally accepted understanding of this concept is advanced by the Food and Agriculture Organisation (FAO), which describes IUU fishing as "a broad term that captures a wide variety of fishing activity and occurs both on the high seas and within national jurisdictions".[23] Referring to it as "a global problem that threatens ocean ecosystems and sustainable fisheries", the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA) proffers three components of IUU fishing.[24] Illegal fishing entails "activities conducted in contravention of applicable laws and regulations, including those laws and rules adopted at the regional and international

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19 Al Arif "An Introduction to International Fisheries Law Research" (November 2022) https://www.nyulawglobal.org/globalex/international_fisheries_law1.html (accessed 2024-11-14).

20 See full discussion below.

21 See full discussion below.

22 See discussion under heading 2 below.

23 Food and Agriculture Organisation of the United Nations "Illegal, Unreported and Unregulated (IUU) Fishing" (undated) https://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/ (accessed 2024-07-12).

24 NOAA Fisheries "Understanding Illegal, Unreported and Unregulated Fishing" (undated) https://www.fisheries.noaa.gov/insight/understanding-illegal-unreported-and-unregulated-fishing (accessed 2024-07-12).

level".[25] Unreported fishing comprises those "activities that are not reported or are misreported to relevant regulatory bodies in contravention of national laws and regulations or reporting procedures of a regional fisheries management organisation".[26] For NOAA, unregulated fishing "occurs in areas … for 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".[27] Globally, IUU fishing is categorised as part of transnational organised crime. This is because it meets the criteria that are required for the essential elements of organised crime, as noted by De Rivaz *et al*.[28]

The European Union Parliament Research Service (EUPRS) also recognises the three aspects of IUU fishing advanced by NOAA.[29] They allude to the fact that it was first recognised in 1997 by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Regional Fisheries Management Organisation (RFMO) responsible for the conservation of fishery resources in the Antarctic marine ecosystems. Early in 2013, the Pew Research Centre described IUU fishing only with reference to illegal fishing.[30] The institution noted that this denotes all activities associated with unlawful fishing contrary to applicable fisheries laws, including instances where they occur outside the domain of such laws and the attendant regulations. The International Maritime Organisation (IMO) notes that IUU fishing "threatens marine biodiversity, livelihoods, exacerbates poverty, and augments food insecurity".[31]

3 IUU FISHING: THE CHALLENGES OF FORMULATING IT AS A STATUTORY DEFINITION

Most jurisdictions have not codified the definition of IUU fishing into their legislative frameworks. To this extent, in most cases, it is not treated as an autonomous crime. Instead, there seems to be a link between IUU fishing and organised crime.[32] This categorisation ties in with the observation made by the American Security Project, which reports that violators of fishing laws often engage in the unlawful transportation of drugs and arms and partake in human

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25 *Ibid*.

26 *Ibid*.

27 *Ibid*.

28 De Rivaz, Haenlein, Reid and Nouwens "Turning the Tide? Learning From Responses to Large-Scale Illegal, Unreported and Unregulated Fishing in Five Countries" 2019 *Royal United Services Institute* 13–27 15.

29 European Parliamentary Research Service "Illegal, Unreported and Unregulated (IUU) Fishing" (October 2022) https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614598/EPRS_BRI(2017)614598_EN.pdf (accessed 2024-07-12).

30 PEW "Illegal, Unreported and Unregulated Fishing" (25 February 2013) https://www.pewtrusts.org/en/research-and-analysis/articles/2013/02/25/illegal-unreported-and-unregulated-fishing-frequently-asked-questions (accessed 2024-07-12).

31 International Maritime Organisation "Illegal, Unreported, and Unregulated (IUU) Fishing" (undated) https://www.imo.org/en/OurWork/IIIS/Pages/IUU-FISHING.aspx (accessed 2024-07-12).

32 Chapsos and Hamilton "Illegal Fishing and Fisheries Crime as a Transnational Organised Crime in Indonesia" 2019 22 *Trends in Organised Crime* 255 258.

trafficking.[33] Commenting on the Palermo Convention (UNTOC), the Global Initiative Against Transnational Organised Crime argue that "while the Palermo Convention does not include IUU fishing and other fisheries-related crimes, it is clear that large-scale commercial IUU fishing constitutes a form of transnational organised crime".[34] The FAO supports this categorisation in that, while fisheries-associated crimes may not be related to fishing as such, they are closely linked to IUU fishing.[35] These include, *inter alia*, document fraud, tax crimes, money-laundering, and inappropriate working conditions that may be contravening the applicable labour laws.

Alvarez[36] critiques the definition of fishing infractions in the Spanish Penal Code[37] and argues that the Community Regulations within the framework of the Common Fisheries Policy (CFP) are more effective.[38] Urbina echoes these sentiments, and notes, in relation to the definition as contained in article 335.1 of the Spanish Penal Code, that

> "the crime is defined by the legal technique of blanket criminal clauses, because it does not specify when illegal fishing is a crime, referring instead to administrative legislation, including international rules and those of the European Union (EU) to determine when the fishing of a marine species is expressly prohibited".[39]

The author adds that "this global remission to administrative fishing laws leads to doubts on their compatibility with the principle of legality, as it then becomes necessary to determine criteria for differentiating between criminal offences and merely administrative infractions". De Coning and Witbooi argue that the correct regulatory framework to adopt in combating illegal fishing is to place emphasis on criminal enforcement measures.[40] However, a contrary view

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33 Daoust "Human Rights Abuses and Organised Crime on IUU Fishing Vessels" (9 November 2021) https://www.americansecurityproject.org/iuufishingcrimes/ (accessed 2024-07-15).

34 Bondaroff, Van der Werf and Reitano "The Illegal Fishing and Organised Crime Nexus: Illegal Fishing as Transnational Organised Crime" (2015) https://globalinitiative.net/wp-content/uploads/2015/04/the-illegal-fishing-and-organised-crime-nexus-1.pdf (accessed 2024-07-15).

35 FAO "Illegal, Unreported and Unregulated (IUU) Fishing: Links Between IUU Fishing and Crimes in the Fisheries Sector" (undated) https://www.fao.org/iuu-fishing/background/links-crimes/en/ (accessed 2024-07-12).

36 Alvarez "The Prosecution of Fisheries Crimes in Spanish Criminal Law: The Impact of European Union Regulations" 2023 147 (105327) *Marine Policy* 1 4.

37 The Spanish Criminal Code of 1995.

38 Council Regulation (EC) No 1005/2008 is the foundational legal instrument that seeks to prevent, deter and eliminate illegal, unreported and unregulated fishing. Similarly, Council Regulation (EC) No 1224 of 2009 establishes a community control system "for ensuring compliance with the rules of the common fisheries policy".

39 Urbina "Towards an International Legal Definition of the Notion of Fisheries Crime" 2022 144 (105214) *Marine Policy* 1–6 3. Also refer to Oanta "The Application of Administrative Sanctions in the Fight Against IUU Fishing: An Assessment of Spanish Practice" 2022 144 (105211) *Marine Policy* 1–7 3.

40 De Coning and Witbooi "Towards a New Fisheries Crime: South Africa as an Illustrative Example" 2015 60 *Marine Policy* 208 https://www-sciencedirectcom.ezproxy.uow.edu.au/science/article/pii/ S0308597×1500189X (accessed 2024-07-15). For further interrogation of the authors' views, refer to Kuemlangan, Amidjogbe, Nakamura, Tomassi, Hupperts, Bojang and Amador "Enforcement Approaches Against Illegal Fishing in National Fisheries Legislation" 2023 149 *Marine Policy* 1 4.

expressed by a position paper from the UNODC casts doubt on the extent to which individual states use criminal-law provisions in the combating of IUU fishing. The organisation notes that, "however egregious the aggravating circumstances in IUU fishing may be, offences occurring specifically in an EEZ [exclusive economic zone] as opposed to territorial waters are highly unlikely to be dealt with as a serious crime".[41] This is due to the provisions of article 73.3, which bar State Parties from imposing a penalty of imprisonment in the absence of a bilateral agreement between the State Parties concerned.[42] According to Hendharto:

> "there is no legal definition of fisheries crime, but a close interpretation may suggest that IUU fishing is an actual form of fisheries crime. IUU fishing is not just fishing activities conducted on the high seas, but also occurs on the exclusive economic zones, territorial seas of coastal states, and even in internal waters, such as river and inland fisheries, committed by both local and foreign vessels."[43]

Fajardo makes an important observation regarding the difficulties associated with formulating a definition for IUU fishing. The author posits that

> "this definitional exercise is driven by the need to understand why IUU fishing has not yet been classified as an environmental or autonomous crime in the various international instruments adopted by the United Nations and FAO and, more recently, in the European Union (EU)'s proposal amending the Environmental Crime Directive".[44]

4 THE PROSECUTION OF FISHERY OFFENCES IN SOUTH AFRICA: THE CONSTITUTION AND APPLICABLE LEGISLATION

The prosecution of fishery offences emanates from the constitutional obligation imposed on the government to uphold the right of citizens to "an environment that is not harmful to their health or wellbeing,[45] and to protect the environment, for the benefit of present and future generations, through reasonable legislative and other measures".[46] Section 24 of the Constitution mandates the government to protect the environment through reasonable legislative and other measures that prevent pollution and ecological degradation.[47] It also obliges the government to promote conservation[48] and secure ecologically sustainable development and use of natural resources

41 UNODC "UNODC Approach to Crimes in the Fisheries Sector" (undated) https://www.unodc.org/documents/Wildlife/UNODC_Approach_to_Crimes_in_the_Fisheries_Sector.pdf (accessed 2024-07-15).

42 *Ibid*. See also University of Cape Town "Symposium Summary Report: Illegal Fishing in Southern African Waters and Beyond: Prevention and Law Enforcement" (9 July 2013) https://maris.uct.ac.za/sites/default/files/content_migration/maris_uct_ac_za/1478/files/FinalFisheries-Symposium-Summary-Report.pdf (accessed 2024-07-15).

43 Hendharto "Understanding IUU Fishing as Transnational Organised Crime With Special Example of Benjina Case" 2018 23 *Kajian* 95 100.

44 Fajardo "To Criminalise or Not to Criminalise IUU Fishing: The EU's Choice" 2022 144 *Marine Policy* 12.

45 S 24(*a*) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

46 S 24(*b*) of the Constitution.

47 S 24(*b*)(i) of the Constitution.

48 S 24(*b*)(ii) of the Constitution.

while promoting justifiable economic and social development.[49] To promote the conservation of depleted fish stocks, the Minister is guided by this provision. When implementing fisheries legislation, the Minister acts in terms of the Constitution, which vests in Cabinet the responsibility to implement legislation,[50] develop and implement national policy,[51] coordinate the functions of state departments and administrations,[52] prepare and initiate legislation[53] and perform any other executive function provided for in the Constitution or in national legislation.[54]

Fishery-related offences are criminalised in terms of the regulations under the MLRA. The Act applies to any act or omission that contravenes any of its provisions by any person within South Africa's territorial waters.[55] It is also applicable to offences committed outside the country by a citizen of South Africa, or any person ordinarily resident in the Republic.[56] It further applies to any person on board a local fishing vessel.[57] Any person who undertakes fishing or related activities contrary to the provisions of section 13,[58] the condition of any right of access, licence or permit granted in terms of Part 1, 2 or Chapter 3 of the MLRA,[59] or an authorisation to undertake fishing or related activities,[60] or any other provision of the Act,[61] is guilty of an offence and liable to a fine not exceeding two million rands, or imprisonment for a period not exceeding five years.[62] Equally,

> "Any person who contravenes–
> *(a)* a provision of an international conservation and management measure inside or outside South African waters …; or
> *(b)* the conditions imposed in a high seas fishing permit or high seas fishing vessel, shall be guilty of an offence and liable on conviction to a fine not exceeding three million rand."[63]

The Act deems such offences to have been committed within the Republic. It prohibits anyone from "engaging in a fishing or related activity by a method or in a manner prohibited by the Minister by notice in the *Gazette*".[64] This means that the Minister of Forestry, Fisheries and the Environment (DFFE) is central to determining the nature of fishery-related offences using the power vested in him by the Act to promulgate regulations. Notably, fishery-related offences

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49 S 24(*b*)(iii) of the Constitution.
50 S 85(2)(*a*) of the Constitution.
51 S 85(2)(*b*) of the Constitution. This includes fisheries-related policy.
52 S 85(2)(*c*) of the Constitution.
53 S 85(2)(*d*) of the Constitution.
54 S 85(2)(*e*) of the Constitution.
55 S 70(1)(*a*) of the MLRA.
56 S 70(1)(*b*) of the MLRA.
57 S 70(1)(*c*) of the MLRA.
58 S 58(1)(*a*)(i) of the MLRA.
59 S 58(1)(*a*)(ii) of the MLRA.
60 S 58(1)(*a*)(iii) of the MLRA.
61 S 58(1)(*b*) of the MLRA.
62 *Ibid*.
63 S 58(2) of the MLRA.
64 S 44(1)(*c*) of the MLRA.

are also punishable in terms of section 57(1) of the National Environmental Management Biodiversity Act.[65]

5 ADMINISTRATIVE *VERSUS* PENAL SANCTIONS FOR FISHERY CRIMES

5 1 The *ultima ratio* doctrine

In most countries, fisheries crimes are treated as a form of IUU fishing. This approach deems fisheries-related offences to be "an administrative law matter and seeks to prevent such behaviour by strengthening fisheries management and conservation rules and stepping up compliance through increased monitoring, control and surveillance (MCS) of vessel activities and complementary port state measures".[66] This approach has the effect of limiting punishment for non-compliance to administrative fines and not criminal-law measures. Salaev notes that this approach to punishment means that "criminal punishment can only be applied to a person as a last resort".[67] In terms of the *ultima ratio* doctrine, "criminal laws should be used by the State only when all other means of civil and administrative law have been exhausted or their application is considered ineffective".[68] According to Stolsvik, "whether illegal fishing attracts administrative sanctions or criminal sanctions, or both, is a decision which each State must take individually".[69] In a study conducted by Cacaud *et al* for the Food and Agriculture Organisation (FAO):

> "administrative sanctions are characterised by two major features. First, the power to impose such sanctions is vested in an administrative agency (not a judicial body) being part of the executive branch or an independent institution. Second, sanctions are imposed outside the judicial process".[70]

To this extent, the nature of the act that gives rise to the determination on whether a functionary should issue an administrative or criminal sanction is instructive. The authors note, with reference to the legal position in Namibia and South Africa, that the two countries treat violations of their fisheries laws as criminal offences.[71] The approach followed by the two countries in the categorisation of IUU fishing-related activities is therefore different from other jurisdictions.

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65 10 of 2004. S 57(1) provides: "A person may not carry out restricted activity involving a specification of a listed threatened or protected species without a permit issued in terms of Chapter 7." Also refer to *Landela v The State* [2017] ZAGPPHC 930 par 3.

66 De Coning and Witbooi 2015 *Marine Policy* 209.

67 Salaev "Classical Ideas of the *Ultima Ratio* Principle in the Modern Criminal Law Paradigm" 2024 2 *International Multi-Disciplinary Journal of Education* 282 282.

68 *Ibid*.

69 Stolsvik "The Development of the Fisheries Crime Concept and Processes to Address It in the International Arena" 2019 105 *Marine Policy* 123 123.

70 Cacaud, Kuruc and Spreij "Administrative Sanctions in Fisheries Law" (2003) https://openknowledge.fao.org/server/api/core/bitstreams/cae4a3c4-fa55-4715-ab71-bf78460445b2/content (accessed 2024-08-15).

71 Cacaud *et al* https://openknowledge.fao.org/server/api/core/bitstreams/cae4a3c4-fa55-4715-ab71-bf78460445b2/content 22.

5 2 The principle of legality as a mechanism to curb vagueness in criminal statutory provisions and sanctions in South African law

The lack of a clear definition of IUU fishing in legislation can also be impugned for vagueness. Urbina notes that "different forums and inter-governmental organisations have considered that illicit fisheries activities are deserving of criminal sanctions, as IUU fishing is now considered to be a criminal phenomenon rather than a mere problem of fisheries management".[72]

Notably, the author avers that it may not be possible to categorise all instances of illicit fishing activities as criminal in nature, as that might be in contravention of the principle of legality, which requires certainty in the description of such offences.[73] To this extent, Urbina notes:

> "the term IUU fishing is not a legal concept, but an extremely broad expression which encompasses a wide variety of fisheries activities which violate international, regional or national legislation and erode the efforts made by the States and international organisations to guarantee the conservation and management of marine living resources under the triple denomination of 'illegal fishing', 'unreported fishing' and 'unregulated fishing'. This expression … does not serve as a legal definition of this phenomenon but is merely descriptive or explanatory in nature. … The requirement of certainty demands that criminal behaviour be defined by law both clearly and precisely."[74]

This observation speaks to the prohibition against vagueness in law, which is contrary to the principle of legality. In *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security*,[75] the court alluded to this doctrine and held that "the doctrine of vagueness is founded on the rule of law, which is a foundational value of South Africa's constitutional democracy".[76] According to the court, "while the doctrine does not require absolute certainty of laws, the impugned legal instrument must indicate with reasonable certainty to those who are bound by it what is required of them, so that they may regulate their conduct accordingly".[77]

6 THE PROMULGATION OF REGULATIONS GOVERNING FISHERY CRIMES IN SOUTH AFRICA: THE MINISTER'S ROLE

The MLRA empowers the Minister, by notice in the *Government Gazette*, to "declare any area of the South African waters to be a fisheries management area for the management of the species described in the notice".[78] In the case of an emergency, the Minister may "in respect of each fisheries management

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72 Urbina 2022 *Marine Policy* 1 1.
73 *Ibid*.
74 Urbina 2022 *Marine Policy* par 3.1.
75 2010 (2) SA 181 (CC).
76 *Bertie van Zyl v Minister for Safety and Security supra par 47.*
77 *Ibid*.
78 S 15(1) of the MLRA.

area, approve a plan for the conservation, management and development of the fisheries". In the process, the Minister must consult with the parties affected by the plan.[79] In the case of an emergency that poses a danger to stocks of fish or aquatic life, including any species or class of fish or aquatic life in any fishery,[80] the Minister may suspend fishing activities in that fishery or any part of it.[81] He or she may restrict the number of fishing vessels in the fishery[82] or restrict the mass of fish taken from that fishery.[83] If the Minister is of the opinion that "special measures are necessary to ensure that authorised fishing within any area of the South African waters is not impeded or otherwise interfered with, he or she may, after consultation with the affected parties, … *(a)* declare such an area to be a priority fishing area …, and *(b)* prohibit any activity determined in the notice".[84]

In addition, the Minister has the power to declare fishing zones as marine protected areas. To this extent, the National Environmental Management: Protected Areas Act[85] (NEMPAA) provides for "the declaration and management of protected areas",[86] in its quest to "provide for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes".[87] In terms of the Act, the Minister may, by a notice in the *Government Gazette*, declare any area specified in the notice as a protected environment,[88] or as part of an existing protected environment.[89] To enforce the designation of an area as a protected environment, the Minister is empowered to appoint fishery control officers (FCOs) in terms of section 9 of the MLRA. The issues peculiar to the Minister's role in the promulgation of fishery-related offences have to do with customary fishing rights holders, those pertaining to small-scale fishers and the criminalisation of fishing-related offences as a form of organised crime.

6 1 The customary right to fish

In South Africa, there is often tension between marginalised communities and law-enforcement authorities in relation to the exploitation of fishery resources within their localities. Issues of contention arise in the context of customary rights and small-scale fishers. To this extent, the government must carefully assess whether a fishery-related activity amounts to IUU fishing or the exercise of rights by a member of the indigenous community and small-scale fishermen, in which case the nature, structure and extent of the Minister's power to issue fishing licences and declare threatened fishing zones as marine protected areas (MPAs) becomes relevant. In this context, the issue of acting contrary to a fishing permit or the conditions of an MPA declaration

79 S 15(3) of the MLRA.
80 S 16(1) of the MLRA.
81 S 16(1)(*a*) of the MLRA.
82 S 16(1)(*b*) of the MLRA.
83 S 16(1)(*c*) of the MLRA.
84 S 17 of the MLRA.
85 57 of 2003.
86 S 2(*a*) of NEMPAA.
87 See the Preamble to NEMPAA.
88 S 28(1)(*a*)(i) of NEMPAA.
89 S 28(1)(*a*)(ii) of NEMPAA.

is less controversial than when it is part of an organised criminal enterprise engaging in IUU fishing.

Since the adoption of South Africa's Constitution, the courts have often had to deal with matters pertaining to the customary right to fish. This issue arose for consideration in *Sustaining the Wild Coast NPC v Mineral Resources and Energy*,[90] where the applicants sought the court's intervention to interdict a seismic survey based, inter alia, on their contention that it would interfere with their customary fishing rights. Granting the interdict, the court held that the applicants' right to meaningful consultation constituted a prima facie right that was worthy of protection through the remedy sought.[91] In *Gongqose v Minister of Agriculture, Forestry and Fisheries*,[92] the High Court had to deal with the respondent's decision to declare the Dwesa-Cwebe Nature Reserve a no-take zone, effectively prohibiting members of the Dwesa-Cwebe community from accessing some of the marine resources within the reserve. The appellants contended that "the MLRA, which does not recognise the appellants' customary fishing rights, has not extinguished those rights".[93] Regarding the question whether section 43 of the MLRA offends against their customary rights of access to marine resources, the court held that "there is no scope for an interpretation that disregards or extinguishes the appellants' customary rights of access to marine resources".[94]

6 2 The rights of small-scale fishers

The huge income inequalities prevalent in South Africa are also evident in the fishing industry, prompting the Minister to strike a balance between protecting existing rights holders and promoting new entrants to the fishing industry, particularly those from historically disadvantaged communities, when allocating fishing rights. This applies *mutatis mutandis* to the promulgation of fishery-related offences, in that the Minister should avoid a blanket criminalisation of all fishing-related activities, which would have the effect of criminalising marginalised communities who can benefit from the exploitation of marine living resources in their localities.

According to a policy document published by the Department of Agriculture, Forestry and Fisheries in 2012, "many small scale fishing communities have historical ancestral links with the indigenous communities and evidence such as fish traps, shell middens and vestiges of customary practice archival

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90 2022 (6) SA 589 (ECMk).

91 *Sustaining the Wild Coast NPC v Mineral Resources and Energy supra* par 34. Also refer to Kantor "Hands Off Our Intangible Cultural Heritage – Khoin v Jenkins in re: Observatory Civic Association v Trustees for the Time Being of the Liesbeek Properties Trust" 2023 26 *PELJ* 1 8. Also see the *dictum* in *Adams v Minister of Mineral Resources and Energy* [2022] ZAWCHC 24 (unreported).

92 [2016] 2 All SA 130 (ECM) par 5. See also the decision of the court *a quo* in *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (2) SACR 367 (SCA).

93 *Gongqose v Minister of Agriculture, Forestry and Fisheries supra* par 33.

94 *Gongqose v Minister of Agriculture, Forestry and Fisheries supra* par 49. See also Ferris "A Customary Right to Fish When Fish Are Sparse: Managing Conflicting Claims Between Customary Rights and Environmental Rights" 2013 *PELJ* 556 556.

records remain".[95] In *Bato Star Fishing v Minister of Environmental Affairs and Tourism*,[96] the Constitutional Court had to determine the lawfulness of the Minister's decision regarding the allocation of the 2002–2005 fishing seasons. Central to the issue were sections 2[97] and 18(5)[98] of the MLRA, which speak to the need for the Minister, as the grantor of fishing rights, to consider previously disadvantaged groups in the restructuring and transformation of the fisheries sector. Regarding fishing allocations in terms of section 18(5), the court held:

> "the obligation imposed by section 18(5) must be observed. This does not mean, however, that regardless of other considerations all new entrants must be catered for at every allocation, nor that new entrants must be admitted in every sector of the fishing industry. The objectives in section 2 must be taken into account as well as they are of considerable importance to the consistent and sound development of the fishing industry as a whole."[99]

Reference to the need to restructure and transform the fishing industry should be understood in line with the Minister's power to determine the total allowable catch (TAC) in terms of section 14 of the MLRA. *Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries*[100] presented another opportunity for the court to interpret the Minister's power to declare threatened fishing zones as MPAs in terms of section 43. The applicants argued that the imposition of the condition in their permits and exemptions which restricted them from fishing in Zone B of the Langebaan Lagoon was arbitrary and irrational in that the scientific evidence available did not indicate unacceptable ecological effects that might be brought about by fishing in Zone B.[101]

The court took note of section 18(1) of the MLRA, in terms of which no person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.[102]

As in *Bato Star*, the court referred to the provisions of sections 2 and 18(5) of the MLRA, which require the Minister to consider the need to permit new entrants to the market, particularly those from historically disadvantaged groups.[103] According to the court, "the reference to the TAC and TAE [total

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95 Department of Agriculture, Forestry and Fisheries "Policy for the Small Scale Fisheries Sector in South Africa" (20 June 2012) https://www.gov.za/sites/default/files/gcis_document/201409/35455gon474.pdf (accessed 2024-11-13).

96 2004 (7) BCLR 687 (CC) (*Bato Star*).

97 S 2 of the MLRA details the considerations the Minister should take into account in the implementation of the Act, in order to redress the imbalances of the past. For instance, section 2(*j*) mandates the Minister to "restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry".

98 S 18(5) of the MLRA requires the Minister to "have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society".

99 *Bato Star supra* par 39.

100 [2016] ZAWCHC 196 (*Coastal Links*).

101 *Coastal Links supra* par 7.

102 *Coastal Links supra* par 56.

103 *Ibid*.

allowable effort] in the context of awarding of rights is to be read with reference to the provisions of section 14 of the Act".[104]

In the determination of the TAC and TAE, the Minister may, during any fishing season, "establish areas or zones where subsistence fishers may fish",[105] and may declare "a specified community to be a fishing community, from which inhabitants may be subsistence fishers".[106] The Minister may also declare any other person to be a subsistence fisher,[107] or "any other fishing or related activity, or the exercise of any other right in that area or zone to be prohibited".[108]

6 3 Organised crime in the marine fisheries sector

As alluded to above, the decision to charge perpetrators of organised crime in the fisheries sector is less controversial, owing to the multiplicity of offences involved. The Prevention of Organised Crime Act (POCA)[109] endeavours *inter alia* to "introduce measures to combat organised crime, money laundering and criminal gang activities, prohibit certain activities relating to racketeering, and provide for the recovery of the proceeds of unlawful activity".[110] Currently, IUU fishing is not treated as a form of organised crime. Where large quantities are involved, organised syndicates are involved, but they are mostly not investigated and prosecuted under POCA. The fisheries management approach means that administrative penalties are preferred. It would, it is submitted, be preferable to criminalise IUU fishing as a predicate offence for prosecution in terms of POCA. It should be addressed as a form of organised crime that often also involves drug and human trafficking, fraudulent catch documentation, money laundering and corruption.[111]

7 IUU FISHING IN TANZANIA

Like all countries in East Africa, Tanzania faces challenges relating to the lack of surveillance in the country's coastal waters.[112] This leaves most of its

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104 *Coastal Links supra* par 57.

105 S 19(1)(*a*) of the MLRA.

106 S 19(*b*)(i) of the MLRA.

107 S 19(*b*)(ii) of the MLRA.

108 S 19(*b*)(iii) of the MLRA.

109 21 of 1998.

110 See the Preamble to POCA.

111 Witbooi and Wood "The Impact of Fisheries Crime in Fisheries Extends Far Beyond the Ocean" (17 August 2020) https://www.wri.org/insights/impact-organized-crime-fisheries-extends-far-beyond-ocean (accessed 2024-08-15). See also Witbooi "Organised Crime in the Fisheries Sector Starts to Get the Attention It Deserves" (4 January 2017) https://theconversation.com/organised-crime-in-the-fisheries-sector-starts-to-get-the-attention-it-deserves-70216 (accessed 2024-08-15).

112 Bergh, Davies, Fewwelling, Boyer, Boyer and Borgstein "Case Study 14: Prosecution of Tawariq 1" (9 July 2019) https://stopillegalfishing.com/publications/prosecution-of-tawariq-1/ (accessed 2024-07-15). See also Daghar "Illegal Fishing in Lake Victoria Endangers Livelihoods and Species" (2 July 2019) https://enactafrica.org/enact-observer/illegal-fishing-in-lake-victoria-endangers-livelihoods-and-species (accessed 2024-07-15). Also refer to Share America "The U.S. and Tanzania Working Together to Fight Illegal Fishing" (28 June

exclusive economic zone (EEZ) vulnerable to IUU fishing.[113] In 2010 alone, the Tanzanian government estimated that at least 200 fishing vessels engaged in IUU fishing in its offshore waters, resulting in millions of dollars lost in much-needed revenue.[114] Local fishers and factories in the fisheries sector face bankruptcy owing to the advent of IUU fishing in Lake Victoria.[115] The situation is so dire that in 2019, it was reported that 76 per cent of fish species in Tanzania face extinction, some of which include crustaceans such as shrimps and crabs.[116] It is against similar challenges that the Southern African Development Community (SADC) adopted the SADC Protocol on Fisheries in 2001, paving the way for the 2008 SADC Statement of Commitment on IUU Fishing.[117]

7 1 The criminalisation of fishery offences

Unlike South Africa, the Constitution of the Republic of Tanzania, 1977, does not expressly enshrine legal provisions pertaining to the government's obligation to protect and preserve the environment and its ecosystem. Instead, the regulations under the Fisheries Act[118] prohibit the fishing and exporting of fish or fishery products without a valid licence empowering the right holder to engage in such activity.[119] In addition, fishing in a controlled area is not permitted unless prior authorisation has been obtained from the Director.[120] Equally, no one may employ a fisherman, cause or permit any person to engage in fishing, collecting or the exportation of any type of fish or fishery products, in a manner that has not been sanctioned by subregulations (1), (2) and (3).[121] Notably, "any fishing licence issued by a local government authority shall be valid within the jurisdiction of that authority" only.[122]

2024) https://share.america.gov/the-us-and-tanzania-working-together-to-fight-illegal-fishing/#:~:text=However%2C%20illegal%2C%20unreported%2C%20and,the%20South%2DWest%20Indian%20Ocean (accessed 2024-07-15). See further ADF "Tanzania Focuses on Illegal Fishing, Boosting 'Blue Economy'" (22 September 2021) https://adf-magazine.com/2021/09/tanzania-focuses-on-illegal-fishing-boosting-blue-economy/ (accessed 2024-07-15).

113 *Ibid*.

114 *Ibid*.

115 Domasa "Havoc as Tanzania's Fish Exports Plummet" (3 June 2024) https://infonile.org/en/2024/06/havoc-as-tanzanias-fish-exports-plummet/ (accessed 2024-07-15).

116 Daghar "Saving Lake Victoria Means Going After the Big Fish" (9 July 2019) https://issafrica.org/iss-today/saving-lake-victoria-means-going-after-the-big-fish (accessed 2024-07-29). Also refer to Stremple "Tanzania Faces an Encroaching Coastal Crisis" (6 February 2024) https://newlinesmag.com/reportage/tanzania-faces-an-encroaching-coastal-crisis/#:~:text=Large%20numbers%20of%20fishers%2C%20using,they%20haul%20in%20their%20catch (accessed 2024-07-29).

117 *Ibid*.

118 22 of 2003.

119 Reg 12(1) of the Fisheries Act Regulations [Tanzania].

120 Reg 12(4) of the Fisheries Act Regulations [Tanzania].

121 Reg 12(5) of the Fisheries Act Regulations [Tanzania].

122 Reg 12(11) of the Fisheries Act Regulations [Tanzania].

Similarly, the Deep-Sea Fisheries Act[123] provides for the management and development of fisheries conservation.[124] It prohibits the buying, selling, possession, exportation, or trading of fish or their products, harvested in contravention of the Act.[125] Failure to adhere to the provisions of the Act is punishable by a fine not exceeding the amount prescribed in Schedule 2.[126] This includes the seizure of all illegally obtained fish and their products.[127]

The Marine Parks and Reserves Act[128] is equally useful, and provides, *inter alia*, for the establishment, management and monitoring of marine parks and reserves. It prohibits the fishing, hunting, killing or capturing of any fish or animal, including the disturbance of any egg, nest, roe or spawn within a marine park or reserve.[129] This prohibition extends to the gathering, collection or removal of any fish, animal, aquatic flora, vegetation or related products, including sand, minerals, or aquatic substrate.[130] Anyone who contravenes these prohibitions commits an offence.[131] However, the nature of the offence is not expressly stated.

In the *Director of Public Prosecutions v Betahose*,[132] the High Court had occasion to try two accused charged with contravening sections 21(1) and (2), and 29(1) of the National Parks Act.[133] The accused also stood accused of contravening regulations 66(1)(a) and (4) of the Fisheries Regulations.[134] They were, *inter alia*, accused of planning to fish in the Geita region without a permit, on account of their unlawful possession of one monofilament net.[135] The court relied on the provisions of regulation 66(4), which prescribes a fine of not less than two million shillings or imprisonment of up to three years as punishment, and found the accused guilty.[136]

7 2 The Minister's role in the promulgation of fishery offences in Tanzania

The Marine Parks and Reserves Act empowers the Minister to promulgate regulations for its implementation. Such regulations may provide for specific limitations or regulate activities pertaining to the species of fish,[137] and the

123 5 of 2020.
124 See the Preamble to the Deep-Sea Fisheries Act.
125 S 30(1) of the Deep-Sea Fisheries Act.
126 S 30(2) of the Deep-Sea Fisheries Act.
127 *Ibid*.
128 29 of 1994.
129 S 22(1)(*a*) of the Marine Parks and Reserves Act.
130 S 22(1)(*b*) of the Marine Parks and Reserves Act.
131 S 22(2) of the Marine Parks and Reserves Act.
132 Criminal Appeal 213 of 2017 [2020] TZHC 1694 (*Betahose*).
133 12 of 1959.
134 GN 308 of 2009.
135 *Betahose supra* p. 2.
136 *Ibid*. Also refer to *Selemani Makumba v The Republic* [2006] TLR 379, where the court held that "the High Court has power to interfere with the sentence of the trial court where the sentence is manifestly excessive or inadequate or where the trial court acted on wrong principle or took into account irrelevant matter".
137 S 23(2)(*a*) of the Marine Parks and Reserves Act.

methods employed in fishing, hunting, capturing, and gathering of fish and aquatic flora.[138] The promulgation of the limitations or activities must also be based upon the type of vessel and vehicle permitted in the marine park or reserve,[139] the size of the fish, animals, vegetation or aquatic flora,[140] or the size of the catch of any fish, animals, vegetation or aquatic flora.[141] The limitations may be imposed indefinitely or for a period of time.[142]

8 FISHERY-RELATED OFFENCES IN MAURITIUS

In January 2016, Mauritius ratified the Port States Measures Agreement (PSMA),[143] in order to enforce international treaties aimed at preventing illegally caught fish from entering its markets.[144] Like other countries, Mauritius does not have specific legislation that deals with offences relating to the fisheries sector. The Fisheries Act[145] endeavours to "ensure the long-term conservation, management and development of fisheries and aquaculture in Mauritius while safeguarding the marine resources, biodiversity, environment and ecosystems for the benefit of the people of Mauritius".[146] The management objectives of the Act are, *inter alia,* to "combat IUU fishing or fishing related activities and exercise powers under a catch documentation scheme".[147] To achieve this objective, the Act gives the Minister the power to declare certain marine species as endangered or threatened, thereby prohibiting or restricting their exploitation to the allowable extent, in line with an applicable international agreement or a relevant regional fisheries management organisation.[148]

Against this backdrop, the Act prohibits anyone from taking, landing, selling, dealing in, transporting, receiving, or commercial dealing in fish and fishery products declared as protected, threatened or endangered.[149] Anyone who contravenes the provisions of the Act commits an offence.[150] However, the Act does not specify the nature of the offence in question. It prohibits the fishing, storage, landing, selling, possessing or any form of illegal activity in relation to specific species of fish.[151] This prohibition applies *inter alia* to any toxic

138 S 23(2)(*b*) of the Marine Parks and Reserves Act.
139 S 23(2)(*d*) of the Marine Parks and Reserves Act.
140 S 23(2)(*g*) of the Marine Parks and Reserves Act.
141 S 23(2)(*h*) of the Marine Parks and Reserves Act.
142 S 23(3) of the Marine Parks and Reserves Act.
143 Food and Agriculture Organisation "Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" (May 2018) http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf (accessed 2025-02-17).
144 Long "Mauritius Signs International Treaty to Protect Ports From Illegally Caught Fish" (7 January 2016) https://www.pewtrusts.org/en/research-and-analysis/articles/2016/01/07/mauritius-signs-international-treaty-to-protect-ports-from-illegally-caught-fish (accessed 2024-08-08).
145 15 of 2023.
146 S 4(1) of the Fisheries Act [Mauritius].
147 S 4(2)(*c*) of the Fisheries Act [Mauritius].
148 S 17(1) of the Fisheries Act [Mauritius].
149 S 17(2) of the Fisheries Act [Mauritius].
150 S 17(3) of the Fisheries Act [Mauritius].
151 S 33(1) of the Fisheries Act [Mauritius].

fish,[152] fish and fish products that are unfit for human consumption,[153] perforated fish,[154] marine turtle,[155] marine mammal[156] and other fish species as may be prescribed.[157]

Instead of criminal sanctions against those found guilty of IUU fishing, the Act provides:

> "Where a person has committed an offence under the Act, the Administrative Sanctions Commission shall promptly notify the person of the offence and shall request the person, within 7 working days of receiving such notification, to either consent to, or refuse, administration proceedings."[158]

However, a person who engages in fishing or fishing-related activities that are subject to administrative proceedings while prohibited from doing so under subsection (3)(b) commits an offence and is liable on conviction to a fine and imprisonment.[159] This proviso does not apply to a criminal offence under any other enactment,[160] or any offence relating to transnational organised crime or individuals that are part of or associated with a transnational criminal group.[161]

The Act prohibits the possession, trade and exportation of fish and fish products taken in contravention of the Act or international and conservation measures.[162] However, the rule does not apply where such fish and their associated products have become the property of the State.[163] Similarly, anyone who contravenes this provision commits an offence.[164] Equally, "trading in fish and fish products taken or obtained in contravention of the relevant laws of another state constitutes an offence punishable by law".[165]

9 FISHERY OFFENCES AND LEGISLATIVE PROVISIONS IN SINGAPORE

9 1 The Fisheries Act

The Fisheries Act[166] provides for

> "the protection and conservation of fisheries, and to make provision for the control of fishing, the control of the marketing and distribution of fish and the

[152] S 33(1)(*a*) of the Fisheries Act [Mauritius].
[153] S 33(1)(*b*) of the Fisheries Act [Mauritius].
[154] S 33(1)(*c*) of the Fisheries Act [Mauritius].
[155] S 33(1)(*d*) of the Fisheries Act [Mauritius].
[156] S 33(1)(*e*) of the Fisheries Act [Mauritius].
[157] S 33(1)(*m*) of the Fisheries Act [Mauritius].
[158] S 181(1) of the Fisheries Act [Mauritius].
[159] S 181(4)(*a*) of the Fisheries Act [Mauritius].
[160] S 184(*a*) of the Fisheries Act [Mauritius].
[161] S 184(*b*) of the Fisheries Act [Mauritius].
[162] S 40 of the Fisheries Act [Mauritius].
[163] *Ibid*.
[164] S 40(2) of the Fisheries Act [Mauritius].
[165] S 41 of the Fisheries Act [Mauritius].
[166] 14 of 1966.

> use and control of fishing ports and harbours, for measures pertaining to the general welfare and improvement of the fishing industry in Singapore".[167]

It defines fish *inter alia* as "any of the varieties of marine, brackish water or freshwater fishes, crustacea, and aquatic *mollusca*".[168] In terms of the Act, "any person who lands or sells fish caught by methods prohibited, or within areas prohibited is guilty of an offence".[169] Similar to the position in Mauritius, the nature of the offence is not expressly stated in the Act. This means that the determination of the specific offence is left to the legislature and the prosecuting authorities.

Any use, operation or rendering of assistance to trawl-net activities in Singapore's territorial waters is prohibited by the Act.[170] A contravention of this rule leads to a guilty verdict, and upon conviction, to imprisonment for a term of not less than three months and not exceeding three years.[171] However, the nature of the offence is not specified. Instead, the proviso merely states that any person who commits "an offence" is liable to imprisonment. The use of the phrase "an offence" is also repeated in section 13(1) of the Act, where "any person who commits an offence under the Act shall be liable, if no special penalty is provided, on conviction to a fine not exceeding $10 000 or to imprisonment for a term not exceeding 12 months or both".[172] Equally, any person who acts contrary to the dictates of the Act,[173] or breaches the legal obligations arising from the restrictions or conditions arising from the issuance of a licence,[174] is guilty of an offence and liable to a fine not exceeding $10 000 on conviction, imprisonment for a period not exceeding twelve months, or both.[175]

A proper reading of the Act suggests that it is vague. This is because it is unclear from the structure and wording of the Act that the legislature has fulfilled its duty to adopt legislation to deal with fisheries crimes. This applies *mutatis mutandis* to the role of the Singaporean prosecuting authorities in dealing with marine fishery offences. The courts are vested with wide-ranging powers to issue confiscation orders in instances pertaining to vessels, vehicles, fishing stakes, nets, instruments, or appliances used in the commission of an offence emanating from the application of the Act. Section 16(1) provides magistrates with the discretionary power to issue such confiscation orders.[176]

The role of the Minister in promulgating regulations that govern fishery offences is not expressly stated. It would be desirable for the Act to state expressly the executive branch's role in the making of proclamations, regulations and notices that govern fishery offences. This applies *mutatis mutandis* to guidelines that can aid the prosecuting authorities and law-

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167 See Long Title of the Fisheries Act [Singapore].
168 S 2 of the Fisheries Act [Singapore].
169 S 11 of the Fisheries Act [Singapore].
170 S 12(1) of the Fisheries Act [Singapore].
171 *Ibid*.
172 S 13(1) of the Fisheries Act [Singapore].
173 S 13(2)(*a*) of the Fisheries Act [Singapore].
174 S 13(2)(*b*) of the Fisheries Act [Singapore].
175 *Ibid*.
176 S 16(1) of the Fisheries Act [Singapore].

enforcement agencies in the prosecution and combating of such crimes. The Act only details the Minister's power to make rules to prescribe which offences may be compounded.[177]

9 2 The Minister's role

The Fisheries Act [Singapore] gives the Minister the power to "make rules for the purpose of carrying out the provisions of the Act".[178] It also provides the Minister with the power to adopt rules that "regulate or prohibit any method of fishing or the use of any fish traps or fishing nets".[179] The Minister may make rules to "provide for the licensing, control, supervision and protection of any fishery and of the cultivation of fish or any particular species of fish".[180] The Act also empowers the Minister to make rules to prescribe the species or the minimum weights and sizes of fish that may be cultured, captured or taken for the purposes of sale, processing, consumption, consignment, rearing or sport.[181] It also confers on the Minister the power to make rules that prescribe the areas and the periods of time in the year within which any particular species or size of fish may be killed or captured, or any particular method of fishing that is prohibited or restricted.[182] He may make rules that prohibit the killing or capture of a fish, unless such killing or capture is carried out in accordance with the terms and conditions of a lawfully issued licence.[183] Similarly, the regulation and control of the landing, collection, transportation, marketing and distribution of fish is also provided for in the Act.[184]

To combat the scourge of IUU fishing, the Act vests the Minister with the power to make rules pertaining to the registration of fishermen, fish culturists, fish dealers or any person connected with fishing or the fishing industry.[185] This includes the licensing of fishing vessels, fishing stakes, fishing nets, and gear and equipment.[186] Notably, the Minister may adopt rules to prohibit or regulate the importation, exportation or transhipment of any species of fish if of the opinion that such species of fish may pose a threat to the ecological balance or integrity of fisheries, or to public safety.[187] Unlike the South African

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177 S 18(2) of the Fisheries Act [Singapore].

178 S 27(1) of the Fisheries Act [Singapore].

179 S 27(2)(*b*) of the Fisheries Act [Singapore].

180 S 27(2)(*c*) of the Fisheries Act [Singapore]. Also see section 27(2)*(ca)*, which refers to information about requirements and procedures for "document control and recording by any fishery or persons involved in the cultivation of fish so as to monitor the supply of fish in Singapore for human consumption, including, (i) the information that must collected about the fish or a particular species of fish; (ii) the period for which the information must be kept; and (iii) how, when and to whom that information must be reported".

181 S 27(2)(*d*) of the Fisheries Act [Singapore].

182 S 27(2)(*g*) of the Fisheries Act [Singapore].

183 S 27(2)(*h*) of the Fisheries Act [Singapore].

184 S 27(2)(*k*) of the Fisheries Act [Singapore]. Also refer to section 27(2)(*l*) This also applies to rules that control "areas which may be used as fishing ports or harbours or areas where fishing vessels may be allowed to moor". Also see section 27(2)(*o*), which allows the Minister to regulate any method of cultivation of fish through ministerial rule-making.

185 S 27(2)(*q*) of the Fisheries Act [Singapore].

186 S 27(2)(*r*) of the Fisheries Act [Singapore].

187 S 27(2)(*s*) of the Fisheries Act [Singapore].

Constitution, the Singaporean Constitution does not contain provisions dealing with the State's constitutional obligation to "protect and preserve the environment for the benefit of present and future generations".

10 FISHERY CRIMES AND LEGISLATIVE PROVISIONS IN INDONESIA

Like other coastal states, Indonesia has had to grapple with the scourge of IUU fishing. The country is the world's largest archipelago and the second biggest producer of wild-caught seafood after China.[188] However, information from data obtained in 2011 shows that between 20 and 38 per cent of the country's seafood has been obtained illegally by local fishers and vessels recruited by transnational criminal organisations.[189] IUU fishing is estimated to cost the country at least USD3 billion annually in lost revenue.[190] In early December 2023, a fishing vessel was engaging in illegal fishing activities.[191] It was then intercepted off the coast of Rembang, Central Java, Indonesia, by the country's Ministry of Marine Affairs and Fisheries (KKP).[192] Mongabay reports that the successful operation was the result of co-operation between the KKP, United Nations Office on Drugs and Crime (UNODC), and Skylight.[193] Similarly, Khan *et al* report that illegal fishing threatens the viability of tuna as a sustainable commodity in Indonesia.[194]

Despite a few successful crackdowns on IUU fishing and related activities in Indonesia, the scourge of illegal fishing remains a challenge. It is against this realisation that, in 2004, the country's President promulgated the Law on Fishery,[195] which governs marine fishery resources within the country's territorial waters. In its Preamble, the Act acknowledges that

> "cultivation of fish resources has to be implemented optimally based on justice and even distribution in their utilisation by giving priority to the expansion of work opportunities and improvement of standard of living of fishermen, fish

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188 Gokkon "With Drop in Illegal Fishing Comes in Piracy, Study in Indonesia Finds" (22 February 2024) https://news.mongabay.com/2024/02/indonesia-illegal-fishing-maritime-piracy-study/#:~:text=Indonesia%20is%20the%20world's%20largest,recruited%20by%20transnational%20criminal%20organizations (accessed 2024-08-14).

189 *Ibid*.

190 *Ibid*.

191 UNODC "Indonesia Cracks Down on Fisheries Crime" (16 February 2024) https://www.unodc.org/roseap/en/indonesia/2024/02/fisheries-crime/story.html (accessed 2024-08-14).

192 *Ibid*.

193 *Ibid*.

194 Khan, Jiang, Yang, Apriliani, Purba, Wiryawan, Taurusman and Pasaribu "Illegal Fishing the Sustainability of Future Tuna Commodities in Indonesia" 2024 159 *Marine Policy* 1 2. For further elucidation on how "over 2,000 coral reef fish species and 500 coral reefs provide social and economic benefits to more than 180 million people who live near Indonesia's coastlines"; see Estradivari, Andradi-Brown, Amkieltiela, Handayani, Sjahruddin, Agung, Campbell, Claborn, De Nardo, Fox, Glew, Hakim, Lazuardi, Nanlohy, Sanjay, Setyawan, Timisela, Veverka, Wiwardhana, Welly, Zainudin and Ahmadia "Marine Conservation in the Sunda Banda Seascape, Indonesia" 2022 138 *Marine Policy* 1 1. See also Razak, Lamont, Hukom, Alisa, Asri and Ferse "A Review of the Legal Framework for Coral Reef Restoration in Indonesia" 2024 248 *Marine Policy* 11.

195 31 of 2004.

> breeders, and parties related to fishery activities and conservation of fish resources and the environment".[196]

In addition, it recognises that the previous legislation on fisheries[197] did not adequately meet the needs required by all aspects of fish cultivation, including developments and advancements in the technology used for purposes of fish cultivation.[198] The legislation prohibits *inter alia* the catching and breeding of fish "using chemical and biological substances, explosives, tools, and structures, which may damage and/or endanger conservation of fish resources and the environment thereof".[199] Owners of fishing vessels, fishery companies, and operators who intentionally catch or breed fish using chemical and biological substances, explosives, tools and structures that may endanger fish and the environment also commit a criminal offence.[200] The Act also prohibits the use of sub-standard methods of fish cultivation,[201] and acts that may cause pollution to fishery resources and the environment.[202]

A commendable inclusion in the legislation is the creation of the Court of Fishery Affairs (CFA), which is authorised to examine, hear and rule criminal cases concerning fishery affairs.[203] The court has the same status as that of the lower court, and functions according to the conditions stipulated in a presidential decree.[204] The 2009 amendment[205] to the Law on Fishery "establishes fisheries courts which are authorised to examine, hear, and adjudicate criminal acts" pertaining to fisheries.[206] These courts lie within the domain of the district courts.[207] They are authorised to examine, hear and adjudicate on criminal conduct relating to fisheries, and acts committed in a fisheries management area within the borders of Indonesia, either by a citizen or a non-national.[208]

Dirhamsyah *et al* note that "the existing regulatory framework is very broad and complex".[209] The authors state, by way of illustration, that "there are seven levels of hierarchy of the legal system in Indonesia, excluding ministerial regulations". This means that there is no uniform legislation governing fishery offences in Indonesia, an approach similar to the other countries selected for review. Muawanah *et al* note that these legislative enactments "recognise[ ] a

196 Par b of the Preamble to the Law on Fishery.
197 Law No. 9 of 1985.
198 Par c of the Preamble to the Law on Fishery.
199 Art 84(1) of the Law on Fishery.
200 Art 84(3) of the Law on Fishery.
201 Art 85 of the Law on Fishery.
202 Art 86(1) of the Law on Fishery.
203 Art 71(2) of the Law on Fishery.
204 Art 71(6) of the Law on Fishery.
205 Law No. 45 of 2009.
206 Art 71(1) of the Law on Fishery.
207 Art 71(2) of the Law on Fishery.
208 Art 71A of the Law on Fishery.
209 Dirhamsyah, Umam and Arifin "Maritime Law Enforcement: Indonesia's Experience Against Illegal Fishing" 2022 229 *Ocean and Coastal Management* 1 3.

shifting paradigm from fisheries management to an ecosystem approach to fisheries".[210]

Three observations can be made from the discussion on the above jurisdictions. First, the fact that most jurisdictions treat IUU fishing as an administrative-law matter does not mean that the enabling legislation does not provide for imprisonment as a sanction for the offence. While criminal in nature, the offence is governed using an approach that is more consistent with administrative-law principles. However, the applicable sanction is then determinable according to criminal-law rules. Secondly, none of the countries selected for review has uniform legislation that treats IUU fishing as an autonomous crime. Thirdly, the absence of such legislation means that there is no statutorily defined and accepted definition of IUU fishing by the prosecuting authorities. This then leads to vagueness in the definition and lesser punishments for perpetrators. However, the creation of the CFA in Indonesia is an approach that could be followed by South Africa to alleviate the burden of a heavy caseload in the country's courts, while at the same time enhancing the effectiveness of the fight against IUU fishing.

11 MARINE LAW ENFORCEMENT IN SOUTH AFRICA: A FRAGMENTED APPROACH

Currently, the legislation that governs fishery crimes in South Africa is fragmented. The MRLA remains the primary legislation in combating IUU fishing. The approach adopted by the government in the fight against illegal fishing is a fisheries management approach. This results in levies and fines being issued against those who act contrary to the dictates of the Act. Equally, it results in lenient sentences against perpetrators. To alleviate this hurdle, it is submitted that there should be a single specific legislation aimed at fishery-related offences. To this extent, South Africa should move from a fishery management approach to one that is ecosystem-based. One way of achieving this objective is to treat IUU fishing as an autonomous crime using the relevant legislation, through *inter alia*, inculcating the legal principles derived from POCA, and those developed over time by the courts in relation to organised crime. This observation comes against the realisation of the depleting fish stocks in the country's marine ecosystem and the overwhelming evidence showing the orchestrated stripping of marine living resources by international organised crime syndicates.[211]

There is an urgent need to decrease the burden, unfairness and possible delay caused by the awarding of fishing licences. Presumably, such issues

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[210] Muawanah, Yusuf, Adrianto, Kalther, Pomeroy, Abdullah and Ruchimat "Review of National Laws and Regulation in Indonesia in Relation to an Ecosystem Approach to Fisheries Management" 2018 91 *Marine Policy* 150 154.

[211] See Haenlein "Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens our Security" (18 July 2017) https://www.rusi.org/explore-our-research/publications/occasional-papers/below-surface-how-illegal-unreported-and-unregulated-fishing-threatens-our-security; Hübschle "Organised Crime in Southern Africa: First Annual Review" (2010) https://issafrica.org/research/books-and-other-publications/organised-crime-in-southern-africa-first-annual-review (accessed 2025-02-17); Interpol "Project Scale" (January 2017) 1 and UNODC "Report: Value Chain Analysis of the Fisheries Sector in South Africa (April 2024).

might be the cause of self-help in the exploitation of marine resources by local community members and some small-scale fishermen. To mitigate against such eventualities, municipalities must be empowered to issue the licences, as evidenced above by the legal position in Tanzania.

12 GENERIC VERSUS SECTORAL SPECIFIC FISHERIES LEGISLATION

The preferable approach is to treat IUU fishing as a separate form of crime, owing to the multiplicity of factors. These include the type of fishery species involved, depleting fish stocks, and the fact that lingering questions over whether marine fishery resources amount to property that can be stolen remain unanswered.[212] An analysis of the countries selected for review in this article has shown that the approach adopted by countries is not to have a single and specific legislation dealing with fishery offences. Instead, most countries have opted to follow a fisheries management approach, resulting in administrative fines being issued for contravention of various fisheries legislative enactments.[213] A 2001 article penned by Nel and Du Plessis[214] suggests three elements that characterise framework legislation. According to the authors, it is generic in nature, inherently flexible, contains arrangements for both overarching and sectoral-specific legislation, and "the inclusion of environmental policy and principles".[215] The approach to adopt in the criminalisation of fishery-related offences in terms of the MLRA, and whether they should be treated as part of framework legislation or sectoral-specific legislation, is informed by the objectives of the Act as set out in the Preamble to the Act.[216]

The penalisation of illegal fishing should therefore be conducted against the urgent need to attain the objective. However, it is submitted that a more effective way of achieving the objectives of the MLRA is to have a sector-specific statute that focuses on fisheries offences. Such legislation should also include the definition of statutory fishery offences, procedures during investigation, including cross-border cooperation between states. It should expressly empower the Minister of Forestry, Fisheries and the Environment to engage with other fellow cabinet ministers[217] in formulating policies on cross-border cooperation in the combating of IUU fishing. The envisaged legislation should also incorporate legal principles dealing with the role of the court during sentencing proceedings against those convicted of fishery-related offences. In *S v Miller*,[218] the court, quoting *S v M (Centre for Child Law as Amicus*

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212 This is discussed in another work by the authors and is beyond the scope of this article.

213 See the discussion above.

214 Nel and Du Plessis "An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation" 2001 8 *SAJELP* 1 3.

215 *Ibid*.

216 See discussion above.

217 Such as the Minister of International Relations and Co-operation.

218 2018 (2) SACR 75 (WCC) (*Miller*). Notably, the leading *dictum* on sentencing in South Africa remains *S v Zinn* 1969 (2) SA 537 (A) 540G–H. For an earlier ruling on the proper approach to sentencing, see *S v Banda* 1991 (2) SA 352 (B) 355A, where the court held: "a court should, when determining sentencing, strive to accomplish and arrive at a judicious counterbalance

Curiae),[219] laid out the principles of sentencing. In a matter relating to abalone poaching, the court held that "when embarking on the lonely and onerous task of passing sentence, the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence".[220]

13 CONCLUSION

Fisheries legislation in terms of the MLRA and other applicable legislation remains fragmented. The current Act is too generic in its approach. To this extent, it is doubtful whether framework legislation is effective in combating IUU fishing. The legislature should consider a sectoral-specific approach, in terms of which all aspects of IUU fishing are incorporated into one legislative instrument. As a point of departure, the objective of the envisaged Act should be to "combat IUU fishing, against the realisation of the ongoing damage to the marine ecosystem brought about by illegal fishing, coupled with the decrease in the fish stock".

Part 2 of this article will examine the legal issues pertaining to bilateral treaties governing mutual legal assistance (MLA) agreements in terms of the Palermo Convention, and how domestic legislation can be reformed to mitigate against the negative impacts brought about by ambiguities in such legal instruments, where two or more state parties are concerned.

between these elements in order to assure that one element is not unduly accentuated at the expense of and to the exclusion of the others". According to the court, "this is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern". See also *Director of Public Prosecutions, KwaZulu Natal v P* 2006 (1) SACR 243 (SCA) par 13. In this case, the court held that the determining factors are the main purposes of punishment, namely its deterrent, preventative, reformative and retributive aspects.

219 2007 (2) SACR 539 (CC) 10.

220 *Miller supra* par 6, citing *S v M supra* par 10.