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Fisheries crime, human rights and small-scale fisheries in South Africa: A case of bigger fish to fry

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ABSTRACT

Marine fisheries plays an important role in ensuring food security and providing livelihoods in South Africa, as in many other developing coastal States. Transnational fisheries crime seriously undermines these goals. Drawing on empirical research this contribution highlights the complexity of law enforcement at the interface between low-level poaching and organised crime in the small-scale fisheries sector with reference to a South African case study. Specifically, this article examines the relationship between a fisheries-crime law enforcement approach and the envisaged management approach of the South African Small-Scale Fisheries Policy.

1. Introduction

The preceding contributions in this collection have explored the concept of fisheries crime and its implications from a law enforcement perspective. These discussions focus primarily on crime within the commercial fisheries sector. However, criminal offences also take place within the small-scale fisheries (SSF) sector. With reference to an empirical case study in South Africa, this contribution zooms in on the implications of such criminality with a fisheries-crime law enforcement lens. The management of the SSF sector in South Africa is governed by the Small Scale Fisheries Policy (SSFP) [1], which is rooted in a human-rights-based paradigm. The interface between this policy and a law enforcement strategy dealing with crime in the SSF sector is complex and it is this complexity which is unpacked and analysed in this article via the use of that case study.

In this paper we use two distinct, yet related, paradigms that have gained traction in recent years.

The first, highlighted by the UN Special Rapporteur on the Right to Food (Special Rapporteur) and the FAO Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication (Sustainability Guidelines) [2], voices the need for a shift from a top-down management strategy to a strong human-rights-based approach to small-scale-fisheries management. This call comes in response to the failure of the neo-liberal 'trickle-down' approach to management in this sector, via individual transferable quotas (ITQs), to adequately support the realisation of basic human rights, such as food security and sustainable livelihoods, and, thereby, effectively contribute towards poverty alleviation [3].[1] We situate this paper within the social inequality and economic exclusion of small-scale fishers in South Africa mainly due to neo-liberal policies implemented by government. We use a human-rights-based approach to argue for social and economic justice in allocating rights in recognition of the fact that one of the drivers of fisheries crime in the sector is formal exclusion resulting from the lack of legal harvesting rights.

The second, namely the fisheries crime paradigm, advocates, in recognition of the inadequacy of the 'traditional' legal approach to address global illegal fishing to date, a law enforcement approach that recasts illegal fishing potentially as a type of 'fisheries crime' and draws on criminal law enforcement and the procedural tools it offers to address the problem.[2]

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[1] The human rights approach to small-scale fisheries is rooted in the Bill of Rights in the Constitution of South Africa and aims to secure fishers' rights to livelihoods, food security and self-governance of marine resources through 'community-based legal entities' (defined in the SSFP as 'a recognised group of fishers from an identified and declared fishing community, which is a legal entity with perpetual succession, and the holder of a right granted or recognised under this Policy') and directly challenge the neo-liberal agenda of the ITQ allocations of rights to small-scale fisheries. It should be born in mind that a human-rights-based approach to managing small-scale fisheries offers, in itself, no panacea. Indeed, care should be taken to ensure that such an approach does not inadvertently facilitate the very neoliberal agenda it seeks to counter (see Ruddle and Davis [3] at 91.

[2] This paradigm has been outlined comprehensively in the introductory essay in this collection written by P Vrancken, E Witbooi and J Glazewski Introduction and Overview: Transnational Organised Fisheries Crime.

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The complex interface of these two paradigms is aptly illustrated by reference to the case of South African small-scale fisheries management in the context of increasing transnational organised crime (TOC) in the fisheries sector. South Africa, via the Department of Agriculture, Forestry and Fisheries (DAFF), has indicated, while involved in relevant international processes,[3] its willingness to embrace the fisheries-crime approach to fisheries law enforcement, and the question arises whether such an approach is capable of accommodating a human-rights-driven management approach to the SSF sector, as advocated in the SSFP [1],[4] which was developed in partial response to the outcome of the *Kenneth George and Others v the Minister* case [4]. It is this question that we address in this essay. More specifically, what we examine is whether, and if so how, a fisheries-crime law enforcement approach can complement the SSFP in such a way as to effectively deal with illegal harvesting in the domestic SSF sector whilst simultaneously supporting the realisation of basic human rights, particularly the right of access to food and sustainable livelihoods. We also focus on a number of key related issues arising from the research that informs this contribution, including: the link between fisheries management and law enforcement at fishing community level — more specifically, how such a law enforcement approach is able to support a management approach that is rooted in the realisation of basic human rights — and, from a law enforcement lens, how one deals with individuals in the fishing communities who aid organised criminals because they lack alternative livelihood options — solutions here cannot be found purely in law enforcement responses, but must necessarily be rooted in social and economic government policies and programmes.

The article is structured as follows. After describing the research methods, it first outlines the theoretical and factual contexts informing the substance of this article before moving on to unpack from a human-rights-based lens the ill-fit of the traditional fisheries management and enforcement models to date in addressing illegal fishing in the SSF sector with reference to various illustrative case studies. The discussion deliberately raises a number of critical questions highlighted by empirical research, to which there are no easy answers. The paper moves on to discuss the fisheries-crime paradigm in relation to the effect of illegal fishing on and within SSF, with a particular interest in how it might impact the right of access to food and food security in this sector. Building on this, it then looks at how the fisheries-crime paradigm might be used when implementing the SSFP to ensure that illegal fishing in the South African SSF is handled in such a way as to protect and promote the human rights of small-scale fishers. The article concludes with some thoughts on how the potential synergy between the fisheries-crime approach and the small-scale fisheries policy can best be fostered towards this end.

2. Research methods

Fieldwork for the case studies referred to in this paper was conducted over a period of 10 years within coastal communities in the Western Cape Province (more specifically, in the Southern Cape region). The methods used were qualitative in nature and included the use of participatory observations, key informants, workshops, focus group interviews with fishers and selected household interviews. The interviews were with fishers, interim relief permit holders, rights holders and boat owners. The research also made use of key informants to assist with arranging interviews and to serve as contacts when not conducting fieldwork.

The empirical work for the social and political process within the fisheries policy arena was gleaned through a participatory-action research process in terms of which the researcher (Isaacs) formed part of the group launching the *George* class-action case in 2005 [4]. Doctoral research was used as evidence to support the class-action case and Isaacs joined as a claimant with a supporting affidavit. Isaacs has been instrumental in the work of the national task team to draft the SSFP from 2008 to 2010 and has been actively involved in raising awareness of the right to livelihoods and food security of South African small-scale fishers at national, regional and global forums and conferences [5].

3. Illegal fishing in the South Africa small-scale fishing sector

3.1. Management of the small-scale sector

Fish makes a vital contribution to the food and nutritional security of over 200 million Africans and provides income for over 10 million, but globally fish stocks are severely over-utilised as highlighted in the introductory essay in this Special Issue [6].[5] Illegal fishing off the African coast is a major contributory factor to over-exploitation, with West African waters estimated to have the highest rates of IUU fishing globally — the estimated illegal catch in the Eastern Central Atlantic is currently worth between US$828 million and US$1.6 billion annually [7,8]. As evidenced by the contributions in this compilation, the traditional approach to addressing illegal fishing (the illegal, unreported and unregulated (IUU) approach), which focuses on strengthening conservation and management rules and stepping up compliance of vessels, has reaped minimal success [9].[6] This has arguably been largely due to a misunderstanding of the problem at hand as being purely a fisheries management problem as opposed to, at a more fundamental level, a failure of international fisheries law enforcement [10]. Further, as exemplified by the management of the SSF sector, this lack of success is arguably also due to a fundamental 'misfit' between the IUU approach and the challenges of managing the small-scale sector. In the South African context, abundant empirical evidence — presented in this paper — attests to this ill-fit, highlighting that the IUU approach is at odds with the realisation of human rights enshrined in the South African Constitution — such as equality and human dignity — in the SSF sector and does not accord with the human rights and developmental approach to fisheries governance advocated by the SSFP. Differing from the IUU approach, the fisheries crime paradigm, outlined in preceding contributions in this collection, regards illegal fishing as a potential form of criminal activity committed within the fisheries sector, which is best addressed by strategically harnessing criminal-law tools rather than by treating it as a primarily administrative-law matter. Whilst the focus of law enforcement within the fisheries crime paradigm is on the high end of the spectrum, namely, tackling well-financed, large-scale transnational organised criminal activities primarily in the commercial fisheries sector, the approach nonetheless has ramifications for illegal harvesting in the SSF sector. The question of interest is whether the fisheries crime approach is more conducive to supporting the realisation of human rights in the SSF section than the IUU approach. We attempt to address this question in this contribution.

At a global level, there is increased emphasis on the important role of small-scale fisheries in contributing to food security. This is evidenced by numerous international instruments and commitments, such as the FAO Voluntary Guidelines on the Responsible Governance of

[3] These processes are outlined in G Stolsvik's article 'The development of the fisheries crime concept and processes to address it in the international arena' at XX.

[4] It must be emphasised that this article does not engage in a critical analysis of the SSFP but, rather, engages with the SSFP as the existing domestic policy for small-scale fisheries and, on that basis, seeks to interrogate how its implementation may interface with the fisheries crime approach.

[5] At para 2. Cross-reference to P Vrancken, E Witbooi and J Glazewski 'Introduction and Overview: Transnational Organised Fisheries Crime' at XX.

[6] As recognised by the FAO at 51- '[t]he realities of corruption and organised crime, which add complexity to the task of combating IUU fishing, need to be addressed through *supplementary means extending beyond the realm of fisheries control and enforcement*' (Emphasis added).

Tenure of Land, Fisheries and Forests in the context of National Food Security (Tenure Guidelines) [11], the FAO Sustainability Guidelines and the FAO Voluntary Guidelines on the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines) [12]. More specifically, the Special Rapporteur recognised the link between the right to food and the need for access to resources such as fish and water [13].[7]

Domestically, the South African Constitution [14] enshrines the right of access to sufficient food.[8] The SSFP takes this a step further in the SSF sector by creating opportunities for fishers to participate in a formalised value chain as part of a development agenda that is concerned with poverty alleviation, food security, access to financial capital and subsidies. Under the Constitution, the State may make budgets available through national, provincial and local governments to strengthen the capacity, training and skills of local community entities and cooperatives. The ability of the South African authorities to make small-scale fishers more food-secure and less vulnerable in practice, however, will depend on the governability of small-scale fisheries, that is to say the quality of representation of local committees, the nature of the rights-allocation process and the relationship between industrial fishing entities and small-scale fishers. As stated by the Special Rapporteur, the State is both obliged to *protect* the right to food by protecting 'the access rights of traditional fishing communities from industrial fishing' and controlling 'private actors that could affect the… territories and water on which these communities depend' and to *fulfil* the right to food by acting proactively to strengthen the individuals' access to, and use of, fisheries resources and means to ensure their livelihoods via, inter alia, 'improving the incomes of small-scale fishing communities'[13].[9] The role the State has to play towards realising the right of access to food is thus crucial and must inform the operationalisation of the SSFP. The question is how this relates to the role of the State in fisheries law enforcement under the fisheries crime paradigm.

Empirical research highlights that the challenges faced on a daily basis by small-scale fishers along the South African coast bear harsh witness to the need for an alternative approach to that used to manage the sector until now. In particular, this research not only provides evidence of the need for an alternative understanding of what constitutes 'illegal' fishing in this sector, and how to address it, but also underscores the imperative of addressing food security and livelihood concerns.

3.2. Poaching as a form of resistance

This paper does not seek to interrogate the issues of illegality, deterrence, compliance, non-compliance or legitimacy in fisheries, which have been covered by Kuperan and Sutinen [15], Jentoft [16] and Hauck [17]. Rather, it highlights an important element that we feel is missing to date, namely, the situation of 'illegal' fishing in the 'infrapolitics'[18][10] of small-scale fishers in South Africa in terms of which 'poaching [i]s a form of resistance' [18].[11] Our theoretical framework to contextualise the politics of poaching and how it is used as a tool of resistance against the Apartheid fisheries policies favouring white economic domination over other race groups is limited to the works of Scott [18]. In so doing, we lean heavily on Scott's notions of hidden transcripts, onstage performance and offstage performance. Scott argues that members of a subordinate group (in our example, excluded fishers of colour) construct hidden transcripts as they congregate offstage, outside official regulatory structures, to speak and act outside the purview of the elite. Because these private conversations are unknown (in terms of their existence and content) by the elite law-makers, subordinates can speak more freely without fearing the consequences of being overheard. This freedom results in a 'hidden transcript' ('off-stage discourse'), which is somewhat conspiratorial in nature [18].[12] In our example of South African small-scale fisheries, the 'hidden transcript' comprises the framework or basis for actions by fishers with no formal legal right to fish who operate outside, and at times in conflict with, formal fishing rules and regulations. The hidden transcript provides a means for the excluded fishers to covertly express their antagonism towards the dominant fisheries management and regulatory system and to strategise their actions, while overtly complying with the management system outside of their hidden transcript.

Scott's theory implies that participants of a hidden transcript control its creation and termination, its content and its dispersal. In other words, without the participants' hidden discourse, transcripts fail to exist. In addition, participants own the content and nature of their hidden transcripts: they are agents of and over the hidden discourse. This means that subordinates cannot openly observe, nor directly influence, the hidden transcript of the elite and vice versa. Each group's offstage transcript cannot overlap with that of another group. In fact, '[t]he hidden transcripts of dominant and subordinate are, in most circumstances, never in direct contact' [18].[13] Interactions between members of opposing groups usually occur only in the public domain (that is, onstage). Evidence of this, in the case of SSF in South Africa, can be found in challenges to policies and quotas concerning the small-scale sector as well as clashes (sometimes violent) between illegal small-scale harvesters and law enforcement officers. Scott criticises the 'examination of public action in power-laden situations that overlooks both the "hidden transcripts" and the necessity of routine and pragmatic submission to the "compulsion of economic relations" as well as the realities of coercion'[19].[14] Fishers witness daily the involvement of police and fisheries officials in abalone poaching and remain silent in public as they fear punishment, brutality, arrests and imprisonment by the police. Fishers only speak about such involvement in the safe spaces of their hidden transcripts.

Scott's concepts of onstage and offstage performances help us to understand why the poor exercise their acts of defiance in the formal fishing rights application process. His work on hidden transcripts assists in understanding the marginalised poor fishers' acts of defiance as agency from below. For example, marginalised poor fishers may show their discontent in the fishing rights allocation system through either publicly protesting or via poaching.

Scott reminds us that, if fisheries departments want marginalised poor fishers to accept the rights allocation process, they need to show that they not only recognise this group in policies [20,21],[15] but also allocate fishing quotas to those fishers. The marginalised poor fishers can use the onstage and offstage arenas of this action space, through explicit and disguised forms of resistance, to exercise their agency from below. They will decide whether to act in such a way as to legitimise the new direction of the rights allocation process or show their disapproval through poaching.

Poaching may thus be seen as one form of weapon or tool used by fishers who have tried to go the legal route, but who have lost out, and engage in a form of more direct resistance, 'a routine form of everyday

[7] Paras 39 and 40 where reference is made in fn 51 to the *George* case [13] fn 3.

[8] See s 27(1)(b).

[9] At paras 40 and 41.

[10] J.C. Scott [18] at 156 'infrapolitics' refers to invisible resentment.

[11] J.C. Scott [18] at 156.

[12] J.C. Scott [18] at 4.

[13] J.C. Scott [18] at 15.

[14] J.C. Scott [19] at 16.

[15] As has been done via the Small-scale Fisheries Policy [20,21] fn 1 and the 2014 Marine Living Resources Amendment Act, which amends the 1998 Marine Living Resources Act by expanding the definition of 'small-scale fisher' (s 1 (a)) and making provision for measures relating to small-scale fishing and for the powers and duties of the Minister in this regard (s 5 which substitutes s 19 of the 1998 MRLA).

resistance' which questions the legitimacy of the new allocation process [16,18,19,22,23]. This is not to say that all fishers who poach are engaging in resistance as there is a large group of professional poachers who never intend to take the legal route. In addition, large-scale poaching of West Coast rock lobster and abalone also takes place in contexts where there is high unemployment and where criminal gangs are involved. It is thus important to distinguish between different categories of violators, although of course the boundaries are porous and there is overlap. It is useful here to refer back to the compliance pyramid referred to in the introductory essay in this compilation: whilst the majority of illegal harvesting in small-scale fisheries can be located as impacting the local sphere exclusively and is most likely undertaken by those classified as 'opportunists' in terms of the pyramid — to be matched with a compliance strategy of 'deterrence' and suited to administrative law sanctions —, there is a small category of illegal fishers in this sector that fall within the organised, deliberate law-breaker category with yet an even smaller group operating or interacting with those who operate in the transnational domain. Illegal fishers within this latter group, regardless of whether they are small-scale or commercial, are regarded as criminals and the suitable compliance strategy is deemed to be intelligence-led policing with a view to prosecution using whatever legal tools are available. Particularly tricky, however, is illegal harvesting in the high-value small-scale resources sphere, eg abalone and West Coast rock lobster, where there is a hazy cross-over line between resistance poachers and 'professional' poachers, non-organised/organised illegal harvesting and domestic/transnational operations. It is in this multi-layered sphere that the interface between the fisheries crime law enforcement strategy and the implementation of the SSFP is most stark and, in practice, likely to be the most challenging.

In South Africa, the public protest process that culminated in the *George* case [4] and resulted in the SSFP, the amendments to the MLRA as well as the SSF implementation plan, was the driver of positive changes in the legislative landscape and cemented formal recognition of this sector. However, in order for the new policy and effective management of the inshore resources to be successfully implemented, compliance by those who have been fishing illegally as an act of defiance is going to be key. To ensure compliance, the SSFP envisages primarily community monitoring of the resources in question through a co-management[16] representative body. The feasibility of this, particularly in the context of high-value small-scale resources, however, is unclear.

Wilson states that formal and informal institutions are always changing [24,25]. Even when such changes are not dramatic shifts in written laws and basic organisational structures, marginal changes are happening through evolving interpretations and shifting degrees of compliance. These constant changes are produced by competitive processes in which different groups seek to push institutions in the directions they desire. This is supported by Leach et al., who point out that '[s]ocial actors alter their behavior to new social, political and ecological circumstances', hence 'institutional flexibility and dynamism are essential.'[26] The authors also warn, however, that, whilst some institutions claim to promote collective good, they reproduce exclusion and marginalisation of certain actors. Institutions are thus shaped by politics and power.

Returning to South Africa, the empirical studies described below indicate the presence of a criminal element in the illegal fishing occurring in the abalone and West Coast rock lobster sectors. This is intimately linked at local community level with gang activities. Interviews suggest that illegal trade of high-value species in contravention of the regulations will continue beyond the achievement of legitimacy of the policy and the process of rights allocation to small-scale fishers. This was aptly illustrated by recent research, in the context of interim relief allocations in the 2013/2014 season, in terms of which a coastal fishing community had identified all the bona fide fishers that should benefit from the interim rights. The list of such fisheries that had been drawn up was given to a gang leader for 'approval', who subsequently set about replacing the bona fide fishers with members of his gang [27–29]. This highlights the inherent difficulties associated with empowering communities to self-regulate management of, in particular, high-value coastal resources. A further important challenge is the fact that it is difficult to exclude criminal elements in the community from access to, and the management of, the resources when some of them play a crucial social welfare role in the community by, for example, providing cash advances for food and paying the school fees of children. Furthermore, many members of the community are simply too afraid to identify and challenge the criminal element within the community [29–31].[17]

In view of the above, what role does a law enforcement approach envisage for fishing communities when it comes to distinguishing between low-level illegal harvesting versus persistent organised illegal fishing associated with transnational criminal networks? To put it bluntly: whose 'job' will it be to draw the line: the community managing the resource in question or the law enforcement officers (that is, the fisheries control officers and/or police)? The research highlighted in this essay warns against placing the burden on the community. This is because the line is in practice a murky boundary and the point at which these two 'sides' (community management and law enforcement) merge is somewhere within the context of activities conducted by gangs that are firmly entrenched within the communities in question. The likely practical difficulty that will arise is that the community will struggle to sustainably manage the resources in question as long as elements of organised poaching persist because individuals within the community are unlikely to 'inform' on the poachers, thereby frustrating potential investigative inroads into the organised networks and weakening the ability to pursue and bring to book the masterminds behind the transnational operations. The scenario is further complicated by the fact that research reveals that a number of law enforcement officers are themselves known to be involved in the poaching of abalone and West Coast rock lobster [28,29] and one can hardly expect the community to police 'the police' and gangs. Finding appropriate answers to these questions and solutions from within the ambit of the community jurisdiction is key in order not to compromise both the sustainability of the resources in question and food security, given that the species function in many communities as 'fish for cash' to purchase and pay for daily necessities.

3.3. Empirical examples

3.3.1. Empirical case 1: Abalone, Arniston

Fishing in Arniston can be traced to the first nations KhoiSan through the use of vyfers (fish traps) in the intertidal zone. Species such as elf (*Pomatomus saltatrix*), harder (*Liza richardsonii*), kolstert (*Diplodus sargus capensis*), strepie (*Sarpa salpa*) and galjoen (*Dichistius capensis*) were caught in these traps. The traps were maintained by clans and families, and women would harvest, gut, cut and cook the fish [32]. Communities situated along the Southern Cape coast of South Africa were selected for this study. The selection was based on their small-scale fishing activities, the low-technology gear utilised, the species targeted, their dependency on marine resources, their poverty and unemployment levels as well as the fact that they reside next to or within a marine protected area. Fish in these communities have

[16] As noted below co-management is not an approach without criticism. This article does not delve into these criticisms, neither does it seek to necessarily support such an approach. Instead, reference to co-management is rooted in the context of discussing it as an element of the existing South African policy regarding management of small-scale fisheries, namely, the SSFP [1].

[17] At 422, 243 regarding the the issue of fear amongst the community of reporting poachers although in this instance it is not gangs that are the fear-inducing factor.

traditionally been harvested for sale and subsistence. However, from the time the waters adjacent to these communities were declared marine protected area their livelihoods have been negatively impacted and this has led to an increase in poaching. One of the fishers explained that '[w]e poach during the night and day. Spring tide, during full moon is the best time to go for abalone as we are able to see. We take whatever we see. We do not have any other options, no fishing rights and no restricted areas to fish. We know it is illegal, but we are struggling to survive'.

According to the fishers, the poaching of abalone is becoming highly problematic, especially as far as the younger men who are unemployed are concerned. Fishers blame the rights-allocation process, the no-take zone in the MPA, the lack of livelihood opportunities and the access to quick and easy money for the younger generation for the unmanageable state of poaching.

All the leaders in the community agree that the poaching activities are beyond their control. To add fuel to the fire, DAFF allocated, for the 2014/15 and 2015/16 West Coast rock lobster seasons, 49 interim relief permits to non-active fishers with no history in fishing activity in Arniston, Struisbaai and Pearly Beach. The list of original fishers was removed and, according to a local community-based organisation (Masifundise[18] and Coastal Links [19]), those fishers fear that they will be left out of a flawed and highly irregular interim relief allocation system. 'That will have a devastating effect on the lives of these fishers and could mean a continuation of outright violation of their human rights'[33].

3.3.2. Empirical case 2: West Coast Rock Lobster, Ocean View

In Cape Town, one of the most unequal towns in the world with the significant gap between rich and poor [29,34], there is a high demand by wealthy locals for West Coast rock lobster (*Jasus lalandii*), especially for religious celebrations (Eid and Christmas), New Year celebrations, weddings and dinner parties [35]. The fishery was regulated to promote exports by the Crawfish Export Act, 1940 [36]. Over the next 60 years, a substantial local market has grown but was often ignored by the authorities. Although the resource declined in the 1960s and 1970s, informal and unregulated trade increased, probably because the economic alternatives on the West Coast were limited [37]. Opportunities to supply the local and export markets were taken up by informal fishers who had few other livelihood options [37]. This trade was spurred by a strong local demand for lobster by the catering industry, restaurants and wine farms, which provided an ongoing market for fishers who relied on the informal fishery to contribute to their households' income. West Coast rock lobster is an important source of cash for many fishing families, particularly in the Ocean View area. However, the fact that the resource is harvested illegally has a negative impact on the future sustainability and governability of the West Coast rock lobster fishery.

4. The misfit between the IUU approach and small-scale fisheries

The empirical observations highlighted above speak to the misfit between the past approach to fisheries management and the SSF sector in South Africa [38–42].[20] As is evident, the issue of legality (or not) of fishing activities runs as a thread throughout the expressions of discontent with the way the sector has been administered. Given that the management approach used to date has not adequately dealt with illegality in the sector, it is important to determine, if the fisheries crime approach is to be looked to as an alternative, when illegal fishing does transition from being a fisheries management issue to becoming a criminal law issue.

The management of the SSF sector is tied to its legislative regulation (or the lack thereof in the past). Prior to 1998, almost all 'subsistence' fishing was unregulated and thus regarded as taking place outside the law. Under the fisheries management approach employed at the time, this 'unregulated' fishing thus placed subsistence fishing into the category of 'IUU' fishing [10].[21] The seeds for the legal recognition of subsistence fishers and the regulation of subsisting fishing were sown in the enactment in 1994 of the interim South African Constitution [43], which fundamentally altered the legal landscape of the country by introducing, for the first time in the country's history, a human-rights-based dispensation in terms of which all government actions are to be formulated in terms of, and measured against, the rights guaranteed in the Bill of Rights. The right to equality, in particular, was a strong driver of reform in the fisheries sector, underpinning as it did the 'foundational' [44,45][22] transformation objective of the MLRA to remedy past discrimination in the fishing industry, [46][23] namely to 'restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry' [20].[24] As emphasised by the Constitutional Court [44],[25] this objective is reinforced by the obligation placed on the Minister to have regard to the need to permit new entrants into the industry 'particularly those from historically disadvantaged sectors of society'[20].[26]

Transformation has, however, been challenging in all the fisheries sectors, in particular because it is necessary to find an equilibrium between, on the one hand, effecting transformation in the context of access rights and, on the other, securing biological sustainability and broader economic stability, nowhere more so than in the subsistence sector [38,40,47]. The MLRA provided legal recognition to a domestic 'subsistence' fishing sector for the first time in South Africa's legislative history via dedicated MLRA provisions in section 19 [20]. This was arguably intended as proof of the government's transformative intent. Yet, movement beyond theoretical intent towards the concrete achievement of the transformation goals in the sector has proven frustratingly slow and difficult. Fisheries law enforcement under the MLRA remained initially steeped in the traditional IUU fisheries management approach. This is reflected in the fact that the government's response to fishing in violation of the MLRA provisions was to consistently tighten management measures and step up compliance and enforcement efforts. This was exemplified in the abalone sector, where, despite evidence of an infiltration of organised crime elements in illegal abalone poaching from the 1990s onwards, law enforcement efforts remained firmly based in a fisheries management approach. That response was typified by case-by-case inspections favoured over intelligence-led investigations which, combined with lack of community buy-in, associated inter alia with discriminatory legal harvesting rights under the former Apartheid regime, resulted in minimal success in halting abalone poaching [39,48].

[18] Masifundise a social justice fisheries Non-Governmental Organisation (NGO) has mobilised and organised fishing communities since 2004. A key goal was to build locally based governance structures to fully participate in political and economic decision making processes.

[19] Masifundise established Coastal Links (CL) in 2007 as the community based organisation for small-scale fisheries in the Western and Northern Cape provinces of South Africa. In 2010 it set up structures in the Eastern Cape and Kwazulu Natal and after 2 years it established a National Executive Committee. In 2015, CL had 2000 members in 89 coastal towns and became the first national body representing small-scale fishers.

[20] Discussions around the complexity of illegality in the South African SSF sector have been captured in literature including that referenced.

[21] The ill-fit between the IUU approach and small-scale fisheries management is expressly highlighted, noting at 209 that the former brands 'small-scale or artisanal fishing in waters where no fisheries management system is in place and thus no access control operates' as IUU fishing.

[22] At paras 78, 81.

[23] At para 26.

[24] Section 2 (j).

[25] At para 96.

[26] Section 18(5).

An apt example of such failed law enforcement efforts in the past can be found with reference to the abalone sector where poaching as 'protest fishing' has taken place over many years. 'Protest fishing', understood in the context of fishing as a form of resistance, as outlined above in Section 3.2, entails traditional fishers openly 'poaching' as a means of protesting against the government's failure to grant legal rights to the fishery. To address that problem, it has been argued that broadening access to the abalone fishery would 'legalise' the fishers' activities and recognise them as lawful fishers rather than 'criminals' [50]. The solution advocated involved decriminalising the activities of informal fishers through the allocation of abalone fishing rights. This entailed, more specifically, the implementation of a territorial user rights system complemented by a co-management arrangement between rights holders and the fisheries department. Instead, however, various law enforcement initiatives have been introduced over the years to target abalone poachers [51].[27]

All of these initiatives were ultimately regarded as failures, however, because they proved inadequate in the face of the growing illicit trade and the emerging corruption between law enforcement officers who 'turn[ed] a blind eye' [51]. The need for re-thinking around allocation rights to abalone thus became ever-increasingly pressing.

In 2005, an Equality Court application by the Artisanal Fishers Association, Masifundise, and the Legal Resources Centre, with support from academics, was lodged against the Minister of the (then) Department of Environmental Affairs and Tourism (DEAT) [4,52].[28] Citing violations of constitutional rights and the Promotion of Equality and Prevention of Unfair Discrimination Act [53], the applicants articulately highlighted the utter failure of the MLRA reform process (individual transferable quota-based system for allocation of fishing rights) in the subsistence sector to date in light of its adverse social and economic impacts. On that basis, they demanded governmental action to redress the alleged violation of fishers' fundamental human rights [4].[29] The resultant obligation of the Minister, stemming from a settlement of that litigation in 2007 — subsequently made an order of the Equality Court — was to craft a new policy adequately catering for equitable access to coastal resources for traditional fishers. This culminated in the release of the SSFP in 2012 and an amendment to the MLRA in 2014 that specifically incorporates small-scale fishers as a legally recognised sector entitled to the allocation of fishing rights in line with the SSPF [20,21].[30] Despite these legislative and policy developments, however, the majority of small-scale fishers still do not hold legal access rights and thus continue to fish 'illegally'. In practice, they therefore remain within the catchment ambit of the IUU concept.

Indeed, the mainstream ITQ neoliberal fisheries rights allocation system (FRAP) is continuing and promises that the inshore resources would form part of the small-scale fisheries allocation remain unfulfilled. The apportionment of fishing rights continues to favour individual rights rather than an allocation of a 'bundle' or 'basket' of rights to SSF communities to harvest coastal resources. All the linefish permits are allocated to individual rights holders and, whilst there is a promise that all abalone will be allocated to small-scale fishers, with the 'basket' of rights continually being diminished by the fisheries department, it is becoming increasingly clear that the department is paying lip service to promoting fishers' rights to livelihood and food security. The lack of political will to implement real change in the fisheries rights allocation system seems set to risk the sustainability of the resources and fuel continued illegal fishing in the small-scale sector.

Why is this so despite the provisions of the SSFP that seek to move towards the fulfilment of constitutional rights including the right to food? The answer is arguably related to the current failure of the State to play the necessary proactive role in both protecting and fulfilling these rights. As asserted by the UN Special Rapporteur on the Right to Food, 'The fisheries sector can contribute to the realisation of the right to food by providing employment and income and sustaining local economies' [13].[31] Policy responses grounded in the right to food will facilitate this yet, as the UN Special Rapporteur is quick to caution, the right to food will not provide a master plan to fisheries reform in this regard: context matters [13].[32] The human rights obligation of states must guide their actions and the courts should play the role of keeping them on track. Referencing the South African Equality Court case, the Rapporteur emphasised that '[c]ourts should be empowered, in particular, to adjudicate claims from small-scale fishers whose livelihoods are threatened by measures that infringe on their ability to fish so as to provide sufficient income to ensure an adequate standard of living'[13].[33] The role of the government in operationalising the SSFP towards realising the human rights of small-scale fishers, along with the associated challenges, is discussed later in greater detail in Section 6 in the context of analysing the SSFP.

5. The fisheries crime law enforcement approach and small-scale fisheries

As emphasised in earlier articles in this Special Issue, fisheries is a well-structured highly lucrative international business [54] and, whilst much of the activities carried out by fishing organisations in the sector are legitimate [10,55], evidence points to the fact that many are associated with illegal activities along the value chain. 'The issue of where the illicit markets merge with the licit is a grey area, as is the range of actors that sit largely in legitimate industries that facilitate the trade and its onward passage. These are the intermediaries within the illicit

[27] The most important of these included: Operation Neptune, which was initiated by the fisheries department in 1999 comprising a co-operative policing venture with the South African Police Service (SAPS) and the navy to address abalone poaching; Operation Trident, an 'Abalone Protection Plan' that focused on law enforcement strategies including support to the MARINEs; Overstrand MARINEs, comprising a partnership with the local municipality to institute a 24 h shift watch to deter divers from entering the water in the Overstrand region; delegation of authority to Table Mountain National Parks to take over the responsibility of compliance in MPAs; Environmental Courts, established in 2003 as a co-funded initiative by the (then) Department of Environmental Affairs and Tourism (DEAT) and the Department of Justice, created primarily to target abalone-related offences; and Collaboration with the Navy, air force, the Department of Justice's Asset Forfeiture Unit and Directorate Special Operations (Scorpions) to gather intelligence on abalone poaching.

[28] Note that the referral to the Equality court was appealed.

[29] At paras 14, 15.

[30] See s 19 of the MLRA as substituted by s 5 of the Marine Living Resources Amendment Act, 2014. Section 1 of the latter also inserted into s 1 of the MLRA a definition of the term 'small-scale fisher', which is stated to mean 'a member of a small-scale fishing community engaged in fishing to meet food and basic livelihood needs, or directly involved in processing or marketing of fish, who (a) traditionally operate in near-shore fishing grounds; (b) predominantly employ traditional low technology or passive fishing gear; (c) undertake single day fishing trips; and (d) is engaged in consumption, barter or sale of fish or otherwise involved in commercial activity, all within the small-scale fisheries sector". This definition is in line with the universally accepted FAO broad

(*footnote continued*)
definition of the terms 'small-scale fisheries' and 'artisanal fisheries'. The latter is defined in the FAO Glossary as meaning 'traditional fisheries involving fishing households (as opposed to commercial companies), using relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, close to shore, mainly for local consumption. In practice, definition varies between countries, e.g. from gleaning or a one-man canoe in poor developing countries, to more than 20-m. trawlers, seiners, or long-liners in developed ones. Artisanal fisheries can be subsistence or commercial fisheries, providing for local consumption or export. They are sometimes referred to as small-scale fisheries' (http://www.fao.org/fishery/topic/14753/en Accessed 17 September 2018).

[31] At para 6.

[32] At para 38.

[33] At para 39.

markets' [56]. From a criminal law enforcement perspective, the fisheries crime approach focuses primarily on activities at the top end of the spectrum and has as its broader goal addressing international organised crime concerns. Nevertheless, if it is to be accepted as an alternative paradigm to the often ineffective IUU approach, its application must be understood in the context of all forms of illegal fishing activities found along the spectrum. In the context of the subject-matter of this article, this necessitates unpacking the practical compliance and law enforcement implications of the fisheries crime approach in relation to illegal fishing (or 'poaching') in the SSF sector, as presented above.

The MLRA criminalises almost all transgressions of its provisions and its regulations. Thus, fisheries law enforcement officers (primarily fisheries control officers (FCOs)) take the first step in the process of potentially investigating and pursuing criminal prosecution of those engaged in illegal fishing activities. It is vital that individual FCOs are aware of the need to distinguish between fishing community members involved in low-level illegal harvesting versus individuals deliberately engaging in fisheries crime. Each FCO requires the necessary skills to ascertain during an inspection whether the illegal fishing activity under scrutiny is likely linked to broader organised criminal activity. If it is linked, the matter should be flagged as worthy of further investigation, in which case the focus should move from the individual perpetrator, in her or his capacity as the particular rule-violator, to the broader criminal context in which she or he is operating. Emphasis should be on gathering information from this individual towards investigating and identifying individuals higher up the organised criminal network. It is at this stage that cooperation with the police is crucial. This approach has the effect that 'small-fry' illegal fishers are not 'unfairly' branded as falling in the same category as criminals engaged in organised crime and punished as such. It also facilitates the process of weeding out and flagging those illegal fishing activities that warrant further investigation because they might provide inroads to major transnational criminal networks with a view to identifying and bringing to book key individuals within these organisations. Indeed, '[i]dentifying the key individuals within criminal networks, even at a local level, is an essential step to directing resources efficiently and ensuring that they are not exhausted on 'lesser' offenders' [56].[34] By not doing so, one runs the risk of '[t]he war… being waged at the wrong level … relentlessly pursuing the "army of ants" — the individual poachers, transporters, corrupt customs officials …'[56][35] Referring back to empirical research highlight above, there are, however, significant practical challenges in operationalising this approach around, for example obtaining information, particularly with regard to high-value resources in the SSF sector.

One of the key advantages of recasting illegal fishing as fisheries crime is that it facilitates harnessing criminal law and procedure tools which are unavailable under a fisheries management approach. One of the most valuable means of doing so is via enhanced cross-border cooperation around information and intelligence-sharing and analysis which contributes significantly towards identifying organised criminal elements involved in illegal fishing.[36] Combined with appropriately trained personnel, this will go a long way towards ensuring effective law enforcement and sanctioning of fisheries crime. It will also impact on the realisation of basic human rights in the context of fisheries management. Indeed, improved law enforcement around organised fisheries crime networks makes inroads into halting the adverse effects of crime, which range from the depletion of natural resources and the destruction of the surrounding environment, to undermining coastal States' economies via lost revenue and tax evasion, threatening States' security and impacting negatively on food security and coastal livelihoods. [55] 'At a local level the involvement of elements of organised crime threatens communities and reduces opportunities to access sustainable and honest income as crime crowds out legitimate ways of making a living' [55].[37] The Global Initiative against Transnational Organised Crime's 2014 report on organised environmental crime, under which fisheries is subsumed, emphasises that human rights abuses and environmental crime often go hand in hand [55].[38]

The relevant international legal framework for addressing TOC is premised on the recognition of the adverse social and economic impacts of organised crime and is aimed at the protection of the basic human right to live in dignity, free from hunger and violence, oppression and injustice [57]. Because fisheries crime is a relatively new legal concept, it is not expressly covered by UNTOC nor its protocols, but there is no reason to assume that it is excluded from the Convention's ambit. Additionally, various types of organised criminal activity that can potentially take place within the fisheries sector are explicitly covered, including human trafficking, corruption and money laundering. As outlined in an earlier contribution,[39] the United Nations expressly recognised the complex, intricate links between organised crime and criminal activities in the fisheries sector in its comprehensive 2011 UNODC report on TOC in the fishing industry, which highlighted the vulnerability of the fisheries sector to multiple crimes and provided evidence of human rights abuses in the sector, in particular human trafficking and, sometimes, murder [55,56,58,59]. The report's findings were endorsed by Resolution 20/5 of the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) [60]. The relevance of international human rights law to states' initiatives in addressing TOC at sea was also highlighted by UNODC in its subsequent issue paper on the topic [61].

5.1. UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD: extracts

'Fisheries contribute to food security through two pathways: directly, by providing fish for people, especially low-income consumers, to eat, thereby improving both food availability and the adequacy of diets; and indirectly, by generating income from the fisheries sector' [13].[40]

'…the Special Rapporteur does not suggest that the right to food will provide a master plan for fisheries reform: context matters. The human rights obligations of States must guide their actions, however…' [13][41]

'Only by linking fisheries management to the broader improvement of the economic and social rights of fishers, in a multisectoral approach that acknowledges how fishing fits into the broader social and economic fabric, can progress be made towards robust and sustainable solutions'. [13] [42]

'States should discharge their duties to respect, protect and fulfil the right to food in the fisheries sector by moving towards sustainable resource use while ensuring that the rights and livelihoods of small-scale fishers and coastal communities are respected and that the food security of all groups depending on fish is improved.'[13][43]

[34] At 23.

[35] At 23.

[36] Here INTERPOL can play a role together with mutual legal assistance agreements and tax information exchange treaties. The key role of cooperation is discussed in G Stølsvik's essay 'The development of the fisheries crime concept and processes to address it in the international arena' at XX earlier in this compilation.

[37] At 6.

[38] At 11.

[39] See G Stølsvik 'The development of the fisheries crime concept and processes to address it in the international arena' at XX.

[40] At para 3.

[41] At para 38.

[42] At para 59.

[43] At para 60 and onwards.

6. The Small-scale Fisheries Policy: human rights centred

South Africa's SSFP heralds a distinct paradigm shift in the management of the SSF sector. It is rooted in a human rights discourse and advocates a movement away from from traditional ITQs to a collective rights system of allocation in terms of which rights are allocated to a community-based legal entity in line with the amended MLRA definition of 'small-scale fishers'. Further, fishers and fishing communities are tasked with co-managing the allocated marine resources together with the Fisheries Department at the various administrative levels — local, district and national. This approach reflects the global realisation that small-scale fisheries play a critical role in the provision of income, jobs and food for coastal communities. Domestically, the sector is the biggest in terms of participants and landed catch and can thus make a significant contribution towards the socio-economic development of fishing communities. The key principles and objectives of the policy include, amongst others, the contribution of the sector towards poverty alleviation, food security and socio-economic development for the formerly marginalised coastal communities. The policy further aims to remedy and rectify the past injustices against coastal and traditional fishing communities through security of fishing rights and the equitable distribution of rights to marine resources within the limits of sustainable utilisation.

6.1. Kenneth george and others vs the minister and the emergence of the SSFP

The impetus for the development of the SSFP, arising from the unsatisfactory fisheries reforms of post-1994 democracy, was the case of *Kenneth George and Others vs the Minister* [4]. The main argument of the case against the Minister was rooted in a human rights approach focusing specifically on three core rights: the right to equality, the right to a livelihood and the right of access to food. These rights are protected in the 1996 South African Constitution. Specifically, the claimants challenged the transformatory management framework based on the ITQ system, which favoured big companies, black economic empowerment — meant to achieve race and gender equity — and rights-grabbers — local elites — in fishing communities. The claimants sought and proposed: a paradigm shift from ITQs to a collective rights allocation; the creation of legal entities; a multi-species rights approach; and preferential access to inshore species for small-scale fishers. The case was due to be heard in the Equality Court[44] but, in May 2007, an agreement was reached in terms of which the Minister was required to develop a policy addressing the needs of small-scale fishers and, until such time as the policy was finalised, to provide 'interim relief' (IR) through access to marine resources. It was further recognised, as part of the agreement, that the small-scale fishers have a claim to marine resources based on their traditional practices and livelihoods and, therefore, have special needs in terms of fisheries management and development. In addition, they could not be expected to compete with the established fishing companies for commercial fishing rights [28,38,49,51,62]. Subsequently the Fisheries Department convened an SSF summit and a national task team, comprising fisher representatives, government officials, NGOs (Masifundise and Coastal Links) and researchers, was established to develop a new SSFP. The process, which was participatory and took cognisance of the voices and inputs of fishers, culminated in 2012 in the adoption of the SSFP.

The language of the SSFP, ie. the human rights principles, are couched in an 'awkward embrace' with the neoliberal agenda (see Ruddle and Davis [3], Li [63] and de Toit [64]). Li [63] reminds us that, with regard to policies framed within a neoliberal agenda, the winners and losers do not emerge naturally but, rather, are selected and the result is the production of an extremely rich social class beside a poorer class.

In a recent roundtable meeting, [65] Prof Merle Sowman raised her concerns on the key shifts in DAFF's approach to the verification and registration of fishers, which resulted in many conflicts mainly due to unintended consequences of the IR permits (including that the value chain was captured by the marketers and the industry and that the process had split fisher organisations) and the fact that little to no attention was given to organising fishers at the local community level from 2007 to 2018. Clearly, the IR system is situated in the ITQ system and the associated community moral decay, conflicts and elite-capturing associated with the problematic registration and verification processes. The IR process turned out to be cumbersome, strict, technical, bureaucratic and to exclude many fishers, yet again. The appeals process proved even more difficult and no allowance was made for late registration.[45]

7. Synergy between the implementation of the Small-scale Fisheries Policy and the fisheries crime approach

As outlined above, the approach to managing illegal fishing in coastal communities, where small-scale fishing dominates, has, until now, been strongly rooted in the IUU paradigm and proved to be ill-suited to achieving its goal. Arguably one of the key reasons for its inappropriateness in the SSF sector is that it leaves no room for recognising that illegal fishing in this sector spans a broad spectrum of illegal fishing activities ranging from resistance poaching, at the one end, to — in sharp contrast — large-scale, transnational organised criminal activity at the other, with the complex interface between the two occupied by 'middlemen'.[29] The case of abalone poaching is an apt case in point here.

Hauck and Sweijd already alluded to the existence of this spectrum of illegal fishing activities in the context of abalone poaching back in 1999. Their analysis of abalone poaching in the Hawston area delineated two distinct, yet overlapping, groups of illegal harvesters: local low-key poachers, whose actions were fuelled by complex socio-economic and political reasons drivers, and organised criminal syndicates, driven by the pursuit of massive profits resulting from the high demand for abalone in the East. The latter's operations infiltrated those of the former, in many instances absorbing local poachers into their fold in the process. [66] Taking cognisance of this, the authors recommended an integrated, two-prong enforcement approach, the one aspect involving tackling the organised crime facet and the other consisting in 'focusing on community involvement in crime prevention, enforcement, awareness, resource ownership, resource management, and local governance'. [66][46] They specified that the former aspect entailed focusing on intelligence, policing, border control and the identification of money-laundering trails used by syndicates supplying the demand in abalone markets. They also insisted that addressing local low-key poaching, on the other hand, should not be via 'confrontational crime-control methods' within the affected communities which, in their view, frequently exacerbated the poaching. Instead, the authors promoted the use of community-based strategies encouraging shared management responsibilities [66].[47] This 'co-management' approach has gained

[44] The Equality Court refers to a sitting of the High Court of South Africa that hears matters argued in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act [53] which gives effect to the equality clause (section 9(1)) of the Constitution.

[45] The case of the fisherwoman Fatiema 'Poppie' Kok is a case in point where the system excluded her appeal due to a technicality. See the documentary testimony of a fisherwoman's struggles with the registration and verification of the new SSFP and the emotional account of her disappointment at being excluded for missing a deadline (https://web.facebook.com/FisherwomanSA/?ref=nf&_rdc=1&_rdr accessed 17 September 2018).

[46] At 1030.

[47] M. Hauck and N.A Sweijd [66] at 1030.

increasing popularity over the years as a (partial) solution to the sustainable management of subsistence and SSF and is now a key principle of the SSFP. [40][48] The important point made by Hauck and Sweijd was that both approaches should be pursued in parallel in order to meaningfully address the illegal harvesting in the sector. They wisely prophesised that:

> 'poaching and the illegal trade of marine products will not be diminished through a single approach. In fact, the very structure of these activities, which range from local abalone divers to international syndicates, emphasises the importance of developing different, but integrated, methods of intervention. Not only do new approaches need to be considered for the various aspects of the problem, but partnerships need to be forged between the initiatives' [66].[49]

There is, however, a recognisable 'third' group of actors, namely, the actors within the fishing communities who directly or indirectly aid the organised criminals by engaging in 'criminal livelihoods' and are driven to do so in the absence of alternative livelihoods by the need to sustain themselves and their families.[50] These actors defy easy classification in that they fall neatly into neither of the two groups identified by Hauck and Sweijd. In fact, they are a theoretical source of information on organised criminals but, due to fear and/or financial need, they may not be willing to provide such information. The appropriate law enforcement approach is thus perhaps not as clear-cut as initially envisaged.

Authors such as Ostrom [67], Agrawal [68], Wilson [69] and Jentoft [22] stress the importance of the fact that self-governance at local community level must translate into the ability to exclude others, create entitlements, monitor the resources as well as structure participation and decision-making. When one is dealing with high-value species, such as abalone and West Coast rock lobster, it is arguably vital that the community structures concerned are able to differentiate between forms of illegal fishing that should be dealt with as a purely management problem and forms of illegal fishing that are inherently an organised crime matter. The difficulty of implementing this in practice, however, has already been highlighted above.

The wisdom of this analysis is arguably equally applicable by analogy to illegal fishing in other small-scale fisheries and, more broadly, to the management of the SSF sector as a whole, when one attempts to minimise illegal fishing and, most importantly, weed out organised criminal elements present within the sector. The two-pronged approach outlined above provides a potentially useful lens as a starting point through which to understand the role and use of extending the fisheries crime paradigm to addressing illegal harvesting in the SSF sector. From within this framework, the fisheries crime approach can be viewed as one side of the duel-sided toolbox from which law enforcement agents can draw means to address illegal fishing in this sector (the other side being an administrative law approach). Specifically, this component includes criminal-law and criminal-procedure tools which facilitate investigations as well as intelligence gathering and sharing aimed at identifying and removing the organised criminal elements involved in illegal fishing and infiltrating broader community poaching activities. The resulting focus on the criminal 'middlemen' — local criminal elements facilitating links between broader organised criminal networks and local poachers — and those higher up the fisheries crime spectrum facilitates a more efficient use of human, monetary and institutional resources by 'freeing up' law enforcement officers and agencies to channel their effort towards identifying the 'head' of the snake rather than wasting time pursuing the 'foot soldiers'.

The fisheries crime approach must run parallel to, and be co-ordinated with, efforts to address low-key local poaching posited within a broader, human rights-based discourse. In line with the tenet of the SSFP, management of this sector must be guided by the human rights needs of the small-scale fishers themselves and the other members of the fishing communities, in particular the right to food security and to secure livelihoods. The first step, facilitated by the SSFP, must be to secure legal access rights of small-scale fishers. This is in line with international sentiments reflected in policies such as the 1995 Fish Stocks Agreement [70] and the 1995 FAO Code of Conduct for Responsible Fisheries [71]. The manner in which South Africa has elected to secure such access is via community-based rights, with users participating in the management of allocated resources by local co-management structures nested within a multi-tiered institutional system [1]. The strong community-based emphasis in the policy aims to promote capacity development and the empowerment of fishers and fishing communities, thereby facilitating local socio-economic development and the progressive realisation of their human rights [42]. Co-management presupposes that fishing communities have the capacity to organise themselves to such an extent that they can efficiently play a core management role. Importantly, it also appears to assume that these communities are sufficiently cohesive and homogenous in their desire and ability to manage illegal fishing, particularly when it involves organised crime. This assumption that communities will be able to, or even want to, play this gate-keeping role is arguably questionable, as highlighted earlier in this essay. Indeed, it is recognised that fisheries co-management arrangements to date have primarily focused on conservation and management goals, to the exclusion of broader socio-economic goals such as poverty-alleviation. [72] Those arrangements may, arguably, be ill-equipped to address issues such as illegal fishing, a gap which it might be possible to fill by means of a fisheries crime law enforcement approach.

Yet, the type of co-management approach that the SSFP adopts focuses on the conservation of marine resources by granting small-scale fishers an active role in monitoring and surveillance. It thus does not reflect self-governance management systems that grant fishers actual decision-making powers to exclude others, allocate rights and decide the nature and type of management structure which suits them. Rather, the envisaged management approach under the SSFP is, in essence, top-down, with the local community committees merely part of a representative democracy where the actual power to exclude others (i.e. illegal harvesters) or identify illegal fishers as a criminal problem, is not in fact given to them. In reality, this may well mean that the criminal elements will continue to plague the communities. To the extent that, in practice, communities will separate fisheries management issues from the criminal aspects of illegal fishing (in particular in relation to high-value small-scale resources), due to the lack of real decision-making powers granted to them, their efforts will have little real effect on curbing the tentacles of organised crime operating within the SSF sector. Information gleaned from affected communities indicates further that the levels of corruption of law enforcement officers and the relationship between those law enforcement officers and local gangs or drug dealers constitute a major stumbling block to dealing with the problem. The consequence could thus be that the communities become despondent with the system and, in some cases, resort to (continued) illegal harvesting and trade.

Furthermore, it is unclear in practice how law enforcement and management will interact in the 'grey' area where individuals within

[48] Criticism of co-management within a coastal fisheries context has been well documented in the literature; it is however beyond the scope of focus of our article to go into these criticisms.

[49] At 1030, 1031.

[50] Isaacs is working with the community of Buffelsjags Bay using action research methodology to gain the trust of the women, run workshops on what the current issues facing the community are, and create a path to self-organisation and is conducting in-depth one-on-on interviews with the women on criminal livelihoods. As a PescaDOLUS project, Isaacs and Witbooi worked with a film maker to document the women's testimonies on criminal livelihoods for visual research; Isaacs and Witbooi will subsequently write-up and contextualise the complexities of criminal livelihoods linked to abalone poaching in this marginalised community.

communities assist organised criminal actors when driven by the necessity of realising their own basic human rights, such as the right of access to food, in the face of the State's failure to proactively facilitate the realisation of such rights. It must be conceded that the fisheries crime paradigm proffers no clear-cut template from a law enforcement approach in this situation and the SSFP, as highlighted above, provides no indication of having foreseen such a scenario.

8. Conclusion

When it comes to the fit of the fisheries-crime paradigm with a human rights-based approach to small-scale fisheries management, it is arguably indeed a case of 'bigger fish to fry', at least theoretically. A two-pronged approach to addressing illegal fishing in small-scale fisheries seems to offer the most appropriate solution towards this goal. One aspect, employing a fisheries crime lens, entails law enforcement responses (such as intelligence-gathering, policing, border control and the identification of money-laundering trails) that focus on organised criminal networks involved in illegal fishing that affects, inter alia, local fishing communities. The second facet, running parallel, focuses on empowering the fishing communities via the co-management of resources, improved local socio-economic conditions and, together with government, the progressive realisation of the human rights of the members of those communities. In this sense, the fisheries crime paradigm complements this latter track in that it 'opens up' space for the government and locals to focus on strengthening the vital community-based element currently lacking in managing the SSF sector. It does so by channelling law enforcement energy towards 'higher' organised criminals involved in illegal fishing, as opposed to locals, in contrast to the confrontational crime-control methods used at ground level in the past. This should ideally create room for the organic strengthening and empowerment of the fishing communities, including through economic development and poverty-alleviation mechanisms. It could also alleviate the strain faced by communities, in their envisaged role as co-managers of fisheries resources, when trying to find ways of coping with the criminal elements infiltrating low-level poaching activities. A focus by criminal law enforcement officers on the 'bigger fish', as encouraged by the fisheries crime paradigm, could in this way contribute in due course to the government fulfilling its duty to protect and realise the right to food of the individuals involved in the SSF sector. In fact, given the reality of the complex interface between organised criminal activities in the sector and 'ordinary' community members facilitating these activities,[51] a fisheries crime approach may be both theoretically and practically the best framework option within which to craft an appropriate law enforcement response.

Ultimately, it remains up to the government to turn the current policy tide and implement the SSFP in a manner that grasps this opportunity. It can do so by instituting a community management system that is conducive to such an approach and granting the communities the prerequisite decision-making powers. It is an opportunity that the government can surely not afford to miss if it is serious about fighting fisheries crime.

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