



**UNODC**

United Nations Office on Drugs and Crime

# COMBATING CRIMES IN THE FISHERIES SECTOR

A GUIDE TO GOOD LEGISLATIVE PRACTICES

With the technical support of



Food and Agriculture Organization  
of the United Nations





UNITED NATIONS OFFICE ON DRUGS AND CRIME

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# TERMS

Archipelagic waters	An area of water surrounding an archipelago and enclosed by archipelagic baselines that is subject to the sovereignty of the archipelagic State
Artisanal fishing	Indigenous or customary fishing usually involving fishing households (as opposed to commercial companies), using a relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, usually close to shore, and harvesting fish mainly for local consumption <sup>1</sup>
Catch documentation scheme	A system that tracks and traces fish from the point of capture to unloading and onward throughout the supply chain. A catch documentation scheme records and certifies information about the harvesting vessel, the location and time of harvest, the species harvested, the type of gear used and any other relevant information so that relevant authorities are able to determine whether the fish were harvested in a manner consistent with applicable national, regional and international conservation and management measures
Commercial fishing	Any fishing, apart from subsistence fishing, that results in or is intended to result in the sale or trade of any fish taken during fishing operations
Compliance Agreement	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
Continental shelf	The seabed and subsoil of submarine areas extending beyond the territorial sea to the edge of the continental margin or a minimum of 200 nautical miles, over which the coastal State enjoys sovereign rights for the purpose of exploring and exploiting its natural resources
Exclusive economic zone	An area extending from the outer limits of the territorial sea to a maximum of 200 nautical miles from the baseline, within which the coastal State exercises sovereign rights for the purpose of exploring and exploiting the natural resources of the water column, the seabed and its subsoil
Fish	Any water-dwelling aquatic or marine animal or plant, alive or dead, including its eggs, spawn, spat and juvenile stages, and any of its parts
Fish aggregating device	An object or group of objects, of any size, whether drifting, deployed or not, that is natural, manufactured or a combination thereof and includes, without limitation, buoys, floats, netting, webbing, plastics, bamboo and logs floating on or near the surface of the water with which fish may associate, and any natural floating object on which a device has been placed to facilitate the location of the object
Fisher	Any person who engages in fishing or related activities
Fishery or fisheries	An activity that leads to the capture of fish, from one or more stocks of fish, that can be treated as a unit for the purposes of conservation and management and that is identified on the basis of geographical, scientific, technical, social or economic characteristics and/or the method of catch. A fishery may be, for example, artisanal, industrial, commercial or subsistence-based, and may be carried out on a year-round, seasonal or other basis

<sup>1</sup>There is no universal definition of “artisanal fishing”. States define the term in different ways, using criteria such as vessel attributes, areas and fisheries. National legislation should therefore be consulted in this regard.

Fishing	Searching for, attracting, locating, catching, taking or harvesting fish, or any activity that can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish
Fish product	Any product or part thereof (including oil) obtained by processing fish
Gear	In relation to fishing, any equipment, implement, device or other object that can be used in the act of fishing, including any net, rope, line, float, trap, hook, hookah gear, scuba gear, winch, boat, craft or aircraft carried on board a vessel or aircraft or vehicle used in association with the act of fishing
Illegal, unreported and unregulated fishing	Activities set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the Food and Agriculture Organization of the United Nations in 2001
International conservation and management measure	A binding or non-binding measure established by a regional fisheries management organization or under an international agreement with a view to conserving or managing one or more species of fish, to be implemented by a State member of the regional fisheries management organization or a party to the international agreement
Landing	All transfers of any quantity of fish from a vessel, other than trans-shipment, including transfers of fish to a port facility, transfers of fish from one vessel to another through a port facility or other means of transportation, and transfers of fish from a vessel to a container, truck, train, aircraft or other means of transportation
National waters	These include the exclusive economic zone, territorial sea and internal waters of a State, as well as the archipelagic waters of an archipelagic State
Organized criminal group	A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more offences in order to obtain, directly or indirectly, a financial or other material benefit
Port	This includes offshore terminals or other installations for landing, transshipping, packaging, processing, refuelling or resupplying
Proceeds of crime	Any property derived from or obtained, directly or indirectly, through the commission of an offence
Regional fisheries management organization	An intergovernmental organization or arrangement that has the competence to adopt international conservation and management measures to conserve or manage one or more species of fish
Related activities	Any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea
Serious crime	Conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty
Subsistence fishing	Local fishing, aimed primarily at the procurement of fish for consumption by the fishers, their families and their respective communities
Territorial sea	An adjacent belt of sea extending from the baseline to a maximum of 12 nautical miles, within which the coastal State exercises sovereignty, subject to the right of vessels to exercise the right of innocent passage

Traffics	In relation to fish or fish products, importing, exporting, re-exporting, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting
Trans-shipment	The direct transfer of any quantity of fish from one vessel to another vessel, regardless of the location of the event, without the fish legitimately being recorded as landed
Use of port	Landing, trans-shipping, packaging and processing of fish that have not been previously landed, and other port services, including refuelling and resupplying, maintenance and dry-docking
Vessel	Any vessel, ship of another type, or boat used for, equipped to be used for, or intended to be used for fishing or fishing-related activities



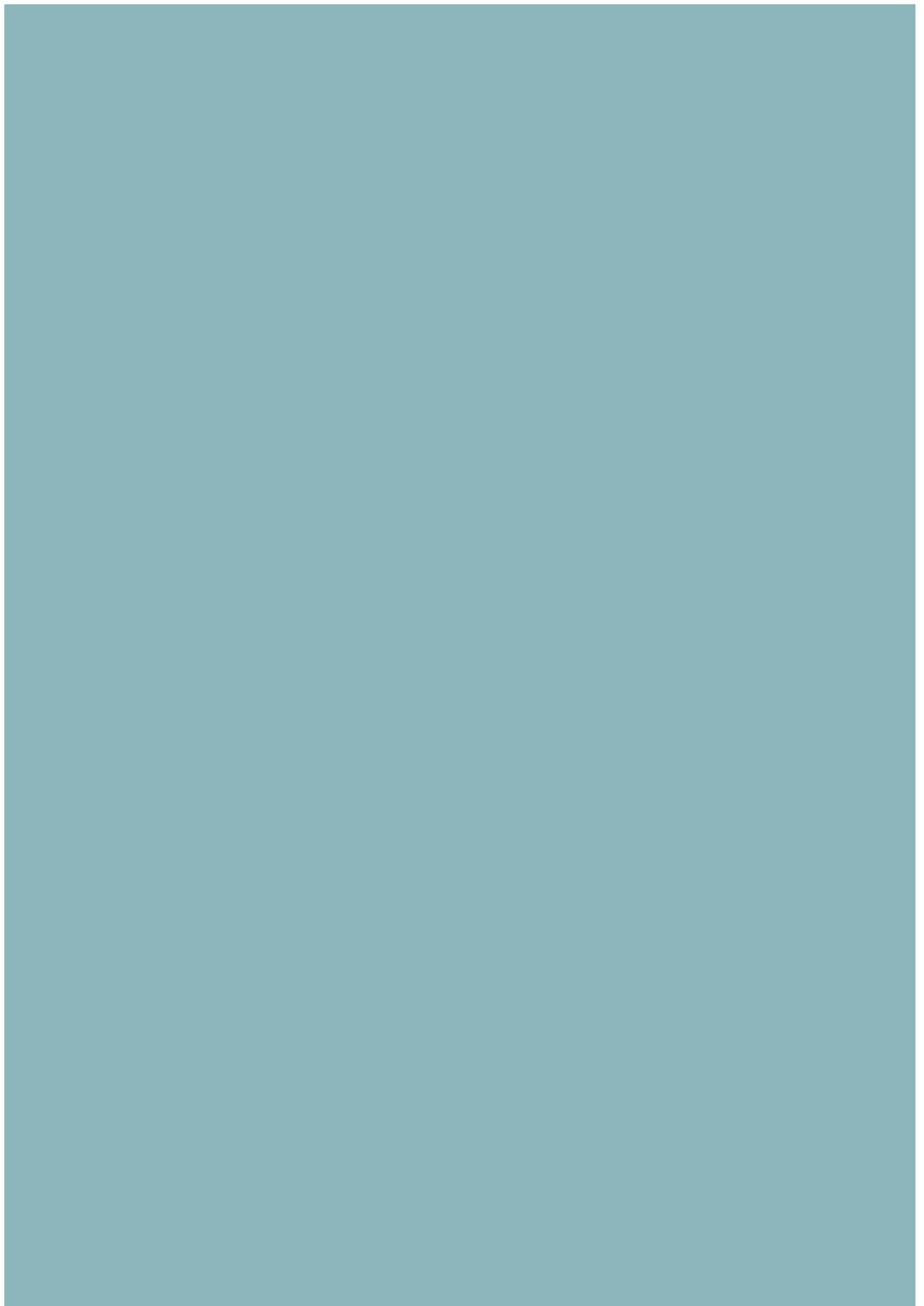


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# INTRODUCTION

The fisheries sector is involved in a wide range of activities, which include taking, culturing, processing, storing, transporting, marketing and selling fish from marine, coastal or inland areas. These activities may be small-scale or part of larger industrial operations and may be undertaken for subsistence, commercial or other purposes. Marine and inland capture fisheries, together with aquaculture (fish farming), provide food and nutrition for billions of people worldwide and a source of income for more than 10 per cent of the global population, from those harvesting and processing fish to those involved in marketing and distribution.<sup>1</sup>

The livelihoods of many people, in particular among those living in poverty in rural areas, depend on secure and equitable access to and management of fisheries and aquaculture resources, which contribute to economic growth and social cohesion.<sup>2</sup> For billions of people around the world, fish are the main source of animal protein.<sup>3</sup> For many, fishing also forms an important part of their traditional culture or identity.

## Crimes in the fisheries sector

The conservation and sustainable management of aquatic and marine resources give rise to many complex challenges, in particular in terms of law enforcement. In 2011, the United Nations Office on Drugs and Crime (UNODC) published an issue paper on transnational organized crime in the fishing industry in which it found that the fisheries sector is vulnerable to multiple forms of crime, including illegal fishing, corruption and trafficking in persons.<sup>4</sup>

The variety of offences committed in, or in connection with, the fisheries sector may be broadly divided into two categories:

(a) Crimes committed along the fisheries value chain that are closely linked to fishing and related activities, such as document fraud and fish fraud, trafficking in fish and fish products, as well as related offences such as money-laundering, tax evasion, corruption and trafficking in persons.<sup>5</sup> Crimes in the fisheries sector may also include illegal fishing and related activities in which national laws and international obligations are violated, and where such violations constitute crimes under national law;

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<sup>1</sup> Food and Agriculture Organization of the United Nations (FAO), *The State of World Fisheries and Aquaculture 2020: Sustainability in Action* (Rome, 2020), p. 95.

<sup>2</sup> *Ibid.*, p. 115.

<sup>3</sup> In 2017, fish consumption accounted for 17 per cent of the global population's intake of all animal protein. Globally, fish provided more than 3.3 billion people with 20 per cent of their average per capita intake of animal protein; this figure is closer to 50 per cent or more for certain developing countries and small developing island States. See *The State of World Fisheries and Aquaculture 2020*, p. 5.

<sup>4</sup> United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking* (Vienna, 2011).

<sup>5</sup> Trafficking in persons, most commonly for the purpose of forced labour, whether at sea or in processing plants ashore, is a well-documented and prevalent crime in the fisheries sector. See UNODC, *Transnational Organized Crime in the Fishing Industry*.

(b) Crimes associated with the fisheries sector that have no direct connection with fishing or related activities, but are committed, for example, on fishing, carrier or supply vessels or in fish-processing facilities, and which use fishing and related activities as a cover for crimes such as trafficking in firearms or illicit drugs, piracy and even terrorism.<sup>6</sup>

The present guide focuses on many of the crimes in the first category, which occur primarily in the context of marine fisheries. Throughout the guide, the term “crimes in the fisheries sector” is used to refer to crimes committed along the fisheries value chain, shown in figure I.<sup>7</sup>

Figure I. Simplified fisheries value chain



## Impact of crimes in the fisheries sector

Crimes in the fisheries sector seriously undermine efforts to manage fisheries resources responsibly and sustainably, contributing to the overexploitation of fish stocks, often with devastating impacts on associated ecosystems and the economies of coastal States. Overfishing, which is defined as stock abundance fished to below the level that can produce a maximum sustainable yield, not only has a negative impact on biodiversity and causes economic loss but also may lead to the collapse of a fishery or seriously impair efforts to rebuild stocks that have already been depleted. The proportion of fish stocks found to be within biologically sustainable levels decreased from 90 per cent in 1974 to 65.8 per cent in 2017.<sup>8</sup> Experts have estimated that illegal and unreported fishing alone result in environmental losses of 12 million to 28 million tons of fish per year, representing an estimated annual financial loss of \$15.5 billion to \$36.4 billion.<sup>9</sup> These figures represent a mere baseline of the damage caused by a fraction of illegal activity in the fisheries sector.

## Organized criminal groups

Organized criminal groups target the fisheries sector worldwide<sup>10</sup> and cause the depletion of fish stocks, thereby harming vulnerable communities, undermining the economies of coastal States and threatening food security. Such groups take advantage of weak control systems at sea, in port, on land or at borders where fish and fish products are traded. Organized criminal groups exploit weaknesses and discrepancies inherent in national legislation and gaps in enforcement in order to poach fish and pillage sanctuaries. The difficulty of regulating and monitoring all fishing and related activities across vast expanses of unpoliced waters and the considerable legal and enforcement challenges faced by States around the world in combating crimes in the fisheries sector enables many perpetrators to elude justice.

<sup>6</sup> UNODC, *Transnational Organized Crime in the Fishing Industry*.

<sup>7</sup> Adapted from UNODC, “UNODC approach to crimes in the fisheries sector”. Available at [www.unodc.org](http://www.unodc.org).

<sup>8</sup> UNODC, *The State of World Fisheries and Aquaculture 2020*, pp. 7, 47, 48 and 130.

<sup>9</sup> See Channing May, *Transnational Crime and the Developing World* (Washington D.C., Global Financial Integrity, 2017), pp. xiii, 62, 67 and 115. The analysis was confined to illegal and unreported fishing. See also David J. Agnew and others, “Estimating the worldwide extent of illegal fishing”, *PLoS ONE*, vol. 4, No. 2 (February 2009). The estimates in the 2017 report on *Transnational Crime and the Developing World* were arrived at by following the methodology set out in the study “Estimating the worldwide extent of illegal fishing”.

<sup>10</sup> It is well documented that organized criminal groups use fishing vessels and trans-shipments to traffic drugs or to smuggle people or weapons. See UNODC, *Transnational Organized Crime in the Fishing Industry*, p. 9.

## Illegal, unreported and unregulated fishing

Illegal, unreported and unregulated fishing refers to a wide variety of fishing and related activities, including those which occur in violation of, or with disregard for, applicable fisheries requirements adopted at the regional, national or international level, including those measures adopted by relevant regional fisheries management organizations.<sup>11</sup> Illegal, unreported and unregulated fishing is found in all types of fisheries and occurs both on the high seas and within areas of national jurisdiction. It concerns all aspects and stages of the capture and exploitation of fish and may sometimes be associated with organized crime.

Illegal fishing includes fishing activities conducted by national or foreign vessels in waters under the jurisdiction of a State without the permission of that State or in contravention of its laws and regulations. Illegal fishing may also refer to activities of a vessel that operates in contravention of any binding conservation and management measures adopted by a regional fisheries management organization to which its flag State is a party.

Unreported fishing refers to fishing activities that are not reported or are misreported to the relevant national authority in contravention of national laws and regulations or international agreements. Where the activity is undertaken within the area of competence of a regional fisheries management organization, unreported fishing may also refer to the failure to report activities or the misreporting of activities in contravention of the reporting procedures of the relevant regional fisheries management organization.

Unregulated fishing includes fishing activities conducted in an area subject to the rules of a relevant regional fisheries management organization by a vessel without nationality or flying the flag of a State that is not a party to the organization, in a manner that is inconsistent with or contravenes the conservation and management measures of that organization. Unregulated fishing also refers to fishing activities carried out in areas where no conservation or management measures apply or where fishing activities are conducted in a manner inconsistent with the responsibilities of States for the conservation of fish under international law.<sup>12</sup>

Vessels that engage in illegal, unreported and unregulated fishing are, by nature, highly mobile platforms that often operate far from land, in remote marine areas where effective monitoring, control and surveillance are lacking. The beneficial owners of the vessels, whose nationalities may differ from those of their vessels, often succeed in preventing fisheries managers and law enforcement officials from ascertaining their identities. Moreover, the ease with which fishers can evade detection, for instance, by changing their vessel name or registration, and the sheer number of ports at which they can offload their catch, make regulation and enforcement particularly challenging.

In many jurisdictions, illegal, unreported and unregulated fishing is not regarded as criminal. Rather, civil and administrative processes and penalties are used for fisheries enforcement. This approach may be expedient, allowing proceedings to advance at an earlier date with a lower burden of proof and facilitating the swift resolution of cases, including through negotiated settlements. In other jurisdictions, enforcement against illegal, unreported and unregulated fishing and related activities is conducted through criminal law proceedings, although civil and administrative processes may also be available.<sup>13</sup>

Certain crimes involving illegal fishing and related activities may be so egregious or frequent that States will impose more severe fines and penalties, including imprisonment. Violations that can attract a custodial sentence of four years or more will meet the “serious crime” threshold under article 2 (b) of the United Nations

<sup>11</sup> The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing offers a definition of illegal, unreported and unregulated fishing. See FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome, 2001), para. 3. See also chapter I below for further information on regional fisheries management organizations.

<sup>12</sup> The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing recognizes that certain unregulated fishing may not violate international law, but it does not elaborate further.

<sup>13</sup> Blaise Kuemlangan and others, “Enforcement approaches against illegal fishing in national fisheries legislation”, *Marine Policy*, vol. 149 (2023).

Convention against Transnational Organized Crime.<sup>14</sup> Where the offence is also transnational in nature and involves an organized criminal group, the applicability of the Convention will be triggered, including its provisions on international cooperation.<sup>15</sup>

The present guide is not intended to cover all aspects of illegal, unreported and unregulated fishing and related activities, which may be better addressed through available fisheries management tools, including effective monitoring, control and surveillance measures. In most cases, civil and administrative approaches and mechanisms for ensuring compliance with and enforcement of conservation and management measures may be the best means of successfully combating illegal, unreported and unregulated fishing.

Some illegal fishing activities will, however, amount to crimes in the fisheries sector and therefore fall within the scope of the present guide.

### FISHERIES AND THE SUSTAINABLE DEVELOPMENT GOALS

The need to “effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics” has been recognized in target 14.4 (Life below water) of the Sustainable Development Goals.

The present guide recognizes that crimes in the fisheries sector and illegal, unreported and unregulated fishing (whether criminal or not), if left unchecked, will seriously undermine sustainable fisheries. In addition to the target mentioned above, the guide is designed to contribute to the achievement of the following targets under the Sustainable Development Goals:

- (a) Target 14.c, in which States are called upon to enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea, which provides the legal framework for the conservation and sustainable use of oceans and their resources;
- (b) Target 16.3, which promotes the rule of law at the national and international levels and seeks to ensure equal access to justice for all;
- (c) Target 16.4, which aims, among other things, to combat all forms of organized crime.

## United Nations Office on Drugs and Crime and Food and Agriculture Organization of the United Nations

The mission of UNODC is to contribute to global peace and security, human rights and development by making the world safer from crime, drugs and terrorism. UNODC is the guardian of the Organized Crime Convention and its Protocols, as well as of the United Nations Convention against Corruption,<sup>16</sup> which represent the only globally legally binding instruments in the fight against organized crime and corruption, respectively.

UNODC derives its mandate to conduct work to combat crimes in the fisheries sector from a number of sources, including a General Assembly resolution dating back to 2009.<sup>17</sup> In 2019, the Commission on Crime Prevention and Criminal Justice encouraged States Members of the United Nations to prevent and combat

<sup>14</sup> Adopted by the General Assembly in its resolution 55/25; entered into force on 29 September 2003. For the United Nations Convention against Transnational Organized Crime to apply, the “serious crime” element must be satisfied. The determinative factor is not whether the sentence imposed in a given case meets this threshold but rather whether the penalty prescribed by law for the offence carries a maximum term of imprisonment of at least four years.

<sup>15</sup> See Organized Crime Convention, art. 3.

<sup>16</sup> General Assembly resolution 58/4; entered into force on 14 December 2005.

<sup>17</sup> General Assembly resolution 64/72, para. 61.



transnational organized crime that exploits protected wildlife, including marine wildlife, in accordance with domestic legal frameworks and international obligations, and affirmed that the Organized Crime Convention and the Convention against Corruption constituted effective tools and important parts of the legal framework for international cooperation in fighting trafficking.<sup>18</sup>

In 2020, the Conference of the Parties to the Organized Crime Convention expressed alarm in view of research indicating that crimes that affect the environment had become some of the most lucrative transnational criminal activities and were often closely interlinked with different forms of crime and corruption.<sup>19</sup> The Conference affirmed that the Convention constituted an effective tool and an essential part of the legal framework for preventing and combating transnational organized crimes that affect the environment and requested that UNODC provide technical assistance and capacity-building to States parties, upon request, for the purposes of supporting their efforts to effectively implement the Convention in preventing and combating transnational organized crimes that affect the environment.<sup>20</sup>

In late 2021, the General Assembly urged Member States to adopt effective measures to combat crimes that affect the environment and affirmed that the Organized Crime Convention and the Convention against Corruption constituted effective tools and an important part of the legal framework for, respectively, preventing and combating transnational organized crimes that affect the environment, and corruption as it relates to such crimes, and for strengthening international cooperation in that regard.<sup>21</sup>

UNODC provides a wide range of technical assistance to Member States to address crimes in the fisheries sector, including through analyses of value chains for their vulnerability to crime, corruption risk assessment and management, the development and publication of resource guides, capacity-building activities to strengthen criminal justice responses and law enforcement capabilities, and raising awareness as to the serious nature of those crimes.

The present guide has been developed by UNODC in close partnership with the Food and Agriculture Organization of the United Nations (FAO), the lead United Nations agency for supporting the sustainable management, use and conservation of aquatic and marine resources.

The work of FAO is crucial to the responsible regulation of inland and marine fisheries. One overarching aim of FAO is to ensure that the fisheries sector operates in an economically, socially and environmentally responsible manner. FAO also plays a leading role in the development of international instruments to ensure the long-term conservation and sustainable use of fisheries, including preventing, deterring and eliminating illegal, unreported and unregulated fishing.

Working in close consultation and collaboration with States, FAO provides technical and legal guidance to support sustainable fisheries and combat illegal, unreported and unregulated fishing by helping to facilitate the implementation of binding and non-binding international fisheries instruments established within the framework of FAO and its Constitution.<sup>22</sup> Non-binding instruments include the Code of Conduct for Responsible Fisheries (1995), the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001), and the Voluntary Guidelines for Flag State Performance (2014).

<sup>18</sup> Commission on Crime Prevention and Criminal Justice resolution 28/3, seventh preambular paragraph.

<sup>19</sup> Conference of the Parties to the Organized Crime Convention resolution 10/6, tenth preambular paragraph. In that resolution, the Conference further noted that money-laundering and the illicit financial flows derived from such crimes may contribute to the financing of other transnational organized crimes and terrorism.

<sup>20</sup> Conference of the Parties to the Organized Crime Convention resolution 10/6, paras. 1 and 15. See also resolution 8/12 adopted by the Conference of the States Parties to the United Nations Convention against Corruption at its eighth session, held from 16 to 20 December 2019. See also Conference of the Parties to the Organized Crime Convention resolutions 11/2 and 11/3.

<sup>21</sup> General Assembly resolution 76/185, para. 3. See also Economic and Social Council resolution 2021/24, para. 3.

<sup>22</sup> FAO has produced various capacity-building materials and guidelines for implementing fisheries instruments, including: (a) checklists of flag, coastal, and port State responsibilities; (b) templates of legal provisions for incorporation into national legislation; (c) monitoring, control and surveillance procedures for incorporation into operations; and (d) guidance documents for the implementation of catch documentation schemes at the national level. See also FAO, Julia N. Nakamura and Blaise Kuemlangan, *Implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) through National Fisheries Legal Frameworks: A Study and A Guide*, Legal Guide, No. 4 (Rome, 2020).

The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) was the first binding international agreement to specifically target illegal, unreported and unregulated fishing.<sup>23</sup>

## OBJECTIVE AND SCOPE OF THE GUIDE

Inadequate national legal frameworks and fragmented law enforcement responses constitute serious impediments to the prevention and punishment of crimes committed in the fisheries sector.

The international community has increasingly recognized the serious nature of crimes in the fisheries sector, and numerous calls to action have urged States to strengthen their legal responses and capacity to investigate, prosecute and adjudicate such crimes.<sup>24</sup>

The present guide aims to assist States in enacting and strengthening domestic legislation to combat crimes in the fisheries sector through the legislative framework provided by the Organized Crime Convention. Where appropriate, guidance is provided on the implementation of binding and non-binding international instruments.

The guide is primarily designed to assist legislators, policymakers and regional and national fisheries managers. Other relevant stakeholders include prosecutors, criminal justice practitioners, the law enforcement community, those representing civil society organizations, academic institutions and those in the private sector.

The criminalization of wrongdoing in the fisheries sector is complementary to, and must be built into, a broader legal framework in order to ensure a balanced approach and avoid the overcriminalization of minor offences. Moreover, as noted above, not all fisheries-related violations will constitute crimes.

Many aspects of illegal, unreported and unregulated fishing and related activities fall outside the scope of the present guide. As noted above, however, certain illegal fishing activities will amount to crimes in the fisheries sector.

The guide addresses illegal fishing and related activities only insofar as they occur in **national waters or on the continental shelf**.<sup>25</sup>

The guide focuses on crimes in the marine capture fisheries sector. Aquaculture, though a significant part of the fisheries sector, is an industry subject to distinct regulations and challenges. Consequently, crimes committed within its ambit fall outside the scope of the guide.

## HOW TO USE THE GUIDE

States may use the present guide as a tool as they review, amend or draft relevant national legislation to combat crimes in the fisheries sector. Crimes in the fisheries sector may be addressed under general criminal legislation or more specific laws, depending on the nature of the crime. Therefore, the guide does not provide a “one-size-fits-all” model law ready to be introduced into the legal system of individual States. Rather, relevant national legislation should be tailored to the legal tradition and social, economic, cultural and geographical circumstances of each State.

States should adapt the model legislative provisions and guidance provided to accommodate local conditions, constitutional principles, legal culture and structures, and existing enforcement arrangements. States should

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<sup>23</sup> See chapter I below.

<sup>24</sup> S/PV.8457. See also the International Declaration on Transnational Organized Crime in the Global Fishing Industry, adopted in Copenhagen on 15 October 2018.

<sup>25</sup> See chapters I and III below.

consult with all relevant stakeholders as they engage in the process of reviewing, amending or drafting legislation regulating crimes in the fisheries sector.

States have taken different approaches to penalizing the commission of offences in the fisheries sector. Although most States have adopted dedicated fisheries legislation, related provisions may also be found in existing criminal codes and other legislation addressing broader environmental issues. Some States have made use of a combination of criminal, civil and administrative offences in fisheries legislation.<sup>26</sup>

Whichever approach is taken, States should ensure that offences established in fisheries legislation and any related provisions are harmonized with existing domestic legislation to avoid inadvertent loopholes, inconsistencies or conflicts that inhibit the effectiveness of legislation.

A number of model legislative provisions are included here as guidance. Throughout the model legislative provisions, square brackets are used to indicate particular words or phrases that will need to be adapted to the State in question. For example, square brackets are used where model legislative provisions make reference to the name of the State, other provisions contained in the present guide, other domestic laws and domestic courts, ministries and competent authorities. Square brackets are also used to draw attention to situations in which a State may select wording from a number of alternatives.

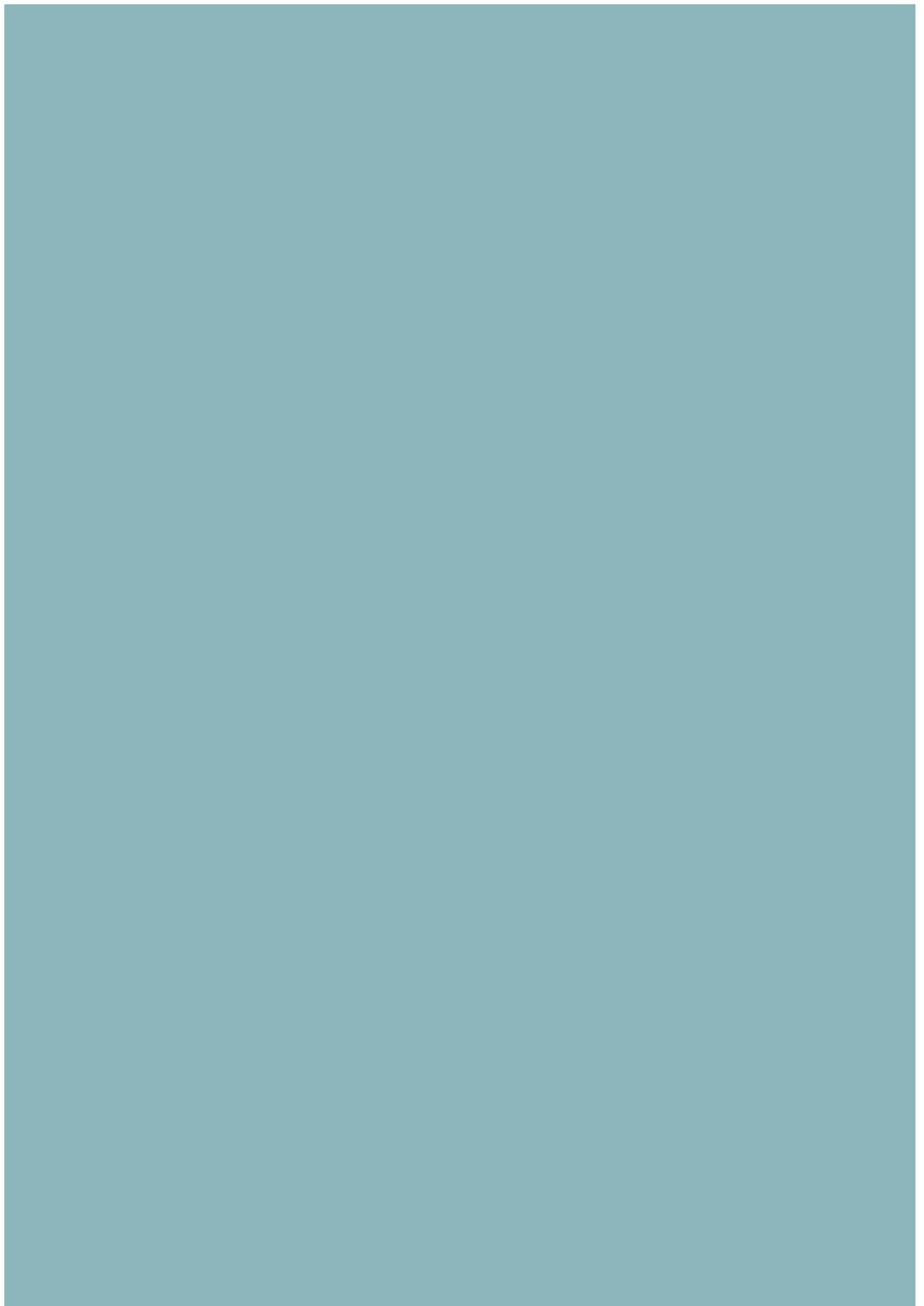
The guide is divided into seven chapters, which cover various legislative provisions necessary to combat crimes in the fisheries sector effectively:

- Chapter I: Maritime zones, regional fisheries management organizations, fisheries management and jurisdiction
- Chapter II: International law and domestic protections for fish
- Chapter III: Offences and liability
- Chapter IV: National mandates, national coordination and investigation
- Chapter V: International cooperation
- Chapter VI: Prosecution and defences
- Chapter VII: Sentencing, fines, penalties and other sanctions

Each chapter contains legislative guidance and model legislative provisions, which are set out in blue boxes. Examples from national legislation are also included to show how States have legislated to combat crimes in the fisheries sector. Care has been taken to ensure equitable geographical representation of domestic legislative examples in order to reflect the diversity of legal systems in various States.

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<sup>26</sup> See Kuemlanguan and others, “Enforcement approaches against illegal fishing in national fisheries legislation”.



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# Chapter I.

## MARITIME ZONES, REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS, FISHERIES MANAGEMENT AND JURISDICTION

The approach that a State takes to combat crimes in the fisheries sector will depend primarily on whether the State acts as: (a) a coastal or archipelagic State; (b) a flag State (i.e. the country in which a vessel is registered); (c) a port State; (d) a State that has adopted market-related measures; or (e) the State of nationality of involved persons.<sup>27</sup> A State may fall into one or more of the aforementioned categories.

Four legally binding international instruments are pertinent in this context:<sup>28</sup>

- (a) United Nations Convention on the Law of the Sea;
- (b) Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement);
- (c) 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 (United Nations Fish Stocks Agreement);
- (d) Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Agreement on Port State Measures).

Though not legally binding, the Code of Conduct for Responsible Fisheries is based in part on relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea, and contains provisions that are binding under the Compliance Agreement.<sup>29</sup> The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the Voluntary Guidelines for Flag State Performance also address State actions and set out in detail the measures to be taken by State and non-State actors, in particular with regard to illegal, unreported and unregulated fishing.

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<sup>27</sup> Persons may be natural or legal. See chapter III below.

<sup>28</sup> For a comprehensive list of States and regional economic integration organizations that are currently parties to these instruments, see <https://treaties.un.org> and [www.fao.org](http://www.fao.org).

<sup>29</sup> The provisions contained in the Code of Conduct for Responsible Fisheries should be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea and the United Nations Fish Stocks Agreement.

## UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND THE RIGHTS AND OBLIGATIONS OF STATES IN DISTINCT MARITIME ZONES

The United Nations Convention on the Law of the Sea provides the foundation for the law of the sea and sets out a legal framework of States parties' rights and obligations in various maritime zones, including territorial sea, archipelagic waters, continental shelf, exclusive economic zone (EEZ), high seas and other areas beyond national jurisdiction.<sup>30</sup>

The jurisdictional rights and associated powers and responsibilities of States, in particular of coastal, archipelagic and flag States, differ depending on where fishing and related activities are undertaken.

### Coastal and archipelagic States

#### *Internal waters, territorial sea, archipelagic waters and continental shelf*

A coastal State's jurisdiction to enforce its national laws will depend on its rights over maritime zones contiguous to its coasts. Within its internal waters, which include its ports, a coastal State has full sovereignty and all national laws apply and may be enforced. A coastal State is also free to determine conditions of entry for foreign vessels.

A coastal State enjoys sovereignty over its territorial sea. Traditionally, a State had sovereignty over coastal waters within three nautical miles of land.<sup>31</sup> The United Nations Convention on the Law of the Sea codified the expansion of the breadth of the territorial sea to 12 nautical miles, which is generally measured from the low-water line at the coast.<sup>32</sup> Within its territorial sea, the coastal State may prescribe and enforce its laws and regulate the exploitation of fish, provided that such laws conform with international legal obligations.<sup>33</sup>

A coastal State has the power to enforce all its laws in the territorial sea in relation to any vessel, whether foreign or domestic. This is subject to one main exception, namely the right of innocent passage, which guarantees the right of foreign vessels to pass through the territorial sea.<sup>34</sup> The coastal State may, however, exercise criminal jurisdiction on board a foreign ship passing through the territorial sea if, for instance, the consequences of any crime committed on board the vessel extend to the coastal State.<sup>35</sup> Moreover, the coastal State may arrest a foreign vessel for civil proceedings "in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State".<sup>36</sup>

Archipelagic States have sovereignty over archipelagic waters, which are demarcated in accordance with article 47 of the United Nations Convention on the Law of the Sea.<sup>37</sup>

Foreign vessels passing through territorial seas and archipelagic waters must refrain from fishing in those maritime zones unless authorized by the coastal or archipelagic State.<sup>38</sup>

<sup>30</sup> This jurisdictional framework is regarded as reflecting customary international law and so sets forth the rights and obligations of States in a general sense. See also figure II.

<sup>31</sup> The "cannon shot rule" derived from the roughly three-mile range of coastal artillery fire, reflecting the principle *terrae dominium finitur, ubi finitur armorum vis* (the dominion of the land ends where the range of weapons ends). The rule, like the weapons it once represented, has been rendered obsolete.

<sup>32</sup> United Nations Convention on the Law of the Sea, arts. 3–5.

<sup>33</sup> See United Nations Convention on the Law of the Sea, art. 21 (1) (d) and (e). See also the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 45.

<sup>34</sup> See United Nations Convention on the Law of the Sea, arts. 17–19.

<sup>35</sup> United Nations Convention on the Law of the Sea, art. 27 (1). This provision sets out a number of instances in which the criminal jurisdiction of a coastal State may be exercised on board a foreign ship passing through the territorial sea.

<sup>36</sup> United Nations Convention on the Law of the Sea, art. 28 (2).

<sup>37</sup> See also United Nations Convention on the Law of the Sea, art. 49.

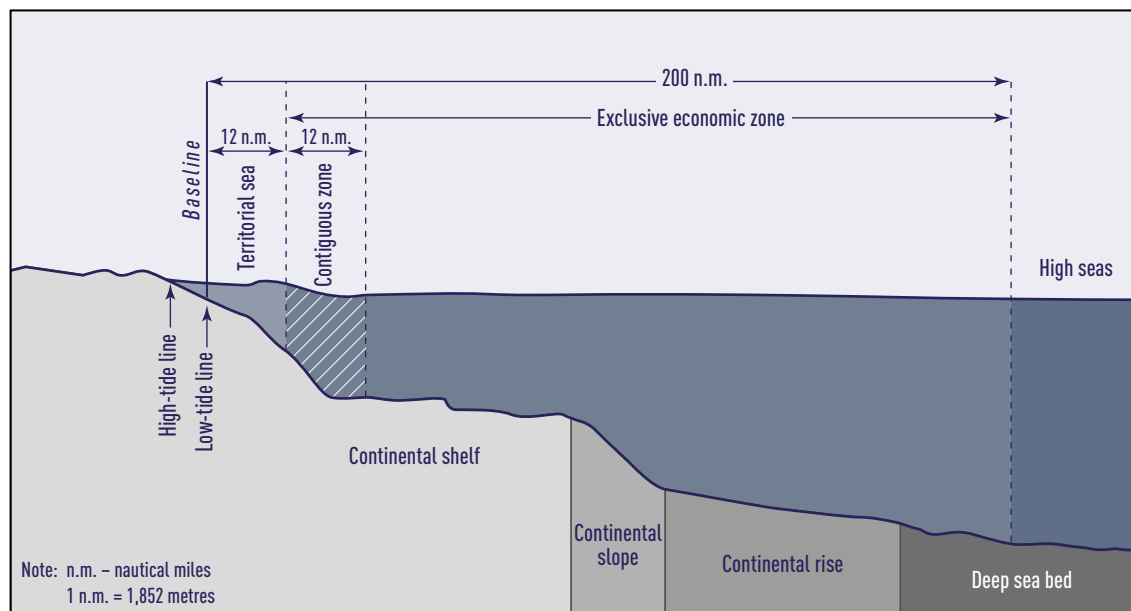
<sup>38</sup> United Nations Convention on the Law of the Sea, arts. 19 (2) (i), 49 and 52 (1).

Coastal States have sovereign rights over the continental shelf,<sup>39</sup> which comprises the seabed and subsoil of submarine areas that extend beyond the territorial sea within the perimeters established under article 76 of the United Nations Convention on the Law of the Sea. Sedentary species of fish that inhabit the seafloor, such as crabs and lobsters, may be harvested on the continental shelf only with the express agreement of the coastal State.<sup>40</sup> The sovereign rights of a coastal State over the continental shelf do not affect the legal status of superjacent waters,<sup>41</sup> which may be regulated by a regional fisheries agreement.

### Exclusive economic zone

The EEZ is a belt of waters adjacent to the territorial sea that extends up to 200 nautical miles from the baseline (see figure II) and was codified under the United Nations Convention on the Law of the Sea.<sup>42</sup> Within the EEZ, a coastal State has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil”.<sup>43</sup> Approximately 90 per cent of all reported catches are taken within 200 nautical miles of the coast.

Figure II. Exclusive economic zone



Source: Adapted from Arctic Portal, available at <https://portlets.arcticportal.org/exclusive-economic-zones>.

In the EEZ, a coastal State may, in the exercise of its sovereign rights, “take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with [the] Convention”.<sup>44</sup> Under article 73 (3) of the Convention, however, a coastal State may not impose penalties that include imprisonment for violations of fisheries laws and regulations in the EEZ, in the absence of agreements to the contrary by the States concerned.

<sup>39</sup> Ibid., art. 77.

<sup>40</sup> Ibid., art. 77 (2)–(4).

<sup>41</sup> Ibid., art. 78 (1).

<sup>42</sup> Ibid., art. 57.

<sup>43</sup> Ibid., art. 56 (1) (a).

<sup>44</sup> Ibid., art. 73 (1).

A coastal State determines the total allowable catch of fish within its EEZ and allocates fishing rights.<sup>45</sup> Foreign nationals fishing in the EEZ must comply with the conservation measures and the laws and regulations of the relevant coastal State.<sup>46</sup> Those laws and measures may include issuing licences or authorizations for fishers, fishing vessels and gear; determining the species, size and age of fish that may be caught; fixing the quota of catch; regulating and limiting the days, seasons and areas of fishing; requiring the presence of observers on board vessels; and specifying information required of fishing vessels.<sup>47</sup> Additional measures may include effective monitoring, control and surveillance of fishing activities in the EEZ and ensuring that at-sea trans-shipment and processing of fish and fish products in coastal State waters have been authorized by the State or have been conducted in conformity with the applicable regulations.<sup>48</sup>

Straddling fish stocks may occur both within the EEZ and in areas adjacent to and beyond the EEZ. The relevant coastal State and States fishing for such stocks in the adjacent area must seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of the stocks in the adjacent area.<sup>49</sup>

Coastal States and other States whose nationals fish in the region for highly migratory species<sup>50</sup> are required to cooperate directly or through appropriate international organizations to ensure conservation and promote the optimum utilization of such species both within and beyond the EEZ.<sup>51</sup> In regions where no such international organization exists, coastal States and other States whose nationals harvest highly migratory species should cooperate to establish an appropriate organization and participate in its work.<sup>52</sup>

### *Right of hot pursuit*

Where a coastal State has good reason to believe that a foreign vessel has violated the laws and regulations of that State, the coastal State has the right of hot pursuit for enforcement purposes.<sup>53</sup> Hot pursuit must commence when the foreign vessel is in the territorial seas, archipelagic waters, on the continental shelf or in the EEZ of the pursuing State and may continue outside that zone only if the pursuit has not been interrupted.

The right of hot pursuit may be exercised only by warships, military aircraft or such ships or aircraft that are clearly marked and identifiable as being on government service and authorized accordingly. Pursuit may only commence after a visual or auditory signal to stop has been given at a distance where it may be seen or heard by the foreign vessel. The right of hot pursuit ceases as soon as the vessel pursued has entered the territorial sea of its own State or of a third State.<sup>54</sup>

<sup>45</sup> Ibid., arts. 61 and 62 (4). Pursuant to the Convention, coastal States should determine the total allowable catch on the basis of the best scientific evidence available to those States.

<sup>46</sup> United Nations Convention on the Law of the Sea, art. 62 (4). See *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, para. 123. See also United Nations Convention on the Law of the Sea, art. 58 (3).

<sup>47</sup> United Nations Convention on the Law of the Sea, art. 62 (4).

<sup>48</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 51.

<sup>49</sup> United Nations Convention on the Law of the Sea, art. 63 (2). Where straddling stocks occur within the exclusive economic zone of two or more coastal States, those States must seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of the stocks. See United Nations Convention on the Law of the Sea, art. 63 (1).

<sup>50</sup> See United Nations Convention on the Law of the Sea, annex I. The list includes most species of tuna, as well as species of pomfret, marlin, sailfish, swordfish, dolphin, saury and certain species of oceanic shark and cetacean.

<sup>51</sup> United Nations Convention on the Law of the Sea, art. 64 (1).

<sup>52</sup> Ibid. There are five regional fisheries management organizations that address highly migratory species. For further information, see the sections entitled “Regional fisheries management organizations” and “Fisheries management” below.

<sup>53</sup> United Nations Convention on the Law of the Sea, art. 111.

<sup>54</sup> Ibid., art. 111 (3).



## Flag States

Vessels must sail under the flag of one State only and are subject to the exclusive jurisdiction of that State on the high seas, save in exceptional cases expressly specified under the United Nations Convention on the Law of the Sea<sup>55</sup> and other international treaties.

Every State is required to effectively exercise its jurisdiction and control in administrative, technical and social matters over vessels flying its flag.<sup>56</sup> A flag State is under a due diligence obligation to take all necessary measures, including those of enforcement, to ensure that its nationals and any vessels flying its flag are not engaged in illegal fishing activities either in the EEZ of coastal or archipelagic States or on the high seas.<sup>57</sup>

## High seas

Although 90 per cent of all reported fish catches are taken in EEZs, many fish species migrate between EEZs and the high seas. Many commercially valuable marine species are found outside the 200-mile zone of the EEZ, including cephalopods, sharks, tuna, swordfish, halibut and turbot.

The nationals of all States, whether coastal or landlocked, have the right to engage in fishing on the high seas, subject to: (a) existing treaty obligations;<sup>58</sup> (b) the rights, duties and interests of coastal States in conserving fish that migrate between EEZs and the high seas; and (c) the duty of States to take such measures as are necessary to ensure that their respective nationals conserve marine living resources on the high seas, and to cooperate with other States to that end.<sup>59</sup> Where appropriate, States should cooperate and establish subregional or regional fisheries organizations to ensure the conservation and management of fish.<sup>60</sup>

A party to the United Nations Fish Stocks Agreement that is not a member of a subregional or regional fisheries organization nor a participant in a relevant arrangement is not discharged from its obligation to cooperate with relevant measures and must not authorize vessels that fly its flag to engage in fishing for straddling or highly migratory fish stocks that are subject to the international conservation and management measures established by such an organization or arrangement.<sup>61</sup>

Pursuant to the United Nations Fish Stocks Agreement, a flag State is required to take necessary measures to ensure that a vessel flying its flag on the high seas complies with subregional and regional conservation and management measures, and to ensure that the vessel does not engage in any activity that undermines the effectiveness of such measures.<sup>62</sup> Moreover, the flag State may not authorize a vessel flying its flag to fish on the high seas unless it is able to control, regulate and monitor the vessel's fishing activities effectively.<sup>63</sup>

<sup>55</sup> Ibid., art. 92 (1).

<sup>56</sup> Ibid., art. 94.

<sup>57</sup> *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, paras. 124 and 129; Permanent Court of Arbitration, *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award, 12 July 2016 (*South China Sea Arbitration*), paras. 743 and 744; Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), art. III, para. 1 (a); Code of Conduct for Responsible Fisheries, arts. 7.6.2, 7.7.3 and 8.2.2; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 34; and Voluntary Guidelines for Flag State Performance, preamble.

<sup>58</sup> For a flag State's duties under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, see resolution conf. 14.6 of the Conference of the Parties to the Convention, entitled "Introduction from the Sea". Available at <https://cites.org/eng/prog/ifis.php>.

<sup>59</sup> United Nations Convention on the Law of the Sea, arts. 116 and 117. The freedom of fishing on the high seas was codified under art. 87 (1) (e) of the Convention.

<sup>60</sup> United Nations Convention on the Law of the Sea, art. 118.

<sup>61</sup> United Nations Fish Stocks Agreement, art. 17 (1) and (2). The Agreement establishes, in its article 8, paragraph 4, that only States which are members of subregional or regional fisheries management organizations or arrangements, or States which agree to apply the international conservation and management measures established by such organizations or arrangements, will have access to the fishery resources to which those measures apply.

<sup>62</sup> United Nations Fish Stocks Agreement, art. 18 (1). See also Compliance Agreement, art. III, 1 (a); Code of Conduct for Responsible Fisheries, art. 6.11; and Voluntary Guidelines for Flag State Performance, para. 7.

<sup>63</sup> United Nations Fish Stocks Agreement, arts. 18 and 19; and Compliance Agreement, art. III, para. 3.

A flag State that is a party to the Compliance Agreement must maintain records of fishing vessels entitled to fly its flag and authorized to fish on the high seas.<sup>64</sup> A flag State should ensure that such vessels fulfil “their obligations concerning the collection and provision of data relating to their fishing activities.”<sup>65</sup> Flag States should also ensure, to the fullest extent possible, that their fishing transport and support vessels do not support or engage in illegal fishing by, for instance, resupplying fishing vessels engaged in such activities or trans-shiping fish to or from those vessels.<sup>66</sup> Flag States should establish comprehensive and effective mechanisms to ensure the implementation of monitoring, control and surveillance measures in relation to fishing, from its commencement through to the point of landing.<sup>67</sup>

In areas of the high seas covered by a regional or subregional fisheries management organization or regional arrangement, authorized inspectors from a State member that is a party to the United Nations Fish Stocks Agreement may board and inspect fishing vessels flying the flag of another State that is also a party to the Agreement for the purpose of ensuring compliance with the relevant international conservation and management measures for protecting straddling and highly migratory fish stocks on the high seas.<sup>68</sup> In such circumstances, authorized inspectors may board and inspect the foreign vessel irrespective of whether the flag State is a member of the relevant fisheries management arrangement. Where, following boarding and inspection, there are clear grounds for believing that the foreign vessel has violated international conservation and management measures, the inspecting State may secure evidence and must promptly notify the flag State of the alleged violation.<sup>69</sup>

Where the flag State has either failed to respond to the notification by an inspecting State or failed to take necessary action and the alleged violation is serious, the inspecting State may take the vessel to the nearest appropriate port. The inspecting State must immediately inform the flag State of the name of the port and the results of any further investigations. At the request of the flag State, the inspecting State must release the vessel to the flag State.<sup>70</sup>

Serious violations identified under the United Nations Fish Stocks Agreement in the context of high seas boarding and inspection include fishing without a valid licence; failure to maintain accurate catch records or serious misreporting of catch; fishing in a closed area; fishing during a closed season; exceeding the established quota; fishing for stocks subject to a moratorium; fishing using prohibited gear; falsifying the identity or registration of the fishing vessel; and violating multiple conservation and management measures.<sup>71</sup> The Agreement does not specify whether serious violations should be addressed through administrative and civil enforcement processes or whether such violations should be subject to criminal proceedings. Rather, the Agreement leaves that matter to the discretion of States.

A flag State that is a party to the Compliance Agreement is required to take enforcement measures in respect of fishing vessels entitled to fly its flag and which it has found to have contravened applicable international conservation and management measures. Where appropriate, the flag State should criminalize such contraventions under national legislation.<sup>72</sup>

<sup>64</sup> Compliance Agreement, art. IV. See also Voluntary Guidelines for Flag State Performance, para. 25; and Code of Conduct for Responsible Fisheries, art. 8.2.1.

<sup>65</sup> Code of Conduct for Responsible Fisheries, art. 6.11. See also the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paras. 46 and 47.

<sup>66</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paras. 48 and 49; and Voluntary Guidelines for Flag State Performance, para. 9.

<sup>67</sup> United Nations Fish Stocks Agreement, art. 18 (3); Voluntary Guidelines for Flag State Performance, paras. 31–34; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 24; and Code of Conduct for Responsible Fisheries, arts. 7.1.7, 7.7.3 and 8.1.4.

<sup>68</sup> United Nations Fish Stocks Agreement, art. 21 (1). The procedure for high seas boarding and inspection is set out in art. 22 (1) of the Agreement.

<sup>69</sup> United Nations Fish Stocks Agreement, art. 21 (5).

<sup>70</sup> *Ibid.*, art. 21 (12).

<sup>71</sup> *Ibid.*, art. 21 (11).

<sup>72</sup> Compliance Agreement, art. III, para. 8. See also Voluntary Guidelines for Flag State Performance, para. 36, and Code of Conduct for Responsible Fisheries, art. 8.2.7.

Notwithstanding provisions contained in the Compliance Agreement and the Voluntary Guidelines for Flag State Performance designed to deter “flag-hopping”, reliance on flag State enforcement has not been effective at preventing illegal fishing or associated crimes in the fisheries sector, in particular on the high seas.<sup>73</sup> Many fishing vessels engaged in illegal fishing and associated crimes in the fisheries sector evade flag-State control, typically by reflagging to a State that is not a party to the relevant regional fisheries agreement.<sup>74</sup>

## Vessels without nationality

A vessel sailing under the flag of two or more States, using them according to convenience, is considered a vessel without nationality or a stateless vessel. A vessel not entitled to fly the flag of any State will also fall into this category.<sup>75</sup>

Where a vessel is reasonably suspected to be without nationality, it may be boarded and inspected on the high seas by a warship of any State.<sup>76</sup> Where the evidence warrants, the inspecting State may take such action as may be appropriate in accordance with international law.<sup>77</sup>

Neither the United Nations Convention on the Law of the Sea nor the United Nations Fish Stocks Agreement provides for procedures to be followed when a vessel without nationality on the high seas is found to have engaged in illegal activities. Some States have, however, adopted legislative provisions permitting them to exercise jurisdiction over stateless vessels on the high seas.<sup>78</sup> In addition, certain regional fisheries management organizations have adopted resolutions encouraging States to take necessary measures, including, where relevant, enacting domestic legislation to allow them to enforce action against vessels without nationality that are engaging, or have engaged, in illegal fishing and related activities within the area of competence of the regional fisheries management organization.<sup>79</sup>

## Port States

The duty of a port State to take measures in accordance with international law to promote the effectiveness of subregional, regional and global conservation and management measures was first recognized in the United Nations Fish Stocks Agreement.<sup>80</sup> The use of port State measures to deter and eliminate illegal, unreported and unregulated fishing was developed in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, a non-binding instrument.<sup>81</sup> The Agreement on Port State Measures, which was adopted in 2009 and entered into force in 2016, was the first binding international agreement aimed specifically at targeting illegal, unreported and unregulated fishing through the implementation of port State measures. The present guide relies on the provisions of the Agreement on Port State Measures only insofar as they pertain to illegal fishing and related activities.

<sup>73</sup>North Atlantic Fisheries Intelligence Group, *Chasing Red Herrings: Flags of Convenience, Secrecy and the Impact on Fisheries Crime Law Enforcement* (Copenhagen, Nordic Council of Ministers, 2018). See also Karine Erikstein and Judith Swan, “Voluntary Guidelines for Flag State Performance: a new tool to conquer IUU fishing”, *The International Journal of Marine and Coastal Law*, vol. 29, No. 1 (March 2014), pp. 116–147.

<sup>74</sup>For instance, the *Thunder*, a notorious vessel, changed its flag multiple times over the course of its 45-year career, sailing variously under the colours of the United Kingdom of Great Britain and Northern Ireland, Mongolia, Seychelles, Belize, Togo and, finally, Nigeria. Following a request to authorize the arrest of the *Thunder* by the South African Navy in early 2015, Nigeria stripped the *Thunder* of its flag, rendering the vessel stateless.

<sup>75</sup>United Nations Convention on the Law of the Sea, art. 92 (2).

<sup>76</sup>*Ibid.*, art. 110.

<sup>77</sup>United Nations Fish Stocks Agreement, art. 21 (17).

<sup>78</sup>See, for instance, United States of America, United States Code, title 46, section 70502 (c) (1).

<sup>79</sup>See, for instance, Indian Ocean Tuna Commission resolution 16/05 on vessels without nationality, paras. 3 and 4; Western and Central Pacific Fisheries Commission, Conservation and Management Measure for Vessels without Nationality, CMM 2009-09, paras. 1–5; and North Pacific Fisheries Commission, Conservation and Management Measure on Vessels without Nationality, CMM 2016-04, paras. 1–4. The International Commission for the Conservation of Atlantic Tunas encourages contracting parties to board a vessel to confirm its nationality where there are reasonable grounds to suspect that the vessel is without nationality. See Recommendation by the International Commission for the Conservation of Atlantic Tunas on vessel sightings, No. 19–09, para. 3.

<sup>80</sup>United Nations Fish Stocks Agreement, art. 23.

<sup>81</sup>International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paras. 52–64.

The Agreement on Port State Measures provides that a foreign vessel seeking entry into a port must submit an advance request for port entry. The request must include, among other things, the vessel's name, flag State, owner, certificate of registry, relevant fishing authorization, any relevant trans-shipment authorization and the total catch on board.<sup>82</sup> On the basis of that information, the port State may determine whether to authorize or deny entry of the vessel into its port.<sup>83</sup> The Agreement establishes a minimum standard for the provision of information to be included in the request and does not prevent port States from requiring foreign vessels to provide additional information to ensure that those vessels have not engaged in crimes in the fisheries sector.<sup>84</sup>

Under the Agreement on Port State Measures, where the port State has sufficient proof that a vessel seeking entry has engaged in illegal, unreported and unregulated fishing or related activities, the port State must deny the vessel entry to its ports.<sup>85</sup> If the port State decides to deny entry, it must communicate this decision to the flag State and, to the extent possible, the relevant coastal States, regional fisheries management organizations and other international organizations.<sup>86</sup>

Where a vessel has already entered a port, a port State that is a party to the Agreement on Port State Measures must deny the vessel the use of the port for landing, trans-shipping, packaging and processing fish that have not been previously landed and for other port services, including refuelling, resupplying, maintenance and dry-docking, if:

(a) The port State finds that the vessel does not have a valid and applicable authorization to engage in fishing or related activities required by its flag State;

(b) The port State finds that the vessel does not have a valid and applicable authorization to engage in fishing or related activities required by a coastal State in respect of areas under the national jurisdiction of that State;

(c) The port State receives clear evidence that the fish on board were taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State;

(d) The flag State fails to confirm within a reasonable period of time, at the request of the port State, that the fish on board were taken in accordance with the applicable requirements of a relevant regional fisheries management organization;

(e) The port State has reasonable grounds to believe that the vessel was otherwise engaged in illegal, unreported and unregulated fishing or related activities, unless the vessel can establish that: (i) it was acting in a manner consistent with the relevant conservation and management measures; or (ii) it provided personnel, fuel, gear or other supplies at sea and the vessel that received the provisions was not, at the relevant time, engaged in illegal, unreported and unregulated fishing or related activities.<sup>87</sup>

Where a port State has denied the use of its port for any of the reasons above, it must promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other relevant international organizations of its decision.<sup>88</sup>

A port State may allow entry to a vessel suspected of engaging in illegal, unreported and unregulated fishing or fishing-related activities exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing,

<sup>82</sup> Agreement on Port State Measures, art. 8. The required information is appended to the Agreement in annex A.

<sup>83</sup> Agreement on Port State Measures, art. 9 (1).

<sup>84</sup> Ibid., art. 8 (1).

<sup>85</sup> Ibid., art. 9 (4).

<sup>86</sup> Ibid., art. 9 (3).

<sup>87</sup> Ibid., art. 11 (1).

<sup>88</sup> Ibid., art. 11 (3).

detering and eliminating illegal, unreported and unregulated fishing and related activities in support of such fishing.<sup>89</sup> The port State must, however, deny such a vessel the use of its ports for landing, trans-shipping, packaging and processing fish and for other port services, including refuelling, resupplying, maintenance and dry-docking.<sup>90</sup>

Inspections carried out by the port State should be undertaken by properly qualified inspectors authorized for that purpose who must, prior to an inspection, present appropriate documentation identifying them as such to the master of the vessel.<sup>91</sup> Authorized inspectors should examine all relevant areas of the vessel, the fish on board, the nets and any other gear, equipment, and any other document or record on board that is relevant to verifying compliance with applicable conservation and management measures.<sup>92</sup> The master of the vessel is required to give inspectors all necessary assistance and information, and access to relevant material and documents, or certified copies thereof.

The results of the inspection should be transmitted to the flag State and, where appropriate, to: (a) the relevant States for which there is evidence that the vessel has engaged in illegal, unreported and unregulated fishing or related activities in support of such fishing within waters under their national jurisdiction; (b) the State of which the vessel's master is a national; (c) relevant regional fisheries management organizations; and (d) FAO and other relevant international organizations.<sup>93</sup>

Where, following an inspection, there are clear grounds for believing that a vessel has engaged in illegal, unreported and unregulated fishing or related activities in support of such fishing, the port State must: (a) promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other international organizations, and the State of which the vessel's master is a national, of its findings; and (b) deny the vessel the use of its ports for landing, trans-shipping, packaging and processing fish that have not been previously landed and for other port services, including refuelling, resupplying, maintenance and dry-docking, if those actions have not already been taken in respect of the vessel.<sup>94</sup>

A flag State that is a party to the Agreement on Port State Measures must require vessels entitled to fly its flag to cooperate with port State inspections carried out pursuant to the Agreement.<sup>95</sup> Where a flag State has clear grounds to believe that a vessel entitled to fly its flag has engaged in illegal, unreported and unregulated fishing or related activities in support of such fishing and is seeking entry to or is in the port of another State, it must, where appropriate, request that the port State inspect the vessel.<sup>96</sup>

Where, following the port State inspection, a flag State receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag has engaged in illegal, unreported and unregulated fishing or related activities in support of such fishing, the flag State must immediately and fully investigate the matter and must, given sufficient evidence, take enforcement action without delay in accordance with its laws and regulations.<sup>97</sup>

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<sup>89</sup> Ibid., art. 9 (5).

<sup>90</sup> Ibid., art. 9 (6).

<sup>91</sup> Ibid., art. 13.

<sup>92</sup> Port inspection procedures are specified in annex B to the Agreement on Port State Measures.

<sup>93</sup> Ibid., art. 15.

<sup>94</sup> Ibid., art. 18 (1). A port State may also take additional measures, providing that such measures are in conformity with international law. See also art. 18 (3).

<sup>95</sup> Agreement on Port State Measures, art. 20 (1).

<sup>96</sup> Ibid., art. 20 (2).

<sup>97</sup> Ibid., art. 20 (4). It should be noted that some States are not parties to the Agreement on Port State Measures but have implemented their own port State measures. See, for instance, <https://www.wcpfc.int/wcpfc-port-state-minimum-standards>.

## States that have adopted market-related measures

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing encourages States to take all necessary steps, consistent with international law, to prevent fish and fish products harvested by vessels identified by the relevant regional fisheries management organizations as having engaged in illegal fishing from being traded or imported into their territories.<sup>98</sup>

In 2010, the European Union, which had endorsed the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, introduced a Council regulation establishing a European Union-wide system to prevent, deter and eliminate the import of illegally caught fish products into the European Union market.<sup>99</sup>

The Council regulation limits access to the European Union market to fish products that carry a catch certificate certifying compliance with fisheries laws and conservation measures, and establishes rules for the control of European Union nationals connected to illegal, unreported and unregulated fishing and trade in the products derived from such fishing.

In 2018, the United States of America introduced its Seafood Import Monitoring Program, under which permits, reporting and record-keeping requirements were established for the importation of 13 seafood species and species groups in order to combat illegal, unreported and unregulated fishing and prevent certain illegally caught seafood from entering the United States market.<sup>100</sup> In 2020, Japan passed the Domestic Trade of Specific Marine Animals and Plants Act, banning the importation of illegally caught seafood.

## States of nationality of involved persons

Without prejudice to the primary responsibility of flag States on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in illegal fishing<sup>101</sup> or, more broadly, engage in criminal activities in the fisheries sector. Moreover, all States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in illegal fishing or other crimes in the fisheries sector. States should also discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities.<sup>102</sup>

## Regional fisheries management organizations and fisheries management

There are approximately 20 regional fisheries management organizations and two related regional arrangements, covering most of the world's oceans.<sup>103</sup> Such organizations and arrangements are established by treaty and are, within their areas of competence – namely, on the high seas, in the EEZ and in respect of certain fish stocks – key to fisheries management. Regional fisheries management organizations adopt a wide range of binding and non-binding international conservation and management measures to conserve and manage

<sup>98</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paras. 66–76. The Plan of Action, at paragraph 80.10, also encourages States acting through regional fisheries management organizations to adopt market-related measures where appropriate.

<sup>99</sup> Council Regulation No. 1005/2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 (*Official Journal of the European Union*, L 286, 29 October 2008).

<sup>100</sup> The seafood species groups are abalone, Atlantic cod, blue crab (Atlantic), dolphinfish (*mahi mahi*), grouper, king crab (red), Pacific cod, red snapper, sea cucumber, sharks, shrimp, swordfish and tuna (albacore, bigeye, skipjack, yellowfin and bluefin).

<sup>101</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 18.

<sup>102</sup> *Ibid.*, para. 19.

<sup>103</sup> Terje Løbach and others, *Regional Fisheries Management Organizations and Advisory Bodies: Activities and Developments, 2000–2017*, FAO Fisheries and Aquaculture Technical Paper, No. 651 (Rome, 2020).

one or more species of fish.<sup>104</sup> Such measures adopted by a regional fisheries management organization are to be implemented by its States members in accordance with the relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea and the United Nations Fish Stocks Agreement.<sup>105</sup>

Examples of international conservation and management measures include the imposition of catch limits or fishing quotas, limits on by-catch, gear specification requirements (such as mesh and net sizes), prohibitions on certain types of fishing gear, closed seasons and areas, and even complete prohibitions on fishing. Such measures also include monitoring, control and surveillance measures that specify compliance and enforcement measures and actions to be taken, as discussed below.

Binding international instruments such as the United Nations Convention on the Law of the Sea, the United Nations Fish Stocks Agreement, the Compliance Agreement and the Agreement on Port State Measures, and non-binding instruments such as the Code of Conduct for Responsible Fisheries and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, have increasingly called upon regional fisheries management organizations and related regional arrangements to adopt international conservation and management measures to address illegal, unreported and unregulated fishing. In particular, the United Nations Fish Stocks Agreement called upon parties to strengthen the role of regional fisheries management organizations and to adopt measures for boarding, inspection and control of vessels within their area of competence. As a result, vessels used for fishing or related activities in the areas of competence of regional fisheries management organizations may not be immune from inspection and detention on the high seas by non-flag States, subject to the international conservation and management measures of the individual regional fisheries management organization.

Building on the provisions of the United Nations Convention on the Law of the Sea,<sup>106</sup> the United Nations Fish Stocks Agreement requires that States parties cooperate to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing international conservation and management measures.<sup>107</sup> Where a subregional or regional fisheries management organization or arrangement exists, States parties with vessels that fish straddling or highly migratory fish stocks on the high seas are required to fulfil their duty to cooperate by becoming members of such organizations or participants in such arrangements or by agreeing to apply established international conservation and management measures.<sup>108</sup> Failure to do so may result in loss of access to those high seas fisheries.<sup>109</sup>

The United Nations Fish Stocks Agreement sets out a number of obligations for members of regional fisheries management organizations,<sup>110</sup> which include:

- (a) Agreeing on and complying with international conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory species;
- (b) Adopting and applying any generally recommended international minimum standards for the responsible conduct of fishing operations;

<sup>104</sup> International conservation and management measures can also be established by treaties and other international agreements. See “Terms” above.

<sup>105</sup> See “Terms” above. See also the United Nations Fish Stocks Agreement, art. 1 (b), and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 6 (d). Likewise, international conservation and management measures established by international agreements are to be applied in accordance with international law by States parties to such agreements.

<sup>106</sup> United Nations Convention on the Law of the Sea, arts. 63, 64 and 118. See also the sections entitled “Exclusive economic zone” and “High seas” above.

<sup>107</sup> United Nations Fish Stocks Agreement, art. 13.

<sup>108</sup> *Ibid.*, art. 8 (3).

<sup>109</sup> *Ibid.*, art. 8 (4).

<sup>110</sup> *Ibid.*, art. 10.

(c) Obtaining and evaluating scientific advice, reviewing the status of fish stocks and assessing the impact of fishing on non-target and associated or dependent species;

(d) Establishing appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;

(e) Agreeing on decision-making procedures which facilitate the adoption of international conservation and management measures in a timely and effective manner.

Of the approximately 20 regional fisheries management organizations worldwide, five address highly migratory species and coordinate their work: the Commission for the Conservation of Southern Bluefin Tuna, the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, the Indian Ocean Tuna Commission, and the Western and Central Pacific Fisheries Commission. These five “tuna regional fisheries management organizations” have maintained a joint register of fishing vessels and mutual recognition of vessels engaged in illegal, unreported and unregulated fishing since the initiation of the Kobe process in 2007, which has served as the basis for cooperation among them.<sup>111</sup>

States are legally required to implement binding international conservation and management measures adopted by regional fisheries management organizations of which they are a member. Violations of such measures will often be subject to civil or administrative penalties and may also be criminalized at the national level.

International conservation and management measures are distinct from the conservation and management measures adopted by coastal and archipelagic States in their national waters, which are governed by domestic fisheries law.

## Monitoring, control and surveillance measures

The United Nations Fish Stocks Agreement requires parties that are coastal States and States fishing on the high seas to “implement and enforce conservation and management measures through effective monitoring, control and surveillance”<sup>112</sup>

International conservation and management measures relating to monitoring, control and surveillance are also adopted by regional fisheries management organizations to be implemented by their contracting parties and by cooperating non-contracting parties in order to combat illegal fishing and ensure compliance with and enforcement of international conservation and management measures. Monitoring, control and surveillance measures adopted by regional fisheries management organizations may include establishing a list of vessels authorized to fish; reporting requirements; a list of vessels found to have engaged in illegal, unreported and unregulated fishing; regulations on trans-shipment; a requirement for vessels to be equipped with a satellite-based vessel monitoring system; observer programmes; and catch documentation schemes for tracking and ensuring the traceability of fish and fish products from the point of capture to the point of landing. Transparency is crucial, not only in preventing and combating illegal fishing, but also, more broadly, in preventing and combating crimes in the fisheries sector.<sup>113</sup>

States should implement monitoring, control and surveillance measures to ensure adherence to the terms and requirements of fishing licences or authorizations and compliance with national fisheries legislation and binding international conservation and management measures adopted by relevant regional fisheries management organizations. Such measures should be adopted by coastal, flag and port States and be applicable across maritime zones.

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<sup>111</sup> See [www.tuna-org.org](http://www.tuna-org.org).

<sup>112</sup> United Nations Fish Stocks Agreement, art. 5 (l).

<sup>113</sup> See also the work of the Fisheries Transparency Initiative; further information available at [www.fiti.global/fiti-standard](http://www.fiti.global/fiti-standard). Vessel tracking information is also made publicly available by organizations such as SkyTruth, which is helpful in this regard. See <https://skytruth.org>.



States should identify a legal mechanism that implements regional fisheries management organization measures effectively as they enter into force. Mindful that some measures are adopted annually, and that the process of amending an act or regulations may be slow and complicated, other options could include, as far as existing legislation allows, implementation by means of schedules to regulations or subsidiary legislation, such as orders or declarations, or by publication in an official gazette. Some States implement regional fisheries management organization measures through licence conditions, but in such cases those conditions should be specific, as a general reference to an international conservation or management measure as a condition may not be easily understood by a vessel operator.

Monitoring, control and surveillance measures should include requirements for:

- (a) Fishing vessels to operate in accordance with the terms and conditions of their licences;
- (b) Recording and timely reporting of vessel position, catch of target and non-target species, fishing efforts and other relevant fisheries data, in accordance with subregional, regional and global standards for the collection of such data;
- (c) Verifying the catch of target and non-target species through observer programmes, inspection schemes, unloading reports, supervision of trans-shipment, and monitoring of landed catches and market statistics;
- (d) Developing and implementing vessel monitoring systems, including, where appropriate, satellite transmitter systems;
- (e) Regulation of trans-shipment on the high seas.

The examples above should not be considered an exhaustive list, and States are free to determine whether additional monitoring, control and surveillance measures should be implemented through their national laws.

## Jurisdiction

Crimes in the fisheries sector encompass a broad range of offences committed both at sea and on land, from certain illegal fishing activities in national waters and trading illegally caught fish to related offences such as corruption, tax evasion and money-laundering. States should enact provisions establishing comprehensive jurisdiction for the prosecution and punishment of such crimes.

Jurisdiction refers to the sovereign power of a State to exercise legal authority over a territory (both on land and at sea), person or thing through its: (a) legislation (prescriptive jurisdiction); (b) police and prosecutors (enforcement jurisdiction); and (c) national courts, tribunals and other institutions (adjudicative jurisdiction).

Establishing comprehensive jurisdiction is particularly important in the context of combating crimes in the fisheries sector, since such crimes can occur across State borders, including in EEZs or on the high seas. Offenders may also move between States and exploit jurisdictional gaps in the laws of individual States in order to avoid apprehension and prosecution. It is therefore important to articulate clearly the jurisdictional bases upon which national courts can determine proceedings for such crimes.

Most obviously, States may exercise jurisdiction over acts committed within their territories, including their inland waters and territorial sea (the territoriality principle). In addition, a flag State has jurisdiction everywhere over vessels that fly its flag, and with limited exceptions, it has exclusive jurisdiction over its flagged vessels on the high seas.<sup>114</sup>

<sup>114</sup>See United Nations Convention on the Law of the Sea, art. 92 (1); *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, *Publications of the Permanent Court of International Justice. Series A, No. 10*, p. 25. See also Permanent Court of Arbitration, *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 366 ("where an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence").

As noted above, coastal States have limited sovereign rights in the EEZ and may not impose penalties that include imprisonment for violations of fisheries laws and regulations within that zone in the absence of agreements to the contrary with the States concerned.

International law also recognizes the rights of States to exercise extraterritorial jurisdiction in a number of circumstances. While the precise scope of these circumstances remains unsettled,<sup>115</sup> international law has generally recognized the jurisdiction of a State over:

- (a) Its nationals, even when outside its territory (active personality principle);
- (b) Acts injurious to its nationals (passive personality principle);
- (c) Acts committed outside the State but intended to have a substantial effect within the territory of the State (objective territorial principle).<sup>116</sup>

As crimes in the fisheries sector may occur across borders, States should enact provisions establishing jurisdiction over crimes in the fisheries sector on the basis of both the territorial principle and recognized principles of extraterritorial jurisdiction. Model legislative provision 1 below provides an example of how a State could establish its jurisdiction on those bases.<sup>117</sup>

#### MODEL LEGISLATIVE PROVISION 1: JURISDICTION

(1) [National court(s)] shall have jurisdiction to determine proceedings for offences to which this [Act/Law/Chapter/etc.] applies when the offence is committed:

- (a) [In whole or in part] within the territory of [State]; or
- (b) [In whole or in part] on board a vessel that is flying the flag of [State] or an aircraft that is registered under the laws of [State] at the time when the offence was committed; or
- (c) By a [State] national present in [State] territory whose extradition is refused solely on the grounds of nationality; or
- (d) By a person present in [State] whose extradition is refused on any ground.

(2) [National court(s)] shall have jurisdiction to determine proceedings for offences committed in areas beyond national jurisdiction of [State] to which this [Act/Law/Chapter/etc.] applies when:

- (a) The [victim] is a national [or permanent resident] [or habitual resident] of [State]; or
- (b) The offence is committed by a national [or permanent resident] [or habitual resident] of [State] [or one of its legal persons]; or
- (c) The offence is committed in areas beyond national jurisdiction of [State] with a view to the commission of a serious crime within the territory of [State]; or
- (d) Such jurisdiction is based on an international agreement binding on [State].

<sup>115</sup> See Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford, Oxford University Press, 2015), pp. 101, 104–113.

<sup>116</sup> See Organized Crime Convention, art. 15 (2); Convention against Corruption, art. 42 (2); and David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford, Oxford University Press, 2007), p. 164.

<sup>117</sup> See also UNODC, *Model Legislative Provisions against Organized Crime*, 2nd ed. (Vienna, 2021), pp. 24–28.

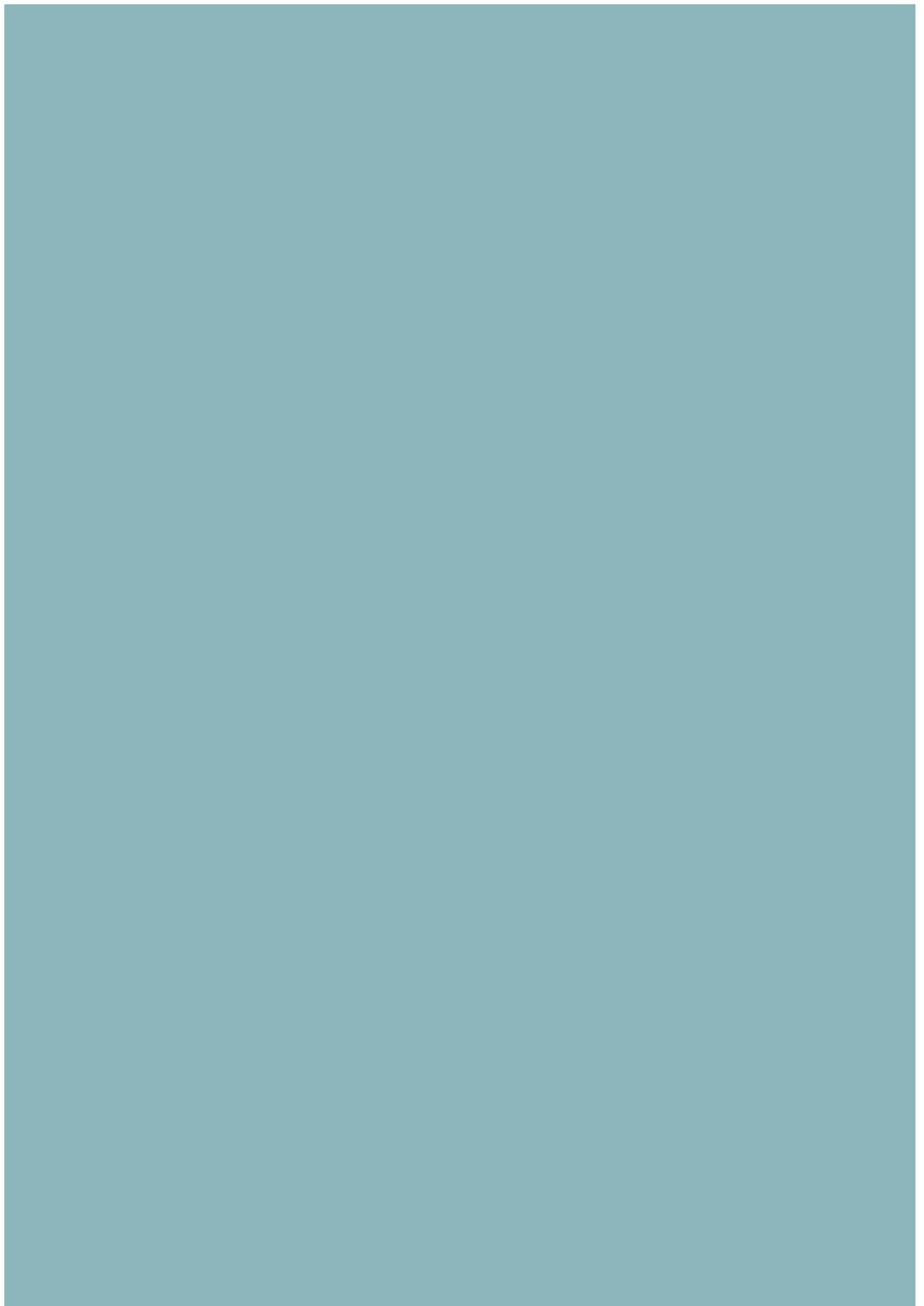
Paragraph 1 of model legislative provision 1 sets out the territorial jurisdiction for the judicial determination of crimes committed in the fisheries sector as follows:

- Paragraph 1 (a) and (b) reflect the obligations of States parties under article 15 (1) of the Organized Crime Convention.
- Paragraph 1 (c) reflects the *aut dedere aut judicare* (extradite or prosecute) principle contained in articles 15 (3) and 16 (10) of the Organized Crime Convention. Article 16 (10) provides that, if a State party to the Convention does not extradite a person in its territory solely on the basis that he or she is one of its nationals, it must, at the request of the State party seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution. Article 15 (3) of the Convention requires each State party, for the purposes of article 16 (10), to adopt such measures as may be necessary to establish jurisdiction over offences covered by the Convention when the alleged offender is present in its territory and it does not extradite such a person solely on the ground that the person is a national of that State.
- Paragraph 1 (d) reflects article 15 (4) of the Organized Crime Convention, which provides that States may also adopt such measures as may be necessary to establish jurisdiction over offences covered by the Convention when the alleged offender is present in their territory and they do not extradite him or her.

If paragraph 1 (d) of model legislative provision 1 is adopted by a State and incorporated into domestic law, it is unnecessary to include paragraph 1 (c), as paragraph 1 (d) covers situations where extradition is refused for any reason, including on the basis of nationality.

Paragraph 2 of model legislative provision 1 sets out four bases for the exercise of extraterritorial jurisdiction to judicially determine crimes in the fisheries sector:

- Paragraph 2 (a) establishes jurisdiction over cases where the victim of an offence is a national of the State, reflecting the passive personality principle and article 15 (2) (a) of the Organized Crime Convention. States may also choose to extend the jurisdictional ground in paragraph 2 (a) to permanent residents and/or habitual residents of the State.
- Paragraph 2 (b) establishes jurisdiction over offences committed by a national (or a permanent or habitual resident) of the State, reflecting the active personality principle and article 15 (2) (b) of the Organized Crime Convention.
- Paragraph 2 (c) provides for jurisdiction over offences committed in areas beyond national jurisdiction but with a view to the commission of a serious crime within the territory of the State, reflecting the objective territorial principle and article 15 (2) (c) of the Organized Crime Convention.
- Paragraph 2 (d) provides a basis for the judicial determination of cases for which jurisdiction has been conferred by an international agreement binding on the State. Such an agreement may also include binding resolutions of the Security Council.



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# Chapter II.

## INTERNATIONAL LAW AND DOMESTIC PROTECTIONS FOR FISH

Several international instruments include fisheries and the marine environment in their mandates. The Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on the Conservation of Migratory Species of Wild Animals prohibit or strictly regulate the trade of certain marine and aquatic species and provide for specific protections, and the Convention on Biological Diversity encourages States parties to establish protected areas to conserve biological diversity in marine ecosystems. These protections may apply across all maritime zones and may, in addition to prescribed measures, require compliance and enforcement of such measures through national frameworks.

Under article 192 of the United Nations Convention on the Law of the Sea, States have the obligation to protect and preserve the marine environment. This general obligation has been held to include a “due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection”.<sup>118</sup> In addition, this obligation “extends to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat”.<sup>119</sup>

In March 2023, an intergovernmental conference of Member States, specialized agencies, and parties to the United Nations Convention on the Law of the Sea concluded an agreement that aims to protect, preserve, restore and maintain marine biodiversity and ecosystems with a view to enhancing their productivity and health, and to strengthen their resilience to stressors, including those relating to climate change, ocean acidification and marine pollution.<sup>120</sup> Among other things, the agreement provides a mechanism for establishing protected areas on the high seas, in areas beyond national jurisdiction.

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<sup>118</sup> *South China Sea Arbitration*, para. 956.

<sup>119</sup> *Ibid.*, para. 959.

<sup>120</sup> See Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction. The Agreement must be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies. It will enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession.

States parties to the International Convention for the Regulation of Whaling are bound by the moratorium on commercial whaling.<sup>121</sup> In 1982, the International Whaling Commission set the catch quotas for all whale and cetacean species listed in the Convention Schedule to zero. The moratorium has been maintained since it entered into force in 1986.

Coastal and archipelagic States may adopt provisions to protect fish species in their internal waters, territorial sea, archipelagic waters and EEZs, and to ensure compliance with those provisions. Such provisions may include: (a) prohibitions on fishing certain species; (b) prohibitions on the use of certain fishing practices and gear; and (c) the establishment of marine protected areas.

To enable such protective measures, the use of legislative schedules is recommended, which may be implemented in national legislation, relating to:

- (a) Protected fish;<sup>122</sup>
- (b) Prohibited destructive fishing practices, and prohibited and regulated gear;
- (c) Marine areas designated for protection.

Legislative schedules are part of the legislative instruments to which they relate, and they draw their legal force from references contained in substantive provisions in the main body of the legislation. Schedules are used in legislation for reasons of convenience to provide details that cannot be adequately addressed in the main body of the legislation. The appropriate legal form of such schedules is a matter for each State to determine.

Depending on the national legal system of the relevant State, the schedules could be included in primary legislative instruments, such as statutes or acts, or in subordinate or delegated legislative instruments, such as regulations.

In certain States, domestic legislation may provide alternative tools for supplementing primary fisheries legislation. These may include the promulgation of regulations, the issuance of orders or declarations, gazetting, public notices or incorporation into licensing conditions. For example, in some jurisdictions, a designated minister has the authority to simply issue a declaration to protect specific marine species, prohibit the use of destructive fishing practices, prohibit the use of specific gear or declare a marine protected area.<sup>123</sup> It is suggested that, where appropriate, the recommended provisions may be implemented through schedules annexed to existing legislative instruments.

States deciding on the appropriate instrument for schedules should consider the applicable processes for amending that instrument. This is an important consideration because the conservation status of fish species and the characteristics of harmful fishing practices continue to evolve. Marine areas in need of protection will require different forms or levels of protection over time. States should update their laws protecting marine ecosystems and fish species, including the applicable schedules, in line with ongoing developments.

The process for amending regulations or other subordinate legislation will typically be more streamlined than the process involved in amending primary legislation. Setting out the relevant schedules in regulations or other subordinate legislative instruments may enable States to react more readily to any developments. To the extent consistent with a State's legislative framework, competent authorities should be assigned a role in the process of enacting or initiating amendments to the schedules. Such powers will generally need to be delegated by the legislature.

<sup>121</sup> United Nations, *Treaty Series*, vol. 338, Nos. 4830–4843. See International Whaling Commission, Chairman's Report of the Thirty-Fourth Annual Meeting, in *Thirty-third Report of the International Whaling Commission* (1983). Norway and Iceland are both members of the International Convention for the Regulation of Whaling but continue to conduct commercial whaling in coastal waters. Norway submitted an objection to the moratorium, whereas Iceland rejoined the Convention in 2002 with a reservation concerning the moratorium.

<sup>122</sup> The definition of fish includes amphibian and marine mammal species. See "Terms" above.

<sup>123</sup> See, for instance, Kenya, Fisheries Management and Development Act No. 35 of 2016, *Kenya Gazette Supplement*, No. 156 (Act No. 35), sects. 45–48.

As to the schedules discussed in the present guide, their number, form and content are matters for each State to determine. Nonetheless, such schedules should draw on existing international norms and be adapted to the local values and realities of the individual State.

## SCHEDULES OF PROHIBITED AND PROTECTED FISH

Some States prohibit fishing for certain species by embedding lists of those species in domestic legislation, either in the text of the legislation itself or in schedules. Species that are subject to absolute prohibitions are referred to as “prohibited species” in the present guide.

Schedules of protected fish species may also form the basis for offences relating to specific species, and States may employ such schedules in other provisions establishing measures for the protection of certain species. The content and categorization of each State’s schedules are a matter for that State to determine, based, at least in part, on the State’s evaluation of which fish species require legislative protection.

It is recommended that States draw upon existing international lists of endangered fish species when developing schedules and that they adapt their schedules to take into account local values and realities. Relevant international lists include the appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on the Conservation of Migratory Species of Wild Animals, as well as the Red List of the International Union for Conservation of Nature and Natural Resources.<sup>124</sup>

As the relevant international lists are amended regularly, domestic legislation should establish mechanisms to update and amend domestic schedules to incorporate such amendments. This is particularly relevant in the context of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on the Conservation of Migratory Species of Wild Animals. States parties to those conventions could provide, for example, that any amendments made by the respective conference of the parties to each convention should be deemed to be included in the relevant domestic schedules.

The Red List of the International Union for Conservation of Nature and Natural Resources is not a legal instrument, but a scientific assessment of conservation concern. Certain listings on the Red List may not be relevant or desirable for inclusion in domestic schedules, for example, if a species is an alien invasive species in the territory of a given State. Moreover, as the Red List is based on the global conservation of species, the conservation status of a given species may differ in a given State. A State may, for example, choose to apply the strictest protection to species that are not considered to be at high risk at the global level but are endangered within its own territory.

Schedules of prohibited and protected fish species should include both the scientific and common names of each species. The use of scientific names ensures that the schedules precisely identify the species covered by the schedules. Including the common names of each species can help to ensure that the schedules are more accessible to criminal justice practitioners and members of the public. In some cases, States may wish to include in their schedules blanket categories of species, subject to specific exceptions where appropriate (e.g. “any species of shark, except ...”).

States may also elect to introduce schedules covering the conditions under which certain species of protected fish may be caught. The conditions could include setting minimum and maximum sizes for specified fish or limiting the duration of the fishing season, for example to exclude spawning season.

States are free to categorize schedules of wildlife as they deem fit, but they may also use existing categories, such as those used in the Red List. Those categories could include:

- (a) Critically endangered species: any species facing an extremely high risk of extinction in the wild;
- (b) Endangered species: any species facing a very high risk of extinction in the wild;

<sup>124</sup> Available at [www.iucnredlist.org](http://www.iucnredlist.org).

- (c) Vulnerable species: any species facing a high risk of endangerment in the wild;
- (d) Protected species: any species of high conservation value or of national importance or that requires regulation to ensure that the species is managed in a sustainable manner.

**NATIONAL EXAMPLE: MEXICO**

National Standard NOM-059 on Environmental Protection of Native Species of Wild Flora and Fauna. Risk categories and specifications for inclusion, exclusion or amendment<sup>a</sup>

Category and species name	Common name
<b>Endangered</b>	
<i>Phocoena sinus</i>	Vaquita
<i>Totoaba macdonaldi</i>	Totoaba
<b>Threatened</b>	
<i>Cetorhinus maximus</i>	Basking shark
<i>Carcharodon carcharias</i>	Great white shark
<i>Rhincodon typus</i>	Whale shark
<i>Pristis pristis</i>	Largetooth sawfish
<i>Pristis pectinata</i>	Smalltooth sawfish
<b>Subject to special protection</b>	
<i>Hippocampus erectus</i>	Lined seahorse
<i>Hippocampus ingens</i>	Pacific seahorse
<i>Hippocampus zosterae</i>	Dwarf seahorse

<sup>a</sup> Secretariat for the Environment and Natural Resources, 2010, annex III (excerpt).

**SCHEDULES OF PROHIBITED DESTRUCTIVE FISHING PRACTICES AND OF PROHIBITED AND REGULATED GEAR**

The Code of Conduct for Responsible Fisheries encourages States to prohibit dynamiting (blast fishing), poisoning and other comparable destructive fishing practices.<sup>125</sup> The Permanent Court of Arbitration has held that, because explosives shatter coral and cyanide can kill or injure non-target species, the use of dynamite and cyanide constitutes “pollution” of the marine environment within the meaning of the United Nations Convention on the Law of the Sea. The Court also noted that both dynamite and cyanide fishing are among the most highly destructive of all fishing methods and result in such deleterious effects as to harm living resources and marine life, constituting a breach of a State’s obligation to protect and preserve the marine environment.<sup>126</sup>

<sup>125</sup> Code of Conduct for Responsible Fisheries, art. 8.4.2.

<sup>126</sup> *South China Sea Arbitration*, para. 970.



Other destructive fishing practices which States may regulate or ban include the use of large-scale drift nets and bottom trawling. These fishing methods have high rates of by-catch of endangered dolphins, sharks, sea turtles and sea birds. The use of large-scale pelagic drift nets has been the subject of General Assembly resolutions and a regional convention recommending that a moratorium on the use of such gear be imposed on the high seas.<sup>127</sup> The Assembly has also called for the prohibition of bottom trawling on the high seas, as the practice has adverse impacts on vulnerable marine ecosystems, including seamounts, hydrothermal vents and cold-water corals.<sup>128</sup>

Electric pulse fishing is also widely considered to be a destructive fishing method. Electrical pulses are emitted into seawater, causing bottom-dwelling fish such as plaice and sole to swim into the path of trawl nets. This practice has been banned in the territorial seas of a number of coastal States and across the European Union. Pulse trawling has been linked to the fatal injury of non-target species and has also been observed to wastefully kill target species, which may elude capture and be left to rot at sea.

It is recommended that States introduce schedules of prohibited destructive fishing practices and prohibited and regulated fishing gear, including dynamiting, poisoning, the use of large-scale drift nets, bottom trawling and electric pulse fishing. These examples should not be considered exhaustive, and States are free to determine which destructive fishing practices should be prohibited and which types of gear should be prohibited or regulated in their schedules.

Schedules of prohibited destructive fishing practices and prohibited and regulated fishing gear may be adopted by coastal and archipelagic States in relation to their internal waters, territorial sea, archipelagic waters and EEZs. Flag States may also adopt schedules prohibiting destructive fishing practices and prohibiting and regulating fishing gear on the high seas.

The schedules are intended to cover: (a) prohibited destructive fishing practices; (b) prohibited fishing gear (for which licences or authorizations would never be allowed, for example because of their highly indiscriminate nature); and (c) regulated fishing gear (the use of which may be authorized by means of a licence or authorization under certain circumstances). Certain gear, such as dynamite, prohibited in the fisheries context, may be legal in other contexts. Likewise, “superlights” used for attracting fish, which may be subject to regulation in the fisheries context, may not be subject to regulation in other contexts.

States may wish to consider prohibiting the sale and possession of gear used in prohibited destructive fishing practices. Where appropriate, States should provide specifications for prohibited and regulated gear, for example, the dimensions and mesh size of prohibited or regulated nets or a watt limit for “superlights” and fishing light attractors.

States, in particular flag and port States, may also wish to prohibit the landing, trans-shipment, processing and import of fish and fish products obtained using destructive fishing practices or gear subject to prohibitions.

Several examples of legislation prohibiting destructive fishing practices and prohibiting and regulating gear are set out below.

<sup>127</sup> General Assembly resolutions 44/225, 45/197, 46/215 and 59/25; Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, adopted at Wellington on 24 November 1989, entered into force on 17 May 1991 (United Nations, *Treaty Series*, vol. 1899, No. 32370). See also Ellen Hey and others, *The Regulation of Driftnet Fishing on the High Seas: Legal Issues*, FAO Legislative Study, No. 47 (Rome, 1991).

<sup>128</sup> General Assembly resolution 59/25.

**NATIONAL EXAMPLE: SAINT KITTS AND NEVIS**

**Fisheries Aquaculture and Marine Resources Act, 2016**

**Article 22**

...

(2) No person shall, for the purpose of killing, taking, stunning, stupefying or disabling fish in any way rendering fish more easily caught –

- (a) Use, permit to be used or attempt to use;
- (b) Support or facilitate any person to use or attempt to use;
- (c) Carry, permit to be carried, possess or control; or
- (d) Place in the water or assist in placing in the water;

any chemical, poison, or noxious substance, bomb, electrical device, or material, dynamite or explosive substance or device.

(3) No person shall

- (a) Land, tranship, buy, sell, deal in, transport, receive or possess any fish or fish product taken by any means which contravenes this section; or
- (b) Fail or refuse to give, on request to any authorised officer, information regarding –
  - (i) An activity described in subsection (2), or the support of or any contribution to such activity; or
  - (ii) The source of the supply of any fish or fish product referred to in paragraph (a).

...

**NATIONAL EXAMPLE: NEW ZEALAND**

**Driftnet Prohibition Act, 1991**

**Article 2. Interpretation**

...

Driftnet means a gillnet or other net that –

- (a) Either singly or tied or connected together in combination with other nets is more than 1 kilometre in length; and
- (b) Acts by enmeshing, entrapping, or entangling any fish or marine life; and
- (c) Acts by drifting in the water, or on the surface of the water; and
- (d) Does not have attached to it sufficient means of anchoring it to any point of land or the sea bed (irrespective of whether the net has attached to it any means of being attached to any vessel)

...

**Article 4. Prohibition on driftnet fishing in New Zealand fisheries waters**

- (1) No vessel shall be used for driftnet fishing in New Zealand fisheries waters.
- (2) No person shall engage in driftnet fishing in New Zealand fisheries waters.

**Article 5. Prohibition on driftnet fishing in Convention Area<sup>a</sup>**

- (1) No New Zealand vessel shall be used for driftnet fishing in the Convention Area.
- (2) No New Zealand citizen shall engage in driftnet fishing in the Convention Area.

<sup>a</sup>Within the meaning of the Driftnet Prohibition Act 1991, “Convention Area” refers to the area covered by the Convention for the Prohibition of Fishing with Long Driftnets in the South.

**NATIONAL EXAMPLE: SOLOMON ISLANDS****Fisheries Management Act (No. 2 of 2015)****Part 1. Preliminary, article 2: Interpretation**

...

“Driftnet” means a net or a combination of nets which is more than 2.5 kilometers in length, the purpose of which is to enmesh, entrap or entangle fish;

“Driftnet fishing activities” include fishing with a driftnet and any related activities including transporting, transshipping and processing any fish caught with the use of a driftnet, and the provisioning of food, fuel and other supplies for vessels used or outfitted for driftnet fishing;

...

**Part 4, division 3. Prohibited activities**

...

**24. Driftnet fishing activities prohibited**

- (1) No person shall engage in or assist any driftnet fishing activities in the fisheries waters, or permit or use a vessel for such activities.
- (2) No person shall permit, use or assist a vessel that is registered in Solomon Islands, to participate in or provide support to any driftnet fishing activities in the areas beyond the fisheries waters.
- (3) No Solomon Islands national shall engage or assist in any driftnet fishing activities in areas beyond the fisheries waters.

...

**26. Use, possession on vessel, import, purchase or sale of prohibited gear**

...

- (2) No person shall import, buy or sell a driftnet or any other fishing gear prohibited by this Act.

...

**NATIONAL EXAMPLE: PALAU**

Act to ban the practice of bottom trawling in the territorial waters and exclusive economic zone of the Republic of Palau, and for related purposes (RPPL No. 7-17, 2006)

**Section 3. Bottom trawling within Palauan waters and Palauan EEZ**

- (A) It shall be unlawful to engage in or assist in bottom trawling in the territorial sea of the Republic of Palau.
- (B) It shall be unlawful to engage in or assist in bottom trawling in the Exclusive Economic Zone of the Republic of Palau.

**Section 4. Bottom trawling by Palauan Nationals, Companies, or Vessels**

- (A) It shall be unlawful for any Palauan National to engage in or assist in bottom trawling, anywhere in the world.
- (B) It shall be unlawful for any business entity, regardless of type, which is registered in or otherwise licensed to do business in the Republic of Palau to engage in or assist in bottom trawling, anywhere in the world.
- (C) It shall be unlawful for any Palauan vessel to engage in or assist in bottom trawling, anywhere in the world.

**SCHEDULES OF MARINE AREAS DESIGNATED FOR PROTECTION**

A coastal or archipelagic State may establish no-take or protected areas within its internal waters, territorial sea, archipelagic waters and EEZ to protect and conserve the marine environment.<sup>129</sup>

A marine protected area may include a broad range of marine and coastal areas. There is no single definition of a marine protected area in international law. A commonly accepted definition adopted in the Convention on Biological Diversity provides that:

(a) “Marine and coastal protected area” means any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings.

(b) “Areas within the marine environment” include permanent shallow marine waters; sea bays; straits; lagoons; estuaries; subtidal aquatic areas (kelp beds, seagrass beds, tropical marine meadows); coral reefs; intertidal muds; sand or salt flats and marshes; deep-water coral reefs; deep-water vents; and open ocean habitats.<sup>130</sup>

The International Union for Conservation of Nature and Natural Resources defines a “protected area” as a “clearly defined geographical space, recognised, dedicated and managed through legal or other effective means, to achieve long-term conservation of nature with associated ecosystem services and values”.<sup>131</sup> Furthermore, it defines a marine protected area as “any area of intertidal or subtidal terrain, together with its overlying waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation to protect part or all of the enclosed environment”.<sup>132</sup>

<sup>129</sup> See Permanent Court of Arbitration, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015. See also footnote 120 and the corresponding paragraph.

<sup>130</sup> UNEP/CBD/COP/DEC/VII/5, footnote 1.

<sup>131</sup> Nigel Dudley, ed., *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland, International Union for Conservation of Nature and Natural Resources, 2008), p. 8.

<sup>132</sup> Paragraph 2 (b) of resolution 17.38, entitled “Protection of the coastal and marine environment”, adopted by the International Union for Conservation of Nature and Natural Resources General Assembly at its seventeenth session, held in San Jose from 1 to 10 February 1988.

Marine protected areas are also variously known as specially protected areas, marine preserves, marine sanctuaries, wilderness areas and marine parks. The protections in place in such areas differ. Some may include, for instance, spatial restrictions and seasonal closures for fisheries management. Marine protected areas may also be zoned into different categories of protection. A marine protected area established to protect deep-sea biodiversity may be zoned vertically (rather than horizontally), with restrictions on fishing varying by depth.<sup>133</sup>

Many coastal and archipelagic States have designated a number of categories of marine protected area under domestic legislation. It is recommended that States adopt a participatory process and engage with relevant stakeholders, including fishers and marine biologists, in the establishment of coastal and marine protected areas. In addition, States should evaluate the impact of marine protected areas on local Indigenous populations that have customary or traditional relationships with fisheries. Legislation regulating conduct within a marine protected area should take into account the rights of such peoples and balance those rights with the need to protect and conserve marine ecosystems and fish species. The appropriate balance between these two interests is a matter for each State to determine.

The specific categories of marine protected area to be used are also a matter for each State to determine. States may decide to make use of existing international provisions, such as the International Union for Conservation of Nature and Natural Resources protected area management categories, when designating their own categories:

- **Category Ia: Strict nature reserve**  
Strictly protected for biodiversity, where human visitation, use and impacts are controlled and limited to ensure protection of the conservation values;
- **Category Ib: Wilderness area**  
Usually large unmodified or slightly modified areas, protected and managed to preserve their natural condition;
- **Category II: National park**  
Large natural or near-natural areas protecting large-scale ecological processes with characteristic species and ecosystems, which also have environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities;
- **Category III: Natural monument or feature**  
Areas set aside to protect a specific natural monument, which can include a seamount or marine cavern;
- **Category IV: Habitat/species management area**  
Areas to protect particular species or habitats, where management reflects this priority;
- **Category V: Protected landscape/seascape**  
Where the interaction of people and nature over time has produced a distinct character with significant ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values;
- **Category VI: Protected areas with sustainable use of natural resources**  
Areas which conserve ecosystems, together with associated cultural values and traditional natural resource management systems. Generally large, mainly in a natural

<sup>133</sup> Kristina M. Gjerde, "High seas marine protected areas and deep-sea fishing", in *Report and Documentation of the Expert Consultation on Deep-Sea Fisheries in the High Seas: Bangkok, Thailand, 21–23 November 2006*, FAO Fisheries Report No. 838, (Rome, FAO, 2007), pp.141–175.

condition, with a proportion under sustainable natural resource management and where low-level non-industrial natural resource use compatible with nature conservation is seen as one of the main aims.<sup>134</sup>

States may also consider using buffer zones to ensure that marine ecosystems are protected in areas peripheral to the marine protected area, thereby enhancing the conservation value of the areas protected.

#### NATIONAL EXAMPLE: PHILIPPINES

National Integrated Protected Areas System Act 1992 (Republic Act No. 7586 of 1992), as amended by Republic Act No. 11038 of 2018

##### Section 4. Definition of terms

...

(c) “Buffer zones” refer to identified areas outside the boundaries of and immediately adjacent to designated protected areas that need special development control in order to avoid or minimize harm to the protected area;

...

##### Section 8. Buffer zones

When necessary, the [Department of Environment and Natural Resources] Secretary, upon the recommendation of the [Protected Area Management Boards], may designate areas surrounding the protected areas as buffer zones for the purpose of providing [an] extra layer of protection where restrictions may be applied: *Provided*, That, in cases where the designated buffer zone would cover private lands, the owners thereof shall be required to design their development with due consideration to the protected area management plan.

## DESIGNATION OF A COMPETENT AUTHORITY

Establishing a clear domestic inter-agency institutional framework is crucial for ensuring the effective implementation of fisheries legislation, and for ensuring that complementary legal provisions are in place in all applicable national legislation in order to combat crimes in the fisheries sector. This involves the designation of national government agencies or institutions responsible for carrying out specific functions in relation to the fisheries sector.

In the present guide, the term “competent authority” is used to refer to agencies or institutions that have competence for functions that are complementary to, and synergistic with, fisheries legislation. Such agencies and institutions include the fisheries agency or ministry, the attorney-general and the department for foreign affairs, as well as those agencies and institutions responsible for ports, customs, maritime transport, labour, police, the coastguard and the navy.

It is recommended that memorandums of understanding be concluded among the various agencies and institutions that have competence relating to the fisheries sector to cooperate in the implementation of fisheries or fisheries-related legislation. The memorandums of understanding should establish a process and framework for notification, consultation and coordination among the agencies in developing and applying the procedures, actions and measures – such as information-gathering, inspection and enforcement – to be taken in order to combat crimes in the fisheries sector.

<sup>134</sup> Further information on the categories of protected areas used by the International Union for Conservation of Nature and Natural Resources can be found on the Union website ([www.iucn.org/](http://www.iucn.org/)) and in its publications. See also Graeme Kelleher and Richard Kenchington, *Guidelines for Establishing Marine Protected Areas. A Marine Conservation and Development Report* (Gland, Switzerland, International Union for Conservation of Nature and Natural Resources, 1992).

## ACCESS TO FISHING RESOURCES AND AUTHORIZATIONS TO FISH

Fishing communities often have a long history of customary and traditional tenure systems. However, access rights for many fisheries stakeholders, especially informal and Indigenous rights, are far less developed or recognized than in other sectors.<sup>135</sup>

Legislators need to consider how to grant access rights to fisheries resources, including authorizations to undertake fishing, in laws and regulations. States must consider who is eligible to apply for the right to access and use fisheries resources or to be granted a licence or authorization to fish, the transferability of those rights, and the conditions for the exercise of such rights or authorizations, including the associated responsibilities, obligations and restraints. Such matters may have a significant influence on how fisheries legislation is drafted, including on the substantive offences, the corresponding penalties and the procedural provisions relating to matters such as compensation for crimes committed in the fisheries sector.

For the purposes of the present guide, two types of access rights are relevant. The first is the right granted by a competent authority through a licence, authorization or other like instrument. The second is the right recognized by the law of a State without the need for a licence, authorization or other like instrument. In the present guide, the term “lawful authority” is used to refer to such rights.

## LICENCES, AUTHORIZATIONS AND OTHER LIKE INSTRUMENTS

Authorizations and licences are the most common means through which access to and the utilization of fisheries resources are managed and regulated. Most States require licences or authorizations for a range of fishing activities. A holder of such an instrument may have lawful authority to fish on a vessel of a specified size and to use specified gear for a specified volume and species of catch. Licensing and authorization systems allow States to tailor the boundaries of lawful conduct to facilitate the sustainable management, use and conservation of marine resources.

Many of the offences included in the present guide are defined to cover particular conduct by a person who does not hold a relevant licence or authorization, or who contravenes the conditions of such an instrument.<sup>136</sup> The reference to licences or authorizations is important in order to avoid criminalizing law-abiding fishers and to distinguish between lawful and unlawful conduct.

Terms such as “certificates”, “concessions” and “permits” may also be used to describe instruments that confer access rights to an instrument holder. For the sake of simplicity, the term “licences or authorizations” is used in the present guide to refer to all such instruments, however described in domestic legislation. Where relevant, the term “licence or authorization” is included in square brackets in model legislative provisions to emphasize that a State must substitute this term with appropriate language under its domestic legislation.

The language chosen by each State must be tailored to the relevant provision and cover all relevant licences, authorizations and other like instruments. Various licensing and authorization regimes in a single State may use different terms to describe such instruments. For example, the instrument allowing a person to fish using particular gear may be called a licence or authorization but the instrument allowing a person to fish in particular waters may be called a concession. Such differences in terminology need to be reflected in the relevant fisheries provisions that make reference to the various instruments. States are therefore encouraged to use consistent terminology to describe such instruments across their various laws.

Access rights conferred by licences or authorizations will generally be subject to particular conditions. The conditions may be specific to the individual licence or authorization granted or may be applicable to all licences or authorizations of a particular class. Common conditions for a fishing licence or authorization relate to the identity of the licence or authorization holder, the period of validity of the licence or authorization,

<sup>135</sup> See [www.fao.org/tenure/resources/collections/fisheriestenure/en/](http://www.fao.org/tenure/resources/collections/fisheriestenure/en/).

<sup>136</sup> See chapter III below.

the area and season to which the licence or authorization applies, the gear that may be used, the volume of allowable catch and the information to be provided to the relevant authorities about fishing activities carried out under the licence or authorization. It would be an offence for a licence or authorization holder to contravene any of those conditions.

The scope of licences or authorizations and the circumstances under which they are granted for fishing in areas within national jurisdiction is a policy decision for each State to make, preferably in consultation with all relevant stakeholders and, where applicable in the EEZ, in accordance with the conservation and management measures of relevant regional fisheries management organizations.

It is not necessarily recommended that States establish licensing or authorization regimes in respect of all activities covered in the present guide. States may decide to prohibit certain damaging fishing practices completely or decide that licences or authorizations should not be available for the use of particular types of gear that are linked to extremely high levels of by-catch or cause extensive damage to ecosystems. In other cases, States may elect to allow licences or authorizations to be granted in particular circumstances but limit their availability. States could also decide to introduce a presumption that licences or authorizations for fishing certain species will not be granted.



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# Chapter III.

## OFFENCES AND LIABILITY

Crime in the fisheries sector may occur at any stage along the fisheries value chain, from the application for a fishing licence to the point of capture, unloading and along the supply chain. This chapter examines substantive criminal offences pertaining to fishing and trade, related offences and criminal liability.

### ELEMENTS OF CRIMINAL OFFENCES

All offences, whether criminal, civil or administrative, require various elements to be proved before contraventions or violations can be established and custodial sentences, fines, penalties or other sanctions imposed.

In general, for an offence to be deemed criminal, two elements must be proved: the physical element (*actus reus*) and the mental element (*mens rea*). The two elements may be referred to by various names in different jurisdictions. Most criminal offences require proof of both physical and mental elements to establish a conviction.

Depending on the legal system of a given State, the physical element of a criminal offence may include conduct (acts and omissions), results of conduct or particular circumstances relating to the conduct. Liability must be based on the conduct of a person to ensure that an offence is not arbitrary.

The mental element of an offence relates to the state of mind of the defendant at the time of the conduct. Proof of a mental element is generally required for each physical element of an offence. Although mental elements require proof of the defendant's internal state of mind, the state of mind may be inferred from objective factual circumstances.

The types of mental state recognized by criminal law in various States and the terms used to describe them vary significantly between jurisdictions. Such differences in terminology and underlying legal principles make it difficult to formulate general statements about mental elements that cover the full spectrum of legal systems.

It can, however, be said that mental elements generally differ according to the degree of the defendant's intention and, where relevant, knowledge of the facts, probabilities and risks, actual or imputed. In some legal systems, certain offences can be established without proof of any mental state on the part of the defendant. Such offences are referred to as offences of strict or absolute liability.

Unless otherwise specified, it is assumed that proof of a mental element or elements showing some degree of intention or, in certain jurisdictions, knowledge will be required for a conviction for an offence covered by the present guide.

As the language used to describe the requisite mental elements varies from country to country in accordance with their legal traditions, specific language is not recommended in the present guide; instead, the phrase “with the requisite mental state” is included in square brackets in the model legislative provisions to emphasize the choice available to legislative drafters.

States may also consider adopting measures that allow particular crimes in the fisheries sector to be established with a less strict mental element, such as recklessness or negligence.

Lowering the requisite mental elements for a crime can make it easier to obtain a criminal conviction.<sup>137</sup> States should, however, exercise great caution in doing so because of the potential prejudice to the rights of defendants. Moreover, in some legal systems the removal of the requisite mental element to create offences of strict liability is permitted only in limited circumstances. The rights of defendants must always receive due consideration. Rather than expose individuals to criminal liability for offences with lesser mental elements, States may wish to impose civil or administrative liability in such cases.

## OFFENCES COVERED IN THE PRESENT GUIDE

Crimes committed in the fisheries sector may occur at various stages along the fisheries value chain. Crimes range from certain fishing-related activities, such as unlicensed commercial fishing in national waters, and trade-related activities, such as trafficking in fish or fish products, to related offences, such as money-laundering and obstruction of justice. The broad range of activities constituting crimes in the fisheries sector requires a broad criminal justice response.<sup>138</sup>

Crimes committed in the fisheries sector are often closely related to a number of other serious criminal offences. A comprehensive examination of all possible criminal offences associated with the fisheries sector, including trafficking in persons, forced labour and tax crimes, such as tax evasion, would be beyond the scope of the guide. Nevertheless, legislation designed to combat crimes in the fisheries sector should be drafted so that it criminalizes those related activities.

Section A of this chapter sets out fishing-related offences, including:

- (a) Offences related to fishing for prohibited or protected species;
- (b) Offences related to the use of prohibited fishing practices and prohibited and regulated gear;
- (c) Offences related to protected areas;
- (d) Unlicensed commercial fishing in national waters or on the continental shelf;
- (e) Illegal trans-shipment in national waters;
- (f) Document fraud.

Section B of this chapter contains legislative guidance on possession and trade-related offences, including:

- (a) Illegal possession of fish or fish products;
- (b) Trafficking in fish or fish products;
- (c) Fish fraud.

<sup>137</sup> See, for example, Solomon Islands, Fisheries Management Act (No. 2 of 2015), sect. 125.

<sup>138</sup> During the twenty-fifth session of the Commission on Crime Prevention and Criminal Justice, it was emphasized during an expert group meeting on fisheries crime that “where there is suspicion that a minor fishery offence may be linked to broader organized criminal activity, reliance should be made on all and any laws applicable so as to allow the identification of the full suite of potential offences warranting further investigations by relevant authorities” (conference room paper E/CN.15/2016/CRP.2, p. 7).

Section C addresses related offences, including participation in an organized criminal group, money-laundering and obstruction of justice. It also contains guidance on establishing forms of secondary liability for offences covered by the guide.

Section D examines criminal liability in relation to natural and legal persons.

The same criminal act may involve the commission of more than one of the criminal offences covered by the guide. For example, unlicensed fishing of a prohibited species using prohibited gear in a prohibited area entails the breach of several provisions. This is deliberate. To help ensure that crimes in the fisheries sector are punished when appropriate, the offences in the present guide seek to target crimes in the fisheries sector from a variety of angles. In taking such an approach, some overlap between offences is inevitable. The way in which an individual State deals with prosecuting offenders in the case of multiple partially overlapping offences is a matter for that State to address in accordance with its legal tradition. In some States, multiple partially overlapping charges are possible in a criminal indictment, whereas in other States, that may not be possible.

The model legislative provisions contained in this chapter do not suggest the form of punishment a State should impose for each offence. Each State should determine whether a custodial sentence, fine, penalty or other sanction would be appropriate on the basis of domestic approaches to sentencing and sanctions. Although criminal liability may be appropriate for many of the offences covered by the present guide, States may wish, additionally or instead, to provide for civil or administrative liability.

It is for States to determine the placement of custodial sentences, fines, penalties and other sanctions in their legislation, namely whether the punishment should form part of the provision establishing the offence or should appear in a separate general provision containing custodial sentences, fines, penalties and other sanctions for the entire instrument. Chapter VII below contains some general guidance on issues relevant to sentencing, as well as on custodial sentences, fines, penalties and other sanctions for the offences covered by the present guide.

## A. Fishing-related offences

This section examines some of the most prevalent fishing-related crimes that occur along the fisheries value chain. It is recommended that States enact and strengthen domestic legislation to prevent, combat and punish such crimes.

### *Offences related to fishing prohibited or protected fish species*

Offences related to fishing prohibited or protected fish species may be criminal, civil or administrative, depending on the laws of the States with jurisdiction over such conduct. States should ensure that the penalties imposed for offences related to fishing prohibited or protected fish species are proportionate to the facts and circumstances of each case.

States may introduce legislation for a single offence but draft a separate penalty provision that offers a range of penalties depending on the specific circumstances of the offence; for instance, the capture of protected juvenile fish species or a particular volume of catch could attract more severe penalties. Alternatively, the judiciary could be given discretion in imposing penalties, in accordance with a State's legal tradition.<sup>139</sup> In certain instances, the identification of fish species may be a challenge, in particular where the fish have been processed on board a vessel prior to inspection. States should consider how to deal with this challenge, including through specialized training of fisheries inspectors and officials.<sup>140</sup>

<sup>139</sup> See chapter VII for further guidance on sentencing.

<sup>140</sup> A number of excellent technologies have been developed to assist in this regard, such as the iSharkFin software, which helps to identify shark species on the basis of their fin shapes. See also Lindsay J. Marshall and Monica Barone, *Shark Fin Guide: Identifying Sharks from Their Fins* (Rome, FAO, 2016).

## MODEL LEGISLATIVE PROVISION 2: OFFENCES RELATED TO THE FISHING OF PROHIBITED OR PROTECTED FISH SPECIES

Any person who [*with the requisite mental state*] engages in fishing of or otherwise processes a prohibited or protected fish species included in [*insert reference to relevant legislation, schedule(s) etc.*] or a fish product derived therefrom:

- (a) Without lawful authority; or
- (b) Without a [*licence or authorization*] granted by [*competent authority*]; or
- (c) In contravention of the conditions of the said [*licence or authorization*];

commits an offence.

Many States prohibit the fishing of or otherwise protect designated fish species in primary or subsidiary legislation or schedules. Other practices include issuing orders, declarations or public notices, gazetting and incorporating specific provisions into licensing conditions.

A State's process for amending regulations or other subordinate legislation will typically be more streamlined than the process involved in amending primary legislation. Setting out the relevant schedules in regulations or other subordinate legislative instruments may enable States to react more readily to any developments. Where appropriate, States are advised to implement the suggested provisions through schedules annexed to existing legislative instruments.<sup>141</sup>

The term "fish product" set out in the glossary of terms above is cast broadly to include any product or part thereof (including oil) obtained by fish processing. Model legislative provision 2 therefore extends to offences involving any fish derivative or product.

Model legislative provision 2 contains exclusions from criminal liability for conduct undertaken with lawful authority or within the conditions of a licence or authorization granted by the competent authority. The scope of each exclusion is a matter for each State to decide by prescribing the circumstances of lawful authority and determining the availability of licences and authorizations. For example, some States may decide to introduce a complete ban on fishing protected species, whereas other States may decide to permit sustainable fishing of certain listed species by granting licences or authorizations in certain specified circumstances.

### NATIONAL EXAMPLE: PHILIPPINES

Fisheries Code of 1998 (Republic Act No. 8550), as amended by Republic Act No. 10654 (2014)

#### Section 102. Fishing or Taking of Rare, Threatened or Endangered Species

- (a) It shall be unlawful to fish or take, catch, gather, sell, purchase, possess, transport, export, forward or ship out aquatic species listed in Appendix I of the Convention on the International Trade in Endangered Species of Wild Flora and Fauna, or those categorized by the International Union for Conservation of Nature and Natural Resources as threatened and determined by the Department [of Agriculture] as such.

Upon a summary finding of administrative liability, the Department shall penalize the offender with a fine equivalent to five (5) times the value of the species or five hundred thousand pesos (P500,000.00) to five million pesos (P5,000,000.00), whichever is higher, and forfeiture of the species.

Upon conviction by a court of law, the offender shall be punished by imprisonment of twelve (12) years and one (1) day to twenty (20) years and a fine equivalent to twice the administrative fine, forfeiture of the species and the cancellation of fishing permit.

<sup>141</sup> See chapter II above.

(b) It shall be unlawful to fish, take, catch, gather, sell, purchase, possess, transport, export, forward or ship out aquatic species listed in [appendices II and III to the Convention on International Trade in Endangered Species of Wild Fauna and Flora] if scientific assessments show that population of the species in the wild cannot remain viable under pressure of collection and trade: Provided, That the taking or fishing of these species from the wild for scientific research, or conservation breeding simultaneous with commercial breeding may be allowed.

Upon a summary finding of administrative liability, the Department shall penalize the offender with a fine equivalent to three (3) times the value of the species or three hundred thousand pesos (P300,000.00) to three million pesos (P3,000,000.00), whichever is higher, and forfeiture of the species.

Upon conviction by a court of law, the offender shall be punished by imprisonment of five (5) to eight (8) years and a fine equivalent to twice the administrative fine and forfeiture of the species.

(c) It shall be unlawful to gather, take, possess, transport, or export, forward or ship out captive-bred species that have been transplanted to the wild.

Upon a summary finding of administrative liability, the offender shall be penalized with a fine equivalent to three (3) times the value of the species or three hundred thousand pesos (P300,000.00) to three million pesos (P3,000,000.00), whichever is higher, and forfeiture of the species.

Upon conviction by a court of law, the offender shall be punished by imprisonment of five (5) to eight (8) years, a fine equivalent to three (3) times the value of the species or three million pesos (P3,000,000.00), whichever is higher, and forfeiture of the species.

Should the violation be committed by a vessel manned by more than two (2) persons, the captain, master, and two highest ranking officers of the vessel involved in the fishing or taking of such protected marine life shall be presumed to have committed the prohibited act.

### *Offences related to the use of prohibited fishing practices and gear and unlawful use of regulated gear*

Crimes committed in the fisheries sector may involve the use of destructive fishing practices and gear, such as dynamiting, poisoning, large-scale driftnets, bottom-trawling, and electric pulse fishing, through which fish are captured and killed on a large scale and in an indiscriminate manner. It is recommended that States introduce provisions that criminalize the use of destructive fishing practices and gear to capture or harvest fish, as well as the unlawful use of regulated gear. The prohibitions and, where appropriate, the limited conditions for use may appear in the relevant act or regulations, or in schedules that can be easily updated.<sup>142</sup>

Model legislative provision 3 below establishes the offence of fishing (a) using a prohibited practice or prohibited gear or (b) using regulated gear to engage in fishing without lawful authority or a licence or authorization granted by the competent authority, or in violation of the conditions of such a licence or authorization.

Unlike model legislative provision 2, model legislative provision 3 is not limited to prohibited or protected species of fish.

A distinction should be drawn between the absolute prohibition of certain fishing practices or gear and the unlawful use of regulated gear. As with other types of licence and authorization covered in the present guide, it is a matter for each State to determine the circumstances in which a licence or authorization for the use of regulated gear may be granted.

<sup>142</sup> See chapter II above.

### MODEL LEGISLATIVE PROVISION 3: OFFENCES RELATED TO FISHING PRACTICES AND GEAR

(1) Any person who [*with the requisite mental state*] engages in fishing using any practice or gear listed in [*insert reference to relevant legislation, schedule(s), etc. of prohibited fishing practices and prohibited gear*] commits an offence.

(2) Any person who [*with the requisite mental state*] engages in fishing using any gear listed in [*insert reference to relevant legislation, schedule(s), etc. of regulated gear*]:

- (a) Without lawful authority; or
- (b) Without a [*licence or authorization*] granted by [*competent authority*]; or
- (c) In contravention of the conditions of the said [*licence or authorization*];

commits an offence.

Model legislative provision 3 relates only to the use of a particular prohibited fishing practice or prohibited or regulated gear for the purpose of fishing. States may also elect to introduce offences addressing the possession, purchase, sale, import or trade of certain fishing gear, either without a licence or authorization or in all circumstances. Such offences would be appropriate for gear that is prohibited internationally, such as large-scale drift nets.<sup>143</sup>

States may elect to prohibit particular fishing practices or prohibit and regulate particular gear in designated protected areas only, in accordance with relevant schedules. The range of practices and gear prohibited or regulated for use within a protected area may be broader than that of practices or gear prohibited or regulated in non-protected areas, and the applicable penalties may be more severe. Offences involving the possession of prohibited or regulated gear in a marine protected area are discussed in the section below, and model legislative provision 4 contains an example of wording for establishing such an offence.

If fisheries provisions and general provisions relating to explosives are contained in different legislative instruments, legislative drafters should consider including cross references to general explosives legislation in provisions regulating the use of explosives in the context of fisheries, and vice versa. In some States, this may also apply to legislation governing the use of noxious substances. Such cross-referencing will assist not only in establishing the scope of the respective offences but also in setting out the respective responsibilities of the competent authorities responsible for the investigation and prosecution of offences under each law.

### NATIONAL EXAMPLE: UNITED REPUBLIC OF TANZANIA (MAINLAND)

Fisheries Act, 2003 (No. 22 of 2003)

Part IX. Offences and penalties

...

43. Penalty for possessing or using explosives:

(1) Any person, who uses explosives to kill fish or, destroys aquatic flora, commits an offence and upon conviction shall be liable to imprisonment for a term of not less than five years and not exceeding ten years.

(2) If any person, without lawful excuse the burden of proof which shall be on him is found in possession of explosive within or in the vicinity of any water body, shall be guilty of an offence against this Act, and upon conviction shall be liable to imprisonment for a term of not less than one year and not exceeding five years.

<sup>143</sup> See General Assembly resolutions 44/225, 45/197, 46/215 and 59/25. See also the national example from Solomon Islands, Fisheries Management Act (No. 2 of 2015), sect. 26 (2), in chapter II above.

**NATIONAL EXAMPLE: UNITED REPUBLIC OF TANZANIA (ZANZIBAR)**

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Fisheries Act, 2010 (No. 7 of 2010)

**Part V. Conservation measures**

...

**20. Prohibited method of fishing**

(1) A person shall not

- (a) Use or attempt to use any explosive, poison or other noxious substance for the purpose of killing, stunning or disabling fish so as to render such fish more easily caught; or
- (b) Carry or have in his possession or control any explosive, poison or other noxious substance in circumstances indicating an intention of using such explosive, poison or other noxious substance for any of the purposes referred to in subsection (a) of this section.

(2) Any explosive, poison or other noxious substance found on board any fishing vessel shall be presumed, unless the contrary is proved, to be used for the purposes referred to in subsection (1) of this section.

Where any explosive, poison or other noxious substance which can be used for the purposes referred to in subsection (1) of this section is found in the possession or control of any person in the vicinity of the internal waters, territorial waters or Exclusive Economic Zone of Zanzibar, shortly after any such explosive, poison or other noxious substance is proved to have been used in such waters, that person shall be presumed, until the contrary is proved to have used such explosive, poison or other noxious substance for such purposes.

A person shall not land, sell, buy, receive or possess any fish knowing or having reasonable cause to believe that the fish have been taken in contravention of the provisions of this section.

...

**Part VI. Offences and penalties****28. Penalty for fishing by explosives and noxious substances**

Any person who contravenes any of the provisions of section 20 of this Act, commits an offence and upon conviction shall be liable to a fine of not less than one hundred thousand shillings and not more than ten million shillings or imprisonment for a term of not less than three months and not more than five years or both such fine and imprisonment.

**NATIONAL EXAMPLE: PALAU****Marine Protection Act (1994), as amended by the Marine Protection Amendment (RPPL No. 9-50 of 2015)**

...

1204. Prohibited acts. Within the Republic of Palau, including the internal waters, territorial sea, and exclusive economic zone as defined in this chapter, all other waters over which the Republic has jurisdiction in accordance with international laws, and all land over which the Republic has jurisdiction, it shall be unlawful for any person to:

...

- (m) Fish with a gillnet or surround net having a mesh size of less than three (3) inches measured diagonally;
- (n) Fish with a *kesokes*<sup>a</sup> net with no bag portion or with the bag portion having a mesh size of less than three (3) inches measured diagonally;
- (o) Retain possession of, or abandon, a *kesokes* net having a mesh size of less than three (3) inches measured diagonally or with a bag portion having a mesh size less than three (3) inches measured diagonally;

...

<sup>a</sup> Long fish net that is kept stationary in order to trap fish when the tide recedes.

*Offences related to protected marine areas*

It is recommended that States introduce special offences for certain conduct within designated marine protected areas. In order to do so, States should use schedules setting out the various categories of marine protected area that may be designated in internal waters, territorial sea, archipelagic waters and the EEZ.<sup>144</sup>

Model legislative provision 4 below establishes offences for three categories of conduct within a marine protected area. The first paragraph establishes an offence relating to intentional unlawful entry into a marine protected area; the second establishes an offence for the possession of prohibited or regulated gear in a marine protected area; and the third establishes an offence relating to liability for carrying out restricted fishing activities in such an area. The activities listed in the third paragraph are the same as those covered by model legislative provision 2. As with other offences covered by the present guide, it is a matter for each State to determine the circumstances under which conduct shall be within the scope of lawful authority and the circumstances under which a licence or authorization may be available to applicants.

The offence of intentional unlawful entry into a marine protected area contained in the first paragraph of model legislative provision 4 could be limited to specific time periods. For example, entry into certain areas could be unlawful during spawning seasons but lawful at other times. States may also consider relying on non-criminal responses in minor cases. For example, a State may decide that the stand-alone offence of unlawful access to a marine protected area could be penalized more effectively through fines or other administrative measures rather than criminal liability. This would not only ensure that offenders do not receive excessive or disproportionate sentences but would also enable more streamlined procedures for issuing penalties with heightened deterrent effects. The type of liability and penalties desirable for a particular offence will depend on the level of protection a State wants to assign to the areas in question. In general, criminal liability should be imposed only when conduct involves a higher level of harm.

<sup>144</sup> Further guidance on the categories of marine protected areas is provided above in chapter II.



The second paragraph of model legislative provision 4 covers possession of prohibited and regulated gear in protected areas.

#### MODEL LEGISLATIVE PROVISION 4: OFFENCES RELATED TO PROTECTED AREAS

- (1) Any person who [*intentionally*] enters a [*marine protected area, marine park, etc.*]:
- (a) Without lawful authority or a [*licence or authorization*] granted by [*competent authority*]; or
  - (b) In contravention of the conditions of the said [*licence or authorization*];

commits an offence.

- (2) Any person who [*with the requisite mental state*] possesses gear listed in [*insert reference to legislation, schedule(s), etc. of prohibited and regulated gear*] in a [*marine protected area, marine park, etc.*]:

- (a) Without lawful authority or a [*licence or authorization*] granted by [*competent authority*]; or
- (b) In contravention of the conditions of the said [*licence or authorization*];

commits an offence.

- (3) Any person who [*with the requisite mental state*] engages in fishing in or otherwise processes any fish taken from a [*marine protected area, marine park, etc.*]:

- (a) Without lawful authority or a [*licence or authorization*] granted by [*competent authority*]; or
- (b) In contravention of the conditions of the said [*licence or authorization*];

commits an offence.

As in model legislative provision 3, the conduct governed by the third paragraph of model legislative provision 4 is not limited to prohibited or protected fish species. In this respect, it is broader than the offence in model legislative provision 2.

The range of protected areas covered under each of the three types of offence in model legislative provision 4 is likely to vary. The range of protected areas covered by the offence of illegal entry in the first paragraph will generally be narrower than the range of marine protected areas covered under the offences described in the second and third paragraphs. For example, in marine protected areas that are national parks, entry will be lawful but undertaking certain prohibited activities in those areas would attract liability.

States may elect to introduce several offences relating to marine protected areas, with each offence covering a different category of marine protected area and potentially carrying a different maximum penalty. Alternatively, States could create a single offence but include a separate penalty provision with different levels of penalty for different categories of marine protected area.

In the present guide, fishing is defined as searching for, attracting, locating, catching, taking or harvesting fish or any activity that can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish.<sup>145</sup> The conduct prohibited by the third paragraph of model legislative provision 4 would therefore cover the removal or translocation of wild fish species from a marine protected area. This could include, for example, taking fish from a marine protected area to an aquarium, as well as the act of attracting fish from a protected area to an unprotected area, where certain protections would not apply. The model legislative provision would also cover the deployment of fish aggregating devices, both inside and along the periphery of a marine protected area.

<sup>145</sup> See “Terms” above.

**NATIONAL EXAMPLE: PHILIPPINES**

Fisheries Code of 1998 (Republic Act No. 8550), as amended by Republic Act No. 10654 (2014)

**Section 101. Fishing in Marine Protected Areas, Fishery Reserves, Refuge and Sanctuaries**

It shall be unlawful to fish in marine protected areas, fishery reserves, refuge, or fish sanctuaries as declared by the Department [of Agriculture] or the [local government units].

Upon a summary finding of administrative liability, the offender shall be punished with confiscation of catch and gear, and administrative fine of twice the value of the catch or the amount indicated below, whichever is higher:

- (1) Twenty thousand pesos (P20,000.00) for municipal fishing: Provided, That if the offender fails to pay the fine, community service shall be rendered;
- (2) Two hundred thousand pesos (P200,000.00) for small-scale commercial fishing;
- (3) Six hundred thousand pesos (P600,000.00) for medium-scale commercial fishing; and
- (4) One million pesos (P1,000,000.00) for large-scale commercial fishing.

Upon conviction by a court of law, violation of this provision shall be punished by imprisonment of two (2) years to six (6) years and a fine twice the amount of the administrative fine, confiscation of catch and gear, and cancellation of license or permit.

**NATIONAL EXAMPLE: AUSTRALIA**

Great Barrier Reef Marine Park Regulations 2019

**Part 2, division 6. Fishing and related offences**

...

**61. Marine National Park Zone – fishing or collecting offence**

A person commits an offence of strict liability if:

- (a) The person engages in fishing (within the meaning of the Act) or collecting (within the ordinary meaning of the expression) in the Marine National Park Zone; and
- (b) The fishing or collecting is not for a purpose set out in paragraph 2.7.3 (b) of the Zoning Plan; and
- (c) The person does not hold a permission authorising the fishing or collecting.

*Note:* Paragraph 2.7.3 (b) of the Zoning Plan allows the Marine National Park Zone to be used, without the written permission of the Authority, for activities otherwise permitted by the section or in accordance with an accredited traditional use of marine resources agreement and any requirements relating to the operation of that agreement prescribed in this instrument.

***Unlicensed commercial fishing in national waters or on the continental shelf***

Most States require that a fishing licence be obtained for fishing in national waters or on the continental shelf, in particular where the fishing is deemed commercial. In some States, commercial fishing is defined by the volume of catch, while in others the size of the fishing vessel or the intended purpose of the fish caught is the determinative factor. In the present guide, commercial fishing is defined as any fishing apart from subsistence fishing, that results in or is intended to result in the sale or trade of any fish taken during fishing operations.<sup>146</sup>

<sup>146</sup> See “Terms” above.

Commercial fishing in national waters, including in internal waters, territorial sea, archipelagic waters or EEZ or on the continental shelf of a coastal or archipelagic State, without a valid licence will constitute the offence of unlicensed fishing or “stealing fish” in many jurisdictions.

Pursuant to article 73 (3) of the United Nations Convention on the Law of the Sea, however, penalties for violations of fisheries laws in an EEZ by foreign nationals may not include imprisonment in the absence of agreements to the contrary by States concerned and therefore, in the absence of the necessary agreements, such violations cannot qualify as serious crimes under the Organized Crime Convention.

Model legislative provision 5 establishes an offence of commercial fishing or related activities in national waters or on the continental shelf without a valid licence or authorization from the competent authority of the relevant coastal or archipelagic State. The offence would also encompass violations of the terms of a valid licence, including, for instance, disposing of by-catch in contravention of the terms specified in a valid licence.<sup>147</sup>

#### **MODEL LEGISLATIVE PROVISION 5: UNLICENSED COMMERCIAL FISHING OR RELATED ACTIVITIES IN NATIONAL WATERS OR ON THE CONTINENTAL SHELF**

Any person who [*with the requisite mental state*] engages in commercial fishing or related activities in the national waters or on the continental shelf of [State]:

- (a) Without lawful authority; or
- (b) Without a valid [*licence or authorization*]; or
- (c) In contravention of the terms contained in a valid [*licence or authorization*];

commits an offence.

#### *Illegal trans-shipment of fish or fish products in national waters*

Trans-shipment is often used in the fisheries sector as a means of transferring catch between harvesting vessels or from a harvesting vessel to a refrigerated cargo vessel that may also supply fishing vessels with fuel, food and personnel. This exchange ensures that fish are brought to market quickly and enables fishing vessels to remain out at sea for long periods of time (sometimes for years). A lack of oversight and poor regulation, in particular in remote marine regions, mean that this system is susceptible to abuse<sup>148</sup> and may be used to hide a broad range of illicit activities, from illegal fishing to trafficking in persons and drug smuggling.

Illegal trans-shipment at sea is used as a means by which vessel operators circumvent quota and licensing regulations and avoid scrutiny at port, transferring fish and fish products between vessels to launder illegally caught fish and then present the catch as legal at market using falsified catch documentation schemes. The unregulated trans-shipment of fish is banned in the national waters of many States and will often constitute an offence.<sup>149</sup>

Model legislative provision 6 below establishes an offence of the illegal trans-shipment of fish or fish products in national waters. This offence encompasses the trans-shipment of fish or fish products: (a) in the absence of the relevant authorization; and (b) in violation of the monitoring and reporting requirements set out in domestic law.

<sup>147</sup> See also FAO, *International Guidelines on Bycatch Management and Reduction of Discards* (Rome, 2011).

<sup>148</sup> See Alicia Mosteiro Cabanelas and others, *Transshipment: A Closer Look – An In-depth Study in Support of the Development of International Guidelines*, FAO Fisheries and Aquaculture Technical Paper, No. 661 (Rome, 2020).

<sup>149</sup> See, for example, Malaysia, Fisheries Act 1985 (Act No. 317), part V, art. 15 (2).

### MODEL LEGISLATIVE PROVISION 6: ILLEGAL TRANS-SHIPMENT OF FISH OR FISH PRODUCTS IN NATIONAL WATERS

Any person who [*with the requisite mental state*] trans-ships fish or fish products in the national waters of [State]:

- (a) In the absence of the relevant authorization; or
- (b) In violation of the monitoring and reporting requirements of [State];

commits an offence.

### Document fraud

Licences, authorizations and other related documents are susceptible to being used fraudulently by criminals in the fisheries sector. Document fraud is not uncommon and occurs throughout the fisheries value chain. It may include the use of fraudulent documents to obtain a licence or the production of false documents in relation to a vessel's flag State registration or ownership, name or other identifiers. Document fraud may also arise, for example, in cases of false fishing licences or false catch and trans-shipment documents for customs.<sup>150</sup>

There are many modes of document fraud. Licensing documents may be forged outright; genuine licences may be altered or falsified, or obtained through intentional misrepresentation to issuing authorities; and lawfully obtained genuine licences or authorizations may be used by persons other than the rightful holder. To combat crimes effectively in the fisheries sector, States must tackle each of those forms of document fraud. Model legislative provisions 7 and 8 below contain offences addressing each of those aspects of document fraud.

Model legislative provision 7 criminalizes making a materially false or misleading statement or representation, or submitting any materially false or misleading documentation to a competent authority, in connection with an application for a licence or authorization. The materiality of any statement, representation or documentation should be assessed in terms of its importance or significance in the determination of an issue or decision.

States should ensure that all provisions concerning fraud in relation to licences or authorizations are consistent with general offences of fraud under their criminal law, as well as customs legislation and regulations concerning the landing and trans-shipment of fish and fish products in port.

### MODEL LEGISLATIVE PROVISION 7: FRAUDULENT CONDUCT RELATING TO FISHING LICENCES OR AUTHORIZATIONS

Any person who [*with the requisite mental state*]:

- (a) Makes a materially false or misleading statement or representation; or
- (b) Submits any materially false or misleading documentation;

to [competent authorities] in, or in connection with, an application for the use of a fishing [licence or authorization], commits an offence.

<sup>150</sup> See also the section entitled "Fish fraud" below.

Model legislative provision 8 criminalizes producing, offering, distributing, procuring, trading, exchanging, providing, selling, acquiring, buying, using or possessing a fraudulent fishing licence, authorization or part thereof. It targets actors involved at each stage of the supply chain for fraudulent licences and authorizations, from the producers and intermediaries of fraudulent documents to the ultimate users and possessors. It covers both forgery and the dishonest alteration of licences and authorizations. States should also review the extent to which corruption laws would cover any officials complicit in unlawfully providing criminals with genuine licences or authorizations.

#### **MODEL LEGISLATIVE PROVISION 8: FRAUDULENT FISHING LICENCES OR AUTHORIZATIONS**

Any person who [*with the requisite mental state*] produces, offers, distributes, procures, trades, exchanges, provides, sells, acquires, buys, uses or possesses a fraudulent fishing [*licence or authorization*], or a part thereof, commits an offence.

### **B. Possession and trade-related offences**

This section examines possession and trade-related crimes that occur along the fisheries value chain. It is recommended that States enact and strengthen domestic legislation to prevent and combat such crimes.

#### *Illegal possession of fish or fish products*

To prevent gaps in legislation, it is recommended that States introduce offences relating to the possession of prohibited or protected fish species and illegally taken fish. In this context, States should consider the rights of Indigenous Peoples and local communities who capture fish for subsistence purposes, as failure to do so may jeopardize the livelihoods of those groups.

Model legislative provisions 9 and 10 below set out two offences of illegal possession. The offence in model legislative provision 9 relates to the illegal possession of a prohibited or protected species of fish or fish product. The offence in model legislative provision 10 more broadly relates to the acquisition or possession of fish obtained in contravention of a State's legislation. The two offences are complementary.

#### **MODEL LEGISLATIVE PROVISION 9: POSSESSION OF PROHIBITED OR PROTECTED FISH SPECIES OR FISH PRODUCTS**

Any person who [*knowingly and*]:

- (a) Without lawful authority; or
- (b) Without a [*licence or authorization*] granted by [*competent authority*]; or
- (c) In contravention of the conditions of any applicable [*licence or authorization*] granted by [*competent authority*];

possesses any fish or fish product, knowing that the species of fish or fish product is or is derived from a prohibited or protected species of fish listed in [*insert reference to relevant legislation, schedule(s), etc. of protected fish*], commits an offence.

To convict a defendant of the offence in model legislative provision 9, it must be proved that the defendant had knowledge in relation to: (a) the fact of possession; and (b) the fact that the fish or fish product was or was derived from a prohibited or protected species of fish.

Article 6 (1) (b) (i) of the Organized Crime Convention requires States parties, subject to the basic concepts of their legal systems, to criminalize the acquisition, possession or use of property by a person who knows, at the time of receipt, that such property is the proceeds of crime.

Model legislative provision 10 implements article 6 of the Organized Crime Convention in part, insofar as it relates to acquisition and possession. The rationale behind the model legislative provision is to avoid the proliferation of illicit markets by addressing demand and imposing liability on those who knowingly acquire illicit property. States introducing an offence such as that in model legislative provision 10 should ensure that the offence is consistent with their money-laundering legislation.

#### **MODEL LEGISLATIVE PROVISION 10: ACQUISITION OR POSSESSION OF ANY FISH OR FISH PRODUCT UNLAWFULLY TAKEN, TRANSPORTED, DISTRIBUTED, PURCHASED OR SOLD**

Any person who [*with the requisite mental state*]:

- (a) Acquires or possesses any fish or fish product taken, transported, distributed, purchased or sold in contravention of this [*Act/Law/Chapter/etc.*]; and
- (b) Knows at the time of receipt that the fish or fish product was taken, transported, distributed, purchased or sold in contravention of this [*Act/Law/Chapter/etc.*];

commits an offence.

To convict a defendant of the offence in model legislative provision 10, it must be proved that the defendant had: (a) the requisite mental state (such as knowledge) in relation to the fact of acquisition or possession; and (b) knowledge that the fish or fish product was taken, transported, distributed, purchased or sold in contravention of the State's fisheries legislation.

States should also consider whether there are circumstances in which illegal possession of fish or fish products for personal consumption should be addressed through seizure, confiscation or forfeiture, civil penalties or other measures, rather than through criminal liability. In specific circumstances, such as where food security depends on the use of listed fish species, States may also decide to establish exemptions from criminal liability.

#### *Trafficking in and illegal importation of fish*

The criminalization of domestic and cross-border trafficking is an essential component of any criminal law combating crimes in the fisheries sector. Model legislative provision 11 provides an example of how this can be achieved.

#### **MODEL LEGISLATIVE PROVISION 11: TRAFFICKING IN FISH OR FISH PRODUCTS**

- (1) "Traffics", in relation to fish or fish products, means importing, exporting, re-exporting, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting.
- (2) Any person who [*with the requisite mental state/intentionally*] traffics in any fish or fish product knowing that the fish or fish product was taken, possessed, processed, distributed, transported, purchased, traded or sold:

- (a) Without lawful authority;
- (b) Without a [*licence or authorization*] granted by [*competent authority*];
- (c) In contravention of the conditions of any applicable [*licence or authorization*] granted by [*competent authority*]; or
- (d) In contravention of any law of [*State*] concerning the conservation or management of fish;

commits an offence.

To ensure that the model legislative provision is as comprehensive as possible, the present guide takes a broad approach to the acts included in the trafficking of fish or fish products. The term “traffics” is defined in the first paragraph of the provision to include “importing, exporting, re-exporting, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting”. Some States may adopt a narrower approach to the acts included in their definition of ‘traffics’ or may prefer to criminalize specific acts rather than instituting a general trafficking offence.

Model legislative provision 11 criminalizes trafficking in any fish or fish product. The fish or fish product does not necessarily have to be, or be derived from, a prohibited or protected species of fish to satisfy the criteria for the offence.

The second paragraph of model legislative provision 11 criminalizes trafficking in fish or fish products taken, possessed, processed, distributed, transported, purchased, traded or sold without lawful authority or an applicable licence or authorization, in contravention of the conditions of any applicable licence or authorization, or in contravention of any applicable conservation or management measures.

To convict a defendant of the offence in model legislative provision 11, it must be proved that the defendant trafficked the fish or fish product with the requisite mental state (or intentionally), knowing that the fish or fish product had been unlawfully taken, possessed, processed, distributed, transported, purchased, traded or sold.

In addition to the offence of trafficking, model legislative provision 12 proposes criminalizing the import of or trafficking in any fish or fish product taken, possessed, processed, distributed, transported, purchased, traded or sold in contravention of: (a) any binding international agreement or international conservation and management measure; or (b) any applicable foreign law; with the knowledge that the fish or fish product was unlawfully taken, possessed, processed, distributed, transported, purchased, traded or sold.

#### **MODEL LEGISLATIVE PROVISION 12: IMPORTATION OF OR TRAFFICKING IN FISH OR FISH PRODUCTS IN BREACH OF INTERNATIONAL AGREEMENTS OR FOREIGN LAW**

Any person who [*with the requisite mental state/intentionally*] [*imports/traffics in*] any fish or fish product taken, possessed, processed, distributed, transported, purchased, traded or sold in contravention or violation of:

- (a) Any international agreement or international conservation and management measure binding on [*State*]; or
- (b) Any applicable foreign law;

knowing that the fish or fish product was unlawfully taken, possessed, processed, distributed, transported, purchased, traded or sold, commits an offence.

Binding international agreements mentioned in subparagraph (a) could include the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on the Conservation of Migratory Species of Wild Animals, as well as other applicable international and regional agreements concerning the conservation and management of fish.

In the present guide, an international conservation and management measure is defined as “a binding or non-binding measure established by a regional fisheries management organization or under an international agreement with a view to conserving or managing one or more species of fish, to be implemented by a State member of the regional fisheries management organization or a party to the international agreement”. Such measures are to be implemented in accordance with the relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea and the United Nations Fish Stocks Agreement. Subparagraph (a) of model legislative provision 12 pertains only to international conservation and management measures that are binding on the respective State.

Subparagraph (b) is based on the national legislation of various States.<sup>151</sup> The phrase “any applicable foreign law” is used to import into the offence a requirement of a jurisdictional nexus between the foreign law and the act of taking, possessing, processing, distributing, transporting, purchasing, trading or selling. To satisfy that provision, it is sufficient that the person imports or traffics the fish or fish product knowing that it was unlawfully taken, possessed, processed, distributed, transported, purchased, traded or sold; it is not necessary for the person to have been responsible for having committed the underlying violation of applicable foreign law.

Model legislative provision 12 does not require States to enforce foreign laws. Rather, it is the applicable foreign law that informs the illegal status of the fish or fish products and renders the import of or trafficking in the fish or fish products illegal under domestic law. The focus of the offence is on protecting the domestic market from the entry of contraband. In this regard, model legislative provision 12 is consistent with article 6 (1) (b) (i) of the Organized Crime Convention, which asserts that States should criminalize the “acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime”.

Model legislative provision 12 proposes two options, namely to criminalize the import of certain fish or fish products or to criminalize trafficking in those fish or fish products. The second option is the broader of the two approaches, as the definition of trafficking used in the present guide includes importing as well as a number of other activities.

The standards contained in model legislative provision 12 can serve as powerful tools in combating cross-border trafficking, disrupting criminal organizations and protecting domestic markets. At the same time, enforcing these stronger provisions will often require law enforcement and prosecutorial authorities to obtain evidence from foreign authorities and to access and understand relevant foreign legislation, and may therefore require greater resources from States.

Because of the broad scope of application of the offence of trafficking, States may wish to require proof of a mental element equivalent to intention for the offence.

The following examples of national legislation from various States demonstrate the ways in which the more stringent standards in model legislative provision 12 may be realized in practice.

<sup>151</sup> See, for instance, Canada, Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, *Statutes of Canada*, chap. 52, sect. 6 (1) (1992), which states: “No person shall import into Canada any animal or plant that was taken, or any animal or plant, or any part or derivative of an animal or plant, that was possessed, distributed or transported in contravention of any law of any foreign state.” See also United States Code, title 16, chap. 53, sect. §3372 (a) (2) (A), which makes it unlawful for any person subject to United States jurisdiction to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law”. Under the United States Code, title 16, chap. 53, sect. §3373 (d) (1) (B), where a defendant knows that the fish or wildlife was taken, possessed, transported or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, he or she may be fined, imprisoned or both. See further national examples below.



**NATIONAL EXAMPLE: PAPUA NEW GUINEA****Fisheries Management Act 1998 (No. 48 of 1998)**

75. Activities contrary to the laws of another State

(1) Notwithstanding Section 3 (2), this section applies to all persons, vessels, fishing and other activities to which this Act has application.

- (2) Subject to Subsection (1), any person who, within Papua New Guinea or in the fisheries waters –
- (a) On his own account, or as the partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or
  - (b) Causes or permits a person acting on his behalf, or any fish taken, possessed, transported or sold,

contrary to the law of another State commits an offence.

(3) This section does not apply to fish taken on the high seas contrary to the law of another State where Papua New Guinea does not recognize the jurisdiction of that State over those fish.

(4) Section 25 (1) of the Criminal Code 1974 [“mistake of fact”] is not a defence to a prosecution for an offence under this section.

**NATIONAL EXAMPLE: NAURU****Fisheries Act 1997, as in force from 15 April 2011 and as amended by the Fisheries (Amendment) Act 2017****Part IV. Offences**

Section 26. Import of illegally taken fish

- (1) Subject to subsection (3), a person who, in Nauru or in fisheries waters:
- (a) On his own account, or as the partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or
  - (b) Uses a boat to land, import, export, transport, sell, receive, acquire or purchase,

any fish taken, possessed, transported or sold contrary to the law of another state is guilty of an offence and is liable to a penalty:

- (a) In a case involving the use of a foreign boat, not exceeding \$1,000,000; or
- (b) In a case involving the use of a national boat, not exceeding \$100,000; or
- (c) In the case of a crew member of a foreign or a national boat, not exceeding \$25,000; or
- (d) In any other case, not exceeding \$10,000.

(2) This section does not apply to fish taken on the high seas contrary to the law of another state where the Republic does not recognise the right of that state to make laws in respect of those fish.

(3) It is a defence to a prosecution for an offence under this section if the person charged satisfies the Court that he did not know and had no reasonable cause to believe that the fish had been taken, possessed, transported or sold contrary to the law of another state.

...

**NATIONAL EXAMPLE: AUSTRALIA****Environment Protection and Biodiversity Conservation Act 1999****Section 303GQ. Imports of specimens contrary to the laws of a foreign country**

- (1) A person must not intentionally import a specimen if the person knows that:
- (a) The specimen was exported from a foreign country; and
  - (b) At the time the specimen was exported, the export of the specimen was prohibited by a law of the foreign country that corresponds to this Part.

Penalty: Imprisonment for 5 years.

- (2) A prosecution must not be instituted for an offence against this section unless a relevant [Convention on International Trade in Endangered Species of Wild Fauna and Flora] authority of the foreign country has requested:
- (a) The investigation of the offence; or
  - (b) Assistance in relation to a class of offences in which the offence is included.

*Fish fraud*

In the fisheries sector, fish fraud may occur when fish are landed or introduced to the market for financial gain, with the intention of deceiving customs officials, customers or consumers, among others.<sup>152</sup> Fish fraud may take place at various points along the fisheries supply chain, from the point of capture to the point of sale. Fish fraud may include species substitution, intentional mislabelling, mixing illegally and legally caught fish, the illegal use of food additives such as carbon monoxide to enhance the visual quality of fish products, or the use of undeclared water-binding agents to increase the weight of fish products.

Species substitution occurs where low-value or less desirable fish species replace more expensive varieties.<sup>153</sup> Fish fraud in species such as tuna is not uncommon because of the considerable price difference between various tuna species and their similarities when filleted and canned. In some instances, public health is endangered when toxic fish species are substituted for non-toxic fish.<sup>154</sup> Fish fraud, in particular mislabelling, may also be used to conceal the geographical origin of the catch or to hide an illegally harvested protected species or a species taken illegally from a marine protected area. Irrespective of the type of fish fraud that occurs, it may affect public health, undermine market confidence, undermine fisheries management or harm marine ecosystems.

There is often overlap between fish fraud and tax fraud. The incorrect description of fish or fish products caught and sold may have a direct impact on the rate of import duty or value added tax applied, resulting in a significant loss of tax revenue for a State.<sup>155</sup> In many instances, both fish fraud and tax fraud may also involve document fraud.<sup>156</sup>

Many States regulate food-related fraud within a civil or administrative framework, such as consumer protection legislation. In some jurisdictions, criminal codes may also define food-related fraud offences that complement regulatory provisions.<sup>157</sup> Where instances of fish fraud are particularly egregious, large-scale,

<sup>152</sup> See, for example, Stephen Leahy, “Revealed: seafood fraud happening on a vast global scale”, *The Guardian*, 15 March 2021.

<sup>153</sup> See, for example, May, *Transnational Crime and the Developing World*, p. 65.

<sup>154</sup> See Q.T. Islam and others, “Puffer fish poisoning in Bangladesh: clinical and toxicological results from large outbreaks in 2008”, *Transactions of the Royal Society of Tropical Medicine and Hygiene*, vol. 105, No. 2 (February 2011), pp. 74–80.

<sup>155</sup> See Organisation for Economic Co-operation and Development (OECD), *Evading the Net: Tax Crime in the Fisheries Sector* (2013), p. 27.

<sup>156</sup> See the section entitled “Document fraud” above.

<sup>157</sup> Michael T. Roberts, Teemu Viinikainen and Carmen Bullon, *International and National Regulatory Strategies to Counter Food Fraud* (Rome, FAO and Los Angeles, University of California, 2022).

repeated or of significant duration, States may wish to consider imposing criminal sanctions. Model legislative provision 13 below sets out the basic offence of fish fraud.

#### MODEL LEGISLATIVE PROVISION 13: FISH FRAUD

Any person who [*with the requisite mental state/knowingly*], for any advantage, benefit, reward or gain:

- (a) Makes or submits any materially false record, account or label for, or any materially false identification of, any fish or fish product; or
- (b) Uses any undeclared agent or substance in the preparation or preservation of any fish or fish product;

which is, or is intended to be, traded or received from any country, commits an offence.

### C. Related offences

Crimes in the fisheries sector may occur at any stage along the fisheries value chain. The conduct forming the basis of such crimes may also constitute related offences, such as conspiracy or criminal association, money-laundering, corruption or obstruction of justice. It is critical that States adopt appropriate legislative and other measures to address such related offences. States parties to the Organized Crime Convention and the Convention against Corruption are, in fact, required to criminalize conspiracy or criminal association, money-laundering, corruption and obstruction of justice.<sup>158</sup>

Corporations and organized criminal groups in the fisheries sector may also be engaged in other related offences, such as tax crimes, including tax evasion, which may occur at multiple points along the fisheries value chain. For example, tax fraud in the fisheries sector may occur at the outset, with the creation of shell companies, or later, at the sale phase, with the evasion of import duties on fish and fish products transported across national borders, value-added tax fraud or the evasion of income or other taxes. Although tax crimes are not addressed in the present guide, States should take appropriate legislative measures to combat such crimes, including tax evasion, in the fisheries sector.<sup>159</sup>

#### *Conspiracy or criminal association*

Article 5 of the Organized Crime Convention requires that States parties adopt legislative measures to criminalize participation in an organized criminal group. Article 5 (1) (a) gives States parties a choice of one or both of two models for achieving this.

The models reflect the differing approaches traditionally taken by common-law jurisdictions and civil-law jurisdictions to criminalize participation in organized criminal groups. The agreement-type offence in article 5 (1) (a) (i) of the Organized Crime Convention reflects the conspiracy model traditionally adopted by common-law jurisdictions, whereas the offence in article 5 (1) (a) (ii) reflects the criminal association model typically followed by civil-law jurisdictions.

Model legislative provisions 14 and 15 below reflect those two models for criminalizing participation in an organized criminal group. The provisions are based on the wording of article 5 (1) (a) of the Organized Crime Convention but have been adapted to relate to the crimes in the fisheries sector covered by the present guide.

As with the two models contained in the Organized Crime Convention, States have a choice as to whether to introduce one or both of these offences.

<sup>158</sup> Organized Crime Convention, arts. 5, 6, 8 and 23; and Convention against Corruption, arts. 15–25.

<sup>159</sup> For further information, see OECD, *Evading the Net*.

**MODEL LEGISLATIVE PROVISION 14: CONSPIRACY**

Any person who agrees with one or more other persons to commit a serious crime in order to obtain, directly or indirectly, a financial or other material benefit, commits an offence.

[To be included if required by domestic law] For a person to be convicted under this section, an act other than the making of the agreement must be undertaken by at least one of the participants in furtherance of the agreement.

To establish criminal liability for the conspiracy offence in model legislative provision 14, it must be proved that the defendant agreed with one or more other persons to commit a serious crime; the agreement is the physical element of the offence.

An optional second paragraph has been included for those States whose domestic law requires an additional, overt action to be taken by one of the participants in furtherance of the agreement. States may also choose to include an additional physical element, namely that the agreement involved an organized criminal group.

The mental elements of model legislative provision 14 require that: (a) the defendant agreed with one or more other persons to commit the offence intentionally; and (b) the purpose of the agreement was to obtain a financial or other material benefit.<sup>160</sup>

Although model legislative provision 14 does not include the word “intentionally”, the act of agreement to commit an offence can only be committed intentionally and the wording of the offence implies this mental element.

**MODEL LEGISLATIVE PROVISION 15: CRIMINAL ASSOCIATION**

(1) Any person who intentionally [*or knowingly*] takes an active part in the criminal activities of an organized criminal group, knowing either the aim and general activity of the organized criminal group or its intention to commit [*the crime in question*], commits an offence.

(2) Any person who intentionally [*or knowingly*] takes an active part in [*any other*] activities of an organized criminal group:

- (a) Knowing either the aim and general activity of the organized criminal group, or its intention to commit [*the crime in question*]; and
- (b) Knowing that their [*conduct/acts or omissions*] will contribute to the achievement of the criminal aim described above;

commits an offence.

Model legislative provision 15 contains two criminal association offences. The first concerns participation in the criminal activities of an organized criminal group, and the second relates to participation in other activities of the organized criminal group.

<sup>160</sup> See also UNODC, *Model Legislative Provisions against Organized Crime*, p. 30.

The physical element of the first offence is that of taking an active part in the criminal activities of an organized criminal group. Determining whether the person has taken “an active part” is a question of fact.<sup>161</sup>

The mental elements of this offence require proof that the defendant:

- (a) Intentionally or knowingly took an active part in the criminal activities of an organized group; and
- (b) had knowledge of either:
  - (i) The aim and general criminal activity of the organized criminal group; or
  - (ii) The intention of the organized criminal group to commit one or more offences covered by the present guide.

Taking an active part in other activities of an organized criminal group is the physical element of the second offence.

The mental elements of this offence require proof that the defendant:

- (a) Intentionally or knowingly took an active part in activities of an organized group; and
- (b) Had knowledge of either:
  - (i) The aim and general criminal activity of the organized criminal group; or
  - (ii) Its intention to commit the crime in question; and
- (c) Had knowledge that his or her conduct (act or omission) would contribute to the achievement of the aim described above.

The “other” activities need not otherwise be illegal for the elements of the second offence to be met. States may wish to clarify this fact in their legislation. Further information about each model of criminalizing participation in an organized criminal group can be found in the second edition of the *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2017) and in the *Model Legislative Provisions against Organized Crime* (2021).

### Money-laundering

Crimes in the fisheries sector are often extremely lucrative for high-level offenders. Money-laundering in the fisheries sector may take various forms, including laundering the proceeds of fish fraud. In addition, the proceeds of crime (whether fisheries-related or not) may be funnelled into the fisheries supply chain at various stages. Offenders may invest illicit funds in fishing gear, fish-processing facilities or transportation. Illicit funds may be laundered during the sale phase at port or by paying crew members in cash.

States should ensure that measures are in place to criminalize money-laundering in the fisheries sector. Article 6 of the Organized Crime Convention requires States parties to introduce measures to criminalize money-laundering.

The first of the subparagraphs, article 6 (1) (a) (i), requires that States parties criminalize the intentional conversion or transfer of property known to be the proceeds of crime for the purpose of: (a) concealing or disguising the illicit origin of the property; or (b) helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her actions. The link between this offence and other forms of organized crime is provided in the term “predicate offence”. The concept of a predicate offence is essential to criminalization in many jurisdictions. Article 2 (h) of the Organized Crime Convention defines a predicate offence as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention”.

<sup>161</sup> Ibid., p. 32.

Article 6 (2) (a) of the Organized Crime Convention requires that States parties seek to apply the offences in article 6 (1) to “the widest range of predicate offences”.

Article 6 (2) (b) requires that States parties include as predicate offences all “serious crimes”, as defined in article 2 of the Convention, as well as the offences specifically provided for under the Convention.

States have taken different approaches to interpreting the concept of a “predicate offence”. Some have defined “predicate offence” specifically by reference to a list of offences contained in legislation. Others have defined “predicate offence” more broadly, as including all crimes, all serious crimes or all crimes subject to a maximum penalty at or above a certain threshold, or they have dispensed with the term altogether.

For those States using a list of predicate offences, article 6 (2) (b) of the Organized Crime Convention requires that the list include, at a minimum, “a comprehensive range of offences associated with organized criminal groups”.

In line with the provisions of article 6 of the Organized Crime Convention, States parties must include as predicate offences for the purposes of money-laundering legislation all crimes committed in the fisheries sector that are deemed to be serious crimes.

Where this would not automatically be provided for under existing legislation, States may decide to expressly state in fisheries legislation either that all crimes in the fisheries sector are predicate offences to money-laundering or that crimes in the fisheries sector constituting serious crimes are predicate offences.

Not all the offences covered by the present guide are serious enough to be considered serious crimes. An example of a provision designating serious crimes in the fisheries sector as predicate offences for money-laundering is provided in model legislative provision 16 below.

#### MODEL LEGISLATIVE PROVISION 16: MONEY-LAUNDERING

Offences contained in this [Act/Law/Chapter/etc.] punishable by [a maximum penalty of [maximum penalty] or greater] shall be considered predicate offences for money-laundering.

Regardless of the manner in which States parties choose to identify predicate offences, it should not be necessary that a person be convicted of a predicate offence in order to prove that property is the proceeds of crime and for a person to be convicted of money-laundering.

Comprehensive guidance on money-laundering legislation is beyond the scope of the present guide. Reference should be made to other UNODC publications for further guidance, in particular the two sets of model provisions on money-laundering. In 2005, UNODC and the International Monetary Fund published *Model Legislation on Money Laundering and Financing of Terrorism*, for use by legislative drafters in civil-law jurisdictions, and in 2016, the Commonwealth Secretariat, in collaboration with UNODC and the International Monetary Fund, published *Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime*, for use by legislative drafters in common-law jurisdictions. Both documents contain detailed model legislative provisions on money-laundering, confiscation and international cooperation in relation to the proceeds of crime.

### Corruption

Organized criminal groups, including those involved in the fisheries sector, frequently resort to corruption in the course of their operations. Bribery and other acts of corruption are used to create or exploit opportunities and to protect a group’s operations from interference from criminal justice systems and other oversight and regulatory mechanisms. Corruption may reduce the risks and increase the profits of organized criminal

groups, and it is less likely to attract the same attention and punishment as attempts to influence public officials and investigators through intimidation or actual violence.

Corruption is both a component and by-product of organized crime, and its effects extend well beyond the facilitation of serious crime. When public officials become compromised and act against the public interest, the stability of governmental systems in general, public confidence in government and the rule of law are undermined. Corrupt officials may facilitate efforts by organized criminal groups to obstruct justice, intimidate witnesses and victims and otherwise impede the international cooperative processes that the Organized Crime Convention seeks to promote, including by refusing to extradite the perpetrators of serious transnational crimes.

The United Nations Convention against Corruption is the only globally legally binding anti-corruption instrument. Its far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem.

The Convention against Corruption covers five principal areas, namely, prevention; criminalization and law enforcement measures; international cooperation; asset recovery; and technical assistance and information exchange. It also addresses many different forms of corruption, including abuse of power and corruption in the private sector.

The public sector corruption offences covered by the Convention include bribery, embezzlement and misappropriation, trading in influence, abuse of functions or position, and illicit enrichment. States parties are required to criminalize these offences, as well as other forms of corruption.<sup>162</sup> The Convention also requires the introduction of legislative and other measures designed to prevent, detect and punish corrupt practices and enhance accountability.

Corruption impairs effective fisheries management and conservation of fish species and marine ecosystems. In the fisheries sector, a criminal actor may, from the outset, promise or give a bribe to a public official to obtain the necessary fishing licence or authorization, or to persuade officials to operate registries with little or no oversight.

Like document fraud, bribery may occur throughout the fisheries value chain. For instance, fisheries inspectors and officials may be offered bribes with a view to avoiding or circumventing on-board or in-port inspections. Bribes may also be offered to fisheries investigators or law enforcement officials to avoid oversight or discontinue proceedings.

All stakeholders are vulnerable to corruption, including politicians, fisheries authorities, fisheries inspectors, port authorities, customs officials, police officers, traders and brokers, and importers and exporters.

Preventing and combating crimes in the fisheries sector requires States to adopt and implement legislation to effectively prevent and combat such crimes. In this regard, States should review their obligations under the Convention against Corruption and the Organized Crime Convention, as well as UNODC guidance concerning the implementation of both conventions.<sup>163</sup>

### *Obstruction of justice*

Crimes in the fisheries sector can be a profitable source of income for organized criminal groups. To maintain and expand their criminal operations, such groups may attempt to pervert the course of justice by using threats, coercion and violence against judges, prosecutors, law enforcement officers, authorized fisheries officers and investigators, other officials, jurors and witnesses. To effectively tackle crimes in the fisheries sector, States need adequate provisions criminalizing the obstruction of justice.

<sup>162</sup> See Convention against Corruption, arts. 15–24.

<sup>163</sup> See UNODC, *Rotten Fish: A Guide on Addressing Corruption in the Fisheries Sector* (Vienna, 2019); UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (Vienna, 2012); and UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (Vienna, 2017).

The offence established in model legislative provision 17 below serves to criminalize attempts to obstruct justice. States should assess the need to include in their fisheries legislation a specific provision criminalizing the obstruction of justice by reference to existing obstruction of justice offences. Whether or not attempts to obstruct justice in relation to fisheries inspectors, investigators and law enforcement officers, and other such officers, would be covered by existing offences is of particular importance in this regard. Some States already have comprehensive provisions that extend protection to such officers and would cover the conduct criminalized by model legislative provision 17. States that have instead opted to include specialized provisions on obstruction of justice in specific laws may wish to consider including in their fisheries legislation an offence such as that contained in model legislative provision 17.

In many States, enforcement powers in the fisheries sector may be exercised by competent authorities other than the police. Such States should ensure that specialized provisions on obstruction of justice cover all officers acting on behalf of such authorities.

#### MODEL LEGISLATIVE PROVISION 17: OBSTRUCTION OF JUSTICE

1. Any person who, in relation to the commission of any offence under this [Act/Law/Chapter/etc.], uses force, threats or intimidation, or offers, promises or gives any gift, concession or other advantage, in order to:

- (a) Induce false testimony; or
- (b) Interfere in the giving of testimony or production of evidence;

commits an offence.

2. Any person who, in relation to the commission of any offence under this [Act/Law/Chapter/etc.], uses force, threats or intimidation to interfere with the duties or performance of law enforcement, prosecution or judicial or other competent authorities commits an offence.

### Secondary liability

In addition to principal offenders, a number of other actors are involved in crimes in the fisheries sector who may organize, direct, aid and abet, facilitate or counsel the commission of offences. Legislation for combating crimes in the fisheries sector should criminalize the conduct of those with secondary liability. The term “secondary liability” refers to situations where establishing liability requires at least prima facie proof of wrongdoing by a third party. It should be distinguished from primary liability, which may be based entirely on the acts or omissions of the principal offender.

Secondary liability generally requires a higher degree of fault than that required for primary liability. This is because “as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability should become narrower”.<sup>164</sup> Accordingly, aiding, abetting, counselling, procuring or facilitating the commission of an offence should require proof of intention and knowledge, meaning that the person intended the act of assistance or encouragement and knew that the principal offender intended to carry out or contemplated carrying out the actions that constitute the offence.

In many jurisdictions, secondary liability is established for all criminal offences under general criminal law provisions. As a result, specific provisions on secondary liability in legislation to combat crimes in the fisheries sector may not be necessary in such jurisdictions. Where this is not the case, legislation to combat crimes in the fisheries sector should expressly establish secondary liability.

<sup>164</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. (Oxford, Oxford University Press, 2013), p. 432.



Model legislative provision 18 below contains an offence that extends liability for involvement in crimes in the fisheries sector to secondary offenders.

The first paragraph of model legislative provision 18 is based on article 5 (1) (b) of the Organized Crime Convention, which requires that States parties criminalize the aiding, abetting, facilitating or counselling of the commission of a serious crime involving an organized criminal group.

The second paragraph establishes secondary liability for organizing or directing the commission of a serious crime involving an organized criminal group and is also based on article 5 (1) (b) of the Organized Crime Convention.

Model legislative provision 18 facilitates the prosecution of leaders, organizers and accomplices, as well as the individuals involved in criminal activities in the fisheries sector at lower levels.

States may elect to establish more severe penalties for organizing or directing than for aiding, abetting, facilitating or counselling because of the higher-level nature of such conduct. In some cases, it may be appropriate for the penalties for organizers and directors to be more severe than those imposed on principal offenders.

**MODEL LEGISLATIVE PROVISION 18: AIDING, ABETTING, FACILITATING, COUNSELLING, ORGANIZING OR DIRECTING THE COMMISSION OF AN OFFENCE**

1. A person who intentionally aids, abets, facilitates or counsels the commission of any of the offences provided for in this [Act/Law/Chapter/etc.], involving an organized criminal group, commits an offence.
2. A person who intentionally organizes or directs the commission of any of the offences provided for in this [Act/Law/Chapter/etc.], involving an organized criminal group, commits an offence.

### *Liability for attempt*

States should also ensure that liability for attempting to commit the offences covered by the present guide is established under domestic law. In most jurisdictions, criminal law will already include liability for attempt. If that is not the case, States should, where appropriate, introduce specific provisions in relevant legislation to include such liability. In addition to liability for criminal attempt, States should review the extent to which the existing law provides for liability for attempt in the case of civil and administrative offences.

## **D. Criminal liability for natural and legal persons**

Crimes in the fisheries sector may be committed by individuals, businesses or organized criminal groups. This section considers the criminal liability of natural and legal persons.

### *Liability of natural persons*

Natural persons (i.e. individuals) from very different backgrounds may be involved in illegal activities at various points along the fisheries value chain. Masters of vessels and crew members are often at the forefront of crimes perpetrated in the fisheries sector. However, they should not be considered the only individuals who can be involved in such illegal activities. The legal or registered owner of a vessel, as well as the beneficial owner, may also be involved in the commission of crimes. In addition, public officials who were involved in document fraud or accepted bribes should be held liable for their criminal activity.

### *Liability of legal persons*

Legal persons (sometimes known as juristic or juridical persons) are organizations that, for the purposes of the laws of a particular jurisdiction, are considered to be persons and that enjoy some, but not necessarily all, of the rights and obligations of a natural person in that jurisdiction. Corporations are the most typical example of an organization with legal personality, but legal persons can also include a range of other entities, depending on the law of a given State.

Sophisticated organized criminal groups often use complicated corporate structures to conceal the identities of human actors in crimes committed in the fisheries sector, for example, to shield the identity of the beneficial owner of a vessel.

In order to effectively combat crimes in the fisheries sector, legal persons must be held responsible when they commit offences. Article 10 (1) of the Organized Crime Convention requires that States parties adopt such measures as are necessary to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with the Convention.

The legal nature of the liability of legal persons is a matter for each State to decide. Under article 10 (2) of the Organized Crime Convention, the liability of legal persons may be criminal, civil or administrative.<sup>165</sup> The liability of legal persons may be established without prejudice to the criminal or other liability of natural persons involved in the organization who have committed offences.<sup>166</sup>

Criminal liability is the most serious form of liability that a State can impose on legal persons. It is generally associated with trials in criminal courts, high levels of potential sanctions and relatively high procedural protections for defendants. Criminal liability on the part of a legal entity has the potential to cause costly reputational damage to the entity and may also deter other legal persons from engaging in unlawful conduct.

Civil and administrative liability for legal persons are options available for legal systems that do not recognize the capacity of legal persons to commit criminal offences. Each of these terms has a distinct meaning, but that meaning may differ by legal system, and in some States the terms are used interchangeably. Civil liability generally refers to civil penalties imposed by courts or similar bodies. Administrative liability is generally associated with liability imposed by a regulator, but in some legal systems judicial bodies may impose administrative penalties. Neither form of liability results in a criminal conviction. Civil and administrative liability are both generally associated with lower standards of proof than criminal liability.

Where criminal, civil or administrative liability for legal persons involved in crimes in the fisheries sector is not already provided for under domestic law, States should include specific provisions establishing such liability. The choice as to whether and in what circumstances to establish criminal, civil or administrative liability should be made by each State, taking into account the legal tradition and culture of the country, and whether or not the legal system recognizes the capacity of legal persons to commit criminal offences.

Whichever form of liability is established, States should ensure that courts or regulators are capable of imposing effective, proportionate and dissuasive criminal or non-criminal sanctions as required by the Organized Crime Convention.<sup>167</sup> Relevant sanctions for legal persons are discussed in chapter VII below.

Model legislative provision 19 is a basic example of a provision establishing liability for legal persons in respect of crimes committed in the fisheries sector as covered by the present guide.

<sup>165</sup> In a number of jurisdictions, vicarious liability forms the basis for the liability of legal persons. See *Legislative Guide for the Implementation of the Organized Crime Convention*, para. 274.

<sup>166</sup> Organized Crime Convention, art. 10 (3).

<sup>167</sup> *Ibid.*, art. 10 (4).

**MODEL LEGISLATIVE PROVISION 19: LIABILITY OF LEGAL PERSONS**

1. Legal persons [*other than the State*] may be criminally liable for offences to which this [*Act/Law/Chapter/etc.*] applies.
2. The liability of a legal person under this article does not preclude the liability of any natural person for the same act or omission.
3. In this [*Act/Law/Chapter/etc.*]:
  - (a) “Legal persons” means [*bodies corporate, companies, firms, associations, societies, partnerships, local government, trade unions, municipalities and public bodies*]; and
  - (b) “Senior officer” means an employee, agent or officer of the legal person with duties of such responsibility that his or her conduct may be fairly assumed to represent the legal person’s policy [*and any other person exercising de facto control over, or acting as a de facto manager of, the legal person*].
4. A legal person is liable for an offence where a senior officer of the legal person [*or persons under the senior officer’s supervision or management*] acting on behalf of the legal person:
  - (a) Commits the offence; or
  - (b) [[*With the requisite mental state*] *authorizes or permits the commission of the offence*]; or
  - (c) [[*With the requisite mental state*] *fails to take reasonable steps to adopt and effectively implement an appropriate organizational and managerial model to prevent the commission of the offence*].

**NATIONAL EXAMPLE: SINGAPORE****Organised Crime Act 2015****Section 76. Offences by bodies corporate, etc.**

- (1) Where an offence under this Act committed by a body corporate is proved –
  - (a) To have been committed with the consent or connivance of an officer of the body corporate; or
  - (b) To be attributable to any neglect on his or her part;

the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

- (2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.

- (3) Where an offence under this Act committed by a partnership is proved –
  - (a) To have been committed with the consent or connivance of a partner; or
  - (b) To be attributable to any neglect on his or her part;

the partner as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

**NATIONAL EXAMPLE: SINGAPORE (CONTINUED)**

(4) Where an offence under this Act committed by an unincorporated association (other than a partnership) is proved –

- (a) To have been committed with the consent or connivance of an officer of the unincorporated association or a member of its governing body; or
- (b) To be attributable to any neglect on the part of such an officer or member;

the officer or member as well as the unincorporated association shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(5) In this section –

“Body corporate” includes a limited liability partnership within the meaning given by section 2 (1) of the Limited Liability Partnerships Act 2005;

“Officer” –

- (a) In relation to a body corporate, means any director, partner, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; or
- (b) In relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of such a committee and includes any person purporting to act in any such capacity;

“Partner” includes a person purporting to act as a partner.

(6) The Minister may make regulations to provide for the application of any provision of this section, with such modifications as the Minister considers appropriate, to a body corporate or an unincorporated association formed or recognised under the law of a territory outside Singapore.

**NATIONAL EXAMPLE: ITALY**

**Regulation of the administrative liability of legal persons, companies and associations, including those without legal personality (Legislative decree 231/2001 of 8 June 2001)**

**Article 5. Liability of the entity**

1. The entity is liable for crimes committed in its interest or to its advantage:
  - (a) By persons who have functions of representation, administration or management of the entity or one of its organizational units with financial and functional autonomy, as well as persons who exercise management and control, including de facto, thereof;
  - (b) By persons subject to the management or supervision of one of the persons referred to in subparagraph (a).
2. The entity is not liable if the persons indicated in paragraph 1 have acted in their own exclusive interest or that of third parties.

**NATIONAL EXAMPLE: TUVALU****Counter Terrorism and Transnational Organised Crime Act 2009****Section 85. Liability of a company**

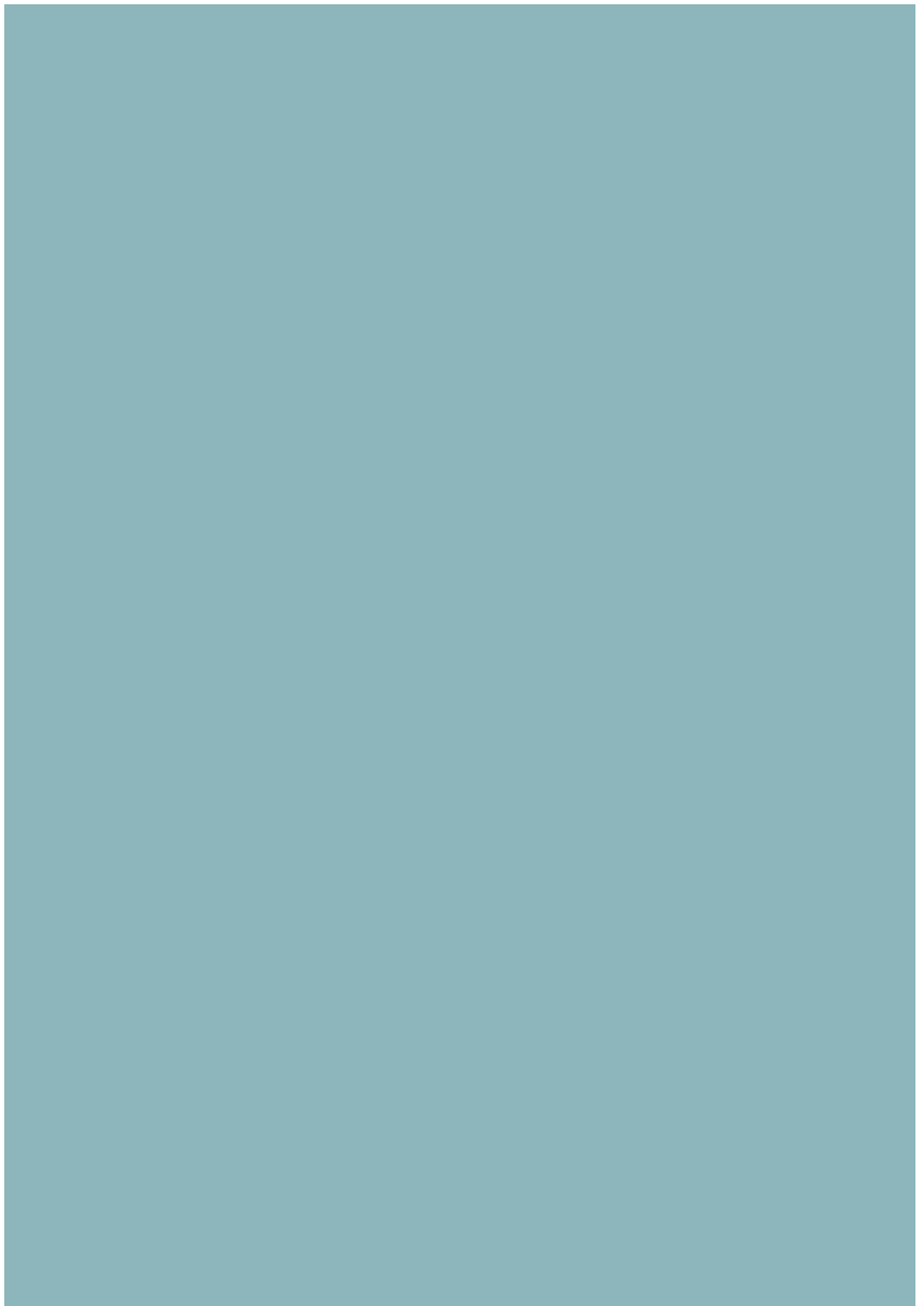
- (1) This Act applies to a company in the same way as it applies to an individual, and a company may be found guilty of any of the offences set out in this Act, in addition to the liability of any person for the same offence.
- (2) For an offence under this Act, the conduct or state of mind of an employee, agent or officer of a company is taken to be attributed to the company if that person is acting:
- (a) Within the scope of the person's employment; or
  - (b) Within the scope of the person's actual or apparent authority; or
  - (c) With the consent or agreement (express or implied) of a director, servant or agent of the company, and giving that consent is within the actual or apparent authority of the director, servant or agent.
- (3) A reference to this section relating to the state of mind of a person includes the person's knowledge, intention, opinion, belief or purpose, and the person's reasons for that intention, opinion, belief or purpose.

*Due diligence*

When seeking to establish liability for legal persons, States should consider whether the legal person exercised due diligence and whether that may serve as a defence or mitigating factor in a prosecution. Due diligence refers to the steps that a legal person takes to ensure compliance with a particular law. There are various ways in which due diligence may be taken into account in relation to the liability of legal persons. For example, due diligence on the part of the legal person may exclude a finding of liability where an offence requires proof of a lack of due diligence (i.e. negligence). In some States, proof of due diligence provides an absolute defence to liability for legal persons. In other States, due diligence may be a factor relevant to the exercise of prosecutorial discretion in bringing a case against a legal person or may constitute a mitigating factor in sentencing. The party that bears the burden of proof of due diligence (or lack thereof) may also differ between States.

What constitutes due diligence will differ according to the legal system in question, the charge and the circumstances of the alleged offence. In general, the exercise of due diligence will depend on risk management and compliance systems for preventing and detecting misconduct. An adequate risk management system will generally include systems for accessing information, assessing risk on the basis of that information, and mitigating risk according to that assessment.

Evidence of failure to exercise due diligence may be inadequate corporate management, control or supervision, or failure to provide adequate systems for conveying relevant information to relevant persons. However, the mere existence of policies, procedures and systems for preventing and detecting misconduct will not generally be sufficient to absolve a legal person of liability. Whether a legal person has exercised due diligence will always depend on the facts and circumstances of the individual case.



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# *Chapter IV.*

## **NATIONAL MANDATES, NATIONAL COORDINATION AND INVESTIGATION**

### **NATIONAL MANDATES**

The effective implementation and enforcement of legislation regarding crimes in the fisheries sector requires a clear domestic institutional framework involving multiple government departments and agencies, as well as independent agencies and institutions with competence in the fisheries sector. States have chosen various ways to allocate responsibilities and powers among such departments and agencies, and across other relevant agencies and institutions, including those responsible for ports, customs, maritime transport, police, the coastguard and the navy.

Memorandums of understanding should be concluded among the relevant agencies and institutions with a view to establishing a process and framework for notification, consultation and coordination among the various bodies in developing and applying the procedures, actions and measures, such as information-gathering, inspection and enforcement, to be taken to combat crimes committed in the fisheries sector.

Below are some examples of the broad range of bodies and personnel that may be involved in the prevention, detection and investigation of crimes in the fisheries sector.

## **EXAMPLES OF BODIES AND OFFICIALS HAVING A ROLE IN THE PREVENTION, DETECTION AND INVESTIGATION OF CRIMES IN THE FISHERIES SECTOR**

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### **Fisheries agencies**

The functions and responsibilities of fisheries agencies chiefly relate to fisheries management and enforcement. Some States may delegate certain functions and responsibilities to regional or local authorities. Fisheries agencies may be involved in policy development, management decision-making, licensing, the collection, analysis and exchange of data, monitoring, control, surveillance, enforcement, regional and international fisheries relations, and the legislative process for updating or enacting new legislation, as well as in taking executive actions. Fisheries agencies may review applications for, and grant, fishing licences, authorizations and permits subject to certain conditions.

### **Fisheries inspectors or authorized officers**

Fisheries inspectors are typically employed by fisheries agencies to exercise monitoring, control, surveillance and enforcement functions, including with a view to ensuring compliance with relevant fisheries legislation and applicable regional and international requirements. Their duties usually apply to areas within and beyond national jurisdiction and involve inspections and the detection of violations of fisheries legislation and of any licences, authorizations or other permissions issued thereunder. As a result of international and regional measures, port controls and inspections are increasingly common in their work and are complemented by the exchange and provision of information facilitated by technology and established mechanisms. In this regard, the requirement that foreign vessels should submit an advance request for port entry plays a key role in the work of inspectors in port States.

### **Port authorities**

Port authorities are public or private entities that are empowered to, among other things, manage, coordinate and control port operations. They may permit or deny the entry of a foreign or national vessel into port and otherwise control and manage port activities, including the inspection of fishing vessels using the port. They are on the front line when fishing vessels request port entry, and it is therefore crucial that port authorities and other relevant agencies are legally bound to cooperate with fisheries agencies in efforts to combat crimes in the fisheries sector.

### **Customs agencies**

Customs agencies will predominantly deal with crimes committed in the fisheries sector at ports, but also, to some extent, at land borders and airports. In many jurisdictions, customs agencies are mandated to detect and identify violations of fisheries legislation and are trained and empowered to conduct general investigations, file cases, and collect and seize evidence. Customs officers, in particular at ports, often play an important role in collecting intelligence, identifying high-risk shipments and conducting special investigations.

### **Law enforcement authorities**

Law enforcement authorities may be involved in detecting and identifying crimes in the fisheries sector and may be called upon to carry out specialized investigative functions, such as financial investigations, that fall outside the mandate or competence of fisheries inspectors or officers.

Relevant law enforcement authorities may include national, regional, local, port, border or transport police, as well as police departments that specialize in combating fraud, organized crime, money-laundering and corruption, as well as in financial investigation. In some jurisdictions, it will be mandatory for law enforcement authorities to be involved in investigating complex or high-value crimes in the fisheries sector. Law enforcement authorities may exercise powers to investigate crimes in the fisheries sector under a variety of national laws and regulations, such as laws relating to organized crime, money-laundering and corruption, and specific laws concerning crimes in the fisheries sector.



**Prosecutorial authorities**

The roles of prosecutors differ among States. In most systems, the core functions of prosecutors are those of deciding whether to prosecute and prosecuting the State's case in court. Core functions in some jurisdictions may also include investigating crimes, supervising investigators' compliance with procedural rules, handling judicial interim release (bail), plea and sentence agreements, providing victim support, issuing recommendations regarding sentences and supervising the execution of sentences.<sup>a</sup>

**Judges and magistrates**

Judges and magistrates may oversee aspects of the investigation of crimes committed in the fisheries sector, such as reviewing and approving warrants and the use of special investigative techniques. In some jurisdictions, judges may have investigative functions and responsibilities, or the power to assign cases to the most relevant agency, taking into account the designation, mandates and powers of various government agencies with investigative roles.

**Other agencies and institutions**

Agencies and institutions such as the coastguard and the navy are also likely to encounter crimes in the fisheries sector. The role of such agencies in investigations into crimes in the fisheries sector will depend to a great degree on specific domestic arrangements. Other specialized agencies, such as anti-money-laundering officers, financial investigation units, anti-corruption commissions and tax revenue authorities, may also contribute to the investigation of crimes in the fisheries sector, subject to local laws.

<sup>a</sup> See also UNODC and International Association of Prosecutors, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, Criminal Justice Handbook Series (Vienna, 2014).

States may opt to divide the responsibilities for investigating crimes in the fisheries sector between multiple agencies depending on the mandate of each agency, the stage of the investigation or the seriousness of the offence under investigation. The seriousness of the offence may relate to the suspected activities of the offenders, the suspected involvement of an organized criminal group or the transnational nature of the offence. The designation, number and competences of agencies involved in the investigation of crimes in the fisheries sector are a matter for each State to determine for itself.

A model legislative provision on the mandates of relevant investigative agencies is therefore not included in the present guide. Whatever division of competences a State adopts, the State should ensure that the respective mandate of each agency involved in preventing, detecting, investigating or taking enforcement action against crimes in the fisheries sector is clearly set out in relevant memorandums of understanding or domestic legislation, including the ability of the relevant agency or personnel to exercise their power and function beyond territorial limits, as appropriate. This is imperative not only for each agency to carry out its functions effectively, but also to ensure the legality and admissibility of evidence obtained by such agencies in subsequent prosecutions.

## NATIONAL COORDINATION

As noted above, the investigation of the offences described in the present guide may involve a number of different agencies and institutions within a single State, each with different roles, designations and investigatory powers. Investigations may also involve interactions with the management and scientific authorities of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, regional fisheries management organizations, environmental authorities, national liaison offices and the national central bureaux of the International Criminal Police Organization (INTERPOL). The involvement of prosecutors, specialist

prosecutors or judicial authorities may also be required at the investigation stage, depending on the legal system of the State in question.

Given the potentially large number of government agencies and other bodies that may be involved in the investigation of crimes in the fisheries sector, it is crucial that the relevant memorandums of understanding or legislative instruments contain provisions establishing procedures and responsibilities for inter-agency cooperation. This is critical in ensuring that evidence is properly collected and handled appropriately, and that the chain of custody is safeguarded.

It is recommended that States establish a national coordinating body with responsibility for developing, coordinating, implementing, monitoring and evaluating the national response to prevent crimes in the fisheries sector, developing prevention and awareness-raising programmes, training, and technical cooperation with other agencies and States in identifying, preventing and investigating such crimes.

Model legislative provision 20 below provides two examples of how a State could establish a national coordinating body with such responsibilities.

#### MODEL LEGISLATIVE PROVISION 20: NATIONAL COORDINATING BODY

The [*relevant Minister(s)*] shall establish a national coordinating [*committee/body*] responsible for the development, coordination, implementation, monitoring and evaluation of the national response to prevent and combat crimes in the fisheries sector, including through data collection, analysis and exchange, the development of training, prevention and awareness-raising programmes, and other measures, such as technical cooperation with other agencies and States in the identification, prevention and investigation of crimes in the fisheries sector.

[*Or, alternatively, the following more general provision:*]

(1) The [*relevant Minister(s)*] shall establish a national coordinating committee, which is to comprise officials from [*relevant government agencies and departments*] and representatives from [*other relevant organizations and non-governmental organizations and institutions*].

(2) The national coordinating committee shall develop, coordinate, monitor and evaluate the national response to prevent and combat all forms of organized crime, including through data collection, analysis and exchange, the development of prevention programmes and training, and facilitate inter-agency and multidisciplinary cooperation between the various government agencies, international organizations, and relevant non-governmental organizations and institutions.

(3) The national coordinating committee will report annually to [*the relevant Minister/Parliament*] on its activities.

## INVESTIGATION

Penalties reflecting the seriousness of crimes in the fisheries sector cannot serve as effective deterrents if the offences are not adequately investigated and prosecuted. It is therefore necessary for States to establish an effective regime for investigating such crimes. Among other things, this includes empowering investigative officers to carry out the functions necessary to combat crimes in the fisheries sector.

## General investigative powers

Officers involved in investigating crimes in the fisheries sector and related offences may include law enforcement officers, fisheries inspectors and authorized officers, customs officers and financial intelligence officers, as well as members of multi-agency task forces. The appropriate powers assigned to them will necessarily differ, but may include powers to:

- Stop and search persons, vessels, vehicles and other conveyances
- Enter and search premises, including vessels in port
- Seize any gear or item suspected of being involved in the commission of an offence
- Seize fish or fish products suspected of being associated with the commission of an offence
- Question witnesses, suspected offenders and other persons of interest
- Compel persons to answer questions or produce documents relevant to the investigation of an offence
- Take photographs or make audiovisual recordings of items or places suspected of being involved in or connected with the commission of an offence
- Manage crime scenes
- Seize and analyse phones, computers and similar devices found in the possession of suspected offenders
- Access forensic information from specialized laboratories
- Access bank and financial records
- Access telecommunications records
- Seize or freeze assets
- Use special investigative techniques, such as controlled delivery, undercover investigations and electronic or other forms of surveillance
- Require the suspension, variation or revocation of licences or authorizations held by suspected offenders
- Require the disqualification of suspected offenders from holding licences or authorizations
- Exchange information with foreign law enforcement agencies
- Participate in or coordinate joint investigations

For enforcement actions to be legitimate and consistent with the rule of law, investigative powers must be adequately provided for in domestic law. The procedures for the exercise of such powers may vary between States. It may be appropriate or necessary for States to require that the use of such powers be exercised only under the supervision of a judge, magistrate or a senior law enforcement officer. A warrant or other order issued by a judge or magistrate may be necessary to exercise the powers of search, entry and seizure, as well as to freeze assets and to use special investigative techniques, such as wiretapping, controlled delivery or undercover investigations.

However, as the examples below demonstrate, it is essential to ensure that fisheries inspectors or authorized officers are able to undertake searches and make seizures without a warrant in certain circumstances, in particular where investigations are conducted offshore, far from access to the courts. Globally, commercial fishing is widely recognized as an industry highly regulated by States and regional fisheries management organizations. Consequently, inspection, in particular of vessels, is permitted in many jurisdictions without probable cause, as it is deemed to be part of regulatory oversight.

**NATIONAL EXAMPLE: NAMIBIA****Marine Resources Act, 2000 (Act 27 of 2000)****Powers of fisheries inspectors**

5. (1) A fisheries inspector may, at any time and without a warrant –
- (a) Board any vessel and inspect such vessel, its fishing gear, cargo and stores, any marine resources aboard and any document or other item required to be kept under this Act and may, for the purposes of that inspection, stop that vessel;
  - (b) Enter any premises, other than a dwelling house, or any vehicle, in which marine resources or any fishing gear are kept or are being transported, as the case may be, and inspect the premises or vehicle, and may, for the purpose of inspecting a vehicle in which marine resources are being transported, stop that vehicle;
  - (c) Stop any vehicle for the purpose of carrying out a routine check for marine resources;
  - (d) Examine any fishing gear or object which he or she has reasonable grounds to suspect is being used or intended for use in the harvesting, handling or processing of marine resources;
  - (e) Question any person who, in his or her opinion, may be capable of furnishing any information which he or she may require; and
  - (f) Require any person employed on a vessel to assist him or her in the examination of any container, fishing gear, marine resources or document on or in such vessel in order to ascertain whether this Act has been complied with.
- (2) Where a fisheries inspector has reasonable grounds to suspect that an offence under this Act has been committed he or she may
- (a) Stop and inspect any vehicle which he or she reasonably suspects is carrying marine resources which have been harvested or fishing gear which has been used;
  - (b) Where reasonably necessary to preserve evidence or items subject to forfeiture or to prevent the continuation or repetition of the offence:
    - (i) Seize any vessel, vehicle, fishing gear, marine resources, document or other item; and
    - (ii) Order the master of any vessel in respect of which the offence has been committed or which has been used in its commission or which may provide evidence of the offence to transit to a specified port; and
  - (c) Require any person who may have information concerning the offence to furnish his or her name and address.
- (3) A fisheries inspector may exercise the powers conferred by subsections (1) and (2)
- (a) With respect to Namibian flag vessels inside and outside Namibian waters; and
  - (b) With respect to foreign flag vessels inside Namibian waters and, to the extent authorized by international agreements to which Namibia is a party, outside Namibian waters.

**NATIONAL EXAMPLE: SOUTH AFRICA****Marine Living Resources Act (No. 18 of 1998)****Chapter 6. Law enforcement**

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## 51. Powers of fishery control officers

- (1) For the purposes of enforcing this Act any fishery control officer may with a warrant enter and search any vessel, vehicle, aircraft or premises or seize any property.
- (2) For the purposes of enforcing this Act any fishery control officer may without a warrant –
- (a) Order any foreign fishing vessel in South African waters, and any local fishing vessel in or beyond such waters to stop;
  - (b) Require the master of a vessel to stop fishing and take the gear of the vessel back on board;
  - (c) Require the master of a vessel to facilitate the boarding of a vessel by all appropriate means;
  - (d) Go on board a vessel and take with him or her such other persons as he or she may require for assistance in the execution of his or her powers;
  - (e) Muster the crew of a vessel;
  - (f) Require to be produced, examine and make copies of a certificate of registry, licence, permit, log book, official documents, record of fish caught and any other document required in terms of this Act or relating to a vessel and to the crew or any member thereof or to any person on board the vessel which is in their respective possession or control on board the vessel;
  - (g) Require the master to appear and give an explanation concerning the vessel, the crew, any person on board the vessel and any document referred to in paragraph (f);
  - (h) Make any examination or enquiry which he or she may consider necessary to ascertain whether any provision of this Act has been contravened;
  - (i) Make an entry dated and signed by him or her in any vessel's log book;
  - (j) Where he or she has reasonable grounds to believe that an offence in terms of this Act has been or is being committed, take or require the master to take the vessel to any place, port or harbour in the territory of the Republic for the purpose of carrying out any search, examination or enquiry;
  - (k) Give directions to the master and any crew member of any vessel stopped, boarded or searched as may be necessary or reasonably expedient for any purpose specified in this Act or for the compliance by the vessel, master or any crew member with any condition of a licence;
  - (l) At all reasonable times enter and inspect any fish processing establishment or any other place where fish or fish products are kept or stored; and
  - (m) Take samples of any fish found in any vessel, vehicle, aircraft or on any premises searched in terms of this section.
- (3) A fishery control officer may, without a warrant –
- (a) Enter and search any vessel, vehicle, aircraft or premises if he or she has reasonable grounds to believe that an offence has been or is being committed or that fish illegally fished or substances or devices for use contrary to section 44 or 45 are being stowed, if
    - (i) The person in control of the vessel, vehicle, aircraft or premises consents to such entry or search; or
    - (ii) The fishery control officer has reasonable grounds to believe that a warrant will be issued, if he or she were to apply for such warrant, and the delay caused by the obtaining of such a warrant would defeat the object of the entry or search;

**NATIONAL EXAMPLE: SOUTH AFRICA (CONTINUED)**

- (b) Stop, enter and search any vessel, vehicle or aircraft which he or she reasonably suspects is being used or is involved in the commission of an offence in terms of this Act;
- (c) Seize:
  - (i) Any property on board any vessel, vehicle or aircraft or on any premises if:
    - (aa) The person in control of the vessel, vehicle, aircraft or premises consents to such seizure; or
    - (bb) The fishery control officer has reasonable grounds to believe that a warrant will be issued, if he or she were to apply for such warrant, and the delay caused by the obtaining of such a warrant would defeat the object of the seizure;
  - (ii) Any vessel, including its gear, equipment, stores and cargo, and any vehicle or aircraft of which he or she has reasonable grounds to believe that it has been or is being used in the commission of an offence in terms of this Act or in respect of which he or she suspects such offence to have been committed or which he or she knows or has reasonable grounds to suspect that it has been seized or forfeited in terms of any provision of this Act;
  - (iii) Any fish or fish product which he or she has reasonable grounds to suspect to have been taken or produced in the commission of such offence or which are possessed in contravention of this Act;
  - (iv) Any substance or device which he or she has reasonable grounds to suspect to have been used or to be possessed or controlled in contravention of section 44 or 45;
  - (v) Any log book, chart or other document required to be maintained in terms of this Act or in terms of any licence, in respect of which he or she has reasonable grounds to believe that it shows or tends to show, with or without other evidence, the commission of an offence in terms of this Act; or
  - (vi) Anything which he or she has reasonable grounds to believe might be used as evidence in any proceedings in terms of this Act;

...

**52. Powers of fishery control officers beyond South African waters**

A fishery control officer may without a warrant following hot pursuit in accordance with international law as reflected in article 111 of the United Nations Convention on the Law of the Sea –

- (a) Stop, board and search outside South African waters, any foreign fishing vessel which he or she has reasonable grounds to believe has been used in the commission of an offence in terms of this Act in South African waters and bring such vessel and all persons and things on board to any place, port or harbour in the territory of the Republic; and
- (b) Exercise beyond South African waters all the powers conferred on a fishery control officer in terms of this Act.

**Special investigative techniques**

Special investigative techniques are covert techniques used for gathering information in such a way as to avoid alerting the target person. Article 20 (1) of the Organized Crime Convention requires States parties to take the necessary measures to allow for the appropriate use of special investigative techniques, such as electronic or other forms of surveillance and undercover operations, if permitted by the basic principles of their domestic legal systems.

States should ensure that, if permitted by the basic principles of their domestic legal systems, special investigative techniques may be used to investigate serious crimes in the fisheries sector.

There are many different types of special investigative technique. Article 20 of the Organized Crime Convention refers to only three of them, namely controlled delivery, undercover operations and electronic surveillance.

The *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2017) states the following:

Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. Legislative provisions are often required to permit such a course of action as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law.

Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence.

Electronic surveillance in the form of listening devices or the interception of communications performs a similar function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.<sup>168</sup>

This section contains model legislative provisions for the following types of special investigative technique: controlled delivery, undercover investigation, the use of an assumed identity, surveillance of persons and electronic surveillance. Some of the techniques can be particularly intrusive and consequently require a careful balance between a suspect's right to privacy and the need to investigate serious crimes.

Special investigative techniques raise specific concerns about privacy and human rights, and will typically require appropriate authorization by courts or law officials in accordance with applicable national legislation. The decisions of international human rights courts and bodies on the permissibility of special investigative techniques and the parameters of such measures should be taken into consideration when drafting the relevant provisions.

Most jurisdictions require a number of strict safeguards against abuse before permitting the use of special investigative techniques, including the requirement that the offence be serious, that the use of the technique be vital to the case, and that essential evidence cannot be secured by less intrusive means.

The model legislative provisions for special investigative techniques in this section include a requirement that the authorizing authority must be satisfied on reasonable grounds that the nature and extent of the criminal activity justify the use of the special investigative technique. This requires the authorizing authority to consider the necessity and proportionality of the covert investigation in assessing the application.

Oversight of the use of special investigative techniques by judicial or other independent authorities is common practice in most jurisdictions and is required under international human rights law. The appropriate level of authorization for special investigative techniques may vary depending on the technique in question. It may be appropriate, for instance, for a controlled delivery to be authorized by senior law enforcement officials, whereas electronic surveillance usually requires judicial authorization and supervision.

When formulating provisions for special investigative techniques, legislative drafters should consider the following:

- Mechanisms for approving the technique
- Thresholds for granting approval for use of the technique
- Conditions for use of the technique
- The extent to which officials using special investigative techniques are protected from civil and criminal liability
- The use of evidence obtained through the technique in question

<sup>168</sup> UNODC, *Legislative Guide for the Implementation of the Organized Crime Convention*, paras. 443–445.

- The extent to which the information obtained may be disseminated
- Supervision, review and oversight mechanisms
- International cooperation
- Any possible impact on third parties

The model legislative provisions contained in this section are intended to complement existing laws and regulations concerning the investigative powers of law enforcement and other agencies.<sup>169</sup> It is therefore important for domestic legislative drafters to consider the operation of the provisions alongside other national laws, including laws relating to police powers in general, criminal law procedure, privacy laws and laws on international cooperation, in particular mutual legal assistance and extradition.

## Controlled delivery

Article 20 (1) of the Organized Crime Convention provides that States must allow for the appropriate use of controlled delivery for the purpose of effectively combating organized crime, if permitted by the basic principles of their domestic legal systems.

Model legislative provision 21 provides an example of how a State could authorize and regulate the use of controlled deliveries. When authorizing a controlled delivery that involves the transportation of live fish, the designated authorizing authority should consider whether there is any risk of: (a) injury to law enforcement officers, cargo and baggage handlers, or any other persons; (b) spreading any disease; (c) breaching the International Air Transport Association regulations concerning the transportation of live fish; (d) harming or killing live fish, in particular where the species is protected; and (e) breaching any health and safety or quarantine regulations. Steps should be taken to ensure that such risks are minimized. Authorities should also consider whether taking steps to minimize those risks would serve to alert those involved in criminal activities.

### MODEL LEGISLATIVE PROVISION 21: CONTROLLED DELIVERY

1. For the purpose of this article, “controlled delivery” means the technique of allowing illicit or suspect consignments to pass into, within, through or out of the territory of [State] with the knowledge and under the supervision of the [competent authority], with a view to the investigation and the identification of persons involved in offences to which this [Act/Law/Chapter/etc.] applies.
2. A controlled delivery under paragraph 1 is lawful only if it has been authorized in accordance with this article.
3. A controlled delivery may be authorized by [designated position holder or office, such as head or deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct a controlled delivery can be made by [method required to submit application]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to conduct a controlled delivery must state:
  - (a) All available information regarding the consignment and its destination;
  - (b) Whether the matter has been the subject of a previous application;

<sup>169</sup> Model legislative provisions 21–25 are based on those contained in chapter III of the UNODC *Model Legislative Provisions against Organized Crime*.



- (c) Where the controlled delivery involves the transportation of live fish, whether there is any risk of:
    - (i) Injury to law enforcement officers, cargo and baggage handlers, or any other persons;
    - (ii) Spreading any disease;
    - (iii) Breaching International Air Transport Association regulations concerning the transportation of live fish;
    - (iv) Harming or killing live fish, in particular where the species is protected; or
    - (v) Breaching any health and safety or quarantine regulations; and
  - (d) [Additional requirements as appropriate/required].
6. After considering the application, the authorizing authority may:
    - (a) Authorize the controlled delivery unconditionally; or
    - (b) Authorize the controlled delivery subject to conditions; or
    - (c) Refuse the application to conduct the controlled delivery.
  7. The authorizing authority must not approve the application unless satisfied, on reasonable grounds, that:
    - (a) An offence to which this [Act/Law/Chapter/etc.] applies has been, is being or is likely to be committed;
    - (b) The nature and extent of the suspected criminal activity are such as to justify conducting the controlled delivery;
    - (c) Any unlawful activity shall be limited to the minimum necessary to achieve the objectives of the controlled delivery;
    - (d) The controlled delivery will be conducted in such a way that ensures that, to the greatest extent possible, any illicit goods involved in the controlled delivery will be under the control of a law enforcement official at the end of the controlled delivery;
    - (e) The controlled delivery will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and
    - (f) Any conduct involved in the controlled delivery will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
  8. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
  9. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
  10. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for such conduct.
  11. The authorizing authority shall report annually to [Parliament/a parliamentary committee/the public] on the number of applications received under this article and the respective numbers of authorizations that were approved, refused, revoked or cancelled under this article.

## Undercover investigation

Article 20 (1) of the Organized Crime Convention provides that States must allow for the appropriate use of undercover operations in their territory for the purpose of effectively combating organized crime, if permitted by the basic principles of their domestic legal systems.

Model legislative provision 22 provides an example of how a State could authorize and regulate the use of undercover investigations.

**MODEL LEGISLATIVE PROVISION 22: UNDERCOVER INVESTIGATION**

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1. For the purpose of this article, “undercover investigation” means an investigation that makes use of one or more law enforcement officials [*or other persons authorized by [law enforcement agency]*] who, for the purpose of investigating an offence to which this [*Act/Law/Chapter/etc.*] applies, neither disclose nor reveal their official position or their mandate.
2. An undercover investigation under paragraph 1 is lawful only if it has been authorized in accordance with this article.
3. Undercover investigations can be authorized by [*designated position holder or office, such as head or deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [*or public prosecutor*].
4. An application to conduct an undercover investigation can be made by [*method required to submit application*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to conduct an undercover investigation must state:
  - (a) The duration for which the authorization is sought;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) [*Additional requirements as appropriate/required*].
6. After considering the application, the authorizing authority may:
  - (a) Authorize the undercover investigation unconditionally; or
  - (b) Authorize the undercover investigation subject to conditions; or
  - (c) Refuse the application to conduct the undercover investigation.
7. The authorizing authority must not approve the application unless satisfied, on reasonable grounds, that:
  - (a) An offence to which this [*Act/Law/Chapter/etc.*] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify an undercover investigation;
  - (c) Any unlawful activity shall be limited to the minimum necessary to achieve the objectives of the undercover investigation;
  - (d) The undercover investigation will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and
  - (e) Any conduct involved in the undercover investigation will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which the undercover investigation is authorized, which shall in any case not be longer than [*appropriate time period*]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be criminally or civilly liable for that conduct.
12. The authorizing authority shall report annually to [*Parliament/a parliamentary committee/the public*] on the number of applications received under this article and the respective numbers of authorizations that were approved, refused, revoked or cancelled under this article.

In addition to the application for and authorization of undercover investigations set out in the provision above, it is vital for legislative drafters to consider the issue of whether or not evidence obtained through undercover investigations can be presented in court and, if so, whether undercover investigators must reveal their true identity or may testify by special means to protect their true identity.

## Assumed identity

Article 20 (1) of the Organized Crime Convention provides that States must allow for the appropriate use of special investigative techniques in areas under national jurisdiction for the purpose of combating organized crime effectively, if permitted by the basic principles of their domestic legal systems. In addition to the three techniques expressly mentioned in article 20 (1), use of an assumed identity by law enforcement officers is another special investigative technique that may be useful when investigating crimes in the fisheries sector.

Model legislative provision 23 provides an example of how a State could authorize and regulate the use of an assumed identity.

### MODEL LEGISLATIVE PROVISION 23: ASSUMED IDENTITY

1. For the purpose of this article, “assumed identity” means a false or altered identity created, acquired and/or used by law enforcement officials [*or other persons authorized by [law enforcement agency or judicial authority]*] to establish contact and build a relationship of trust with another person or infiltrate a criminal network for the purpose of investigating an offence to which this [*Act/Law/Chapter/etc.*] applies.
2. The creation, acquisition and use of an assumed identity under paragraph 1 is lawful only if it has been authorized in accordance with this article.
3. The creation, acquisition and use of an assumed identity may be authorized by [*designated position holder or office, such as head or deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [*or public prosecutor*].
4. An application to create, acquire and use an assumed identity can be made by [*method required to submit application*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to create, acquire and use an assumed identity must state:
  - (a) The details of the proposed assumed identity;
  - (b) The duration for which the authorization is sought;
  - (c) Whether the matter has been the subject of a previous application; and
  - (d) [*Additional requirements as appropriate/required*]
6. After considering the application, the authorizing authority may:
  - (a) Authorize the creation, acquisition and use of an assumed identity unconditionally; or
  - (b) Authorize the creation, acquisition and use of an assumed identity subject to conditions; or
  - (c) Refuse the application to create, acquire and use an assumed identity.
7. The authorizing authority must not approve the application unless satisfied on reasonable grounds that:
  - (a) An offence to which this [*Act/Law/Chapter/etc.*] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify the use of an assumed identity;
  - (c) The assumed identity will not be used in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and

**MODEL LEGISLATIVE PROVISION 23: ASSUMED IDENTITY (CONTINUED)**

- (d) Any conduct involved in the use of the assumed identity will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which the creation, acquisition and use of the assumed identity is authorized, which shall in any case not be longer than [*appropriate time period*]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A person acting under an authorization to create, acquire or use an assumed identity may request assistance from relevant officials or agencies to obtain evidence of an assumed identity, including identity documents and other supporting documents, that has been approved under this article. Notwithstanding any other laws, an official or agency may create or provide evidence of an assumed identity in response to a request under this article.
12. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
13. The authorizing authority shall report annually to [*Parliament/a parliamentary committee/the public*] on the number of applications received under this article and the respective numbers of authorizations that were approved, refused, revoked or cancelled under this article.

In addition to the provisions above, legislative drafters should also give consideration to how law enforcement officials and other authorized persons using an assumed identity may give testimony in criminal trials. In particular, procedures should be put in place to ensure that any testimony given by an official or authorized person using an assumed identity is handled in a manner that provides appropriate protection to the identity of that person and does not prejudice any ongoing investigations, while at the same time respecting the rights of the defendant and safeguarding the right to a fair trial.

## Surveillance of persons

Article 20 (1) of the Organized Crime Convention provides that States must allow for the appropriate use of special investigative techniques, including surveillance, for the purpose of effectively combating organized crime, if permitted by the basic principles of their domestic legal systems.

Model legislative provision 24 below provides an example of how a State could authorize and regulate the use of surveillance of persons.

**MODEL LEGISLATIVE PROVISION 24: SURVEILLANCE OF PERSONS**

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1. For the purpose of this article, “surveillance of persons” means the observation of persons, by law enforcement officials, for the purposes of investigating an offence to which this [Act/Law/Chapter/etc.] applies that has been, is being or may be committed.
2. Surveillance of persons under paragraph 1 is lawful only if it has been authorized in accordance with this article.
3. The surveillance of persons may be authorized by [*designated position holder or office, such as head or deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [*or public prosecutor*].
4. An application to conduct surveillance of persons can be made by [*method required to submit application*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application for authorization of surveillance of persons must state:
  - (a) The duration for which the authorization is sought;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) [*Additional requirements as appropriate/required*].
6. After considering the application, the authorizing authority may:
  - (a) Authorize the surveillance of persons unconditionally; or
  - (b) Authorize the surveillance of persons subject to conditions; or
  - (c) Refuse the application for the surveillance of persons.
7. The authorizing authority must not authorize the surveillance of persons unless satisfied on reasonable grounds that:
  - (a) An offence to which this [Act/Law/Chapter/etc.] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify the surveillance of persons; and
  - (c) Any conduct involved in the surveillance of persons will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which the surveillance of persons is authorized, which shall in any case not be longer than [*appropriate time period*]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.

## Electronic surveillance

Article 20 (1) of the Organized Crime Convention provides that States must allow for the appropriate use of electronic surveillance for the purpose of effectively combating organized crime, if permitted by the basic principles of their domestic legal systems.

Electronic surveillance may include:

- (a) Audio surveillance (including by means of phone-tapping, voice over Internet protocol and listening devices);
- (b) Video surveillance (including by means of hidden video surveillance devices, in-car video systems, body-worn video devices, thermal imaging/forward-looking infrared devices, closed-circuit television and automatic licence plate recognition systems);
- (c) Tracking surveillance (including by means of global positioning systems/transponders, silent short message services and other mobile phone tracking technologies, radio frequency identification devices, vessel monitoring systems, and biometric information technology such as retina scans);
- (d) Data surveillance (including both interception of content and traffic data, the use of means such as computer and Internet spyware and cookies, mobile phones and keystroke monitoring).

Electronic surveillance involving the interception of communications is particularly useful where an organized criminal group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance must be subject to strict judicial control and numerous statutory safeguards to prevent abuse.<sup>170</sup>

Model legislative provision 25 below provides an example of how a State could authorize and regulate the use of electronic surveillance.

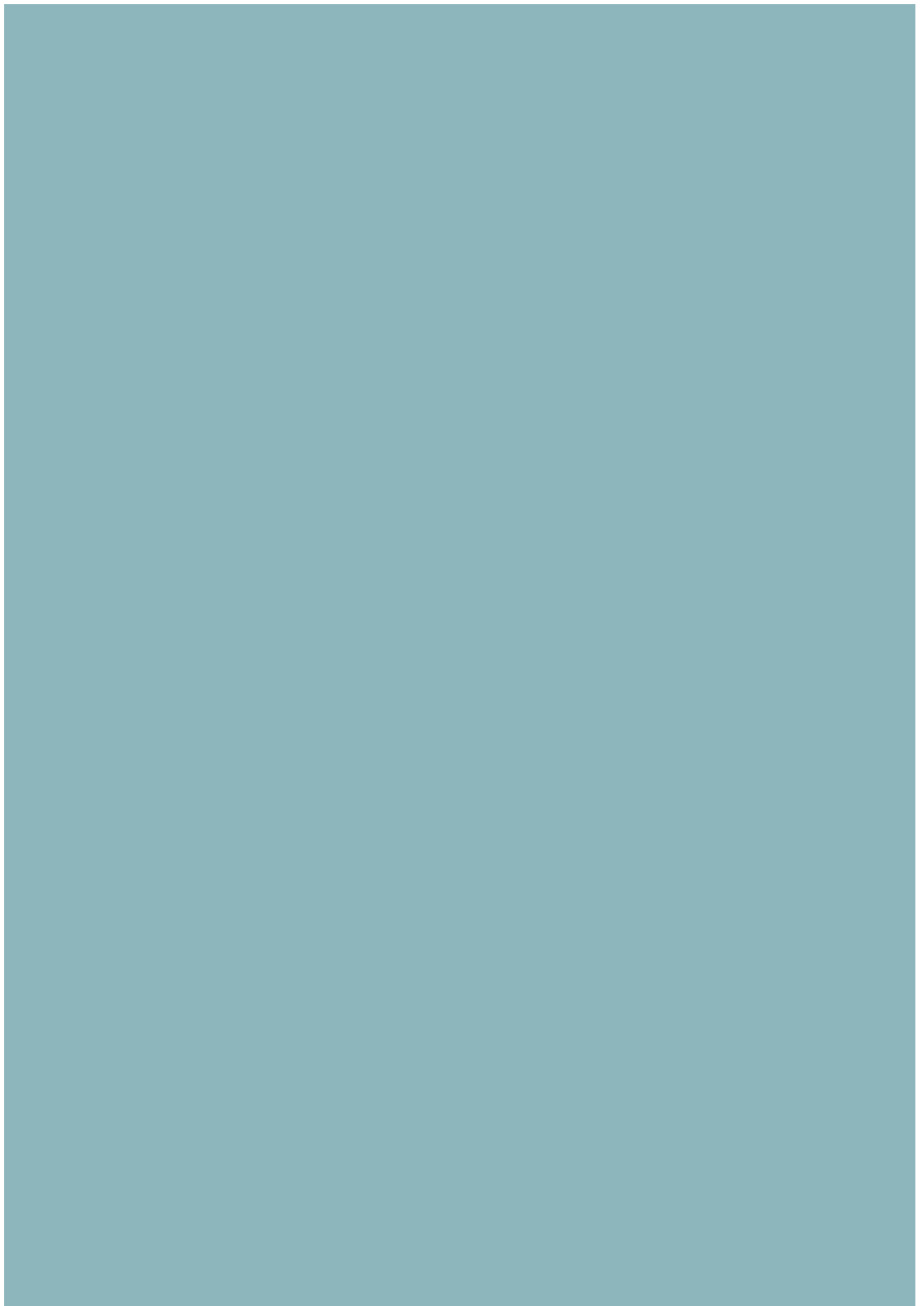
### MODEL LEGISLATIVE PROVISION 25: ELECTRONIC SURVEILLANCE

1. For the purpose of this article, “electronic surveillance” means:
  - (a) Monitoring, intercepting, copying or manipulating messages, data or signals transmitted by electronic means; or
  - (b) Monitoring or recording activities by electronic means;

for the purposes of investigating an offence to which this [Act/Law/Chapter/etc.] applies that has been, is being or may be committed.
2. Electronic surveillance under paragraph 1 is lawful only if it has been authorized in accordance with this article.
3. Electronic surveillance of persons can be authorized by [*designated position holder or office, such as head or deputy head of competent law enforcement agency; prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [*or public prosecutor*].
4. An application to conduct electronic surveillance can be made by [*method required to submit application*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.

<sup>170</sup> UNODC, *Legislative Guide for the Implementation of the Organized Crime Convention*, para. 445.

5. The application for authorization for electronic surveillance must state:
  - (a) The type of electronic surveillance for which authorization is sought;
  - (b) The duration for which authorization is sought;
  - (c) The nature of the information that is expected to be collected;
  - (d) The individuals, locations or devices that are the target of the surveillance;
  - (e) The measures that are in place to ensure that the privacy and other human rights of those under electronic surveillance are protected to the extent possible;
  - (f) Whether the matter has been the subject of a previous application; and
  - (g) *[Additional requirements as appropriate/required]*.
6. After considering the application, the authorizing authority may:
  - (a) Authorize the electronic surveillance unconditionally; or
  - (b) Authorize the electronic surveillance subject to conditions; or
  - (c) Refuse the application for electronic surveillance.
7. The authorizing authority must not authorize the electronic surveillance unless satisfied on reasonable grounds that:
  - (a) An offence to which this *[Act/Law/Chapter/etc.]* applies has been, is being or is likely to be committed; and
  - (b) The nature and extent of the suspected criminal activity are such as to justify the type of electronic surveillance for which authorization is sought.
8. The authorization must specify the time period for which electronic surveillance is authorized, which shall in any case not be longer than *[appropriate time period]*. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
12. Information obtained through electronic surveillance must not be disseminated outside the *[relevant law enforcement agency or other competent authority]* without the approval of *[the head of the law enforcement agency or other competent authority or their delegate]*. Such approval may be given only for the purposes of:
  - (a) Preventing or prosecuting an offence to which this *[Act/Law/Chapter/etc.]* applies;
  - (b) Enhancing international cooperation on the prevention or prosecution of *[serious]* crime; or
  - (c) Ensuring proper oversight of the activities of the agency.
13. The *[head of the law enforcement agency]* must ensure that information which has been collected through electronic surveillance authorized under this article but which is not relevant to the prevention or prosecution of an offence to which this *[Act/Law/Chapter/etc.]* applies is destroyed as soon as practicable, and no later than *[six]* months after the expiry of the authorization.
14. The authorizing authority shall report annually to *[Parliament/a parliamentary committee/the public]* on the number of applications received under this article and the respective numbers of authorizations that were approved, refused, revoked or cancelled under this article.





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# Chapter V.

## INTERNATIONAL COOPERATION

Many crimes in the fisheries sector have transnational elements. Supply chains of illicitly caught and processed fish extend around the globe. Effective international cooperation between the agencies of different States is key to successful criminal investigations and subsequent prosecutions.

International cooperation refers to the sharing of information, resources and personnel, and the provision of assistance to achieve common goals. Cooperation between States may occur formally or informally. Formal cooperation in the fisheries sector may be based on the Organized Crime Convention or other multilateral or bilateral treaties, or occur through international organizations and regional fisheries management organizations.

The Organized Crime Convention requires States to take steps or consider taking steps to implement a number of measures to enable and facilitate international cooperation in cases falling within the scope of the Convention. Such measures include mutual legal assistance,<sup>171</sup> extradition,<sup>172</sup> law enforcement cooperation,<sup>173</sup> joint investigations,<sup>174</sup> the transfer of criminal proceedings<sup>175</sup> and the transfer of sentenced persons.<sup>176</sup>

This chapter provides legislative guidance for establishing provisions concerning mutual legal assistance, extradition and joint investigations. As in other chapters of the present guide, model legislative provisions are included in order to assist with the implementation of these principles.

### MUTUAL LEGAL ASSISTANCE

Mutual legal assistance in criminal matters is a process by which States can seek and provide assistance in gathering evidence for use in criminal cases. It is an essential mechanism for international cooperation, in particular in the context of transnational crimes, which often involve the enforcement of laws and the prosecution of offences under different domestic legislation. Through mutual legal assistance, witnesses can be interviewed or summoned, persons can be located, evidence can be requested and produced, objects and sites

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<sup>171</sup> Organized Crime Convention, art. 18.

<sup>172</sup> *Ibid.*, art. 16.

<sup>173</sup> *Ibid.*, art. 27.

<sup>174</sup> *Ibid.*, art. 19.

<sup>175</sup> *Ibid.*, art. 21.

<sup>176</sup> *Ibid.*, art. 17.

can be examined and analysed, and warrants for search and seizure can be issued and executed in foreign jurisdictions.<sup>177</sup>

Article 18 of the Organized Crime Convention establishes a framework for mutual legal assistance between States parties in relation to serious crimes and offences established under the Convention and its Protocols. States parties are further encouraged to consider, where necessary, concluding additional bilateral or multi-lateral agreements or arrangements to give practical effect to the provision.

States parties should ensure that domestic mutual legal assistance regimes, whether established under a bilateral or multilateral treaty, apply to investigations, prosecutions and judicial proceedings concerning crimes committed in the fisheries sector. Certain treaties are not specific to fisheries but may be used as the basis for requests for mutual legal assistance in fisheries-related cases. These include the European Convention on Mutual Assistance in Criminal Matters, the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries and the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters.

Model legislative provision 26 below provides an example of a provision on mutual legal assistance that a State could include in fisheries legislation introduced pursuant to the present guide.

#### MODEL LEGISLATIVE PROVISION 26: MUTUAL LEGAL ASSISTANCE

The provisions on mutual legal assistance contained in [*national legislation on mutual legal assistance*] and in any bilateral or multilateral treaty to which [*State*] is a party shall apply to investigations, prosecutions and judicial proceedings in relation to the offences established under this [*Act/Law/Chapter/etc.*].

Some States permit a more informal approach to international cooperation based on the principles of reciprocity and comity between law enforcement agencies. Such an approach can be taken instead of, or in tandem with, a formal request for mutual legal assistance. Mutual legal assistance is not necessary where the documentation sought is in the public domain of the requested State.

Further information and practical guidance on mutual legal assistance can be found in the *Manual on Mutual Legal Assistance and Extradition*, published by UNODC in 2012.

## EXTRADITION

Extradition is the formal process whereby one State requests that another State return a person accused or convicted of a crime to stand trial or serve a sentence in the requesting State. Extradition is generally dealt with under bilateral or multilateral treaties, though an extradition treaty is not a requirement for extradition. Given that crimes in the fisheries sector are often transnational in nature, arrangements for extradition are critical for the effective prosecution of these crimes.

Extradition is addressed in article 16 of the Organized Crime Convention, which provides a basis for the extradition of persons sought in respect of offences established in accordance with the Convention. It allows for extradition only where the offence for which extradition is sought is punishable under the domestic law of both the requesting and requested State (the principle of “dual criminality”).

<sup>177</sup> UNODC, *Legislative Guide for the Implementation of the Organized Crime Convention*, pp. 157–171.

Extradition is a complex area of law, and different States have different ways of dealing with it. In recognition of these complexities, the present guide does not attempt to provide a comprehensive examination of legal issues relating to extradition or to provide model legislative provisions in this regard. Rather, it addresses some of the basic legal issues relating to extradition that a State will have to consider when introducing legislation to combat crimes in the fisheries sector.

The key legal issue with respect to extradition for the purposes of the present guide is the designation of fisheries offences as extraditable offences. Some of the offences covered by the guide may not be deemed by a State to be sufficiently serious to warrant extradition. This is a matter for each State to determine in accordance with its legal system and values. For those offences potentially warranting extradition, a State should take care to ensure that they are considered as such under both domestic law and any bilateral and multilateral extradition treaties to which it is a party. How this can be implemented will depend on the method for designation of extraditable offences used by the State in question.

Two approaches have historically been used for designating offences as extraditable offences: the “list approach” and the “penalty threshold approach”. Under the list approach, whether an offence is extraditable is determined by reference to a list (usually described as exhaustive) of extraditable offences contained in the extradition treaty and any relevant implementing legislation. Under the penalty threshold approach, whether an offence is extraditable is determined by reference to the maximum penalty applicable to the offence. Any offence with a maximum penalty at or above a certain threshold is liable to be an extraditable offence.

States using the list approach should take steps to ensure that offences introduced to combat crimes in the fisheries sector are included in lists of extraditable offences in relevant bilateral and multilateral extradition treaties and in any relevant implementing legislation. States that use the minimum penalty approach should ensure that offences in the fisheries sector meet the minimum requirements for extradition under relevant bilateral and multilateral extradition treaties and domestic legislation.

States should also ensure that extradition legislation applying to offenders accused of crimes in the fisheries sector is consistent with the “extradite or prosecute” principle outlined in article 16 (10) of the Organized Crime Convention, which provides that, where a State party refuses to extradite an alleged offender in relation to an offence covered by the Convention solely on the basis that he or she is a national of that State, the State party must, at the request of the State party seeking extradition of an alleged offender, submit the case to its competent authorities for the purpose of prosecution.

## LAW ENFORCEMENT COOPERATION

International cooperation between law enforcement agencies is addressed in article 27 of the Organized Crime Convention, under which States parties are required to cooperate closely with each other, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat serious crime involving organized criminal groups and other offences covered by the Convention. According to article 27, States parties are also required to adopt “effective measures” to this end, which include: establishing channels of communication between competent authorities, agencies and services for the secure and rapid exchange of information related to organized crime; exchanging such information; cooperating with other States parties in investigating persons, property and proceeds involved in organized crime; sharing items and substances for analytical and investigative purposes; and posting liaison officers.

A model providing for such forms of international law enforcement cooperation is provided in model legislative provision 27 below. The provision is primarily relevant to those States in which a legal mandate is required for investigative agencies to cooperate with their international counterparts. In other States, such a provision may not be necessary, but it could nevertheless be desirable for clarifying and enhancing existing mechanisms for law enforcement cooperation.

## MODEL LEGISLATIVE PROVISION 27: INTERNATIONAL LAW ENFORCEMENT COOPERATION

1. The functions of [*designated national law enforcement and investigative agencies and authorities*] shall include assisting and cooperating with foreign law enforcement agencies or other international or regional law enforcement agencies and providing information concerning all aspects of offences to which this [*Act/Law/Chapter/etc.*] applies [*including in connection with other criminal activities*].
2. The [*designated national law enforcement and investigative agencies and authorities*] may cooperate with law enforcement or other investigative agencies and authorities of another State and, where relevant, competent international and regional organizations for the purpose of:
  - (a) Preventing, identifying and combating offences under this [*Act/Law/Chapter/ etc.*];
  - (b) Assisting with inquiries concerning the identity, whereabouts and activities of persons suspected of involvement in offences to which this [*Act/Law/Chapter/etc.*] applies; and
  - (c) Providing items, substances, documents or records for analytical or investigative purposes.
3. The [*designated national law enforcement and investigative agencies and authorities*] may cooperate with the law enforcement or other investigative agencies and authorities of another State, or with international and regional organizations, with regard to:
  - (a) Seconding or exchanging personnel, including by posting law enforcement liaison officers or making experts available;
  - (b) Conducting joint investigations;
  - (c) Witness protection, including relocation of a protected witness; and
  - (d) Other administrative assistance.
4. The [*designated national law enforcement and investigative agencies and authorities*] may enter into agreements with the law enforcement or other investigative agencies and authorities of another State, or with international and regional organizations, to enhance law enforcement cooperation to prevent, identify and combat the offences criminalized by this [*Act/Law/Chapter/etc.*].

Care should be taken to ensure that domestic legislation is adequately adapted to deal with evidential issues that may arise from international cooperation in cases of crimes committed in the fisheries sector. These include, among other possible issues, the admissibility of evidence obtained from foreign law enforcement agencies through mutual legal assistance and international cooperation, and the transmission of evidence to forensic services located in foreign jurisdictions.

## JOINT INVESTIGATIONS

As crimes in the fisheries sector are often transnational in nature, joint investigations between law enforcement agencies of two or more States may sometimes be more effective in dismantling organized criminal groups, especially in complex cases.

The term “joint investigation” refers to a broad range of collaborative efforts in the investigation of crime. Such efforts may be generally classified as involving joint parallel investigations, joint investigative teams and joint investigative bodies.

Joint parallel investigations are not co-located, but closely coordinated investigations undertaken in two or more States with a common goal.

Joint investigative teams are teams of law enforcement authorities, prosecutors, judges or investigative judges that are established pursuant to an agreement between the competent authorities of two or more States for a limited duration and for the specific purpose of conducting criminal investigations in one or more of the States involved. Joint investigative teams may further be classified as passively or actively integrated teams. One example of a passively integrated joint investigative team would be an arrangement in which a foreign law enforcement officer assists officers from the host State in an advisory or consultancy role or in a support role, providing technical assistance. An actively integrated joint investigative team would include officers from at least two jurisdictions, each with the ability to exercise some or equivalent operational powers under host State control in the territory or jurisdiction where the team is operating.

The concept of joint investigative bodies was introduced under article 19 of the Organized Crime Convention, according to which States parties are required to consider concluding agreements or arrangements to establish such bodies in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States. Neither the text of the Convention nor the relevant *travaux préparatoires* offer a definition of a joint investigative body.

Model legislative provision 28 below seeks to provide a legal basis for the relevant domestic authority to conclude agreements or arrangements to conduct joint investigations, either through the establishment of a joint investigative body or by undertaking joint investigations on a case-by-case basis. The domestic laws of most States already permit such joint activities, but for those States whose laws do not, the inclusion of a provision such as model legislative provision 28 may provide the legal basis for taking action.

#### MODEL LEGISLATIVE PROVISION 28: JOINT INVESTIGATIONS

1. For the purpose of investigating offences to which this [Act/Law/Chapter/etc.] applies, the [relevant national law enforcement agency and/or prosecution or judicial authority] may, in relation to matters that are the subject of investigations [or prosecutions or judicial proceedings] in one or more States, conclude agreements or arrangements with one or more foreign law enforcement agencies [or prosecution or judicial authorities] or relevant international or regional law enforcement or judicial cooperation organizations regarding either or both of the following:
  - (a) The establishment of a joint investigative body; and/or
  - (b) The undertaking of joint investigations on a case-by-case basis.
2. Where an agreement or arrangement under paragraph 1 has been made, the law enforcement agencies [or public prosecution or judicial authorities] may engage in joint investigations with the relevant State or international or regional law enforcement or judicial cooperation organizations.
3. Evidence collected outside of the territory of [State] pursuant to a joint investigation under this article shall be admissible in judicial proceedings as if such evidence had been collected within the territory of [State].

UNODC has identified several legal impediments relating to the establishment of joint investigations. These include a lack of a clear framework or specific legislation regarding the establishment of such investigations, a lack of clarity regarding control of operations and a lack of clarity regarding liability for the costs of joint investigations. Legislation providing for joint investigations in the context of crimes in the fisheries sector must ensure that each of these issues is addressed in order for joint investigations to operate effectively.

A clear legal framework is particularly important in the case of actively integrated joint investigative teams or joint investigative bodies, as these may involve the operational deployment of officers from foreign jurisdictions. In particular, legislation may be required for:

- (a) Conferring powers on foreign law enforcement officers or, where appropriate, public prosecutors or investigative judges;

- (b) Clarifying the seniority of law enforcement officers and the provision of an unambiguous hierarchy of those in charge;
- (c) Clarifying the roles and responsibilities of seconded officers and ensuring their proper supervision;
- (d) Establishing limits on the activities of seconded officers;
- (e) Evidence-gathering procedures by foreign law enforcement officers and the admissibility of this evidence in court proceedings;
- (f) Dispensing with mutual legal assistance procedures in relation to evidence obtained pursuant to the joint investigation;
- (g) Conferring certain protections for seconded foreign officials equivalent to those enjoyed by their national counterparts.

Model legislative provision 29 below deals with two of these issues and contains a provision establishing the conferral of powers on foreign officials and affording seconded officials protections from civil and criminal liability.

#### **MODEL LEGISLATIVE PROVISION 29: CONFERRAL OF POWERS ON FOREIGN OFFICIALS IN JOINT INVESTIGATIONS**

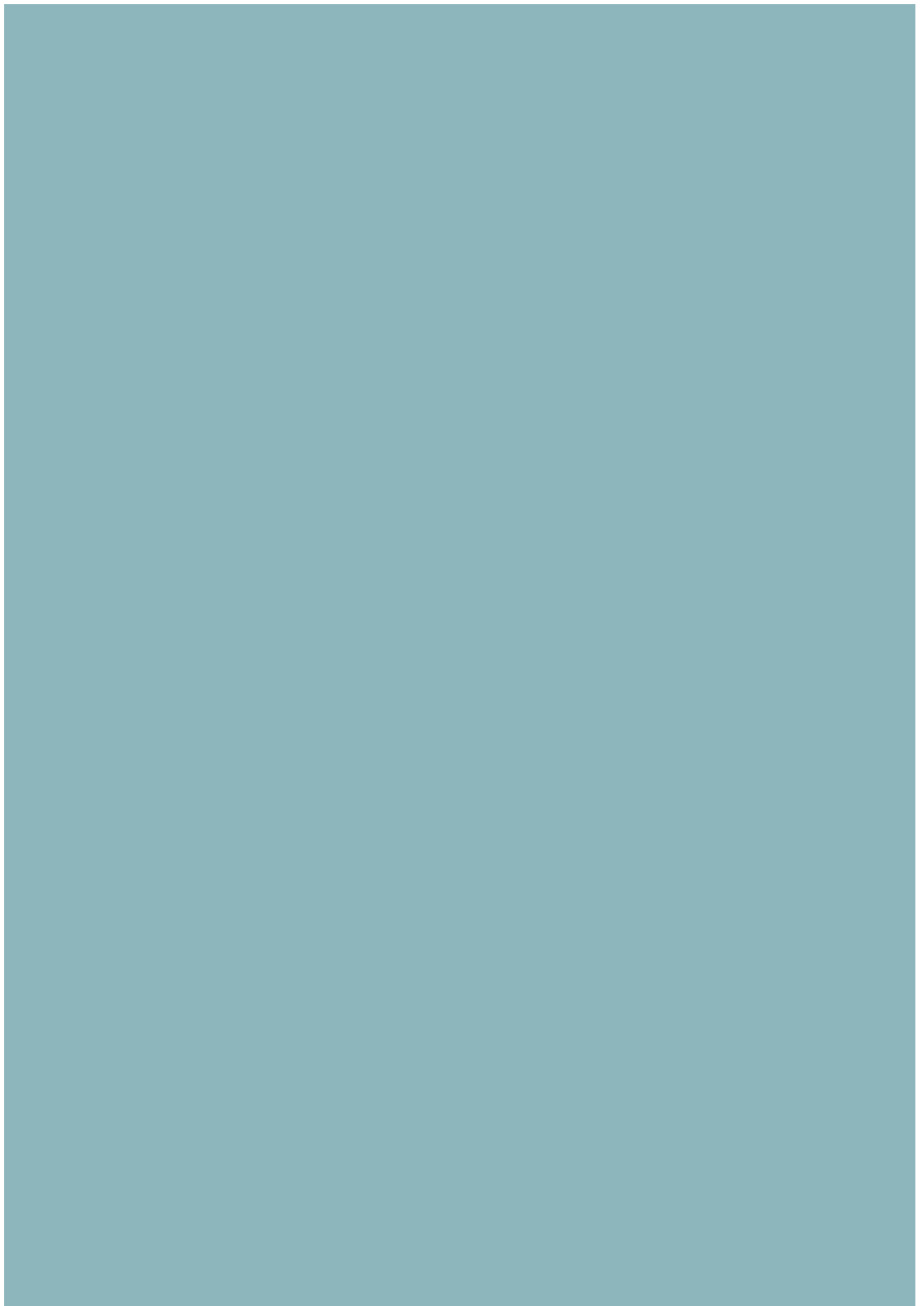
1. Where [State] has an agreement in place with a foreign State in relation to the conferral of powers in joint investigations, [competent authority] may confer upon law enforcement officials [or public prosecutors or investigative judges] of that State one or more of the following powers, which shall be exercised in [State], subject to [State] law:
  - (a) [The power to receive information and take statements, in accordance with the law of the foreign State];
  - (b) [The power to record charges in the official record, including in a form required by their national law];
  - and
  - (c) [The authority to undertake surveillance of persons and/or undercover operations].
2. An official to whom any of the powers specified under paragraph 1 has been conferred shall be entitled to the same protections as an equivalent official of [State] under [State] law.

## **COOPERATION THROUGH THE INTERNATIONAL CRIMINAL POLICE ORGANIZATION AND PURPLE NOTICES**

Law enforcement cooperation occurs through various channels, including through regional and international police organizations, including INTERPOL, whose mandate is to ensure the broadest possible cooperation between criminal police authorities. INTERPOL also acts as a neutral platform for the global exchange of law enforcement information, providing guidance, coordination and assistance to its members.

INTERPOL notices are international requests for cooperation or alerts containing crime-related information from police in member countries. The notice system is used not only to alert the relevant agencies of member countries to fugitives and dangerous criminals, but also to provide information on the *modi operandi*, objects, devices and concealment methods used by criminals. Notices of the latter type are categorized as Purple Notices.

Purple Notices have been requested by member countries and issued by INTERPOL for fishing vessels and in relation to crimes in the fisheries sector. Although the notice system is for police use and not generally available to the public, it is a useful tool for identifying and disseminating information on vessels engaged in such crimes to relevant agencies, in particular in the early intelligence stage of investigations into crimes in the fisheries sector.





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# Chapter VI.

## PROSECUTION AND DEFENCES

Beyond investigation, preventing and combating crimes in the fisheries sector requires effective prosecution. This chapter addresses some of the key procedural issues that may arise in the prosecution of offences covered by the present guide and then examines the defences that may be raised at trial.

### PROSECUTION

As noted in chapter IV, the roles of prosecutors differ between States. In most systems, the core functions of prosecutors are those of deciding whether to prosecute and prosecuting the State's case in court. Some jurisdictions may assign the following additional functions to prosecutors: investigating crimes, supervising investigators' compliance with procedural rules, handling judicial interim release (bail), plea and sentence agreements, providing victim support, issuing recommendations regarding sentences and supervising the execution of sentences.<sup>178</sup>

This section considers the following issues relating to the prosecution of offences: prosecutorial discretion, alternatives to trial, limitation periods and pretrial detention.

### Prosecutorial discretion

In some States, prosecutors are afforded discretion as to whether to prosecute offences, which may be handled through criminal proceedings or through civil or administrative procedures. Conditions on the exercise of this discretion may include public interest in prosecuting or not prosecuting an offence and the need to bring offenders to justice and deter the commission of similar offences.

In cases concerning crimes in the fisheries sector, prosecutors may also consult the reports of relevant regional fisheries management organizations to determine whether the vessel is included in their lists of vessels engaging in illegal, unreported and unregulated fishing, or whether their compliance committee shows that the flag State in question is reluctant to investigate and take measures against a vessel for its violations of regional fisheries management organization measures. Where a vessel has violated national legislation and regional fisheries management organization measures, there may be a strong case for oversight and prosecution.

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<sup>178</sup> See UNODC and International Association of Prosecutors, *The Status and Role of Prosecutors*. See also chapter IV above.

In the criminal law process, prosecutorial discretion may relate not only to decisions to initiate and pursue a prosecution but also to decisions to accept plea bargains. In some States, plea bargaining may be a useful tool that enables prosecutors to bring cases against high-level offenders by securing testimony from lower-level offenders. In other States, prosecutors do not possess such a tool.

Given the differences in legal traditions with respect to prosecutorial discretion, the present guide does not contain model legislative provisions relating to this topic. For States that do afford prosecutors discretion as to whether to initiate and pursue prosecutions, it is important to ensure consistency in prosecutorial decision-making as to when to initiate, maintain or discontinue prosecutions and accept plea bargains. Where applicable, States should adopt appropriate measures to that effect.

## Alternatives to trial

In certain jurisdictions, prosecutors may exercise discretion to resolve cases, where appropriate, through alternatives to trial, such as formal cautions, diversion programmes, discharge, deferred prosecution agreements and other alternative forms of dispute resolution.

Alternatives to trial may be particularly appropriate in cases of minor and/or first-time offending, but less appropriate in cases of significant or repeat offending. In cases involving criminal conspiracy, some States have developed a cooperation framework that allows for the imposition of lighter sentences where individuals are prepared to cooperate with law enforcement officials. Such arrangements are not without peril and should be monitored closely and implemented with care.

Factors that may be relevant to determining whether an alternative to trial should be pursued include the intent and motives of the offender, the environmental and other impacts of the offence, the need for specific or general deterrence, whether the offender has a criminal record (and for what offences), the attitude of the offender to the offence and the extent to which the offender has cooperated during the investigation, any remedial measures taken by the offender and the offender's personal circumstances.

In the context of crimes in the fisheries sector, deferred prosecution agreements may be offered to defendants who agree to fulfil certain conditions, such as paying compensation and repairing environmental damage caused in the course of the offence. In some jurisdictions, the prosecutor has the authority to impose fines for minor offences. In such instances, the payment of the fine is deemed to be an admission of guilt.<sup>179</sup>

In jurisdictions where such alternatives to trial exist, laws or guidelines should regulate their use, in particular where cases are closed upon the payment of a fine. There is a danger that such payments under deferred prosecution agreements or other alternatives to trial will simply be absorbed by organized criminal groups as an operating cost of their criminal activities in the fisheries sector without having any deterrent effect on their criminal conduct. Moreover, there is a significant risk that monetary payments from members of organized criminal groups or legal persons involved in crimes in the fisheries sector will be of illicit origin.

## Limitation periods

In some jurisdictions, the commencement of a prosecution is limited by a period of time known as the "limitation period" under a statute of limitations. In other jurisdictions, limitation periods do not apply to criminal offences, or apply to certain offences but not others. According to article 11 (5) of the Organized Crime Convention, States parties that do impose limitation periods on the prosecution of criminal offences are required to ensure that the limitation periods applicable to offences covered by the Convention are sufficiently long, in particular where the alleged offender has deliberately sought to evade the administration of justice.<sup>180</sup>

<sup>179</sup> See, for instance, Canada, *Contraventions Act*, *Statutes of Canada*, chap. 47, sect. 22 (1992).

<sup>180</sup> See UNODC, *Legislative Guide for the Implementation of the Organized Crime Convention*, paras. 322–327.

States should ensure that the legislative provisions implementing this obligation under the Organized Crime Convention extend to the offences covered by the present guide. Legislation should clearly indicate when the limitation period starts to run – in particular whether the period runs from the time of the commission of the offence or the time of discovery – and the circumstances in which the running time of a limitation period may be suspended, for example when the offender has deliberately sought to evade the administration of justice.

In some States, the limitation period may be suspended while evidence is being gathered from abroad. States should consider whether such a provision would be desirable considering the length of limitation periods applicable to crimes in the fisheries sector and the potential difficulties in gathering evidence from abroad. Whatever approach is taken, States should ensure the timely prosecution of cases at trial.

Model legislative provision 30 below provides an example of how a State could set out an appropriate limitation period for crimes in the fisheries sector. Paragraph 2 provides for the suspension of the limitation period where a suspect has deliberately sought to evade the administration of justice.

#### **MODEL LEGISLATIVE PROVISION 30: LIMITATION PERIOD**

1. Subject to paragraph 2, the limitation period for criminal proceedings for offences to which this [Act/Law/Chapter/etc.] applies is [number of years] [from the commission of the offence/the time of discovery of the offence/any other recognized period].
2. Where a person suspected of an offence to which this [Act/Law/Chapter/etc.] applies deliberately seeks to evade the administration of justice, the limitation period in paragraph 1 shall not run for the duration of such evasion.

### **Pretrial detention**

Those responsible for crimes in the fisheries sector cannot be brought to justice if they evade the jurisdiction of prosecuting and judicial authorities. Crimes in the fisheries sector are often committed by foreign nationals or persons who may otherwise be at risk of absconding. It is imperative that States take steps to prevent offenders from fleeing the country prior to trial or sentencing, within their constitutional and human rights frameworks. In some cases, the possibility of flight risk may require that the offender be detained pending trial. In other cases, measures such as the confiscation of an offender's passport may be sufficient to mitigate flight risk.

Pursuant to article 11 (3) of the Organized Crime Convention, States parties are required to take appropriate measures with respect to the offences established under the Convention, in accordance with domestic law and with due regard for the rights of the defence, to seek to ensure that conditions imposed in connection with release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

The illegal operations in which organized criminal groups engage may generate substantial profits, rendering large sums of money available to suspects and defendants, and enabling them to post bail. Article 11 (3) of the Organized Crime Convention serves to encourage the prudent use of pretrial detention by requiring States parties to take appropriate measures consistent with their domestic laws and the rights of suspects and defendants to ensure that they do not abscond.

While not expressly required by the Convention, the capacity of a suspect to influence witnesses, tamper with evidence or take other steps to undermine the administration of justice should be considered in the decision-making process in the context of pretrial release or detention. These factors are included for consideration in model legislative provision 31 below.

**MODEL LEGISLATIVE PROVISION 31: PRETRIAL DETENTION**

1. Where a person has been charged with an offence to which this [Act/Law/Chapter/etc.] applies, the defendant may be denied bail if the offence charged is serious [and/or] if any of the grounds listed in paragraph 2 applies.
2. The defendant may be denied bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would:
  - (a) Fail to surrender to custody;
  - (b) Commit an offence while on bail; or
  - (c) Interfere with witnesses or otherwise obstruct the course of justice.
3. The pretrial detention of a defendant under this article:
  - (a) Shall not exceed [maximum period for pretrial detention, or the maximum period of imprisonment for the offence charged, whichever is shorter];
  - (b) May be extended on the application of the prosecutor where the court is satisfied that the defendant should not be granted bail under paragraph 2 of this article; and
  - (c) Shall not exceed, in total, [maximum period for pretrial detention, or the maximum period of imprisonment for the offence charged, whichever is shorter].
4. Bail shall not be denied if the objectives of the detention may be achieved through less severe means.
5. In lieu of denying bail, the court may impose conditions on the defendant to ensure surrender to custody and the administration of justice, by:
  - (a) Seizing or confiscating travel or other identity documents belonging to the defendant;
  - (b) Requiring the provision of security or sureties;
  - (c) Placing restrictions on the movement of the defendant, such as home confinement or electronic monitoring; or
  - (d) Other measures considered by the court to be necessary and proportionate to prevent the defendant from influencing witnesses, tampering with evidence or otherwise obstructing the administration of justice.

**DEFENCES**

Many of the offences contained in the present guide contain exemptions for lawful authority and for holders of relevant licences or authorizations. States may also consider it desirable for certain partial or complete defences to be available for particular offences. Similarly, certain defences may not be available in the context of certain crimes committed in the fisheries sector.<sup>181</sup>

Defences are distinguished from exemptions in that a defence excuses or justifies conduct that would otherwise constitute an offence, while an exemption excludes certain conduct from the offence itself.

As noted in chapter III, in certain jurisdictions, due diligence may be established as a defence to the liability of legal persons.

States may wish to make the defence of necessity or duress available for the offences covered by the present guide. In many States, this defence will already exist as a defence of general application under criminal law. Where necessity or duress does not exist as a defence of general application, States may wish to introduce that defence into fisheries legislation.

<sup>181</sup> See chapter III above. In Papua New Guinea, the mistake-of-fact defence is not available where an offender has been charged with fishing contrary to the laws of another State.

The defence of necessity or duress will not be available to all defendants prosecuted for crimes in the fisheries sector. For instance, it may be a defence for crew members aboard a fishing vessel where they are threatened with violence or death, but it would not be available to the master of the vessel.

It is for States to determine whether the availability of particular defences to particular offences is set out in legislation or left to judicial interpretation.

In cases involving crimes in the fisheries sector, the defences raised at trial frequently involve challenges to the jurisdiction of the court and to the mandate of the prosecution. Additional or alternative defences raised often relate to a lack of the requisite mens rea. Prosecutors should be particularly mindful of those potential defences when bringing their cases and presenting evidence in court.

## STANDARD AND BURDEN OF PROOF

The standard of proof is the measure by which a court or tribunal determines whether a party has established facts to a sufficient degree in order for the entire case or a particular issue to be decided in its favour. The standard of proof is not rigid; rather, it is the degree or range of certainty within which facts need to be established.

In criminal proceedings in most jurisdictions, the defendant is presumed innocent until proved guilty. The burden of proof is on the prosecution to prove its case to a very high standard of proof, often described as “beyond reasonable doubt”. By contrast, in civil or administrative cases, the standard of proof tends to be based on a balance of probabilities – in other words, the court or tribunal must be satisfied that, on the basis of the evidence, the occurrence of the event was more likely than not; this is often referred to as “a preponderance of the evidence”.

In many jurisdictions, certain rebuttable presumptions may apply to evidence. For instance, where a fishing vessel has been used in the commission of an offence, all fish found on board may be presumed to have been caught in the commission of the offence, unless the contrary is proved.<sup>182</sup>

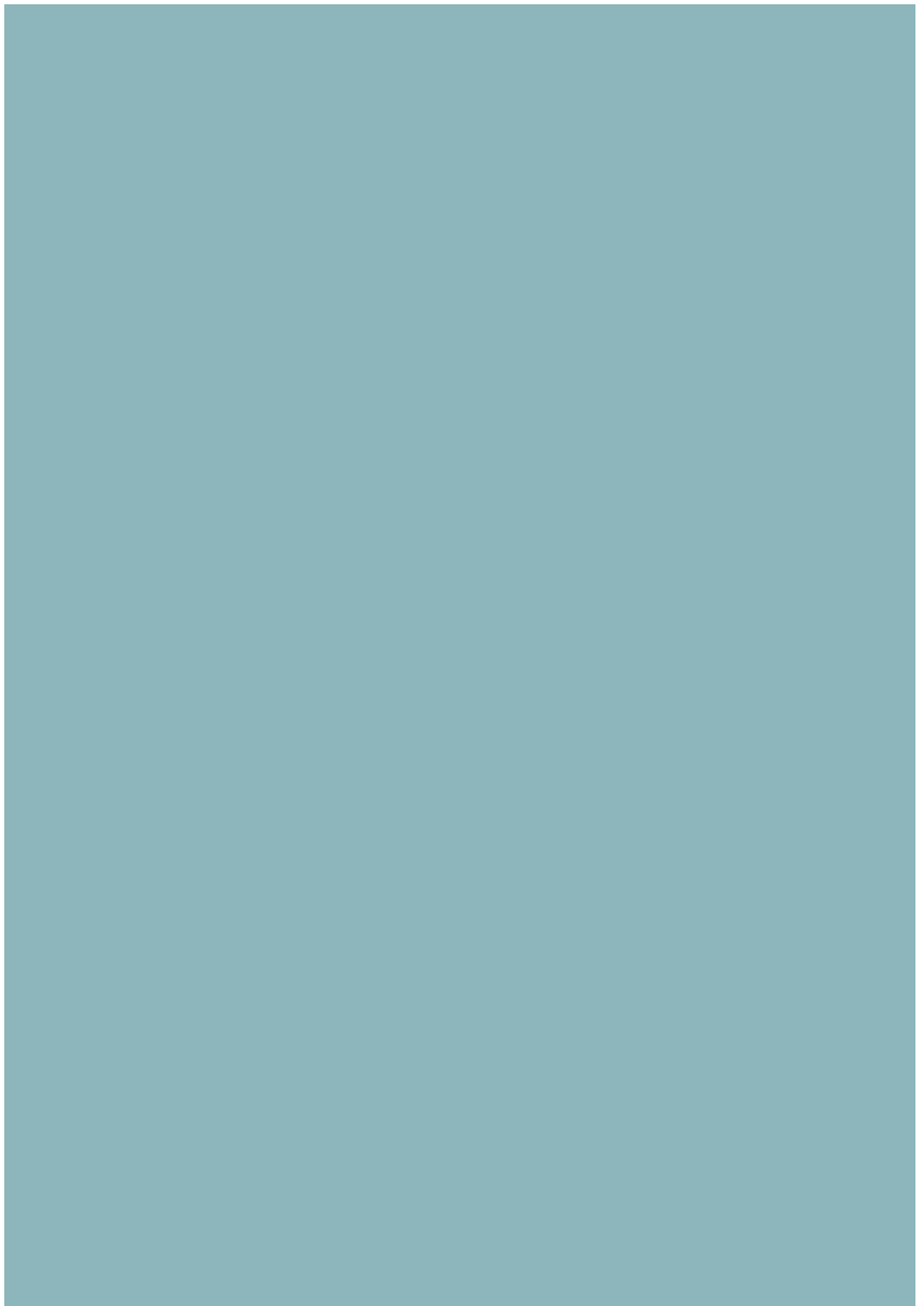
## ADMISSIBILITY OF ELECTRONIC DATA

In many national legal systems, information generated by modern technology is admissible in judicial proceedings, including from vessel monitoring systems, owing to their accuracy and trustworthiness. Such evidentiary provisions promote judicial economy and facilitate expeditious proceedings.

However, police and investigators responsible for gathering evidence should not rely on mere admissibility when collecting evidence. At trial, the defendant may challenge the accuracy of electronic data. It is therefore essential that other corroborative evidence, such as the vessel’s logbooks, is secured at the investigative stage and presented at trial.<sup>183</sup>

<sup>182</sup> See, for instance, Solomon Islands, Fisheries Management Act 2015 (No. 2 of 2015), sect. 124; Saint Kitts and Nevis, Fisheries Aquaculture and Marine Resources Act, 2016 (No. 1 of 2016), sect.141 (1); and Ghana, Fisheries Act 2002 (Act No. 625 of 2002) sect. 122 (1).

<sup>183</sup> See also, for instance, Indian Ocean Tuna Commission, *Evidence in Fisheries Offences: Effective Collection and Use, Laws, Procedures, Prosecutions, Illegal, Unreported and Unregulated Vessel Listing* (Rome, FAO, 2023).



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# Chapter VII.

## SENTENCING, FINES, PENALTIES AND OTHER SANCTIONS

Legislation establishing offences covered by the present guide should provide for appropriate penalties and should seek to ensure that convicted persons receive adequate and proportional sentences. As approaches to setting penalties and sentencing offenders vary greatly between States according to their legal traditions, the guide does not provide any model legislative provisions on penalties and sentencing. Rather, this chapter sets out a number of relevant issues for consideration by States in drafting legislative provisions relating to penalties and sentencing for crimes committed in the fisheries sector.

The overriding considerations in determining appropriate penalties for the offences contained in the present guide are that the penalties should be proportional, effective and dissuasive.<sup>184</sup>

The principle of proportionality of sentencing is a general principle of criminal law across national legal systems. It is upheld by international human rights law and enshrined in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)<sup>185</sup> and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules).<sup>186</sup>

Many of the offences contained in the present guide constitute serious crimes. These offences are severely damaging not only to the environment but also to the rule of law and stability within States. It is imperative that the penalties for these offences reflect their serious nature and be comparable to sanctions for other serious crimes.<sup>187</sup> They must reflect the public's condemnation of crimes in the fisheries sector and act as effective deterrents.

However, not all of the offences covered by the guide are equally grave. For instance, the offence of entering a marine protected area is less serious than the offence of trafficking in fish.<sup>188</sup> The penalty for each offence must be proportionate to its gravity.

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<sup>184</sup> See Organized Crime Convention, arts. 10 and 11.

<sup>185</sup> General Assembly resolution 40/33, annex, rules 5.1 and 17.1.

<sup>186</sup> General Assembly resolution 45/110, annex, rules 2.3 and 3.2.

<sup>187</sup> See Organized Crime Convention, art. 11 (1).

<sup>188</sup> In certain circumstances, however, entering a marine protected area unlawfully may constitute a serious offence.

## SENTENCING

The circumstances of each offence and of each offender are infinitely variable. Sentences available to judges need to be flexible enough to take into account the individual circumstances of each case.

It follows from the requirement that sentences be proportional to the seriousness of the offence that sentences must take into account the relevant circumstances of the offending. Factors that tend to raise the seriousness of the offence or the culpability of the offender, or otherwise warrant longer sentences, are known as aggravating factors. Factors that tend to lower the seriousness of the offence or the culpability of the offender, or otherwise warrant less severe sentences, are known as mitigating factors.

Different approaches to aggravating and mitigating factors are taken in different jurisdictions. In some jurisdictions, legislative provisions require stricter penalties, such as longer minimum and/or maximum sentences, where specific aggravating factors are present. In other jurisdictions, statutory provisions merely set out relevant factors to be taken into account by sentencing judges in their (absolute or qualified) discretion in deciding upon the appropriate sentence.

In some jurisdictions, specific lists of aggravating and mitigating factors will be set out in legislation for particular offences.<sup>189</sup> In other jurisdictions, sentencing judges will rely upon general lists of relevant factors for all criminal offences. Some jurisdictions use a combination of these approaches, depending on the legislation and the offence in question.

It is for each State to determine how aggravating and mitigating factors are taken into account in sentencing offenders for crimes committed in the fisheries sector, bearing in mind the obligations of the State under international law and its domestic legal traditions. Whichever approach is taken, a number of suggested aggravating and mitigating factors are set out below.

After taking all relevant aggravating and mitigating factors into account, the sentencing judge should consider whether the proposed sentence, as a whole, meets the objectives of sentencing, namely, whether the sentence is effective, proportionate and dissuasive.

### Aggravating factors

Factors that may be considered to increase the culpability of an offender or the seriousness of the offence or otherwise warrant more severe penalties for an offence covered by the present guide include:

- (a) Whether the offence involved prohibited or protected species listed in a schedule;
- (b) Whether the offence involved the use of a prohibited practice or prohibited gear;
- (c) Whether the offence was committed, in whole or in part, in a marine protected area;
- (d) Whether the offence was committed during a protected spawning season;
- (e) Whether the offence caused, or was likely to cause, serious harm to a particular species, marine environment, ecosystem, biodiversity, tourism, society or the economy;
- (f) Whether a large number or quantity of fish were harmed or killed in the commission of the offence;<sup>190</sup>
- (g) Whether the offender has previously committed a similar crime in the fisheries sector, and whether the offender has been charged or convicted in relation to such an offence;
- (h) Any financial or other material benefit to the offender or any other person as a result of the offence;
- (i) The size of any financial or other material loss to another person caused by the offence;

<sup>189</sup> See, for instance, Saint Kitts and Nevis, Fisheries Aquaculture and Marine Resources Act, 2016 (No. 1 of 2016), sect. 118 (3).

<sup>190</sup> The quantity of fish should be determined per species.



- (j) Whether the offence was committed as part of an activity of an organized criminal group;
- (k) Whether the offender had a leadership or managerial role in the organized criminal group;
- (l) Whether the offence was part of a pattern of ongoing criminal activity;
- (m) Whether the offender attempted to obstruct the administration of justice during the investigation, prosecution or sentencing of the offence;
- (n) Whether the offence was committed by a government official;
- (o) Whether the offence was committed by a person in a position of trust or authority, including the holder of a relevant licence or authorization.

Several of the aggravating factors listed above are also constituent elements of some of the offences set out in the present guide. It would be inappropriate to use an aggravating factor to increase a sentence where that factor is part of the underlying offence for which a person has already been convicted.

For instance, when a person is convicted of participating in the activities of an organized criminal group, the fact that the offence was committed in connection with the activities of such a group cannot also be counted as an aggravating factor warranting a longer sentence. Likewise, when a person is convicted of organizing or directing the commission of an offence, the managerial role of the offender cannot also be considered aggravating or justify the imposition of a longer sentence.

## Mitigating factors

Factors that may be considered to reduce the culpability of an offender or otherwise warrant lower penalties for an offence covered by the present guide include:

- (a) Whether the offence was relatively minor, for instance, where the offence harmed or killed few fish;
- (b) Whether the offender had a lesser or minor role in the commission of the offence;
- (c) Whether the offender committed the offence as a result of coercion, intimidation or exploitation;
- (d) Whether the offender was or is suffering from reduced mental capacity at the time of the offence or at the time of sentencing;
- (e) Whether the offender entered a guilty plea, especially where a guilty plea was entered early in the course of the proceedings;
- (f) Whether the offender showed remorse for the offence;
- (g) The steps taken by the offender to rectify or mitigate the impacts of the offence;
- (h) Whether the offender voluntarily cooperated by providing information or otherwise assisted competent authorities, including in the investigation and prosecution of related crimes;
- (i) Whether the offender had no prior criminal record;
- (j) Whether the offender was otherwise of prior good character;
- (k) Whether the offender was or is particularly old or particularly young at the time of the offence or at the time of sentencing;
- (l) Where the offence provided no or very limited financial or other material benefit to the offender or any other person, or caused little or no financial or other material loss to any person.

## CUSTODIAL SENTENCES, FINES, PENALTIES AND OTHER SANCTIONS

This section examines the various penalties that may be imposed for the commission of crimes covered by the present guide. The penalties may range from imprisonment to non-custodial alternatives, such as fines that may be imposed on offenders, and ancillary penalties such as confiscation, revocation of licences and banning orders. In addition, this section considers penalties for legal persons and provisions relating to compensation and restitution.

### Custodial sentences

The most serious offences contained in the present guide should be punishable by sentences of imprisonment proportional to the seriousness of the offence and long enough to serve as effective deterrents. Beyond proportionality and deterrence, there are several considerations that States should take into account in setting maximum sentences of imprisonment for crimes committed in the fisheries sector.

First, for the Organized Crime Convention to apply to an offence, the offence must either be established in accordance with the Convention or constitute a “serious crime”, be transnational in nature and involve an organized criminal group. Participation in an organized criminal group, corruption, money-laundering and obstruction of justice are expressly addressed by the Convention, while a “serious crime” is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.<sup>191</sup> The Organized Crime Convention would therefore apply only to the most serious crimes in the fisheries sector covered by the present guide, that is, those which carry maximum penalties of at least four years’ imprisonment.

Second, in certain States, the designation of predicate offences for the purpose of money-laundering legislation is determined by reference to the maximum penalty of the offence in question. In such States, legislative drafters should ensure that the maximum penalties for crimes in the fisheries sector that are intended for designation as predicate offences are sufficiently high to meet that threshold.

Third, in some States the eligibility of an offence to serve as a basis for extradition is determined by reference to the maximum penalty for the offence in question. Where this is the case, legislative drafters should ensure that the maximum penalties for offences in the fisheries sector are severe enough to warrant extradition and are sufficiently high for extradition to be possible under the State’s extradition treaties and domestic legislation.

Lastly, as noted above, the United Nations Convention on the Law of the Sea precludes imprisonment (and other forms of corporal punishment) as a penalty for violations of fisheries laws and regulations where they are committed by foreign nationals in the EEZ of a coastal or archipelagic State.<sup>192</sup> Custodial sentences for violations of fisheries laws in the EEZ are possible only where the States concerned have agreements in place permitting imprisonment for such offences.

### Non-custodial sentences

Legislation establishing or amending offences in the fisheries sector should take into consideration the desirability of alternatives to custodial sentences in certain circumstances. The types of non-custodial sentences that can be handed down to offenders and the availability of each type of non-custodial sentence are matters for each State to determine in accordance with its legal framework for sentencing.

<sup>191</sup> Organized Crime Convention, art. 2 (b).

<sup>192</sup> United Nations Convention on the Law of the Sea, art. 73 (3).

Guidance on alternatives to imprisonment can be found in the Tokyo Rules and in the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),<sup>193</sup> as well as in the relevant UNODC handbooks.<sup>194</sup>

Under the Tokyo Rules, domestic law should provide for a wide range of non-custodial measures for persons convicted, from pretrial to post-sentencing provisions.<sup>195</sup> In particular, the authorities investigating or prosecuting criminal cases should be empowered to discharge the offender in appropriate circumstances and to impose non-custodial measures for minor offences.<sup>196</sup>

Non-custodial penalties may include: verbal sanctions, such as admonition, reprimands or warnings; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day fines; confiscation, expropriation or banning orders; compensation to the victim or compensation orders; suspended and deferred sentences; probation and judicial supervision; community service orders; referral to an attendance centre; house arrest; any other mode of non-institutional treatment; and any combination of such measures.<sup>197</sup>

## Fines

Like other penalties for offences committed in the fisheries sector, maximum fines must adequately reflect the seriousness of the offences and be high enough to act as effective deterrents. In some circumstances, fines may be imposed in addition, or as an alternative, to a sentence of imprisonment.

Legislators should bear in mind that crimes in the fisheries sector can be an extremely lucrative business for offenders. If fines are not sufficiently high, there is a danger that they will simply be absorbed as part of the operating costs of organized criminal groups. In certain cases, a fine alone will not serve as an effective deterrent without confiscation of the proceeds of crime.<sup>198</sup>

In determining the appropriate sum of any fine, the financial position of the offender should be taken into account. The court (or other competent authority) may require access to accounts and other financial documents of legal persons and, where appropriate, the accounts and other financial documents of related entities to assess the offender's financial status.

In determining the appropriate fine in a given case, courts should also consider the value and volume of the fish involved in the offence, the financial or material benefit obtained by the offender and the loss of fish species and/or damage to the marine ecosystem. States should consider implementing measures to prevent the real value of fines from being reduced over time by inflation. One approach could be to tether fine values to penalty units, which could then be adjusted in step with inflation.<sup>199</sup> In many jurisdictions, when an offender defaults on a fine, a sentence of imprisonment may be imposed in lieu of payment.<sup>200</sup>

## Ancillary penalties

In certain cases, it may be necessary for a court to impose penalties ancillary to a sentence of imprisonment or non-custodial sentence. These could include, but are not limited to, the following: (a) orders to confiscate proceeds of crime or property, equipment or other instrumentalities used in or destined for use in offences; (b) orders disqualifying or prohibiting a person from one or more social, commercial or professional activities;

<sup>193</sup> General Assembly resolution 65/229, annex, rules 57–65.

<sup>194</sup> See UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, Criminal Justice Handbook Series (Vienna, 2014); and UNODC and International Committee of the Red Cross, *Handbook on Strategies to Reduce Overcrowding in Prisons*, Criminal Justice Handbook Series (Vienna, 2013).

<sup>195</sup> United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) rules 2.3 and 3.1.

<sup>196</sup> *Ibid.*, rule 5.1.

<sup>197</sup> *Ibid.*, rule 8.2.

<sup>198</sup> See “Confiscation orders” below.

<sup>199</sup> See, for instance, Solomon Islands, Fisheries Management Act 2015 (No. 2 of 2015), sect. 100 and First Schedule.

<sup>200</sup> See, for instance, Malaysia, Criminal Procedure Code (Act 593), as at 1 November 2012, art. 283 (1).

(c) orders disqualifying a person from participation in public procurement; and (d) orders disqualifying a person from applying for or being granted a licence or authorization from a relevant competent authority.

## Confiscation orders

Under the Organized Crime Convention, confiscation includes forfeiture and is defined as “the permanent deprivation of property by order of a court or other competent authority”.<sup>201</sup> Pursuant to article 12 (1) of the Convention, States parties are required to adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable the confiscation of: (a) the proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds; and (b) property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention.

States should ensure that orders for the confiscation of such proceeds, property, equipment and other instrumentalities can be made as ancillary orders during sentencing for offences covered in the present guide. Where that is not adequately provided for under other domestic laws, it should be addressed in legislation combating crimes in the fisheries sector. In this context, States parties should also be aware of their obligations relating to international cooperation for the purpose of confiscation and the disposal of the proceeds of crime or property confiscated in accordance with articles 13 and 14 of the Convention.

Forfeited fishing vessels may be repurposed by State agencies for enforcement or sold at auction. Legislation should prevent the owner from repurchasing the forfeited vessel. Proceeds from the sale may be used for stated purposes, including restitution. Some States may decide to sink forfeited vessels to ensure no further use or to create an artificial reef, although such action should be taken only after environmental impact assessments have been carried out.

## Disqualification orders, cancellation of licences and authorizations, and banning orders

In some cases, it may be appropriate for a court to issue orders disqualifying a natural or legal person from holding a certain occupation or position, or from fishing. Such orders may be issued in addition, or as an alternative, to a penal sentence. For instance, it may be appropriate for a court to disqualify a natural person from acting as a company director for a specified period of time. It may also be appropriate for a court to order that a natural or legal person’s licence or authorization to fish be cancelled.

In other cases, it may be appropriate for courts or competent authorities to issue banning orders that cancel fishing licences or authorizations and ban a natural or legal person from applying for such a licence or authorization for a specified period,<sup>202</sup> independent of any criminal proceedings against that person. Such orders could, for instance, be made on the basis of breach of the conditions of a fishing licence or authorization.

## Restitution

In some States, the court or tribunal may award certain costs for restitution purposes. Where applicable, restitution is an important component of a criminal sentence because it helps to ensure that the perpetrator pays the cost of the crime and that the State harmed receives compensation. The prosecutor may present evidence in court regarding the value of the damage caused by the offence – for instance, the cost of restoring a reef damaged or destroyed by dynamiting or illegal dragnets. Alternatively, the amount of restitution could be calculated on the basis of the market value of the fish that was illegally harvested or traded. Such harm can

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<sup>201</sup> Organized Crime Convention, art. 2 (g). However, in certain States, confiscation by a court may be temporary and will not result in permanent forfeiture where a court declines to make the relevant order.

<sup>202</sup> See, for instance, Solomon Islands, Fisheries Management Act 2015 (No. 2 of 2015), sect. 107; and Saint Kitts and Nevis, Fisheries Aquaculture and Marine Resources Act, 2016 (No. 1 of 2016), sect. 125.

be established and calculated through an expert-led judicial inquiry and, depending on the circumstances, may be determined in accordance with the civil standard of proof, namely, the balance of probabilities (i.e. the preponderance of evidence).

## Penalties for legal persons

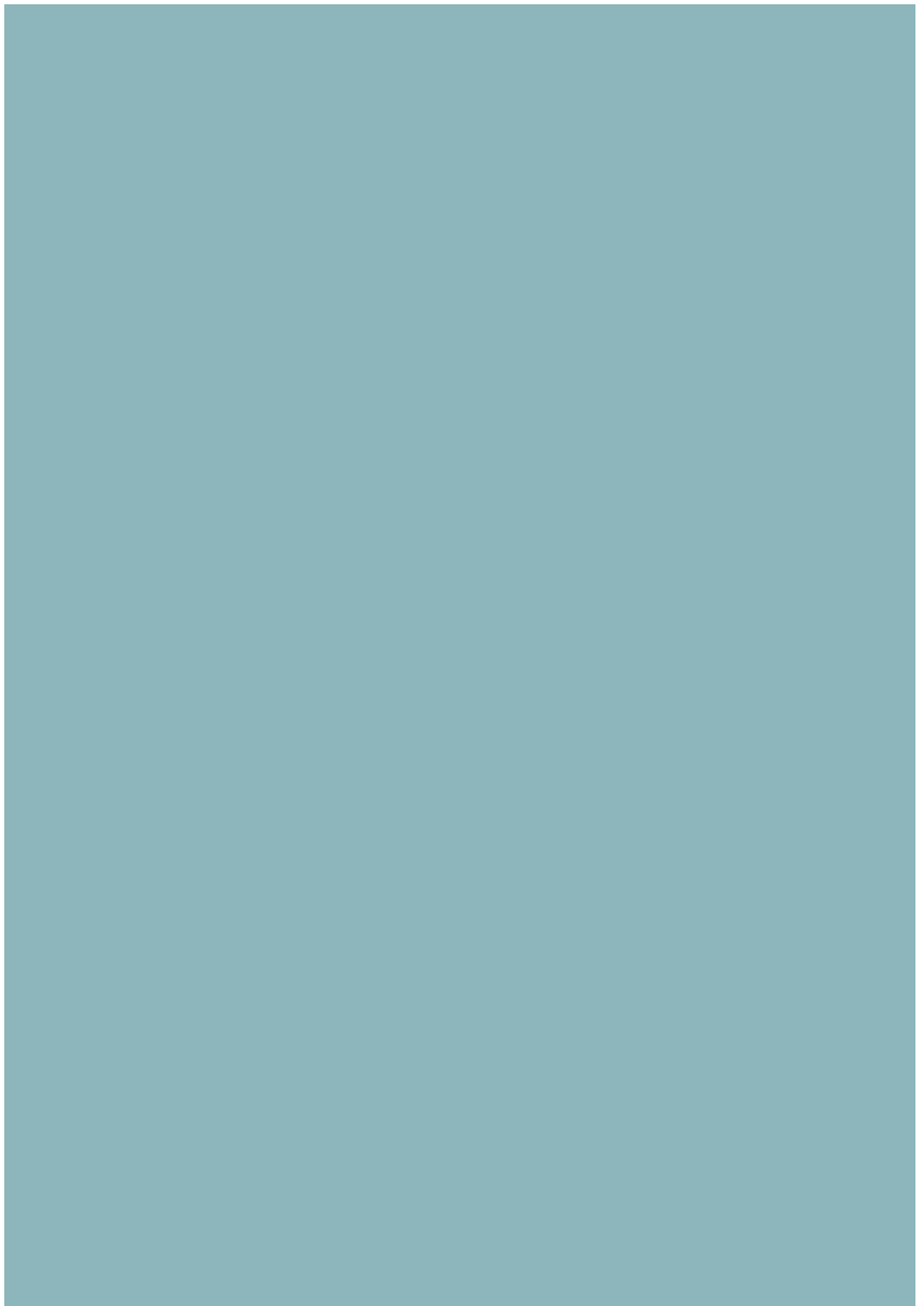
Some sanctions, such as fines and ancillary penalties, are applicable to natural and legal persons alike. Other sanctions, such as imprisonment, are applicable only to natural persons; a company cannot be imprisoned. Equally, there are certain sanctions that may only apply to a legal person, such as an order for the legal person to be dissolved or wound up.

Model legislative provision 32 below sets out a non-exhaustive list of sanctions that may be imposed, individually or in combination, upon legal persons found guilty of an offence. The types of sanctions listed range from monetary penalties, confiscation of proceeds of crime and adverse publicity to probation-style sanctions, disqualifications and the dissolution of the legal person.

### MODEL LEGISLATIVE PROVISION 32: SANCTIONS FOR LEGAL PERSONS

Upon conviction for an offence under this [Act/Law/Chapter/etc.], a legal person may be subject to one or more of the following sanctions:

- (a) A fine not exceeding:
  - (i) [maximum amount]; or
  - (ii) [x] times the total value of the benefit obtained or damage caused that is reasonably attributed to the offence; or
  - (iii) [If the court cannot determine the total value of the benefit or damage] [x] per cent of the annual turnover of the legal person during the 12 months prior to the commission of the offence;
- (b) Confiscation of proceeds of crime, equipment or other instrumentalities used in or destined for use in offences;
- (c) An order requiring the legal person to publish the judgment by the court, including, as appropriate, the particulars of the offence and the nature of any penalty imposed;
- (d) An order that the legal person do stated things or establish or carry out a stated project for the public benefit;
- (e) An order requiring that the legal person be placed under judicial supervision for a maximum period of [x] years;
- (f) An order for the legal person to undergo review by an independent monitor appointed by the court for the purpose of reporting to the court on the legal person's efforts to implement a culture of lawfulness;
- (g) An order revoking [licences or authorizations] held by the legal person;
- (h) An order [temporarily] [permanently] disqualifying the legal person from applying for a fishing [licence or authorization];
- (i) An order for the [temporary] [permanent] closure of the establishment, or one or more of the establishments, of the legal person used to commit the offence(s) in question;
- (j) An order [temporarily] [permanently] excluding the legal person from public bidding, from entitlement to public benefits or aid [and/or] from participation in public procurement;
- (k) An order [temporarily] [permanently] disqualifying the legal person from the practice of other commercial activities [and/or] from the creation of another legal person;
- (l) If the activity of the legal person was entirely or predominantly used for carrying out criminal offences or if the legal person was created to commit an offence to which this [Act/Law/Chapter/etc.] applies, an order that the legal person be dissolved; or
- (m) Any further orders that the court considers just.



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# CONCLUDING REMARKS

The present guide was developed to assist States in their efforts to enact and strengthen domestic legislation to combat crimes in the fisheries sector. It outlines a range of issues that States should consider when reviewing, amending or drafting legislation and includes model legislative provisions and relevant national examples to provide practical guidance.

The guide covers the principal crimes in the fisheries sector and many other types of related offences. It also introduces provisions relating to the jurisdiction of courts, national mandates, investigations, international cooperation, the prosecution of offenders, and penalties and sentencing.

Although it is comprehensive, the guide is not exhaustive, and there remains a myriad of possible issues relevant to the development of legislation designed to combat crimes in the fisheries sector. Beyond the issues considered by the guide, States may decide to consider offences relating to trafficking in persons, corruption and tax evasion. Moreover, given the links between crimes in the fisheries sector and organized crime, States may wish to consider provisions to ensure the safety of witnesses and the protection of whistle-blowers.

The criminal justice response recommended in the guide is just one part of an inventory of measures designed to assist States in combating crimes in the fisheries sector. Criminal law can be an effective mechanism for addressing unlawful behaviour, but it is by no means the only device available to States. Civil and administrative frameworks will bolster and support criminal sanctions, which are often reserved for the most egregious or persistent violations.







# UNODC

United Nations Office on Drugs and Crime