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DISCUSSION RESPONSE

The battle against transnational fisheries crime

Jurisdictional challenges

VALENTIN J. SCHATZ — 3 March, 2017



The *raison d'être* of the concept of transnational ‘fisheries crime’ (TFC) ([INTERPOL 2013](#)) or ‘marine resource crime’ ([UNODC 2011](#)) can be traced to endemic illicit activities in the fisheries sector which, due to their devastating impacts, are increasingly considered as a serious problem worthy of attention as ‘criminal’ rather than merely ‘illegal’ behaviour. In terms of scope and approach, TFC is a broader and perhaps more ambitious successor of the concept of ‘illegal, unreported and unregulated fishing’ (IUU-fishing) ([FAO 2001](#)). TFC falls within the broader concept of

‘transnational environmental crime’ (TEC), as it frequently involves a value chain across several jurisdictions. States are, however, reluctant to endorse the concept of TFC and so far the relevant resolutions of the UN General Assembly merely noted “the concerns about possible connections between transnational organized crime and illegal fishing in certain regions of the world.” Thus, IUU-fishing will likely remain the dominant term for the foreseeable future, despite the fact that some States such as Indonesia have recently increased their enforcement efforts and are actively pushing TFC on the agenda of the international community (see here and here).

As Professor Elliott puts it in her contribution, “[i]n strict international law terms, transnational environmental crime does not exist”, and neither does TFC. It follows that TFC is a transnational phenomenon which *de lege lata* has to be addressed by domestic law. From an international legal perspective, the extent and nature of sanctions imposed under domestic law depends on the existence of regulatory and enforcement jurisdiction for TFC and on the political will or legal duty of competent States to exercise such jurisdiction. Competent States may choose to (1) *criminalize* relevant activities, (2) impose administrative or civil law sanctions below the level of criminal law, thereby implying *illegality*, or (3) remain inactive, in which case an activity subject to criminal or administrative sanctions in one State may be perfectly legal in another.

Crucially, the cross-section of fisheries-related conduct which forms part of TFC is not subject to a single coherent jurisdictional regime. For the most part, the relevant jurisdictional framework is established by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and

customary international law. Professor Elliott omits UNCLOS on her shortlist of important multilateral environmental agreements (MEAs) relevant to TEC despite the fact that UNCLOS contains key provisions on the protection of the marine environment and the conservation of marine living resources (UNEP 2006). In order of proximity to the illicit fishing activities as the starting point of the value chain, the most relevant State actors are (1) coastal States (unless the illicit fishing activity takes place on the High Seas), (2) flag States, (3) States of nationality of involved natural and juridical persons, (4) port States, and (5) market States. Importantly, a coastal State may in itself combine *all these functions* (the European Union (EU) is an excellent example).

Coastal States have limited jurisdiction with regard to fisheries-related conduct, which even under the progressive stance taken by the International Tribunal for the Law of the Sea (ITLOS) in 2014 does not include all conduct which falls into the broad concept of TFC such as, for example, forced labour and money laundering. In addition, the coastal State's exercise of criminal and punitive administrative jurisdiction over persons involved in illegal fishing-related activities in its exclusive economic zone (EEZ) is subject to significant limitations both legally and practically (investigation and enforcement at sea is often difficult). Professor Fajardo's call for the "punishment [of TEC] by at least four years deprivation of liberty" in a multilateral treaty may, for example, conflict with the *prohibition of imprisonment* under Article 73(3) UNCLOS unless such a treaty rule can be qualified as an agreement to the contrary by the States concerned.

Flag State jurisdiction and jurisdiction based on the nationality principle are arguably *the most extensive* and include full criminal jurisdiction. What has been lacking, however, were incentives for States to exercise jurisdiction and control in fisheries matters –such as sufficiently clear hard-law obligations. In the Spanish Supreme Court decision cited by Professor Fajardo, for example, the Court held that, as a matter of *Spanish domestic law* (which imposes a requirement of double criminality), the Spanish judiciary had no jurisdiction over illegal fishing activities of Spanish nationals on board of an Equatorial Guinean vessel in the High Seas based on the personality principle. In his dissenting opinion, Judge del Moral García cautiously expresses doubts as to the status of the relevant Spanish legislation in light of Article 117 UNCLOS. Indeed, Rosemary Rayfuse shows in her excellent commentary to Article 117 UNCLOS in the forthcoming comprehensive UNCLOS-Commentary that States have a supervisory obligation to take measures to prevent their vessels *and* nationals to ensure the conservation of marine living resources in the High Seas. In addition, the ITLOS has held in its SRFC Advisory Opinion of 2015 that flag States have a supervisory obligation of due diligence to exercise their *concurrent* regulatory and enforcement jurisdiction over fishing vessels flying their flag within the coastal waters of other States to combat illegal fishing (see Article 58(3) UNCLOS). This obligation entails sufficiently severe but not necessarily *criminal* sanctions, as flag States enjoy broad discretion with regard to its implementation. Whether such an obligation also exists with respect to natural and juridical persons, is less clear. In conclusion, it seems to me that the domestic law requirement of double-criminality is not only no requirement *under public international law* for the State of

nationality to exercise extraterritorial jurisdiction (see, for example, [here](#) and [here](#)) but also incompatible with the normative expectations of UNCLOS.

Port States and market States have territorial jurisdiction with regard to offences which fall into the last limbs of the value chain of TFC, such as importing and selling illegal catch, fraud, and money laundering. Specifically, port States may impose conditions for the entry into port of fishing vessels. The details and the controversy regarding the permissible extent of (extraterritorial) port State jurisdiction with regard to TFC in the High Seas or the jurisdiction of other States cannot be discussed here. With respect to market States, Professor Fajardo already mentioned § 3372 of the US Lacey Act as a particularly ambitious example of legislation addressing TEC/TFC. Market States can also use their market power to compel other States to fulfil their duties. The EU, for example, has had some success in this regard under the system established in accordance with the IUU-regulation.

An adaptation of the jurisdictional framework as such, particularly an incorporation of universal jurisdiction for TEC as proposed by Professor Fajardo, may prove unrealistic in the foreseeable future. Instead, available jurisdiction should be used to the fullest possible extent. To that end, States should ratify the existing multilateral fisheries treaties and harmonize their domestic legislation and policies in accordance with applicable soft-law instruments. In addition, new binding instruments can strengthen existing (and create new) obligations of flag States, States of nationality and market States. Remaining jurisdictional and factual hurdles should be addressed by increased cooperation between States, international institutions and

relevant private actors such as NGOs. For example, agreements on mutual legal assistance and extradition can facilitate cross-border enforcement. A more efficient use of existing enforcement resources can be achieved by enforcement cooperation.

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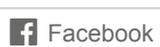
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