



Discussion Document on The Synergies and Convergence of IUU Fishing and Transnational Organized Fisheries Crime¹

1. Background

This discussion document is based on the sixth webinar in a series of Blue Justice Forum webinars facilitated by the Blue Justice Initiative Secretariat in conjunction with the UNDP Blue Resilience project.

The theme for the webinar was the ‘**The Synergies and Convergence of IUU Fishing and Transnational Organized Fisheries Crime**’.

The webinar was presented by Eve De Coning, Senior Advisor for the Norwegian Ministry of Trade, Industry and Fisheries. A total of 47 participants joined the webinar from a total of 19 countries (Australia, Austria, Denmark, India, Indonesia, Ireland, Italy, Japan, Kenya, Madagascar, Norway, Philippines, South Africa, Sri Lanka, Sweden, Tanzania, Trinidad and Tobago, Tunisia, and United Kingdom). The webinar was moderated by Emma Witbooi.

2. Topics in Focus

The Synergies and Convergence of IUU Fishing and Transnational Organized Fisheries Crime – Eve De Coning, Senior Advisor for the Norwegian Ministry of Trade, Industry and Fisheries.

1. Definitions and understandings of phenomena such as illegal, unreported and unregulated fishing (IUU), fisheries crime and transnational fisheries crime, should not be regarded as fixed. Rather they should be understood as dependent on the perspective of those who seek to define them. For example, whether one seeks to define them from a technical legal, law enforcement or criminological lens will impact the understanding ascribed to them. In this way, one should be cautious of labeling an understanding of any of these phenomena as ‘wrong or right’ and rather approach it from the perspective of whether it is a more or less useful definition.
2. On the topic of flag states duties: in 2015, the International Tribunal of the Law of the Sea (ITLOS) delivered an advisory opinion on the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive

¹ The webinar was held on 14 October, 11:00 CET.

Economic Zone (EEZ) of third party States (ITLOS Case No. 21, Advisory Opinion of April 2, 2015).

3. The opinion was requested, in 2013, by the Sub-Regional Fisheries Commission (SRFC) on behalf of its 7 West African states.
4. It unanimously stated that flag states have ‘**due diligence**’ obligations. These entail:
 - a. An obligation to **take necessary measures, including those of enforcement, to ensure compliance** by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their EEZs for purposes of conservation and management of these resources.
 - b. An obligation, under article 58(3); article 62 (4) and article 192 of UNCLOS, to **take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities** as defined in the 1993 SRFC minimum conditions of access (MCA) Convention within the EEZ of the SRFC Member States.
 - c. In fulfilment of its obligation to effectively exercise jurisdiction and control in administrative matters under article 94 UNCLOS, the flag state has **the obligation to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the EEZs** of the SRFC Member States which undermine the flag State’s responsibility under article 192 UNCLOS for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment.
 - d. The flag State and the SRFC Member States are under **an obligation to cooperate in cases related to IUU fishing** by vessels of the flag State in the EEZ of the SRFC Member States concerned.
 - e. The flag State, in cases where it receives a report from an SRFC Member State alleging that a vessel or vessels flying its flag have been involved in IUU fishing within the EEZ of that SRFC Member State, **has the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation, and to inform the SRFC Member State of that action.**
5. The ‘due diligence’ obligation is an obligation of conduct not of result. In other words, the flag state does not have an obligation to achieve a particular result.
6. It would seem that due diligence in relation to IUU fishing obliges the the flag state, in relation to its legal subjects, to at least put in place at national level a system to ensure compliance by its vessels. It would seem that this system can be determined by each flag states but should include enforcement measures, regulating and controlling fishing activities and imposition of sufficiently severe penalties for violations.
7. In relation to coastal states, flag states have an obligation to take measures with regards to cooperation in investigating IUU fishing.
8. This has implications with regards to the convergence of IUU fishing with fisheries crime.
9. The obligation of flag states in relation to its legal subjects, as per point 6, may include criminal penalties as part of a suite of compliance measures.
10. Compliance is best ensured by combining various measures. Firstly, and as far as it is possible, proactive measures should be implemented to avoid and prevent criminal activity, including making use of MCS and technological advances to monitor fishing activities more closely. Secondly, administrative and criminal law enforcement mechanisms should be applied.

11. In comparison to preventive measures and even administrative law enforcement, criminal law enforcement is resource intensive and very expensive, and should be used as a last measure. It should not be the only measure and it should be utilized with care. It can be difficult, however, to know when illegal activities can best be avoided by means of preventive measures, and when it is necessary to impose criminal sanctions. Factors that would count towards criminal prosecution is whether the criminal offence is considered to be grave and involves multiple offences and is organized.
12. Fisheries crime refers to criminal activities in the fisheries sector. “Criminal activities” in this particular field can relate to multiple criminal offences, such as human trafficking, money-laundering, tax crimes and document fraud.
13. Fisheries crime may also amount to organized crime (when several people are working together over longer periods of time), which adds another level of complexity because it is imperative to understand the entire criminal network, which makes such investigations more resource demanding.
14. Transnational crime, referring to criminal activities across more than one jurisdiction, likewise adds a level of legal complexity to fisheries crime. Due to its very nature, identifying, investigating and prosecuting transnational crime cannot be conducted domestically solely but requires cross-border cooperation and for states to utilize mutual legal assistance (MLA) treaties.
15. The ‘Chasing Red Herrings’ report sought to identify synergies between IUU fishing and efforts at domestic level to investigate and prosecute fisheries crime. It did so through the lens of examining the operation of IUU vessels in the Southern Ocean.
16. 249 IUU vessels were scrutinized in an attempt to identify core features of flag states unable or unwilling to enforce compliance with their fishing laws and regulations. The investigation found the following core features of the flag states:
 - a. The flag registries were not operated by the flag state administration but, rather, were outsourced to private entities situated in a different jurisdiction
 - b. Many of the flag states were vulnerable states typically with limited resources and expertise to investigate.
 - c. Many flag states allowed “anonymous ownership”, meaning they operated as secrecy jurisdictions in their own right, permitted non-transparent ownership making it difficult to identify the true beneficial owner of the vessel
17. This leads to the question: how can a state exercise due diligence to ensure that their legal subjects comply with their laws and regulations **if they don’t know who they are, the identity of the fishing vessels on their register or what fishing activities these vessels are engaging in?**

In sum:

18. The flag state is under an obligation to exercise due diligence to ensure their legal subjects comply with their laws and regulations. This requires a flag state to put in place a system that requires compliance by its vessels. This should consist of various enforcement measures regulating and controlling fishing activities and imposition of sufficiently severe penalties for violations, which may include criminal penalties.

19. Compliance is best ensured by combining various enforcement measures. Firstly, and as far as it is possible, proactive measures should be implemented to avoid and prevent criminal activity, including making use of MCS and technological advances to monitor fishing activities more closely. Secondly, administrative and criminal law enforcement mechanisms should be applied.
20. Factors associated with the inability or unwillingness of flag states to enforce compliance with their fishing laws and regulations include outsourced flag registries to private entities; non-transparency around vessel and company ownership, and vulnerability with regards to limited resources and expertise.

General discussion

Discussion themes included:

- The relation between corruption and transnational organized crime in the fisheries sector
- The potential role of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- How the international community can best encourage flag states to regulate, control and prosecute IUU.
- Use of MLA to investigate fisheries crime offences committed at-sea versus on land.