

Reflections on the Past, Present, and Future of IUU Fishing under International Law

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Abstract

The present brief contribution reflects on the evolution of IUU fishing, its current status, and possible future pathways to prevent, deter, and eliminate this practice. IUU fishing not only presents a question of management and conservation, but also entails serious human rights and transnational crime components. From these perspectives, this paper concludes that IUU fishing must be addressed through a multi-regime and multi-institutional process requiring the involvement of many stakeholders, including non-State actors. In particular, the effective settlement of IUU fishing disputes requires enhancing the role of international courts and tribunals as part of this process.

Keywords

IUU fishing – human rights – transnational crime – non-State actors – international courts and tribunals

1 Early Codification Efforts

The concept of IUU fishing was predated by Distant Water Fishing (DWF), based on the open access regime of freedom of the high seas. DWF had existed for centuries, but expanded due to technological advancements in years following the Second World War. Fishing vessels had greater capacity to track fish stocks through the use of sonar and other advanced technologies, and to store

fish for long periods in refrigerated vessels. These combined circumstances led to a significant increase in DWF, which in turn would have an impact on disputes and the development of the law of the sea.¹

This same period was marked by State practice such as the 1945 Truman Fisheries Proclamation (sister to the Truman Proclamation on the Continental Shelf).² This declaration announced the US policy of establishing fisheries conservation zones, influencing other States to extend their territorial sea limits up to 200 nautical miles to protect their marine resources from DWF. This development would precede a number of fishing disputes, such as the famous cod wars between the UK and Iceland.³

The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas remains somewhat forgotten today.⁴ Nevertheless, this agreement was an important attempt to address the problem of DWF and resulting disputes. It sought to create a balance between conflicting interests at stake in DWF, yet was handicapped by its drafters' inability to establish an agreed limit to the breadth of the territorial sea regime.

The 1958 Convention notably featured different forms of duties of cooperation. These include the obligation of States with nationals fishing in the high seas adjacent to a coastal State to enter into negotiations for conservation measures at the request of the coastal States.⁵ The Convention also included a special provision permitting coastal States to unilaterally take *urgent* conservation measures in the high seas, which are binding on third States so long as they are non-discriminatory and scientifically well-founded.⁶ Certain provisions of the Convention have influenced several of the contemporary concerns discussed in the papers collected in the present Special Issue, such as a clause providing for compulsory dispute settlement before a five-member special commission or other process.⁷

1 For an economic perspective on this history, see Gordon R. Munro, "Coastal states, distant-water fleets and EFJ: some long-run considerations", 9 *Marine Policy* (1985) pp. 2–15.

2 U.S. Presidential Proclamation no. 2668, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, Washington, 28 September 1945.

3 See further Jeffrey A. Hart, *The Anglo-Icelandic Cod War of 1972–1973: a case study of a fishery dispute* (1976); Hannes Jónsson, *Friends in conflict: the Anglo-Icelandic cod wars and the Law of the Sea* (1982).

4 Convention on Fishing and Conservation of the Living Resources of the High Seas (1958) 559 UNTS 285. The Convention garnered only 39 Parties.

5 See *ibid.*, art. 6.

6 See *ibid.*, art. 7(1)–(2).

7 See *ibid.*, arts. 9–12.

2 UNCLOS and the Emergence of the IUU Concept

The most important international legal response to the conflict between DWF and the interests of coastal States was the great expansion of the coastal State's sovereign rights over a 200nm exclusive economic zone (EEZ) under the 1982 UN Convention on the Law of the Sea (UNCLOS).⁸ This was accompanied by the 1982 UNCLOS extension of the breadth of the territorial sea to 12nm.⁹ The new EEZ regime included a resource-sharing provision that mandated the coastal State to make available any surplus allowable catch through access agreements with other States.¹⁰ Such agreements have since become a very important source of revenue for many developing coastal States.

Building upon the dispute settlement innovation of the 1958 Convention, Part XV of the 1982 UNCLOS provides for compulsory dispute settlement procedures, with limited exceptions concerning sovereign rights over marine living resources in the EEZ.¹¹ Yet neither this nor the 1982 Convention's access provisions and extended coastal State regulatory and enforcement jurisdiction stemmed the tide of DWF. By 1997, this phenomenon would be re-characterized as IUU fishing at a meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),¹² and subsequently defined by the UN Food and Agriculture Organization (FAO).¹³

While the concept of IUU fishing did not exist at the time of the 1982 Convention's adoption and does not expressly appear in the 1995 Straddling Fish Stocks Agreement (FSA) (an UNCLOS implementing agreement), the latter does include important provisions on strengthening the role of regional fisheries management bodies and enforcement in particular.¹⁴ Both treaties

8 UN Convention on the Law of the Sea (1982) 1833 UNTS 3 (UNCLOS). See further Part V of the Convention.

9 See *ibid.*, Part II, Section 2.

10 See *ibid.*, arts. 62(2), 69(3), 70(4).

11 See *ibid.*, art. 297(3)(a). This should not prevent the application of compulsory jurisdiction in IUU fishing cases.

12 See further Andrew Serdy, "Antarctic Fisheries Management", in E.J. Molenaar, A.G. Oude Elferink, and D.R. Rothwell (eds.), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (2013), pp. 217–242, 232, n. 77.

13 See further David J. Douman, "Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action", UN Food and Agriculture Organization, Document AUS:IUU/2000/4 (2000) para 40.

14 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 (1995) 2167 UNTS 88 (UNFSA).

include compulsory dispute settlement mechanisms.¹⁵ Together with FAO instruments and the management and conservation regimes of different regional fisheries organizations, these agreements comprise the current international law framework to prevent, deter, and eliminate IUU fishing.¹⁶

3 Accountability and Enforcement

Enforcement remains a key concern in the response to IUU fishing. Technological developments have loomed large in this respect, such as through the use of satellite data for engaging hot pursuit under the 1982 Convention.¹⁷ In terms of accountability for IUU fishing, the most important development has been the establishment of international courts and tribunals to identify violations of State responsibility and determine resulting liability.

3.1 *Prompt Release Cases*

The International Tribunal for the Law of the Sea (ITLOS) has been seized of a number of prompt release cases involving the arrest of foreign fishing vessels and crews engaged in IUU fishing in the EEZ of a coastal State. The basic criteria provided in the 1982 Convention is that the coastal State may detain a vessel and require the posting of a “reasonable bond or other financial security”.¹⁸ In the *Camouco* prompt release case brought by Panama against France, ITLOS provided a list of factors for assessing “reasonableness” in this context, including “the gravity of the alleged offences”.¹⁹ Yet in practice, ITLOS has not afforded IUU fishing the “gravity” it has deserved.

In virtually all of its cases involving IUU fishing, ITLOS has reduced the amount of the bond as determined by the coastal States concerned. For

15 See *ibid.*, Part VIII. Cf. Part XV UNCLOS (supra note 8).

16 These notably include the first binding international agreement to specifically target IUU fishing, the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) 55 ILM 1157 (PSMA).

17 On the emerging roles of technology in enforcement against IUU fishing, see the joint contribution of Barbara Hutniczak and Frank Meere in the present Special Issue. On the evolution of the practice of hot pursuit under the law of the sea, see Randall Walker, “International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century”, 17 *Auckland University Law Review* (2011) pp. 194–218; William C. Gilmore, “Hot Pursuit”, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), pp. 897–909, 898–903.

18 Art. 292 UNCLOS. See also art. 73.

19 “*Camouco*” (*Panama v. France*), *Prompt Release, Judgment, ITLOS Reports 2000*, p. 10, para 67.

example, in the *Volga* prompt release case brought by Russia against Australia, the latter State invited the Tribunal to take into account the serious problem of continued illegal fishing in the Southern Ocean.²⁰ This notably included threats to the Patagonian toothfish, a species that had been famously overfished to near-depletion, sounding a clarion call in the nascent movement to combat IUU fishing.²¹ Rather, the Tribunal found Australia's imposition of an AUS\$ 1 million security to be in non-compliance with the 1982 Convention, despite the vessel holding a catch of over 130 tonnes and lacking the vessel monitoring system required under both the CCAMLR and its own domestic law.²²

Some of the Members of the Tribunal noted that the *Volga* Judgment did not reflect the Tribunal's recognition of illegal fishing as a serious problem. For example, after providing a detailed overview of the state of IUU fishing and highlighting the calls of the FAO and other international organizations to take measures against this practice, Judge Cot observed that “[t]he measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat illegal, unreported and unregulated fishing”, and moreover fell well within the exercise of its sovereign rights.²³ Viewed in the light of other ITLOS prompt release (and provisional measures) decisions involving IUU fishing – in which the Tribunal has consistently reduced what constitutes a “reasonable” bond – one might wrongly assume that little has emerged from Hamburg to effectively support the global response to this phenomenon.

3.2 *Advisory and Other Proceedings*

Looking to the Tribunal's broader jurisprudence, however, one can more optimistically credit its 2015 Advisory Opinion's clarification of the responsibilities of both flag and coastal States in this domain.²⁴ The Advisory Opinion provides guidance to States in bringing a contentious case against flag States engaged in IUU fishing, and has moreover opened the door for a contentious case on the basis of these responsibilities. Given that IUU fishing continues to pose a major threat five years after that Opinion was rendered, the time may indeed be ripe for instituting such a case under Part XV of the 1982 UNCLOS.

20 “*Volga*” (*Russia v. Australia*), *Prompt Release, Judgment, ITLOS Reports 2002*, p. 10.

21 See *ibid.*, paras 51, 67.

22 See *ibid.*, paras 53, 78.

23 See *ibid.*, “Separate Opinion of Judge Cot”, p. 50, para 11 (referring to art. 56 UNCLOS).

24 *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 4.

The mechanisms provided in Part xv have so far had generally limited application to fisheries disputes. These include the *Southern Bluefin Tuna* case brought by Australia and New Zealand against Japan (which was dismissed for lack of jurisdiction following the provisional measures phase),²⁵ and the *Swordfish* case and concurrent World Trade Organization (WTO) proceedings between Chile and the EU, which ultimately withdrew and settled these cases.²⁶ Nevertheless, as seen in the *Chagos Marine Protected Area* and *South China Sea* arbitrations, recent cases filed under Part xv do offer some optimism that the gravity of IUU fishing disputes can be effectively addressed through international courts and tribunals.²⁷ Following from these cases, it is appropriate to consider IUU fishing litigation in the wider context of Part xii of the 1982 UNCLOS (concerning the protection and preservation of the marine environment) and Part xv's fisheries management exceptions to compulsory jurisdiction.²⁸

Beyond conservation and management, an effective global response to IUU fishing disputes requires the development of a broader approach encompassing a range of regimes and institutions. While the FAO remains the key organization for addressing IUU fishing, other international bodies such as the International Maritime Organization (IMO) have exercised their competences in this domain.²⁹ The possibility of the WTO proactively addressing trade aspects of IUU fishing in the sea-to-table link – including the problem of subsidies – further illustrates the value of a multi-regime approach to this phenomenon.³⁰

25 *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on Jurisdiction and Admissibility, XXIII RIAA 1, 4 August 2000.

26 *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)*, Order of 16 December 2009, ITLOS Reports 2008–2010, p. 13; *Chile – Measures Affecting the Transit and Importation of Swordfish*, Joint Communication from the European Union and Chile, WT/DS193/4, G/L/367/Add.1, 3 June 2010.

27 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, PCA Case No. 2011-03, 18 March 2015; *South China Sea Arbitration (Philippines v. China)*, Award, PCA Case No. 2013-19, 12 July 2016. On the links between IUU fishing and biodiversity in these cases, see the contribution of Yoshifumi Tanaka in the present Special Issue.

28 See art. 297(3)(a) UNCLOS.

29 On potentially expansive utility of IMO instruments in combatting IUU fishing, see the contribution of Solène Guggisberg in the present Special Issue.

30 See further WTO, “WTO members prepare to firm up legal text for fisheries subsidies agreement”, Press Release (13 February 2020).

4 The Future of IUU Fishing Disputes

In making this regime convergence central to the *lex ferenda* of IUU fishing, the links between this practice and transnational crime are critical. The human trafficking and forced labour (i.e., slavery) aspects of IUU fishing have been very publicly and horrifically documented in recent years.³¹ Indeed, by 2009 the UN General Assembly (UNGA) had already noted potential connections between international organized crime and illegal fishing in certain regions of the world.³²

As such, INTERPOL has become very active in what it refers to as “transnational fisheries crimes”.³³ Since 2013, it has issued over 50 Purple Notices alerting States to human trafficking and forced labour in relation to IUU fishing.³⁴ It has also established the INTERPOL Global Fisheries Enforcement programme, which assists Member State agencies in detecting, suppressing, and combating fisheries crime.³⁵ INTERPOL offers access to valuable data and information to help its 194 Members investigate and enforce against IUU fishing and related transnational crimes. As such, it will remain a key institutional player in the global response to IUU fishing because it provides a cooperation framework for States that lack individual enforcement capacity.

This underlines the point that IUU fishing is not simply a problem for individual coastal States but also a concern of *the international community as a whole*. It threatens the livelihoods of millions and can catalyze political instability. West Africa is today considered the region most impacted by this phenomenon (with northwest Africa alone accounting for 20 per cent of IUU fishing globally).³⁶ In East Africa, the extent to which IUU fishing deprived

31 See UN Office on Drugs and Crime, “Transnational Organized Crime in the Fishing Industry”, Issue Paper (2011) p. 115; Ian Urbina, *The Outlaw Ocean: Crime and survival in the last untamed frontier* (2019).

32 See UNGA, A/RES/64/72, “Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments”, Sixty-fourth session, Agenda item 76(b), 19 March 2010.

33 See, e.g., INTERPOL, “Leading the fight against transnational fisheries crime”, Press Release (5 October 2018).

34 See, e.g., INTERPOL, “Fighting illegal, unreported and unregulated fishing”, Press Release (5 June 2019).

35 See INTERPOL, “Global Fisheries Enforcement: An INTERPOL initiative to enable member countries to identify, deter and disrupt transnational fisheries crime”, Issue Paper (July 2019).

36 Dyhia Belhabib, “The Black Hole in the Seas”, International Collective in Support of Fishworkers, 77 *SAMUDRA Report* (2017) p. 20.

local artisanal fishermen of their economic livelihood has been linked to the subsequent resurgence of Somali piracy.³⁷

It may thus be time to redefine IUU fishing as one of the most serious international crimes affecting the international community as a whole, on par with crimes against humanity. The framing of environmental crimes in this context dates back to at least 1973, when the concept of ecocide (inspired by the 1948 Genocide Convention) was reflected in a draft convention proposed to the UNGA.³⁸ The same premise was recently invoked in Pope Francis's call for ecocide to be codified as a fifth crime against peace in the Rome Statute.³⁹ Indeed, the International Law Commission (ILC) had considered including environmental crimes in its Draft Code of Crimes against the Peace and Security of Mankind, the precursor to the Rome Statute.⁴⁰ The ILC proposed a provision concerning individuals who "willfully" cause or order the cause of widespread long-term and severe damage to the natural environment.⁴¹

While some governments (and ILC members) did not consider that the time was ripe for this inclusion, we might today question when such a time might arrive. In this light, it is notable that the Prosecutor of the International Criminal Court (ICC) in 2016 issued a policy statement on case selection and prioritization that included reference to environmental destruction, encompassing illegal exploitation of natural resources.⁴² While the broad notion of mass destruction of the environment or natural resources as a separate matter from war crimes had been omitted when the Rome Statute was adopted, we

37 See Jean-Pierre Larroque, "Somali Pirates Return as Illegal, Unregulated, and Unreported Fishing Continues in the Gulf of Aden", *Woodrow Wilson Center New Security Beat* (21 March 2018) < <https://www.newsecuritybeat.org/2018/03/somali-pirates-return-illegal-unregulated-unreported-fishing-continues-gulf-aden/> >.

38 Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277. Further Richard A. Falk, "Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals", 4(1) *Bulletin of Peace Proposals* (1973) p. 80.

39 Rome Statute of the International Criminal Court (1998) 2187 UNTS 3 (Rome Statute). See further Pope Francis, "Address of His Holiness Pope Francis to Participants at the World Congress of the International Association of Penal Law", *Bulletin of the Holy See Press Office* (15 November 2019).

40 See further Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short, Polly Higgins, "Ecocide is the missing 5th Crime Against Peace", *University of London School of Advanced Study* (2012) pp. 2–3.

41 See further "Draft Code of Crimes against the Peace and Security of Mankind. Title and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1–26 – reproduced in A/CN.4/SR.2236 to SR.2237 and SR.2239 to 2241", *Yearbook of International Law Commission* (1991) Vol. 1, pp. 234–236 (Draft Article 26).

42 See ICC Office of the Prosecutor, "Policy paper on case selection and prioritization" (2016) para 41.

may thus observe some increased interest in re-opening the matter of recognizing international environmental crimes.⁴³

5 Conclusion

In the face of clear data on IUU fishing and the scale of its damage to the environment – as well as its impacts on human rights and threats to political stability – the time is indeed ripe to recognize IUU fishing as a crime against humanity or else develop it as a stand-alone international crime. In this respect, we must emphasize the need to provide for individual criminal responsibility at all levels (from the master to the corporation), in recognition of the complications in tracking companies and the inadequacy of variant domestic criminal laws on this point. This illustrates the broader point that confronting IUU fishing necessitates a multi-regime and multi-institutional process, entailing the involvement of both State and non-State stakeholders. The future unquestionably requires bringing all of these factors together in a consolidated effort to address this phenomenon from the perspectives of management, conservation, human rights, and transnational crime – including through enhanced roles for international courts and tribunals.

43 On the characterization of environmental damage within the context of war crimes, see further Rome Statute (*supra* note 39) art. 8(2)(b)(iv).