

Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime

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With illegal, unreported, and unregulated fishing accounting for the removal of nearly one out of every eight fish from the oceans, illegal, unreported, and unregulated fishing is a problem of global proportion. A growing amount of illegal, unreported, and unregulated fishing is the result of expansion into new “business ventures” by transnational organized criminal groups that are easily facilitated within the margins of the law by unregulated access to flags of convenience, little regulation of transshipments, the existence of ports of convenience, and an active business in offshore shell companies and tax havens. This Article argues that part of the failure of states to respond to the growing illegal, unreported, and unregulated fishing crisis is a lack of effective governance by both vertical and horizontal government networks. In contrast, transnational criminal networks have functional and flexible governance networks that permit them to respond nimbly to changes in government enforcement. To address global illegal, unreported, and unregulated fishing, horizontal government networks should focus on addressing large-scale illegal, unreported, and unregulated fishing as a transnational crime problem and not as a fishery management challenge.

Given the irreparable damage to both marine living resources and to fishery-related livelihood, illegal, unreported, and unregulated fishing should be regarded as a transnational “serious crime.” Under the United Nations Convention against Transnational Organized Crime, states should create sanctions that explicitly identify illegal, unreported, and unregulated fishing by transnational syndicates as “serious crime” (requiring at least four years of imprisonment) and invest additional state funding in monitoring and enforcement of illegal, unreported, and unregulated fishing. This Article proposes a number of additional suggestions to strengthen the capacity of domestic government networks, including characterizing illegal, unreported, and unregulated fishing as a “serious crime” in national fisheries codes, harmonizing criminal laws on illegal, unreported, and unregulated fishing across jurisdictions, creating concurrent extraterritorial jurisdiction over

large-scale illegal, unreported, and unregulated fishing crimes, and authorizing states to acquire information about “beneficial owners” of illegal, unreported, and unregulated vessels.

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INTRODUCTION

Managing stocks of living marine resources for the global food market is a classic collective action problem. Sometimes referred to as “back of the invisible hand” problems or free rider problems, most collective action problems that involve natural resources share similar qualities.¹ Take a physical resource that is dispersed and largely independent of a legal property framework. Add numerous independent actors who believe, for a variety of historical reasons, that they are entitled to extract the resource. Top it off with a weak governance system, including underenforcement. The result is an unprecedented resource crisis.

In the case of fisheries, the collective action problem has been labeled “illegal, unreported, and unregulated” (IUU) fishing by fishery managers.² It is a catchall term used to refer to those fishing activities that place undue and uncontrolled pressure on sustainable marine production limits.³ IUU fishing is not defined in the U.N. Convention on the Law of the Sea, the so-called Constitution of the Oceans, but it is defined in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).⁴ Unfortunately, the definition, in trying to be comprehensive, ends up somewhat convoluted, and stocks have continued to largely decline since the IPOA-IUU was negotiated in 2001.⁵

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1. RUSSELL HARDIN, *COLLECTIVE ACTION* 7 (1982).

2. *See Illegal, Unreported, and Unregulated (IUU) Fishing*, NOAA FISHERIES, http://www.nmfs.noaa.gov/ia/iuu/iuu_overview.html (last visited Oct. 25, 2014).

3. *See id.*

4. Tommy Koh, *A Constitution for the Oceans*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 11 (Myron Nordquist ed., 1985).

5. FOOD & AGRIC. ORG., UNITED NATIONS, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING pt. II, § 3 (2001) [hereinafter INT’L PLAN OF ACTION], available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>; FOOD & AGRIC. ORG., UNITED NATIONS, REVIEW OF THE STATE OF WORLD MARINE FISHERY RESOURCES 12–13 (2011) [hereinafter STATE OF WORLD MARINE FISHERY RESOURCES], available at <http://www.fao.org/docrep/015/i2389e/i2389e.pdf> (identifying that in 2009 approximately 57.4 percent of commercial fish stocks were fully exploited and that 29.9 percent were overexploited). The Food and Agriculture Organization (FAO) Committee on Fisheries adopted the IPOA-IUU at its twenty-fourth session on March 2, 2001. *See generally* INT’L PLAN OF ACTION, *supra*. The plan defines illegal fishing, unreported fishing, and unregulated fishing separately. *Id.* pt. II, § 3. Though these subcategories are readily distinguishable, it is less clear why the international community does not characterize “illegal fishing” as “unlicensed” fishing or fishing in violation of an existing license, which would encompass all three categories of IUU fishing. This definition emphasizes a flag state’s responsibility to ensure that

The status quo is unacceptable if marine fisheries are to be part of the legacy for future generations. Of the 395 marine fish stocks assessed by the Food and Agriculture Organization (FAO) in 2009, 57.4 percent are at or very close to maximum sustainable yield, 29.9 percent are overexploited, and only 12.7 percent were not yet fully exploited.⁶ One of the key reasons for a potentially accelerated global fishery collapse is IUU fishing by large industrial fishing vessels. Based on data from fifty-four countries on high seas catches from 1980 to 2003, fishery biologists and managers estimate that from eleven to twenty-six million tons of IUU fish are caught annually.⁷ If one assumes a continuation of these trends and applies these numbers to the marine catch estimates for 2006 to 2011, which suggest approximately seventy-seven to eighty million tons per year, then somewhere between one-eighth to as much as one-third of caught fish can be attributed to IUU fishing.⁸ The trade in illegal fishing products linked to criminal activity is extensive and accounts for somewhere between \$10 billion and \$23.5 billion a year.⁹ Based on estimates of wild-caught seafood imported to the United States in 2011, this trade is a problem even for countries with relatively well-developed enforcement networks such as the United States, where 20 to 32 percent of the weight of wild-caught seafood is estimated to be either illegal or unreported.¹⁰

States and others have developed numerous policy interventions to tackle the known collective action problems of IUU fishing. They have entered a variety of bilateral and multilateral international agreements. Some of these are specific to the IUU problem, such as the IPOA-IUU, which encourages signatories to develop National Plans of Actions to Combat Illegal, Unreported and Unregulated Fishing (NPOAs) within three years of adopting the IPOA-IUU.¹¹ Others are institution-building treaties creating Regional Fisheries Management Organizations (RFMOs) designed to negotiate management interventions either covering a particular stock or a specific geographic

vessels have appropriate licenses to fish wherever the vessel may be located and that vessel activities conform to the conditions of the licenses.

6. STATE OF WORLD MARINE FISHERY RESOURCES, *supra* note 5, at 13; *see also Review of the State of World Marine Fisheries Resources*, FAO, <http://www.fao.org/fishery/topic/166313/en> (last visited Sept. 18, 2014) (noting that the FAO selected 395 of the 584 “stock” terms from its 2009 reports on the health of marine fishery resources, which represented 70 percent of the marine catch).

7. David J. Agnew et al., *Estimating the Worldwide Extent of Illegal Fishing*, PLOS ONE, Feb. 25, 2009, available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0004570>.

8. STATE OF WORLD MARINE FISHERY RESOURCES, *supra* note 5, at 3.

9. U.N. OFFICE ON DRUGS & CRIME, TRANSNATIONAL ORGANIZED CRIME IN THE FISHING INDUSTRY 97 (2011) [hereinafter UNODC ORGANIZED CRIME STUDY], available at https://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf. Because it is very difficult to ascertain these numbers, some consider these estimates to be high. *See, e.g.,* DARREN S. CALLEY, MARKET DENIAL AND INTERNATIONAL FISHERIES REGULATION 149 (2012) (citing losses of \$1.5 billion to \$2 billion).

10. Ganapathiraju Pramod et al., *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, 48 MARINE POL’Y 102, 105 (2014).

11. INT’L PLAN OF ACTION, *supra* note 5, pt. IV, § 25.

region.¹² A number of these RFMOs currently blacklist IUU fishing vessels.¹³ Transnational actors have also intervened with semimarket-based solutions such as certification of sustainable stocks designed so that buyers will preferentially purchase certain catches.¹⁴

Based on the numerous bilateral and multilateral legal agreements that have been negotiated to address IUU fishing, we have a governance landscape filled with many (perhaps too many) parties operating across a number of vertical networks of RFMOs.¹⁵ But why have these well-intentioned international cooperative efforts not netted better results? There are a number of possible theories. On the data collection side, perhaps institutions such as the FAO have collected more refined data than previously possible, making it easier to detect IUU fishing. So perhaps IUU fishing is being effectively combatted and we are seeing more effective collective responses. On the institutional side, it is also possible that there are simply too many actors involved in efforts to combat IUU fishing, resulting in little individual accountability and no chain of command in terms of strategy and decision making.¹⁶ While both of these hypotheses might warrant further investigation, this Article focuses on explaining how the ineffectiveness of governance networks are an important driver of the IUU fishing problem.

This Article will test a legal framing theory by arguing that insufficient attention has been given to understanding large-scale IUU fishing as a transnational organized criminal activity.¹⁷ Until recently, IUU fishing had generally been regarded as a fishery resource management problem rather than as an egregious criminal act. Part of this mischaracterization may be a result of IUU fishing being a broadly dispersed phenomenon spread across a number of different groups. There are arguably three types of IUU fishing: opportunistic overfishing by usually law-abiding fishing interests who usually obtain permits

12. See *Regional Fisheries Management Organisations (RFMOs)*, EUROPEAN COMMISSION, http://ec.europa.eu/fisheries/cfp/international/rfmo/index_en.htm (last visited Nov. 8, 2014).

13. These include the Commission for the Conservation of Antarctic Marine Living Resources, the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, the Indian Ocean Tuna Commission, the Northwest Atlantic Fisheries Organisation, the North East Atlantic Fisheries Commission, the South East Atlantic Fisheries Organisation, and the Western and Central Pacific Fisheries Commission. *About*, COMBINED IUU VESSEL LIST, <http://iuu-vessels.org/iuu> (last visited Sept. 18, 2014). Lists of IUU vessels can be accessed centrally at a website maintained by Trygg Mat, a Norwegian sustainable fish foundation. See COMBINED IUU VESSEL LIST, <http://iuu-vessels.org/iuu/iuu/search> (last visited Oct. 25, 2014).

14. *MSC Certified 'Fish to Eat'*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/cook-eat-enjoy/fish-to-eat> (last visited Sept. 18, 2014).

15. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 13 (2004) (defining vertical networks as networks between "national government officials and their supranational counterparts").

16. See generally Ibo van de Poel et al., *The Problem of Many Hands: Climate Change as an Example*, 18 *SCI. & ENGINEERING ETHICS* 49 (2012).

17. The criminal component of IUU fishing is beginning to receive some international attention. In February 2013, Interpol held a conference to address fisheries crime. *1st INTERPOL International Fisheries Enforcement Conference*, INTERPOL, <http://www.interpol.int/Crime-areas/Environmental-crime/Events/Meetings/1st-INTERPOL-International-Fisheries-Enforcement-Conference> (last visited Sept. 18, 2014).

and comply with management measures but occasionally underreport actual catches; overfishing by traditional artisanal fishing groups who may be unaware of modern fishing regulations or may be living at true subsistence levels; and overfishing by premeditated industrial businesses. Efforts to end IUU fishing have tended to focus resources on creating incentives for usually law-abiding fishing entities. With broad policy efforts focused on creating territorial use-rights fisheries and assigning individual take quotas, fishery managers have been making some headway in reducing IUU fishing.¹⁸ These ideas work for communities who want to be stakeholders in fishery management and are open to exploring cooperative regulation in order to conserve resources. However, not all IUU fishers are willing to accept responsibility for the long-term management of fishery resources, perhaps because many IUU fishing operations simply do not care about the industry's long-term sustainability.¹⁹ For criminal participants, overfishing is a relatively low-capital, high-reward business. It is both an alternative to illicit markets such as drugs and human trafficking, and an indirect facilitator of these illegal businesses.²⁰

In a recent U.N. Office on Drugs and Crime (UNODC) report on transnational organized crime and fishing focused on overextraction, the authors attempt to distinguish between criminal groups who fish and fishing groups who commit crimes. They suggest that the former category consists of transnational organized crime groups that ordinarily engage in drug smuggling but have now diversified into valuable marine species, such as abalones and shark.²¹ The latter group encompasses "legal" transnational fishing companies who are also committing "organized marine living resource crimes," such as overharvesting the Patagonian toothfish.²² Yet the distinction between the two categories is meaningless. The UNODC's second category of transnational fishing companies should also be regarded as transnational organized crime groups and, as will be argued below, prosecuted for committing "serious crimes." It does not matter that the transnational fishing companies do not have illicit side businesses.

In spite of drafting NPOAs that mention sanctions against criminal fishing, many governments have assigned insufficient resources to combating criminal fishing activities to prevent IUU fish products from entering both licit

18. See generally Edward Allison & Frank Ellis, *The Livelihoods Approach and Management of Small-Scale Fisheries*, 25 MARINE POL'Y 377 (2001); Cindy Chu, *Thirty Years Later: The Global Growth of ITQs and Their Influence on Stock Status in Marine Fisheries*, 10 FISH & FISHERIES 217 (2009).

19. Cf. UNODC ORGANIZED CRIME STUDY, *supra* note 9, at 55 (discussing the prevalence of human trafficking in connection with IUU fishing).

20. See, e.g., *Costa Rica: Network Used Fishermen to Ship Cocaine*, YAHOO! NEWS (Jan. 31, 2011, 8:13 AM), <http://news.yahoo.com/costa-rica-network-used-fishermen-ship-cocaine-20110130-135213-641.html> (describing drug cartels paying fishermen to shuttle drugs).

21. UNODC ORGANIZED CRIME STUDY, *supra* note 9, at 98.

22. *Id.*

and illicit markets.²³ There have been few efforts to seriously criminalize IUU fishing behavior because there seems to be an unstated assumption that parties engaged in IUU fishing are rationally self-interested enough not to destroy a fishery. Hence the sanctions applied to IUU fishing through fisheries codes have been less extensive than those that have been assigned to other crimes involving theft. This Article suggests that efforts to combat IUU fishing should be framed as responses to transnational criminal activities since, to industrial IUU fishers, marine fish and shellfish are just another fungible and difficult-to-trace commodity in a global trading network. This Article argues for 1) harmonizing national fisheries laws to ensure that premeditated IUU fishing activities (which include far more than simply the act of fishing) are legally categorized as serious criminal acts, and 2) including within those laws the authority to exercise concurrent extraterritorial jurisdiction over IUU fishing vessels in order to provide some venue for prosecuting individual actors who are engaged in industrial IUU fishing activities regardless of the nationality of the vessel, the crew, the beneficial owner, or the site of the illegal activity.

Part I opens with a general explanation of horizontal public government networks and how these networks have failed to achieve meaningful reductions in IUU fishing because they are unable to easily adapt to the flexibility of criminal networks. Part II evaluates the growing linkages between IUU fishing and transnational criminal networks. Part III explores national efforts to combat IUU fishing. In this Part, it becomes apparent that traditionally there has been very little domestic criminal prosecution associated with IUU fishing activities. Instead, the general fishing laws for five of the largest fishing nations contain mostly low-deterrence sanctions directed at a limited group of actors—with the notable exception of the United States' Lacey Act. Part IV includes a number of proposals to strengthen horizontal government networks' power to prosecute and deter transnational IUU fishing operations, including harmonizing criminal laws and extending extraterritorial jurisdictions to include IUU fishing operations. Finally, Part V describes a number of promising transnational governance efforts, including early steps taken by Interpol to encourage member states to create National Environmental Security Task Forces (NESTs) to improve communication between horizontal government networks. The Article concludes that while properly resourced NESTs may provide the missing institutional link needed to ensure that domestic criminal laws will be routinely enforced, governments will still need to invest in creating networks for NESTs to operate effectively across national boundaries.

23. Cf. Pramod et al., *supra* note 10, at 105 (finding that 20 to 32 percent of the fish imported into the United States is likely to have been caught by IUU fishing practices). *But see* U.S. DEP'T OF STATE ET AL., NATIONAL PLAN OF ACTION OF THE UNITED STATES OF AMERICA TO PREVENT, DETER, AND ELIMINATE ILLEGAL, UNREPORTED, AND UNREGULATED FISHING 33–48 (2004) [hereinafter NATIONAL PLAN OF ACTION OF THE UNITED STATES OF AMERICA], available at http://www.nmfs.noaa.gov/ia/iuu/iuu_nationalplan.pdf (listing a number of laws with criminal penalty sanctions).

I. COMPETING PUBLIC GOVERNMENT AND CRIMINAL NETWORKS

In the ongoing competition between government and criminal networks for control of international fisheries, governments are hampered by poor coordination across vertical and horizontal networks. Vertical government networks refer to networks between national and international counterparts such as the relationship between the National Oceanic and Atmospheric Administration and the FAO. Horizontal government networks refer to political entities that are expected to coordinate either across government departments located within one state or between two equally situated domestic departments operating in different national jurisdictions, such as the relationship between the U.S. and Canadian fishery departments. States' cumbersome regulatory apparatuses compare poorly with the nimbleness of criminal networks.

A. Challenges for States to Create Effective Vertical and Horizontal Government Networks

While states may be making progress in terms of addressing cooperative aspects of the collective action problems that have led to IUU fishing, not all IUU problems can be managed as cooperation failures. There are IUU problems involving transnational crime that require coercive responses.²⁴ Institutional responses are possible both at the vertical and horizontal government network levels. States have entered into various vertical government network agreements that theoretically could have an impact on reducing IUU fishing by providing an institutional space for creating more robust resource management structures. Yet states have been unwilling to cede much of their national fishery authority, particularly in relation to the waters within exclusive economic zones (EEZs), to intergovernmental regional bodies; perhaps because approximately 90 percent (by volume) of the world's commercial marine capture fishery harvests are within the two hundred nautical mile EEZ.²⁵ States seem most willing to cooperate in the RFMO frameworks on the high seas. However, RFMOs have been institutionally constrained in their ability to manage intentional noncompliance in the area of their

24. For a host of resources discussing the problem of transnational environmental crimes, especially in the fisheries context, see UNODC ORGANIZED CRIME STUDY, *supra* note 9; GREGORY L. ROSE & MARTIN TSAMENYI, WORLD WILDLIFE FUND INT'L, UNIVERSALIZING JURISDICTION OVER MARINE LIVING RESOURCES CRIMES (2013), available at <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2261&context=lhapapers>; Lorraine Elliott, *Fighting Transnational Environmental Crime*, 66 J. INT'L AFF. 87 (2012); Henrik Osterblom et al., *Illegal Fishing and the Organized Crime Analogy*, 26 TRENDS ECOLOGY & EVOLUTION 261 (2011); Klas Sander et al., *Conceptualizing Maritime Environmental and Natural Resources Law Enforcement—The Case of Illegal Fishing*, 11 ENVTL. DEV. 112 (2013).

25. Lewis Alexander & Robert Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569, 586 (1975).

jurisdiction due to the lack of enforcement authority given to them by member states.²⁶

Instead, most of the coercive legal authority to combat IUU fishing, particularly within an EEZ, resides with domestic institutions authorized by domestic government laws.²⁷ The vertical government network centered on RFMOs fails to function effectively to deter criminal actors because states have repeatedly failed to invest resources in creating horizontal government networks that are capable of responding to criminal fishing threats.²⁸ The potential assertion of coercive authority based on existing domestic laws has not been effectively deployed to combat transnational IUU fishing activities due to a lack of coordination across horizontal government networks.

Operating government networks horizontally is no easier than operating vertically. One of the recurring challenges with horizontal governance is generating cooperative institutional relationships that will outlive the personal relationships that individual decision makers may forge. Even when domestic bodies invest institutional resources in maintaining cooperative relations as part of their institutional culture, they frequently must negotiate recurring political barriers. For example, if the Ministry of Agriculture, Livestock, and Fisheries in the Republic of Argentina wishes to coordinate enforcement efforts for a shared stock, such as the hake, with its analog in Uruguay, the fish managers and respective law enforcement officers may not have the authority to enter into any legal agreement with each other without the engagement of their respective foreign ministries. These foreign ministries may also have obligations to consult with other domestic stakeholders before agreeing to coordinated enforcement. Instead of opening a channel of communication where adaptive learning may take place, the likelihood of governance gridlock grows as the number of actors involved in the governance process increases.

Within a state, it is not uncommon for there to be a lack of formal coordination among agencies that share overall authority over a resource but do not necessarily coordinate their exercise of responsibilities. For example, in Taiwan, central authority over commercial fisheries is vested in the Council of Agriculture.²⁹ Under the Council of Agriculture, there are two separate

26. FRANK MEERE, *ORG. FOR ECON. CO-OPERATION & DEV., FISHING FOR DEVELOPMENT: THE ROLE OF FISHERIES MANAGEMENT ORGANISATIONS* (2014), available at <http://www.oecd.org/tad/events/fishing-for-development-2014-session-5-RFMOs.pdf>.

27. See, e.g., 16 U.S.C. §§ 1802, 1861 (2012) (extending U.S. fishery authority to two hundred nautical miles offshore and assigning the U.S. Coast Guard the duty of enforcing U.S. fishery laws at sea).

28. This paper uses the terms “vertical government network” and “horizontal government network” largely in the context of Anne-Marie Slaughter’s work on global networks, with one distinction. Slaughter defines “vertical government networks” as networks between “national government officials and their supranational counterparts” and “horizontal government networks” as “links between counterpart national officials across borders.” SLAUGHTER, *supra* note 15, at 13. This paper extends the concept of “horizontal government networks” to refer to links between officials concerned with the management or control of a particular issue within national borders.

29. *About COA*, COUNCIL AGRIC., <http://eng.coa.gov.tw/list.php?catid=8798> (last visited Oct. 25, 2014).

government organizations: the Fisheries Agency based in Taipei and the Fisheries Research Centre based in Keelung, both of which have complex institutional histories and appear to have no formal overlap in shared responsibilities for fishery management.³⁰ Furthermore, there are limited linkages between the Fisheries Agency and the bodies that are responsible for enforcing fisheries management. Taiwan's NPOA provides for an annual exchange of information between the Taiwanese Coast Guard Administration and the Fisheries Agency regarding international fisheries management.³¹ Both the Coast Guard and the Fisheries Agency can conduct boarding and inspection of vessels but it is unclear what coordination is legally required between the two institutions.³² Further complicating matters, the Maritime and Port Bureau in the Ministry of Transportation and Communication also wields legal authority to inspect Taiwanese flagged vessels in order to deter IUU fishing.³³

While there are many examples of successful interagency actions and there may very well be frequent informal coordination between agencies because of the alliances and commitments of various individual actors within respective agencies, many existing formal governance structures related to fisheries management do not facilitate regular communication channels between decision makers that can guarantee sustainable resource governance.³⁴ For example, even though vessel monitoring systems are installed on the approximately 2800 Taiwanese flagged vessels that participate in distant water fishing,³⁵ vessels can still outmaneuver government patrols due in part to a

30. *See History, FISHERIES RES. INST.*, <http://www.tfrin.gov.tw/lp.asp?ctNode=830&CtUnit=202&BaseDSD=7&mp=3> (last updated Oct. 1, 2014); *Organization, FISHERIES RES. INST.*, <http://www.tfrin.gov.tw/np.asp?ctNode=822&mp=3> (last updated Oct. 1, 2014) (listing six research units that do not appear to have formal links to the Fisheries Agency: Freshwater Aquaculture Research Center, Mariculture Research Center, Coastal and Offshore Resources Research Center, Tungkuang Biotechnology Research Center, Eastern Marine Biology Research Center, and Penghu Marine Biology Research Center); *Organization Chart, FISHERIES AGENCY*, <http://www.fa.gov.tw/en/PolicySovereignty/index.aspx> (last updated Apr. 24, 2012) (describing a somewhat complex organization with an unexplained division between the "Deep Sea Fisheries Division" and the "Deep Sea Fishery Research and Development Center," and no link to the Fisheries Research Institute).

31. NATIONAL PLAN OF ACTION OF THE REPUBLIC OF CHINA (TAIWAN) TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING 24 (2013) (translation on file with author).

32. *Id.* at 28; *see also Fisheries Act, FISHERIES AGENCY*, <http://www.fa.gov.tw/en/LegalsActs/content.aspx?id=1&chk=F8CA5D8C-49DB-46B5-9839-43D955E36275¶m> (last updated Apr. 11, 2014) (reproducing Article 54 of the Republic of China Fisheries Act, which authorizes the Fisheries Agency to use patrol fleets to protect fisheries and to request that the "Ministry of Defense and other authorities" assist the Agency in fulfilling its responsibilities under the Fisheries Act); Coast Guard Act, Jan. 26, 2000, art. 4, *compiled in LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, available at* <http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=D0090009> (requiring the Coast Guard to "protect and preserve [the] oceanic environment").

33. NATIONAL PLAN OF ACTION OF THE REPUBLIC OF CHINA (TAIWAN), *supra* note 31, at 35.

34. *See id.* at 28 (reporting only four patrol trips in the Pacific Ocean in 2012 arising from cooperation between the Fisheries Agency and the Coast Guard Administration).

35. Shui-Kai Chang et al., *Distant Water Fisheries Development and Vessel Monitoring System Implementation in Taiwan—History and Driving Forces*, 34 MARINE POL'Y 541, 546 (2010).

failure of fishery managers and port officials to coordinate.³⁶ A lack of clear communication channels between individuals whose decisions can impact the effectiveness of monitoring and compliance strategies becomes a capacity problem.

B. The Success of Criminal Networks

Public governance networks that lack capacity, like the vertical networks of RFMOs, or that fail to facilitate departmental coordination across horizontal networks within a state struggle to regulate competing criminal networks.³⁷ In the case of IUU fishing, it is accepted that such criminal networks exist in tandem with public governance networks and compete successfully for resources.³⁸ While knowledge about criminal organizations engaged in commercial fishing is generally anecdotal rather than empirical, criminal networks seem to be functioning effectively as governance networks asserting control over the long-term fate of fisheries. IUU fishing continues at sea, IUU products enter ports, and IUU products reach consumers. While more information about the criminal fishing syndicates would no doubt facilitate government enforcement, it is also clear that the existing inadequate government response to IUU fishing can be attributed in part to insufficient criminalization, explored in Part II, and the institutional coordination issues described above. Put simply, criminal networks are outcompeting their government counterparts.³⁹

IUU criminal networks have several qualities that lend to their success. First, criminal networks are responsive to external threats. As described in a task force report, the syndicates “play cat and mouse with authorities,” using a network of spies who communicate information about patrol ships throughout the IUU network.⁴⁰ Second, IUU criminal networks are organized on principles of diffusion and creating distance between participants, so that with the exception of a few kingpins who tightly control information, there will be no

36. *Id.* at 547 (observing that the value of vessel monitoring system technology can be foiled by the “A–B vessel issue,” where vessel monitoring systems are exchanged between regulated and unregulated vessels, and noting that this kind of situation requires either port or onboard inspection activities).

37. Governance for purposes of this Article does not require a government. *See generally* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James Rosenau & Ernst-Otto Czempel eds., 1992). In this Article, governance refers to the exercise of rule making over resources by either public or private entities that control the affairs of a dispersed but identifiable group across a network.

38. *See generally* UNODC ORGANIZED CRIME STUDY, *supra* note 9.

39. *The Escalating International Wildlife Trafficking Crisis: Hearing before the Subcomms. on African Affairs and E. Asian & Pac. Affairs of the S. Comm. on Foreign Relations*, 113th Cong. 2 (2014) (statement of Brooke Darby, Deputy Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs).

40. HIGH SEAS TASK FORCE, CLOSING THE NET: STOPPING ILLEGAL FISHING ON THE HIGH SEAS 25 (2006), available at <http://www.oecd.org/sd-roundtable/papersandpublications/39375276.pdf>.

concentration of knowledge about the reach of the network.⁴¹ As described in the task force report, owners of IUU fleets require minimal communication between fleet vessels, utilize multiple front companies to mask the fleet's ownership structure, and are careful to keep fleet operating details confidential so that the captain of an IUU vessel may not know who owns the ship.⁴² Working on a need to know basis, fishermen may not even know they are participating in a much larger criminal network.⁴³ Third, criminal fishing networks are focused on a single objective—increasing profit while remaining undetected. In contrast, public governance networks involved in fishery management have multiple (sometimes competing) objectives including protecting fishing communities, ensuring adequate food stocks, restoring fishery stocks, reducing pollution, and conserving ecosystems.

Finally, criminal fishing networks tend to be capable of great internal flexibility, meaning that if one port is closed to IUU vessels because of surveillance, vessels simply redeploy to another port.⁴⁴ In contrast, government networks have layers of bureaucracy designed to protect society from arbitrary and capricious decisions. For important decisions, a decision-making record is expected to reflect that the appropriate stakeholder's comments have been reviewed and considered.⁴⁵ Thus, while ad hoc decision making helps criminal networks avoid detection, if government agencies adopted the same approach they would risk upsetting delicate political balances, particularly between government leaders and industry leaders. The formality of decision making in most horizontal public government networks is therefore mismatched with the dynamic ability of criminal networks to make relatively quick decisions. In essence, IUU fishing becomes a competition between highly disaggregated public government networks seeking to exercise managerial capacities and highly adaptive criminal networks whose business decisions have profound impacts on resources.

41. CARLO MORSELLI, *INSIDE CRIMINAL NETWORKS* 71 (2009) (describing how criminal enterprise networks may become more secure when they can grow the periphery of the network in order to insulate the core of well-connected traffickers).

42. HIGH SEAS TASK FORCE, *supra* note 40, at 25.

43. *Id.*

44. *Major Tuna Vessel is Denied Port Landing Because of Evidence of Illegal Fishing*, PEW CHARITABLE TR. (Apr. 19, 2013), <http://www.pewtrusts.org/en/about/news-room/news/2013/04/19/major-tuna-vessel-is-denied-port-landing-because-of-evidence-of-illegal-fishing> (describing how a Korean-flagged vessel that was denied the ability to offload in Seychelles travelled to Mauritius and was denied the ability to offload there as well).

45. *See, e.g.*, 5 U.S.C. § 553(c) (2012) (requiring agencies to give interested persons an opportunity to participate in rule making and to consider submitted comments).

II. CRIME AND THE LAW OF INTERNATIONAL FISHING

IUU fishing has become an attractive option for transnational criminal networks for a number of reasons.⁴⁶ First, given the vastness of the oceans and the limited capacity of states to deploy patrol boats, the chance of detecting illegal activity is low, especially when fishing activities by vessels flagged to a state are dispersed across long distances. Second, fishing is generally a legal business, meaning that efforts to find specific illegal fishing activity have been less extensive than in the narcotic or human trafficking areas. Third, unlike many other smuggled goods, fish are an easily transformable commodity whose original identity can be hidden through filleting and relabeling; monitoring the accuracy of labels and packaging requires a concerted effort on the part of a regulator.⁴⁷ Fourth, both regional and national fishery managers have generally relied upon self-reporting, with limited external review. Finally, fishing is extremely profitable and not excessively capital intensive. Researchers estimate that the IUU fishing market ranges between \$10 billion and \$23.5 billion a year.⁴⁸

Yet while law should deter IUU fishing, the existing Law of the Sea unintentionally enables it by sheltering criminals throughout the IUU fishing chain, particularly through the current customs of flag registration. For purposes of this Article, the “IUU fishing chain” refers to practices beyond simply fishing at sea. It also refers to purchasing boats, registering boats, transshipping fish at sea, unloading cargo in ports, and finally selling fish through complex arrangements that maintain the anonymity of the sellers while often evading taxes. The following subparts examine different key aspects of the IUU fishing chain that increase the attractiveness of IUU fishing for criminal networks.

A. *Low Start-Up Costs*

Low start-up costs, the indirect result of previous government interventions to combat IUU fishing, may encourage criminal networks to enter into IUU fishing activities. In response to an excess of fishing vessels registered within a state, governments created programs to buy back vessels or to subsidize owners who would sell their vessels back to the government.⁴⁹ Yet instead of being scrapped, many of these vessels were sold back into markets in

46. For purposes of this Article, a transnational criminal network refers to either (1) two or more persons of different nationalities participating in a crime, or (2) two or more persons participating in a crime that takes place across more than one geographical jurisdiction.

47. See KIMBERLY WARNER ET AL., OCEANA STUDY REVEALS SEAFOOD FRAUD NATIONWIDE (2013), available at http://oceana.org/sites/default/files/reports/National_Seafood_Fraud_Testing_Results_FINAL.pdf (finding high rates of mislabeling in fish sales).

48. Agnew et al., *supra* note 7, at 1 (relying on data from fifty-four countries and the high seas).

49. See Hsiang-Wen Huang & Ching-Ta Chuang, *Fishing Capacity Management in Taiwan: Experience and Prospects*, 34 MARINE POL'Y 70, 72, 74–75 (2010).

other states with fewer rules and regulations.⁵⁰ The European Union has partially addressed this problem by prohibiting the purchase of vessels from and the sale of vessels to countries that are listed on an E.U. list for failing to cooperate in combating IUU fishing.⁵¹ However, used and relatively inexpensive vessels are still easily available on numerous publicly accessible websites.⁵² For example, in January 2014, a search by this author found a 157-foot Sierra Leonean-flagged tuna long liner with the capacity for 180 tons of fish built in Japan in 1972 and now located in Sierra Leone for an asking price of \$200,000.⁵³ Assuming an estimated average price of \$2000 per ton for frozen tuna,⁵⁴ filling the fishhold of the Sierra Leonean bargain vessel to its capacity would net the new owner \$160,000 in ninety days if the vessel is capable of catching an average of two tons a day.⁵⁵ If the owner continually deployed the vessel, then the ship would net \$1.2 million over the course of a year. After subtracting fuel and crew costs, the owner of the vessel would still have a healthy amount of remuneration for their initial \$200,000 investment.⁵⁶ This brief exercise in pricing capital costs suggests that entry into the industrial fishing business is relatively inexpensive for criminal enterprises.

B. Flag Registries and Reflagging

The second strategic choice that increases the attraction of IUU fishing for criminal syndicates is the option for a vessel owner to choose the flag state that will exercise jurisdiction over a vessel. The Law of the Sea gives every state the opportunity to “fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag.”⁵⁷ Even

50. ORG. FOR ECON. CO-OPERATION & DEV., WHY FISH PIRACY PERSISTS: THE ECONOMICS OF ILLEGAL, UNREPORTED AND UNREGULATED FISHING 78 (2005); Huang & Chuang, *supra* note 49, at 75.

51. Council Regulation 1005/2008 to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing, Information Note, *available at* http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/information_note01_en.pdf.

52. *See, e.g., Fishing Vessels/Trawlers for Sale*, MAR. SALES, INC., <http://www.maritimesales.com/Fishing%20Vessels.htm> (last visited Sept. 18, 2014).

53. *See id.* (screenshot of vessel on file with author). The vessel was identified as “HAR11.” *See id.*

54. *See* Rudy Ruitenberg, *World Fish Prices Climb to Record on Demand for Salmon and Tuna*, BLOOMBERG NEWS (June 19, 2013, 2:50 AM), <http://www.bloomberg.com/news/2013-06-19/world-fish-prices-climb-to-record-on-demand-for-salmon-and-tuna.html> (reporting that the U.S. market for uncanned tuna was stable with prices at \$2000 per ton). Current quotations for a ton of frozen tuna are also available on sites such as Alibaba.com, with prices in April 2014 ranging from \$1000 to \$2000 per ton for Bluefin tuna (a threatened species) from suppliers in India, Indonesia, Japan, Norway, and Spain. *See* ALIBABA, <http://www.alibaba.com> (last visited Sept. 18, 2014).

55. James Joseph, FAO, United Nations, *Managing Fishing Capacity of the World Tuna Fleet*, FAO Fisheries Circular No. 982 (2003), *available at* <http://www.fao.org/docrep/005/y4499e/y4499e00.htm#Contents>.

56. Maintenance costs and insurance costs are not included since few IUU vessels take anything beyond minimum safety measures. *See* ENVTL. JUSTICE FOUND., ALL AT SEA: THE ABUSE OF HUMAN RIGHTS ABOARD ILLEGAL FISHING VESSELS 6 (2010), *available at* http://ejfoundation.org/sites/default/files/public/media/report-all%20at%20sea_0.pdf.

57. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, art. 91.

though the law expects that there will be a “genuine link between the [s]tate and the ship,” this requirement has been left to the discretion of the flagging state, allowing even landlocked countries such as Mongolia and Bolivia to operate as flag states.⁵⁸ As this suggests, open registries, whereby states register foreign entities’ vessels and allow them to fly the national flag, have proven problematic.⁵⁹ Ordinarily, a state is expected to exercise control over vessels that are registered to fly its flag, and in recent cases, coastal and port states have been suggesting that flag states must assert greater control over their vessels.⁶⁰ However, many flag states without this external pressure are either incapable of controlling their flagged vessels due to a lack of compliance resources or are indifferent to controlling vessels on their registries.⁶¹

There have been attempts to further define the meaning of “genuine link,” including a draft of what eventually became the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. In the draft, states were expected to only flag ships if they could exercise “effective control over activities of the vessel,” or if the ship’s beneficial owner shared the flagging state’s nationality or was a permanent resident.⁶² This provision on flagging failed to pass.⁶³ Since this attempt, open registry states have continued to refuse to interpret “genuine link” as requiring that the beneficial owner or captain have the nationality of the registry state.⁶⁴

58. *Id.*; see also MONG. SHIP REGISTRY, <http://www.mngship.org> (last visited Sept. 18, 2014); REGISTRO INTERNACIONAL BOLIVIANO DE BUQUES, <http://www.ribb.gob.bo> (last visited Sept. 18, 2014).

59. “Open register” or “open registry” refer to a state’s practice of registering a vessel from a foreign entity. See Judith Swan, FAO, United Nations, *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities—Information and Options*, FAO Fisheries Circular No. 980 (2002), available at <http://www.fao.org/docrep/005/y3824e/y3824e00.htm#Contents>. Open registry countries “that include or have included fishing vessels” are Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Cambodia, Cayman Islands, China, Cook Islands, Cyprus, Equatorial Guinea, Gibraltar, Honduras, Isle of Man, Kerguelen, Liberia, Malta, Marshall Islands, Mauritania, Mauritius, Morocco, Netherlands Antilles, Panama, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Seychelles, Sierra Leone, Singapore, Tonga, Tuvalu, and Vanuatu. *Id.* app. 1.

60. The Sub-Regional Fisheries Commission, which is composed of seven West African coastal states, has requested an advisory opinion from the International Tribunal on the Law of the Sea (ITLOS) regarding flag state liability for IUU fishing activities. Letter from Ciré Amadou Kane, Permanent Sec’y, Sub-Reg’l Fisheries Comm’n, to Judge Shunji Yanai, President, Int’l Tribunal for the Law of the Sea (Mar. 27, 2013) [hereinafter Request for Advisory Opinion], available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf (requesting advisory opinion).

61. See Rose George, *Flying the Flag, Fleeing the State*, N.Y. TIMES (Apr. 24, 2011), http://www.nytimes.com/2011/04/25/opinion/25george.html?_r=0.

62. FAO, UNITED NATIONS, REPORT OF THE TWENTIETH SESSION OF THE COMMITTEE ON FISHERIES (FISHERIES REPORT NO. 488) 60 (1993), available at <http://www.fao.org/docrep/014/am686e/am686e.pdf>.

63. ARIELLA D’ANDREA, FAO, UNITED NATIONS, THE “GENUINE LINK” CONCEPT IN RESPONSIBLE FISHERIES: LEGAL ASPECTS AND RECENT DEVELOPMENTS 9 (2006), available at http://www.fao.org/fileadmin/user_upload/legal/docs/lp061.pdf.

64. *Id.* at 1.

Until now, there has been no definitive multilateral decision in the context of the Law of the Sea regarding the meaning of “genuine link.” Even when a contentious case presented an opportunity for the International Tribunal for the Law of the Sea (ITLOS) to clarify the term, the ITLOS declined to offer any legal test to measure what constitutes a “genuine link.”⁶⁵ Specifically, when Guinea challenged the registration of the *M/V Saiga* in Saint Vincent and the Grenadines, the court simply accepted that a ship owned by a Cypriot, managed by a Scottish corporation, and chartered to a Swiss company could be legally registered in Saint Vincent and the Grenadines as long as it met the Saint Vincent and the Grenadines requirements.⁶⁶ It did not matter that there were no apparent linkages between the vessel and any of its immediate owners or users.

The known flexibility of the “genuine link” concept means that in practice, criminal ventures will flag with a group of states colloquially referred to as “flags of convenience.”⁶⁷ An investigative report by Matthew Gianni and Walt Simpson based on a review of Lloyd’s Register of Ships concluded that among registered fishing vessels, 15 percent of the large ships either had unknown flags or were flagged with flags of convenience.⁶⁸ Many of the large-scale vessels built since 2000 were immediately flagged with flags of convenience because they appeared “to be built with a view to engaging in IUU fishing.”⁶⁹ Where Belize, Honduras, Panama, or Saint Vincent and the Grenadines were listed as owners of a vessel, Gianni and Simpson concluded that the companies that applied for registration “[were] likely to be fictitious or shell.”⁷⁰ When a vessel that is identified as engaging in IUU fishing activities in waters under the jurisdiction of a RFMO is actually flying a flag,⁷¹ the flag on the vessel is most likely to be a flag of convenience.⁷²

65. Judgment para. 83, *The M/V “Saiga” (Saint Vincent and the Grenadines v. Guinea)* (No. 2) (July 1, 1999) [hereinafter *Saiga* Judgment], available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf.

66. *Id.* paras. 75–88.

67. These states include Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, Faroe Islands, Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Mauritius, Moldova, Mongolia, Netherlands Antilles, North Korea, Panama, Saint Vincent and the Grenadines, São Tomé and Príncipe, Sri Lanka, Tonga, and Vanuatu. *Flags of Convenience*, INT’L TRANSP. WORKERS’ FED’N, <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/> (last visited Nov. 12, 2014). There is a large amount of overlap between these “flags of convenience” and the open registries. See, e.g., MONG. SHIP REGISTRY, *supra* note 58.

68. MATTHEW GIANNI & WALT SIMPSON, *THE CHANGING NATURE OF HIGH SEAS FISHING: HOW FLAGS OF CONVENIENCE PROVIDE COVER FOR ILLEGAL, UNREPORTED AND UNREGULATED FISHING 3* (2005), available at <http://www.wwf.org.uk/filelibrary/pdf/flagsofconvenience.pdf>.

69. *Id.* at 4.

70. *Id.*

71. Most of the listings on the RFMO IUU vessel lists are of “unknown” flags. See, e.g., *infra* note 72 (providing links to IUU lists that reveal a majority of “unknown” flags). Since these vessels do not have a nationality, they can be boarded by the coastal state within an EEZ or by any state on the high seas because every ship must “sail under the flag of one [s]tate only.” See Convention on the Law of the Sea, *supra* note 57, art. 92.

72. This conclusion is based on examining the IUU lists issued by seven of the largest RFMOs. *Current IUU Vessel List*, INTER-AM. TROPICAL TUNA COMMISSION, <http://www.iattc.org/>

IUU fishing operations understand the business implications of being included on an IUU list. Unsurprisingly, when a government reviews its registry for violations or threatens enforcement against a ship, vessels will flag-hop.⁷³ Thus the flexibility of the registry network favors potential criminal owners, but penalizes global and national government enforcement networks who may not be able to follow the chain of ownership through shell companies and back to a beneficial owner in a timely fashion. Adding further difficulty, an owner of an IUU ship that has been seized by a state will opt to sacrifice a ship rather than jeopardize the much more profitable criminal network operating across registries and throughout the ocean.⁷⁴ The stateless *Bangun Perkasa* ship illustrates this reality. When the ship was seized at sea as an IUU fishing vessel, the U.S. Coast Guard investigated its provenance. When the investigation failed to provide any leads of who the beneficial owner might be, the Coast Guard gave the order to scrap the ship.⁷⁵ One assumes the national or transnational criminal enterprise behind the *Bangun Perkasa* continued its operations in anonymity.

Despite the prevalence of flag-hopping described above, states have few legal options to end the practice. The Law of the Sea does not provide a specific legal dispute mechanism to challenge the practice of flag-hopping, but only empowers a state “which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised” to “report the facts to the flag [s]tate.”⁷⁶ The flag state then has an obligation to

VesselRegister/IUU.aspx?Lang=en (last updated Oct. 1, 2014) (listing Georgia); *Illegal, Unreported and Unregulated Fishing*, NW. ATLANTIC FISHERIES ORG., <http://www.nafo.int/fisheries/frames/fishery.html> (last visited Sept. 18, 2014) (listing vessels with current flags of Guinea and Ghana and former flags of Panama, Georgia, Sierra Leone, Togo, and Morocco); *IUU Vessel List*, INT’L COMMISSION FOR CONSERVATION ATLANTIC TUNAS, <http://www.iccat.int/en/IUU.asp> (last updated Mar. 12, 2013) (listing Georgia and Indonesia); *List of IUU Vessels*, INDIAN OCEAN TUNA COMMISSION, <http://www.iotc.org/vessels#iuu> (last visited Sept. 18, 2014) (listing vessels formerly flagged with Belize, Equatorial Guinea, and Georgia that had unknown flags as of June 2014); *NEAFC IUU B List*, N.E. ATLANTIC FISHERIES COMMISSION, <http://www.neafc.org/mcs/iuu/blist> (last visited Sept. 18, 2014) (listing Guinea and Ghana); *Non-Contracting Party IUU Vessel List*, CONVENTION FOR CONSERVATION ANTARCTIC MARINE LIVING RESOURCES (CCAMLR), <http://www.ccamlr.org/en/compliance/non-contracting-party-iuu-vessel-list> (last updated May 10, 2013) (listing Iran, Nigeria, Mali, and Tanzania); *WCPFC IUU Vessel List for 2013*, W. & CENT. PAC. FISHERIES COMMISSION, <http://www.wcpfc.int/system/files/WCPFC-IUU-List-6-February-2013.pdf> (last visited Sept. 18, 2014) (listing flags from Georgia).

73. The CCAMLR IUU vessel registry provides several good examples of this phenomenon. *Non-Contracting Party IUU Vessel List*, *supra* note 72. For example, in early 2012 the CCAMLR IUU registry listed the *Baiyangdian*, a refrigerated cargo vessel that had no flag, as owned by Stanley Management. *Tiantai*, CCAMLR, <http://www.ccamlr.org/en/node/85608> (last updated Oct. 24, 2014). In late 2012 the CCAMLR listed the same vessel with a Tanzanian flag. *Id.* In early 2013 the ship changed its name to *Keshan* and reflagged with Mongolia. *Id.* By late 2013, the vessel had again changed its name to *Tiantai*, flew no known flag, and listed no known owner. *Id.*

74. HIGH SEAS TASK FORCE, *supra* note 40, at 25.

75. See Sherrie Tinsley Myers, *From Seizure to Scrap—the Bangun Perkasa Story*, N. PAC. ANADROMOUS FISH COMMISSION NEWSL., July 2013, at 1, available at <http://www.npafc.org/new/publications/Newsletter/NL34/Newsletter%2034%20%281-4%29.pdf>.

76. Convention on the Law of the Sea, *supra* note 57, art. 94(6).

investigate and “if appropriate, take any action necessary to remedy the situation.”⁷⁷ There is no record of how often this section has been invoked by states. Moreover, even when it is invoked, investigations by flags of convenience states are likely to be perfunctory at best.⁷⁸

Even assuming a substantive investigation, the practice of reflagging allows criminals to continue their masquerade. It is difficult to remove a ship from fishing operations without the cooperation of a flag state.⁷⁹ The process of reflagging from one flag of convenience to another is straightforward. There is no need to bring the ship to any port in a flagging state, because as with purchasing vessels, the internet provides easy opportunities for reflagging.⁸⁰ For example, internationalshipregistries.com offers assistance to vessels owners in obtaining international ship registrations from various states identified as flags of convenience.⁸¹ To satisfy the “genuine link” requirement, the website offers additional assistance to vessel owners in setting up offshore companies in states that have been identified as either flags of convenience or as popular tax havens.⁸²

Nor are these legal maneuvers difficult to execute. The registration process for some states lacks any physical vessel verification and can apparently be completed anywhere in the world. A quick investigation into obtaining a flag registry from landlocked Mongolia reveals that “provisional registrations” and “post dated provisional registration[s]” can be available after faxing a declaration of ownership and accounting authority with a payment of fees.⁸³ Nonresidents can create offshore corporations in Panama, one of the flag of convenience states, in five to eight working days for €1000.⁸⁴ These registration ruses provide optimal flexibility for criminal networks with extremely low levels of possible detection of illegal behavior and limited

77. *Id.*

78. See Robert Neff, *Flags That Hide the Dirty Truth*, ASIA TIMES ONLINE (Apr. 20, 2007), <http://www.atimes.com/atimes/Korea/ID20Dg03.html> (describing how the Cambodian Ministry of Public Works and Transportation failed to investigate alleged illegal activities such as drug and cigarette smuggling by Cambodian-flagged ships).

79. Vessels can be detained by a nonflag state under the U.N. Convention on the Law of the Sea Articles 73(2), 220, and 226(1), but the prompt release rules under Article 292 require that the detainment be temporary. See Convention on the Law of the Sea, *supra* note 57.

80. Neff, *supra* note 78 (describing how the Cambodian Shipping Corporation, which was authorized by the government to register ships under the Cambodian flag, operated an online registration from Singapore that could complete the flag registration process in twenty-four hours).

81. Home Page, INT’L SHIP REGISTRIES (WORLDWIDE) LLC, <http://internationalshipregistries.com/> (last visited Oct. 26, 2014). Examples of registrations that can be organized online include registrations from Belize, Cambodia, Cyprus, Dominica, Georgia, Honduras, Jamaica, Malta, Mongolia, Panama, Saint Vincent and the Grenadines, and Slovak Republic. See *id.*

82. Examples of states where offshore companies can be created include Belize, British Virgin Islands, Cayman Islands, Costa Rica, Cyprus, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, Mauritius, Niue, Panama, and the Seychelles. See *id.*

83. *Mongolia*, INT’L SHIP REGISTRIES, http://internationalshipregistries.com/pdf_files/Mongolia.pdf (last visited Sept. 18, 2014).

84. See *Offshore Panama Corporations*, GLOBAL MONEY CONSULTANTS, <http://global-money.com/item.php?id=155> (last visited Sept. 18, 2014).

chances of being prosecuted. For example, between 1997 and 2001, Belize flagged several hundred large fishing vessels—a number of which allegedly engaged in IUU fishing in the Atlantic, Pacific, Indian, and Antarctic Oceans.⁸⁵ Yet the state only took enforcement actions against seventeen fishing vessels, which in twelve cases led to dismissal and in five resulted in fines averaging a mere \$20,000.⁸⁶

C. *Crew Recruitment*

Under the Law of the Sea, every state is expected to “ensure safety at sea with regard, *inter alia*, to . . . labour conditions and the training of crews, taking into account the applicable international instruments.”⁸⁷ However, for criminal networks that employ IUU vessels, there is no incentive to have either well-maintained ships, since the vessels could be forfeited if seized, or good working conditions, since the crewmembers can be easily replaced by new crewmembers who are desperate for subsistence income. Indeed, a recent report from UNODC provides evidence that crewmembers of IUU vessels are treated particularly inhumanely.⁸⁸ Working up to eighteen hours a day for as little as \$200 per month with regular threats of harm to their persons, IUU fishing crews tend to consist of some of the poorest fishermen in the global South whose nationality states provide them no systematic protection against exploitation.⁸⁹

D. *Transshipment and Resupply at Sea*

Vessels engaged in IUU fishing can avoid detection by enforcement officials in part by offloading their cargo and resupplying at sea.⁹⁰ Such transshipment encourages “fish laundering”; distant smaller fishing vessels can easily offload their catches to a central vessel that processes the fish at sea into boxed filets that are difficult for inspectors to identify. As a result of this “mothership” transshipment, IUU fishing vessels can avoid having to call into port and risk inspection.⁹¹ Instead, the central transshipment vessel can carry a mixture of legally obtained fish and illegally captured fish that are difficult to

85. Matthew Gianni, *IUU Fishing and the Cost to Flag of Convenience Countries*, in *FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING* 287 (Kathleen Gray et al. eds., 2004).

86. *Id.* at 286.

87. Convention on the Law of the Sea, *supra* note 57, art. 94(3).

88. See UNODC ORGANIZED CRIME STUDY, *supra* note 9, at 127.

89. See Michael Field, *Indonesian Fishermen Claim Exploitation*, SUNDAY STAR TIMES (Nov. 24, 2013), <http://www.stuff.co.nz/business/farming/9432480/Indonesian-fishermen-claim-exploitation>.

90. Matthew Gianni & Walt Simpson, *Flags of Convenience, Transshipment, Re-Supply and At-Sea Infrastructure in Relation to IUU Fishing*, in *FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING*, *supra* note 85, at 89.

91. See ENVTL. JUSTICE FOUND., *TRANSHIPMENT AT SEA: THE NEED FOR A BAN IN WEST AFRICA 5–7* (2013), available at http://ejfoundation.org/sites/default/files/public/ejf_transhipments_at_sea_web_0.pdf.

distinguish once the fish are processed and packaged.⁹² As with IUU fishing vessels, many of the transshipment vessels are flagged with flags of convenience even though the beneficial ownership is in another state.⁹³ The ability of criminal networks to engage in undetected transfers adds yet another degree of flexibility for groups engaged in the IUU fishing chain.

E. Ports of Convenience/Ports of Noncompliance

An IUU fishing vessel will often try to sell its cargo at sea and offload the cargo to a transshipment vessel that will bring the shipments to a “port of convenience” where inspection rates are low.⁹⁴ The buyers of these goods are often complicit in laundering fish because they can obtain far more competitive prices with black market goods than with legal cargo.⁹⁵ These sales have consequences for the whole market. For example, a flood of Russian IUU king crab into the market allegedly impacted the global king crab market in 2013.⁹⁶

Illicit sales are facilitated by the rarity of port inspections of fishing cargo in states that have not already committed to applying minimum port state measures to combat IUU fishing.⁹⁷ When the FAO Agreement on Port State Measures was negotiated, it was intended to strengthen global government networks by creating legal opportunities for effective cooperation among coastal states, flag states, and RFMOs to combat the phenomena of “ports of convenience” or “ports of noncompliance” by ensuring that states exercise some control over IUU fishing operations that may be using their ports to offload IUU marine products.⁹⁸ Yet while the European Union and the United

92. See *id.* at 91 (stating that the *M/V Hatsukari*, a Panamanian-flagged transshipment vessel with owners of Japanese nationality, had carried both IUU and legally caught tuna from the South Atlantic in its holds).

93. *Id.* at 90 (listing transshipment vessels that are beneficially owned in Japan, Korea, and Taiwan, but flagged primarily in Panama, as well as in Saint Vincent and the Grenadines, the Bahamas, and Liberia).

94. FAO, UNITED NATIONS, STOPPING ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING 14–15 (2002), available at <http://www.fao.org/docrep/005/y3554e/y3554e00.htm#Contents>.

95. See Press Release, White House, Presidential Memorandum—Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud (June 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/17/presidential-memorandum-comprehensive-framework-combat-illegal-unreported> (“Global losses attributable to the black market from IUU fishing are estimated to be \$10-\$23 billion annually, weakening profitability for legally caught seafood . . .”).

96. Jeanine Stewart & Eva Tallaksen, *King Crab Prices Keep Dropping on Suspected IUU Fishing*, UNDERCURRENT NEWS (May 17, 2013, 3:57 PM), <http://www.undercurrentnews.com/2013/05/17/king-crab-prices-keep-dropping-on-suspected-iuu-fishing>.

97. See FAO, UNITED NATIONS, AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2009) [hereinafter AGREEMENT ON PORT STATE MEASURES], available at http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf. As of April 2014, there are eleven parties to the agreement: Chile, the European Union, Gabon, Myanmar, New Zealand, Norway, Oman, Seychelles, Sri Lanka, the United States, and Uruguay. See *Oman Is First Arab State to Ratify Treaty to Stem Illegal Fishing*, PEW CHARITABLE TR. (Sept. 4, 2013), <http://www.pewenvironment.org/news-room/other-resources/oman-is-first-arab-state-to-ratify-treaty-to-stem-illegal-fishing-85899502306>.

98. See AGREEMENT ON PORT STATE MEASURES, *supra* note 97, at 1–2. “Ports of convenience” as used in this Article are similar to the phenomenon of “flags of convenience” and refer to state ports

States, two of the largest consumers of fish, are parties to the FAO Agreement,⁹⁹ many states still employ lax port regulations.

While there are 4764 ports across the globe where fish might be offloaded, approximately 2395 of these ports are under no legal obligation to implement the FAO Agreement.¹⁰⁰ IUU vessels will travel large distances to offload illegal catches at these ports to avoid inspection.¹⁰¹ Thus, until there is an effective network of harmonized port state measures, criminal networks will still have opportunities to traffic fish through ports of convenience. Unless the international community is able to apply pressure to improve surveillance at these ports, IUU trade will continue unencumbered by regulations, as some of the economically poorest countries with the weakest public governance networks compete to service the illegal fishing industry.

F. Profitable Trading

After an IUU vessel has found a purchaser for its cargo, the captain or another agent will make arrangements for payment with the buyer. Continuing the theme of detection avoidance, payments may be transferred through complex financial transactions that may involve third-party state tax havens and difficult-to-trace cash payments.¹⁰² According to the Organisation of Economic Co-operation and Development, IUU fishing vessel owners are increasingly

over which there is little to no regulatory oversight for health and safety standards or legality of goods. While crew members have used the term in the national press to refer to ports that do not inspect vessels for health and safety violations, it is used in this Article to refer to a lack of oversight for cargo inspections. The Canary Islands, which supplies Europe with IUU marine products, is one known “port of convenience.” See, e.g., ENVTL. JUSTICE FOUND., *PIRATE FISH ON YOUR PLATE: TRACKING ILLEGALLY-CAUGHT FISH FROM WEST AFRICA INTO THE EUROPEAN MARKET 7–12* (2007), available at http://www.imcsnet.org/imcs/docs/pirate_fish_on_your_plate_ejf.pdf.

99. See *supra* note 97 and accompanying text.

100. This number is the total number of registered ports (4764) minus the number of listed ports identified with parties to the FAO Agreement (2369). Listed ports include: Chile, Myanmar, Norway, Oman, Seychelles, Sri Lanka, Uruguay, and the twenty-eight E.U. member countries (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom). See *World Ports by Country*, WORLD PORT SOURCE, <http://www.worldportsource.com/countries.php> (last visited Sept. 18, 2014). This number is only a rough estimate, because some of the listed ports may not be marine ports or ports capable of receiving fish for trading.

101. A. WILLOCK & M. LACK, WORLD WILDLIFE FUND INT’L & TRAFFIC INT’L, *FOLLOW THE LEADER: LEARNING FROM EXPERIENCE AND BEST PRACTICE IN REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS 28* (2006), available at <assets.panda.org/downloads/rfmoreport06.pdf>. To circumvent trade measures, such as increased inspections by the International Commission for the Conservation of Atlantic Tuna in the region, IUU vessels will travel to the Pacific and Indian Oceans to offload cargos. *Id.*

102. Meeting of the European Parliament Intergroup on Climate Change, Biodiversity, and Sustainable Development, Brussels, Belg., Dec. 5, 2012, *Summary Report on Combating Transnational Organized Fisheries Crime*, available at http://www.ebcd.org/en/EP_Intergroup_CCBSD/Fisheries_and_Aquaculture/Combating_transnational_organised_fisheries_crime.html (citing Nik Mohamed, economist and policy analyst for the Organisation of Economic Co-operation and Development).

relying on tax havens to hide ill-gotten gains and avoid taxes by making fraudulent declarations about profits, customs duties, and social security.¹⁰³ Many of the states that offer open vessel registration services also offer corporate services that include not releasing the names of beneficial owners.¹⁰⁴ Further complicating enforcement efforts by financial regulators, some transactions may even be taking place in the “dark net” using alternative internet currencies that have not been heavily regulated.¹⁰⁵ Armed with the ability to hoard profits in anonymous tax havens, the availability of digital underground markets, and the ability to participate in difficult-to-trace digital transactions, individual and corporate beneficiaries of IUU fishing have numerous flexible options for protecting their ill-gotten profits from government oversight.

G. Summary

IUU fishing does not require a criminal mastermind. It merely requires some planning to set up corporate fronts to ensure that beneficial owners are not exposed, and a fair amount of low-level deception. Because the IUU fishing chain is dispersed across jurisdictions, combating it is inherently challenging. Seriously challenging the criminal networks will require investing government resources at critical junctures along the IUU fishing chain. Even with the commitment of additional resources, it may still prove frustrating. As the head of British Customs and Excise observed wryly in an interview with an anthropologist, “To understand the truth of shipping, follow the unrecorded ship stops at sea. But of course you can’t follow them; that’s the whole point.”¹⁰⁶

Global changes in the law associated particularly with prosecuting for flag state responsibility may reduce economic or political incentives for states that

103. ORG. OF ECON. CO-OPERATION & DEV., *EVADING THE NET: TAX CRIMES IN THE FISHERIES SECTOR* 14 (2013) [hereinafter *EVADING THE NET*], available at <http://www.oecd.org/ctp/crime/evading-the-net-tax-crime-fisheries-sector.pdf>.

104. Adam Davidson, *My Big Fat Belizean, Singaporean Bank Account*, N.Y. TIMES (July 24, 2012), http://www.nytimes.com/2012/07/29/magazine/my-big-fat-belizean-singaporean-bank-account.html?pagewanted=all&_r=0 (“Information about beneficial owners, shareholders, directors and officers is not filed with the Belize government and not available to the public.” (quoting a company website)).

105. See Brad Chacos, *Meet Darknet, the Hidden, Anonymous Underbelly of the Searchable Web*, PCWORLD (Aug. 12, 2013, 3:00 AM), <http://www.pcwORLD.com/article/2046227/meet-darknet-the-hidden-anonymous-underbelly-of-the-searchable-web.html>. The “dark net” or “dark web” is an area of the internet not “discoverable” through major search engines, where users are likely to use encryption software to prevent easy tracking. *Id.*; see also Nic Fleming, *Hunting Wildlife’s Illegal Traders Online*, NEW SCIENTIST (Apr. 27, 2013), <http://www.newscientist.com/article/mg21829140.300-hunting-wildlifes-illegal-traders-online.html#.VC7rlyldUwI> (identifying the “dark net” as a forum for illegal wildlife sales); Lauren O’Neil, *Illegal Wildlife Trade Thrives on the ‘Dark Web’*, CBC NEWS (Apr. 30, 2013, 7:47 PM), <http://www.cbc.ca/newsblogs/yourcommunity/2013/04/dark-web-boosts-illegal-wildlife-trade.html>.

106. CAROLYN NORDSTROM, *GLOBAL OUTLAWS: CRIME, MONEY AND POWER IN THE CONTEMPORARY WORLD* 122 (2007).

offer flags of convenience.¹⁰⁷ Yet there are few indications that the global governance network will respond in a timely fashion to the fishery crises, since vertical public government networks lack the capacity to enforce on a broad scale. Therefore, greater attention should be given to creating more robust horizontal government frameworks that can capitalize on additional criminalization and enforcement. As Part III indicates, states are beginning to systematically cooperate to respond to the criminal networks. But these are nascent efforts. In the meantime, as will be explained in Part IV, to combat IUU fishing states must immediately characterize IUU fish smuggling as a serious crime and invest substantial domestic resources into prosecuting criminal networks. IUU fishing has become more than a fishery management problem. It has become a global criminal security threat as international gangs diversify into whatever commodity markets will generate quick profits.¹⁰⁸ Failing to invest in combating what has been loosely termed an “environmental crime” can end up causing social dissolution among fishing communities who depend wholly on marine resources for their livelihood.¹⁰⁹ While aquaculture may play a larger role in feeding the global population in the future, this transition will be gradual and the rapid loss of fish today has the potential to impact the primary and ancillary livelihood of between 462 to 574 million people.¹¹⁰

III. EXISTING STATE RESPONSES TO IUU FISHING TO INTERVENE WITH CRIMINAL NETWORKS

States have not remained indifferent to the challenge of combating IUU fishing and have adopted a polycentric governance approach, with management activities arising and intersecting at a number of different governance levels.¹¹¹ This Part will review three state responses to IUU fishing that cover the range from information gathering to implementation. First, this Part will look at efforts by states to create nonbinding NPOAs to combat IUU fishing that take

107. See, e.g., Request for Advisory Opinion, *supra* note 60 (requesting an advisory opinion on how flag state responsibility extends to vessels fishing in the EEZ of other states).

108. NORDSTROM, *supra* note 106, at 105–06 (observing that, as seafood prices have increased, international gangs have switched from narcotics smuggling to the illegal seafood harvest and trade market).

109. See generally Lawrence C. Hamilton et al., *Above and Below the Water: Social/Ecological Transformation in Northwest Newfoundland*, 25 *POPULATION & ENV'T* 195 (2004) (describing the social dissolution of Canadian communities that depended on cod once the cod stocks had collapsed).

110. See FAO, UNITED NATIONS, *THE STATE OF WORLD FISHERIES AND AQUACULTURE 10* (2012), available at <http://www.fao.org/docrep/016/i2727e/i2727e.pdf>. These numbers are calculated on the basis that between 660 and 820 million people depend either directly or indirectly on the production of both marine capture and aquaculture fish through businesses including processing, packaging, and distributing, as well as manufacturing fisheries equipment. *Id.* Since marine capture fisheries account for 70 percent of employment in the fisheries sector worldwide, 70 percent of those who depend on marine fish production would be between 462 and 574 million people. *Id.*

111. For a discussion of systems addressing global collective action environmental problems, see Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 *GLOBAL ENVTL. CHANGE* 550 (2010).

into account criminal sanctions and prosecutions. Second, this Part will cover the FAO Agreement on Port State Measures, which, when implemented, should effectively constrict the availability of IUU fishing products in states that have adopted the agreement, but may have the unintended consequence of opening new markets. Unfortunately, the FAO Agreement will have little effect on criminal networks that can continue to use ports in nonmember states and illicit overland trade channels to supply the markets in states that have implemented more restrictive measures. Finally, this Part will look at whether existing national fisheries laws in some of the largest fishing nations are capable of exercising coercive regulatory power over criminal IUU networks in order to comply with legal obligations under the U.N. Convention against Transnational Organized Crime. Specifically, this Part observes that while there may be organized crime laws under which IUU networks might be prosecuted, IUU fishing has generally been treated as a less serious crime under national fishery codes.

A. *Criminal Sanctions and Prosecutions under NPOAs*

Under the nonbinding IPOA, the FAO Agreement called upon states to examine their policies regarding IUU fishing.¹¹² Naturally, states are expected to cooperate with other states to prevent, deter, and eliminate IUU fishing. Yet each party to the FAO Agreement is also expected in its role as a flag state, coastal state, and/or port state to voluntarily promulgate national legislation that will “address in an effective manner all aspects of IUU fishing.”¹¹³ Of particular interest in this regard is the emphasis on sanctions in paragraph 21 of the IPOA, which calls for states to “ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.”¹¹⁴ The document goes on to recommend “the adoption of a civil sanction regime based on an administrative penalty scheme.”¹¹⁵ There is no direct mention of criminal sanctions in the IPOA document.

In response to the IPOA, individual states have drafted NPOAs to outline the steps that they have taken or plan to take to combat IUU fishing. Eleven individual states and the European Commission have submitted NPOAs, published on the FAO website.¹¹⁶ For purposes of understanding what role

112. See generally INT’L PLAN OF ACTION, *supra* note 5.

113. *Id.* pt. IV, § 16.

114. *Id.* § 21.

115. *Id.*

116. The states that have submitted NPOAs are: Argentina, Australia, Belize, Canada, Chile, Fiji, Ghana, Japan, New Zealand, South Korea, and the United States. *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO, <http://www.fao.org/fishery/ipoa-iuu/npoa/en> (last visited Sept. 18, 2014). The FAO does not appear to be updating its website, but it should be investing resources to make NPOAs publicly available in one centralized location since all of these documents are potentially significant for tracking government

criminal sanctions and prosecutions play in the development of IUU fishing strategies, this Article examines three of these NPOAs: Australia,¹¹⁷ Japan,¹¹⁸ and the United States.¹¹⁹

While the NPOAs provided useful insight into what efforts states are undertaking to combat IUU fishing, there was surprisingly little acknowledgment of the organized criminal component of IUU fishing and little specificity of how a state might respond.¹²⁰ When most of the NPOAs were drafted, the possibility that IUU fishing might be facilitated by organized criminal groups did not seem to influence the strategies states selected in combating IUU fishing. Consequently, while NPOAs may be useful as planning or reflection documents, any influence they may have over the

accountability. A number of other states have NPOAs, including Seychelles, Tonga, Spain, and Zambia. See MARY ANN PALMA ET AL., PROMOTING SUSTAINABLE FISHERIES: THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING 96–97 & n.15 (2010). Other drafts of NPOAs that are not listed on the FAO website can be found on the internet. See, e.g., DEP'T OF FISHERIES, MALAYSIA'S NATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2013), available at http://www.apfic.org/attachments/article/85/2013%20NPOA_IUU%20Malaysia.pdf; MINISTRY OF AGRIC., LANDS, HOUSING & THE ENV'T, ANTIGUA AND BARBUDA'S PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2010), available at http://www.fisheries.gov.ag/information/publications/pdf/Antigua_Barbuda_NPOA_IUU_Fishing.pdf; REPUBLIC OF NAMIB., NATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2007), available at http://209.88.21.36/openencms/export/sites/default/grmnet/MFMR/downloads/docs/Namibia_NPOA_IUU_Final.pdf; REPUBLIC OF THE PHIL., NATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2013), available at <http://www.gov.ph/downloads/2013/12dec/20131206-EO-0154-Annex-A-BSA.pdf>. Mentions of NPOAs can be found online as well. For example, Brunei, Cambodia, Indonesia, Papua New Guinea, Singapore, Thailand, Timor Leste, and Vietnam are all listed as having NPOAs. *NPOA IUU*, RPOAIUU, <http://rpoaiuu.org/index.php/en/2014-04-10-09-10-46/npoa-iiu> (last visited Nov. 12, 2014). The content of NPOAs from the Southeast Asian states is not easily identifiable on the internet.

117. While Australia's NPOA reported the outcome of prosecutions, including an eighteen-month prison sentence for poaching ten tons of abalones, the NPOA was not explicit about the minimum and maximum lengths of criminal sentences imposed on IUU fishers. AUSTRALIAN DEP'T OF AGRIC., FISHERIES & FORESTRY, AUSTRALIAN NATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING 80–81 (2005) [hereinafter AUSTRALIAN NAT'L PLAN OF ACTION], available at http://www.agriculture.gov.au/SiteCollectionDocuments/fisheries/iuu/npoa_iuu_fishing.pdf. Victoria, where abalone poaching has a maximum five-year prison sentence, is the one exception. *Id.*

118. While the Japanese NPOA indicates that criminal convictions can lead to imprisonment of up to three years, the Japanese NPOA is cursory in addressing criminalization as a strategy to combat IUU fishing and includes no details about the application of these criminal sanctions. FISHERIES AGENCY OF JAPAN, IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (IPOA-IUU) 3–4 (2004) (on file with author).

119. The U.S. NPOA also provides fleeting information about criminal sanctions and prosecutions as a strategy to combat IUU fishing. In a footnote, the report refers to a criminal fishery prosecution that led to an eight-year criminal sentence as one of the longest sentences ever given under the Lacey Act. NATIONAL PLAN OF ACTION OF THE UNITED STATES OF AMERICA, *supra* note 23, at 6 n.5; see also Press Release, Nat'l Oceanic & Atmospheric Admin., McNab to Continue Serving Federal Sentence for Lobster Smuggling (Mar. 22, 2004), available at <http://www.publicaffairs.noaa.gov/releases2004/mar04/noaa04-r119.html>.

120. See, e.g., *supra* notes 117–119 (analyzing criminal sanctions mentioned in the NPOAs).

behavior of criminal networks engaged in IUU fishing is largely conjectural. As a tool to combat IUU fishing, the NPOAs seem limited to conveying vague enforcement strategies to actors within criminal networks by informing the public at large of the state's intent to create new legislation or new penalties. Given the lack of attention to maintaining the FAO website and the level of generality contained within the NPOAs, it appears that they exert little influence over the actions of domestic government networks working to combat IUU fishing. At best, they convey domestic government priorities to the international community, such as Australia's ongoing effort to pierce the corporate veil to expose the most highly remunerated beneficiaries of IUU fishing.¹²¹ At worst, they provide almost no insight into how states intend to combat large-scale criminal IUU fishing activity.

B. Port State Measures—Port of Convenience Problem

Approaching the IUU problem from both a supply and demand angle, a number of states adopted the binding FAO Agreement.¹²² The measures contained in the FAO Agreement were adopted by members of the FAO (but only ratified by ten states and the European Union) and are an assertion of extraterritorial jurisdiction over a foreign vessel.¹²³ Port state measures have historically varied by state, but under the FAO Agreement states are expected to deny fishing access, prohibit landing and transshipments of IUU fish,¹²⁴ inspect suspected IUU vessels,¹²⁵ and carry out enforcement measures¹²⁶ if there is sufficient evidence that a vessel has engaged in IUU fishing.¹²⁷

In theory, the FAO Agreement is an effective means of harmonizing laws across the states party to the agreement, and systematically regulating potential IUU fishing vessels. Yet, states have been discouragingly reluctant to ratify or accept the treaty despite the global rhetoric regarding the need to combat IUU fishing. While only twenty-five ratifications, acceptances, and accessions are needed for the FAO Agreement to go into force, as of 2014 there were only eleven parties: Chile, the European Union, Gabon, Myanmar, New Zealand, Norway, Oman, Seychelles, Sri Lanka, the United States, and Uruguay.¹²⁸ This lack of enthusiasm suggests either that states are worried about the expense of implementing the FAO Agreement or about potential state responsibility for failing to comply. Landings and transshipments are sizable businesses in the Global South, and some states seem willing to serve as ports of convenience.

121. See AUSTRALIAN NAT'L PLAN OF ACTION, *supra* note 117, at 17.

122. See *supra* note 97 and accompanying text.

123. AGREEMENT ON PORT STATE MEASURES, *supra* note 97, at 2.

124. *Id.* art. 11.1.

125. *Id.* art. 12.

126. *Id.* art. 18.

127. *Id.* art. 9.4.

128. See *supra* note 97 and accompanying text.

The failure of a sufficient number of states to adopt this agreement is troubling and reflects a challenge for global political will.

C. *Transnational Organized Crime and National Fisheries Laws*

Because states have not yet been effective in responding collectively to the threats posed by IUU fishing, and NPOAs have failed to address the criminal drivers behind certain IUU fishing practices, combating IUU fishing should be a top priority for national criminal enforcement officials, particularly in the top five fish-producing nations: China, Japan, Russia, Taiwan, and the United States.¹²⁹ The most viable legal framework for connecting IUU fishing to organized crime is the Organized Crime Convention.¹³⁰ Subpart 1, below, provides a brief overview of the Convention and argues that most states, based on treaty commitments, have a legal obligation to define organized large-scale IUU fishing as a serious transnational crime. Subpart 2 then examines whether states' existing national laws, particularly their fisheries laws, address IUU criminal activity as a "serious crime" as that term is understood under the Convention. Based on the analysis below, it appears that even though IUU fishing operations share many similarities with other transnational crimes such as drug trafficking, money laundering, and corruption, and may even take place at the same time as these crimes, there is a disconnect between the obligations the Organized Crime Convention imposes on parties and the level of criminalization of IUU fishing in parties' national laws.¹³¹ While paper laws alone will not end fishing by criminal syndicates, the existing laws of a number of major fishing states provide no recognition of the transnational criminal element of IUU fishing.

1. *Organized Crime Convention and IUU Fishing*

Unlike the limited reach of the FAO Agreement and the IPOA, the Organized Crime Convention is binding on 179 parties, including most states that offer flags of convenience, offshore corporations, and ports of convenience.¹³² Each of the top five fish-producing nations, with the exception

129. See *infra* note 154.

130. ROSE & TSAMENYI, *supra* note 24, at 99 ("The most likely existing legal framework within which to situate a new binding legal standard [on IUU fishing] would be the UN Convention on Transnational Organised Crime.").

131. Increasing reports suggest that human and drug trafficking occur at the same time as illegal fishing. See, e.g., *Illicit Fishing and Human Trafficking: Hearing on H.R. 69, H.R. 2646, and the Pirate Fishing Elimination Act before the Subcomm. on Fisheries, Wildlife, Oceans & Insular Affairs of the H. Comm. on Natural Res.*, 113th Cong. 2 (2014) (statement of Mark P. Lagon, Professor of International Affairs, Georgetown University:

[T]here is limited information available on the relationship between illegal fishing, human trafficking, and other criminal activities. These activities can occur independently. Obviously only some fishing vessels are engaged in illegal fishing and human trafficking. However, the available data suggests that the confluence of these activities at sea does occur all too often . . .).

132. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

of Japan and Taiwan, is a party to the Organized Crime Convention,¹³³ which was first negotiated in response to concerns about a growth in organized criminal groups and operations across territorial borders. As explained in the Legislative Guide prepared at the request of the U.N. General Assembly, the Convention fills an important governance gap:

While ad hoc arrangements, mutual legal assistance treaties and extradition treaties may bear positive results in some instances, the complexities of the legislative and procedural framework within and across jurisdictions sometimes prevent those arrangements and treaties from being sufficient to respond to the current challenges. International conventions on specific offences, such as trafficking in drugs, terrorism, corruption and money-laundering, have paved the way for further coordination of efforts and stronger collaboration between [s]tates. The most pressing need, however, is for a more integrated and synchronized approach, with effective enforcement mechanisms. . . . The Convention is the response of the international community to the need for a truly global approach. Its purpose is to promote cooperation, both for the prevention of and for the effective fight against transnational organized crime.¹³⁴

Article 3 of the Convention identifies two types of crimes. First, specific transnational offenses defined in the Convention as involving an organized criminal group and second “serious” transnational crimes involving an organized criminal group.¹³⁵ An “organized criminal group” is “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 *serious crimes* or offences established in accordance with [the] Convention, in order to obtain, directly or indirectly, a financial or other material benefit”¹³⁶ Both large-scale and small-scale IUU operations that involve at least three persons would qualify under the definition of “organized criminal group.”¹³⁷

If states actually implement their existing obligations under the Organized Crime Convention, this may create the needed global momentum to nationally prosecute transnational IUU criminal networks.¹³⁸ There are at least three relevant articles that legally obligate the member states: Articles 5, 6, and 8. Article 5 of the Convention requires each state party to criminalize participation in organized crime groups. Specifically, states must create laws or use other means to create “criminal offences” when an individual or group of

133. *United Nations Convention Against Transnational Organized Crime*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12&chapter=18&lang=en (last visited Nov. 12, 2014).

134. UNODC, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO xvii (2004) [hereinafter LEGISLATIVE GUIDES] (citation omitted), *available at* http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

135. *Convention Against Transnational Organized Crime*, *supra* note 132, art. 3.

136. *Id.* art. 2(a) (emphasis added).

137. *See id.*

138. *Id.* art. 3(1)(a) (including Convention offenses under Articles 5, 6, 8, and 23).

individuals conspires “to commit a serious crime” and/or engages actively in criminal conduct that directly or indirectly contributes to the achievement of a criminal aim.¹³⁹ States must also create laws or other measures to criminalize the “[o]rganizing, directing, aiding, abetting, facilitating or counseling [of] the commission of serious crime involving an organized criminal group.”¹⁴⁰ Implementing legal obligations under Article 5 to criminalize participation in transnational organized crime groups may provide a pathway for pursuing the profiteering architects of criminal IUU networks who currently operate outside the reach of most law due to the skilled use of offshore companies and open registries. For a state to combat global IUU criminal networks through Article 5, states must identify IUU fishing specifically as a domestic criminal act so that participation in organized IUU fishing, particularly at the highest levels of financing and decision making, would be considered participation in a transnational organized crime group.¹⁴¹

Clearly identifying certain practices characteristic of IUU fishing, such as intentionally mislabeling seafood products or forging certificates of origins, as domestic criminal acts would also satisfy state obligations under Article 6 of the Organized Crime Convention. Specifically, Article 6 provides that parties must create criminal offenses where parties intentionally hide “the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime”¹⁴² As part of this obligation, states must “institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence” and “endeavour to develop” cooperation among national and regional judicial, law enforcement, and financial regulatory authorities.¹⁴³ What this means in the context of IUU fishing proceeds is that states must be prepared to identify and regulate offshore companies that may be laundering illicit profits from IUU fishing.

Under Article 8, states must create laws that criminalize acts by parties who offer public officials bribes, as well as acts by public officials who accept bribes. This aspect of the Convention is relevant to IUU criminal fishing networks since flag state nations, when given the opportunity to prosecute vessels, may fail to do so because of a culture of corruption. There is evidence in IUU fishing of illegal payments to public officials in exchange for issuing additional quotas or providing export licenses for IUU fish.¹⁴⁴ Likewise,

139. *Id.* art. 5(1)(a)(i)–(ii).

140. *Id.* art. 5(1)(b).

141. *See id.* art. 5(3).

142. *Id.* art. 6(1)(a)(ii).

143. *Id.* art. 7(1)(a), (4).

144. *See* MAÍRA MARTINI, TRANSPARENCY INT’L, U4 EXPERT ANSWER: ILLEGAL, UNREPORTED AND UNREGULATED FISHING AND CORRUPTION 5 (2013), available at <http://www.u4.no/publications/illegal-unreported-and-unregulated-fishing-and-corruption/downloadasset/3261>.

official observers onboard vessels may choose not to report on IUU fishing activities when they have received bribes.¹⁴⁵

In addition to the Convention's specific obligations for offenses involving money laundering, corruption, and participation in an organized criminal group, states are also expected to prevent, investigate, and prosecute "serious crimes."¹⁴⁶ This obligation was added to the Convention to provide some flexibility to cover emerging transnational crimes.¹⁴⁷ In somewhat confusing fashion, Article 2(b) of the Convention defines a "serious crime" as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."¹⁴⁸ The inclusion of the word "maximum" in the text presents a dilemma. While it seems that there must be at least a maximum prison sentence of four years for the crime to qualify as a "serious crime," it also seems possible that the prison sentence could be longer if imprisonment can also be considered a "more serious penalty." It is unclear from the plain language or the *travaux préparatoire* whether the use of the term penalty is intended to refer to simply a monetary fine or may also refer to imprisonment.¹⁴⁹ The nonbinding legislative guide, drafted to help governments implement the Organized Crime Convention, suggests that a longer term of imprisonment may be possible since experts interpreted the confusing language in Article 2(b) to mean that "the maximum penalty is at least four years of deprivation of liberty or longer."¹⁵⁰ On the other hand, parties to the treaty such as Germany have interpreted the language to mean that serious crimes are those crimes that "carry a minimum sentence of four years and are committed by structured groups consisting of three or more members."¹⁵¹

Regardless of whether the imprisonment sentence is a maximum of four years or a minimum of four years, IUU fishing that is intentionally planned and executed should be characterized by Convention parties as a "serious crime" for three reasons. First, IUU fishing causes environmental harm by recklessly destroying resources needed for current and future generations. Second, IUU fishing results in economic harms since smuggling activities undermine

145. *Id.*

146. Convention Against Transnational Organized Crime, *supra* note 132, art. 3(1)(b).

147. Stefano Betti, *The European Union and the United Nations Convention Against Transnational Organized Crime* 10 (Directorate-General for Research, European Parliament, Working Paper, 2001), available at http://www.europarl.europa.eu/workingpapers/libe/pdf/1116_en.pdf.

148. Convention Against Transnational Organized Crime, *supra* note 132, art. 2(b).

149. UNODC, TRAVAUX PRÉPARATOIRES DE LA NÉGOCIATION POUR L'ÉLABORATION DE LA CONVENTION DES NATIONS UNIES CONTRE LE CRIME ORGANISÉ TRANSNATIONAL ET LES PROTOCOLÉS Y RELIÉS 7-18 (2006), available at http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf. What emerges from the travaux papers is that there was some controversy over the definition of "serious crime" based simply on the length of a penal sentence. *See generally id.* There is no discussion of what constitutes a "more serious penalty" or whether imprisonment or probation constitutes a "penalty."

150. LEGISLATIVE GUIDES, *supra* note 134, at 13.

151. *UN Convention Against Organized Crime and the Protocols Thereto*, GER. FED. FOREIGN OFF., http://www.auswaertiges-amt.de/EN/Aussenpolitik/VereinteNationen/Schwerpunkte/OKriminalitaet_node.html (last updated Aug. 8, 2008).

legitimate fishing operations and result in tax evasion, which deprives states of funds.¹⁵² Finally, IUU fishing causes social harm by threatening the food security of vulnerable populations such as artisanal fishing communities, as well as breeding a culture of crime and complicity where incorrect origin declarations and underreporting of volumes become standard rather than exceptional practices. Categorizing as “serious crimes” IUU fishing by certain actors who are aware their actions are illegal, such as the beneficial owner, the captain, or the receiver of IUU fishing products, could function as a deterrent. Assuming the law is enforced, criminalization of IUU fishing should reduce its attractiveness for criminal networks by increasing the associated costs, since potential imprisonment would exceed the benefits of short-term profits.

Applying the Organized Crime Convention to IUU fishing creates opportunities to assign appropriate penalties for crimes whose severity has been historically overlooked. As will be argued below in the case of the five largest fish-producing nations, IUU fishing has been largely regarded as a regulatory violation rather than as a serious criminal act. In particular, IUU fishing has almost never been identified in national fisheries legislation as a “serious crime.” Only recently has wildlife crime by transnational organized groups been considered criminal.¹⁵³

Why the disconnect between IUU fishing and serious crime in national fisheries legislation? One possibility is that law enforcement officers have only recently appreciated the critical extent of overfishing by criminal groups. The low levels of criminalization may also be attributed to the fact that most fisheries codes were drafted before the unprecedented current crisis in transnational wildlife trafficking. Regardless, in light of states’ obligations under the Organized Crime Convention, and the prevalence of IUU fishing, most parties need additional fisheries-specific criminal legislation that recognizes that IUU fishing is a serious crime as defined under the Convention. Unfortunately, as of today most states, while recognizing IUU fishing as a threat to marine resources, have not fully criminalized key acts (such as flag-hopping) that form the basis for IUU fishing activities. The following subpart explores some national criminal responses to IUU fishing.

2. Criminalizing IUU Fishing within the Domestic Laws of the Top Five Fish-Producing Nations

This subpart explores whether the top five fish-producing states by fleet capacity have characterized IUU fishing (in their waters or by their nationals, including vessels flagged to their nations) as “serious crimes,” and whether

152. EVADING THE NET, *supra* note 103, at 14.

153. Press Release, Convention on Int’l Trade in Endangered Species of Wild Fauna & Flora, Heads of UNODC and CITES Urge Wildlife and Forest Offences to be Treated as Serious Transnational Organized Crimes (Apr. 23, 2013), *available at* http://www.cites.org/eng/news/pr/2013/20130423_CCPCJ.php.

states' respective fisheries codes specifically link IUU fishing, organized crime, money laundering, and corruption to prosecutable criminal acts.¹⁵⁴

a. Russia

The Russian Federation Federal Law No. 166-FZ on fisheries and conservation of living marine resources establishes liability for the infringement of fisheries and conservation legislation.¹⁵⁵ It is unclear from the law whether a violator would be prosecuted civilly or criminally. With no explicit mention of prison time in the law, the legislation simply provides that the state will confiscate illegally harvested fish. Article 54 of the Russian Fisheries Law was amended in 2007 to provide for state seizure of illegally caught or harvested aquatic biological resources, fishing vessels engaged in illegal activities, and fishing gear used for illegal fishing.¹⁵⁶ If biological resources cannot be returned to their natural habitat (as may be possible with live crabs) then the products are destroyed according to Russian government decrees.¹⁵⁷ Based on Russia's most recent legislation in this area, there does not appear to be any clearly delineated criminalization of IUU fishing activities specific to the Russian Fisheries Law.

It is possible that IUU fishing acts might be prosecuted under the Russian Federation Criminal Code, but there is no explicit language in Russian Fisheries Law that connects the two. Article 256 of the Criminal Code makes it illegal to harvest aquatic animals, but focuses specifically on extraction from preserves or "in a zone of ecological distress or ecological emergency."¹⁵⁸ The

154. U.N. ENVTL. PROGRAMME, FISHERIES: INVESTING IN NATURAL CAPITAL 88 (2011), available at http://www.unep.org/greeneconomy/Portals/88/documents/ger/GER_3_Fisheries.pdf (listing the top five fish-producing states: Russia, Japan, China, Taiwan, and the United States). For purposes of this Article, I reviewed only fishery laws and criminal laws that mentioned fisheries. I anticipated that most states would deal with IUU fishing through their domestic fishing laws. I did not evaluate customs laws, which may also criminalize IUU fishing activities, and could be an area of fruitful future research. If a country criminalizes IUU fishing through nonfishery and noncriminal laws, this suggests that the domestic compliance network is ineffective, leaving a gap between predicate criminal activities (illegal fishing) and activities deemed criminal by law (offloading illegal fish).

155. Russian Federation Federal Law on Fisheries and Conservation of Aquatic Biological Resources, No. 166-FZ (Dec. 20, 2004), arts. 51–53, translated summary available at FAOLEX, <http://faolex.fao.org/faolex/index.htm> (search for "Russian Federation Federal Law No. 166-FZ fisheries").

156. Russian Federation Federal Law No. 57-FZ Amending Federal Law No. 52-FZ of 1995 on Wildlife and Federal Law No. 166-FZ on Fisheries and Conservation of Aquatic Biological Resources (Apr. 20, 2007), translated summary available at FAOLEX, <http://faolex.fao.org/faolex/index.htm> (search for "Federal Law No. 57-FZ amending Federal Law No. 166-FZ on fisheries and conservation of aquatic biological resources"); see also Ministerial Decree No. 367 Implementing Article 54 of Federal Law No. 166-FZ on Fisheries and Conservation of Aquatic Biological Resources (May 31, 2007), translated summary available at FAOLEX, <http://faolex.fao.org/faolex/index.htm> (search for "Russian Federation Ministerial Decree No. 367 Article 54").

157. Ministerial Decree No. 367 Implementing Article 54 of Federal Law No. 166-FZ on Fisheries and Conservation of Aquatic Biological Resources, *supra* note 156.

158. UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] art. 256 (Russ.), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=277023.

maximum penalties for this crime are six months of imprisonment or two years of corrective labor.¹⁵⁹ Article 175 makes it illegal to acquire property by criminal means or to sell property acquired by criminal means.¹⁶⁰ An individual convicted under this section may be deprived of their liberty for two years for a first offense or three years for a repeated offense. Organized groups may be deprived of their liberty for three to seven years.¹⁶¹ So is IUU fishing characterized as a “serious crime” in the context of the Organized Crime Convention? It depends. While it may be possible to apply Article 175 of the Criminal Code to cover IUU fishing as an acquisition of public property, there is no explicit characterization of IUU fishing as a crime under Russian law, making it potentially difficult to prosecute IUU vessel owners, captains, or wholesalers.

According to one nongovernmental organization, there are few illegal fishing convictions under Article 175 of the Criminal Code.¹⁶² While there have been criminal convictions under the Criminal Code for fishing crimes, prison sentences are rarely imposed.¹⁶³ Corruption appears to be particularly widespread in Russia, resulting in IUU fishing activities that may or may not be transnational in nature taking place with the active complicity of Russian officials.¹⁶⁴ The lack of explicit reference to the Criminal Code’s provisions in the Russian Fisheries Law illustrates the complexity of implementing the Organized Crime Convention in a manner that meaningfully combats IUU fishing. Where the various acts that contribute to IUU fishing operations are not clearly identified as criminal activities, it will be difficult to prosecute criminal networks engaged in IUU fishing under Russian law. Examples of prosecutions in the media tend to reflect soft sanctioning.¹⁶⁵

b. Japan

While Japan is not a member of the Organized Crime Convention, the 1949 Japanese Fishery Act, as amended in 2007,¹⁶⁶ does punish acts that would

159. *Id.*

160. *Id.* art. 175.

161. *Id.*

162. WILD SALMON CTR., A REVIEW OF IUU SALMON FISHING AND POTENTIAL CONSERVATION STRATEGIES IN THE RUSSIAN FAR EAST 12–13 (2009), available at http://www.wildsalmoncenter.org/pdf/WSC_IUU_paper_v3.pdf.

163. *Id.*

164. *Id.* at 10.

165. See, e.g., John Davis, *How International Enforcement Cooperation Deters Illegal Fishing in the North Pacific*, 8 ECON. PERSP., no. 1, Jan. 2003, at 11, 13, available at http://photos.state.gov/libraries/korea/49271/dwoa_120909/ijee0103.pdf (describing how the Russian-flagged trawler *Sakhfrakt-3* converted into a driftnet fishing vessel and was observed illegally driftnet fishing fifteen nautical miles inside the Russian EEZ). The vessel was seen in an area close to the region covered by the Convention for Conservation of Anadromous Stocks in the North Pacific Ocean. *Id.* The fishing mater’s license to fish was suspended for three years, and he was fined 1.2 million rubles (approximately \$41,000 U.S. dollars).

166. Fishery Act, Law No. 267 of 1949 (amended by Act No. 77 of 2007) (Japan), available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=1871&vm=04&re=02>.

fall under the classification of IUU fishing as the term has been used here.¹⁶⁷ The Fishery Act provides for up to three years of “imprisonment with work” for parties¹⁶⁸ who operate fisheries without the right to do so¹⁶⁹ or violate restrictions or conditions on the exercise of otherwise legal fishing rights.¹⁷⁰ The law only assigns a maximum of six months of “imprisonment with work” where a party provides fraudulent information in relation to the submission of a required report or as part of a field inspection.¹⁷¹ The 2007 Amended Act on the Protection of Fishery Resources for “public waters” also provides for punishment against acts that would be considered as constituting IUU fishing.¹⁷² When parties fail to comply with prohibitions on taking marine species, or restrictions on the use of certain fishing equipment or vessels or the sale of aquatic species,¹⁷³ they may be punished by “imprisonment with work” for up to three years.¹⁷⁴ Fishing using explosives or poisons, or without a license, may also result in a prison sentence of up to three years.¹⁷⁵

Japanese laws extend jurisdiction over nonnationals who may engage in fishing within Japanese waters. According to the Act on Regulation of Fishing Operation by Foreign Nationals, nonnationals or captains of non-Japanese vessels who violate Japanese fishing or port laws can face up to a three-year prison sentence.¹⁷⁶ Japan also attempts to assert some control over its nationals by requiring that they obtain permission from the government before working on a non-Japanese vessel.¹⁷⁷

What becomes apparent through an examination of Japan’s fishing laws is that there is no clear legal regime that characterizes the various components of IUU fishing by organized groups as a “serious crime.” As under Russian law, a Japanese public prosecutor may be able to advance a prosecution by relying on

167. INT’L PLAN OF ACTION, *supra* note 5, art. 3.

168. Fishery Act, *supra* note 166, art. 138.

169. *Id.* art. 9.

170. *Id.* arts. 36 (permitting fishing in the absence of the original right holder with the permission of the prefectural governor), 52 (requiring Cabinet order to operate designated fisheries), 65 (referring to ordinances from the Ministry of Agriculture, Forestry and Fisheries), 66 (describing very specific types of fisheries, such as the salmon driftnet fishery).

171. *Id.* art. 141(iv) (referring to an obligation in art. 134, which requires the Ministry of Agriculture, Forestry and Fisheries to collect reports or inspect books and fishing grounds).

172. Act on the Protection of Fishery Resources, Law No. 313 of Dec. 17, 1951, art. 2 (amended by Act No. 77 of 2007) (Japan), available at <http://www.japaneselawtranslation.go.jp/law/detail?id=32&vm=04&re=02&new=1> (“[The Act] shall not apply to water surfaces that are not used for public purposes unless otherwise specifically provided.”). I read Article 2 to mean that the Act on the Protection of Fishery Resources was drafted with the intent to apply to “public waters.”

173. *Id.* art. 4.

174. *Id.* art. 36(1).

175. *Id.* art. 36.

176. Act on Regulation of Fishing Operation by Foreign Nationals, Law No. 60 of July 14, 1967 (revised by Act No. 92 of June 29, 2001) (Japan), available at <http://faolex.fao.org/docs/pdf/jap80334.pdf>.

177. Harry Scheiber et al., *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 97, 149 (2007).

various parts of the criminal code involving criminal property. Yet it is significant that the fishing codes that govern the activities of vessel owners and captains of Japanese origin have no clearly delineated laws that define IUU fishing as a “serious crime.”

c. China

Home to the largest fishing fleet in the world, China has one of the most explicit codes regarding illegal fishing. For waters under its jurisdiction, China provides for criminal liabilities when there are gross violations of fishing laws such as fishing in a prohibited area.¹⁷⁸ Foreigners who fish in Chinese waters may be subject to criminal liabilities.¹⁷⁹ However, China’s Fisheries Act does not specify what criminal liabilities will be imposed, only that an individual “shall be investigated for criminal responsibility in accordance with the law.”¹⁸⁰ In order to understand the extent of China’s criminal liabilities for illegal fishing activities, it is essential for a prosecutor to consult the Chinese Criminal Law.

Article 340 of the Chinese Criminal Law identifies a violation of aquatic resources laws as a crime with a fixed-term sentence of no more than three years in criminal detention.¹⁸¹ Relying only on this Article, IUU fishing would not generally qualify as a “serious crime” under the Organized Crime Convention. However, there are a number of crimes that seem equally relevant to IUU fishing by organized groups, including smuggling or tax evasion, which might qualify as “serious crimes” if they include a transnational component. For example, an individual convicted of smuggling IUU fish on which duties are owed may be sentenced to not less than three years if the violation is not serious and to ten or more years for serious violations.¹⁸² Purchasers of smuggled goods are also held criminally liable.¹⁸³ The code provides for anywhere from five years to lifetime imprisonment for acts of fraud associated with illegal possession depending on the monetary value associated with the fraud.¹⁸⁴ Illegal possession for purposes of applying this section of the code could theoretically include illegally obtained fish and seafood. Illegal operations that disrupt market order may result in sentences of at least five years if the circumstances around the operation are deemed serious.¹⁸⁵ Here,

178. Fisheries Law of the People’s Republic of China, art. 38 (promulgated by the Standing Comm. Nat’l People’s Cong., Jan. 20, 1986, effective Jan. 20, 1986, amended Oct. 31, 2000 & Aug. 28, 2004), *translation available at* http://english.agri.gov.cn/governmentaffairs/lr/fish/201305/t20130509_19610.htm.

179. *Id.* art. 46.

180. *Id.* arts. 38, 43 (forging or adulteration of fishing licenses), 46.

181. Criminal Law of the People’s Republic of China, art. 340 (promulgated by Order No. 83 of the President, People’s Republic of China, Mar. 14, 1997, effective Oct. 1, 1997), *translation available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm.

182. *Id.* art. 153.

183. *Id.* art. 155(1).

184. *Id.* art. 192.

185. *Id.* art. 225(3).

dumping large amounts of illegal IUU fish products onto the market would have the potential of disrupting the market. Additionally, if IUU fishing were to take place within China and involve the state's public property, then parties may be prosecuted from three years to life depending on the severity of the theft of public property.¹⁸⁶ There is also a specific section of the Chinese criminal code addressing organized crime that provides for sentences of up to three years for any individual who "forms, leads, or takes an active part" in criminal syndicates to commit "illegal or criminal acts."¹⁸⁷

While there are many causes of action under the criminal code for which a potential IUU criminal network or Chinese national might be prosecuted, it is far less clear whether criminal networks involving Chinese members whose illegal fishing is taking place outside of China can be easily prosecuted within China. At best, it seems that they may be prosecuted under Article 294 for participation in an organized crime unit and Article 340 for violations of the Aquatic Act.¹⁸⁸ Taken together, these two crimes might result in a cumulative maximum sentence of six years, which qualifies as a "serious crime" under the Organized Crime Convention.

It is difficult to find many examples in the English language press of Chinese prosecution of organized criminal groups for IUU fishing within China under Chinese criminal law. Most articles involving Chinese fishermen appear to be focused on other nations prosecuting Chinese vessels and nationals for IUU activities.¹⁸⁹ Therefore, while it is possible to define IUU fishing by organized criminal groups as a "serious crime" within the existing Chinese code, it is unclear that the Chinese government is using or would use its national laws to prosecute its nationals for IUU fishing outside of Chinese jurisdictional waters. In fact, there is great concern that China is not prosecuting its nationals who may be engaged in IUU fishing on the coast of West Africa.¹⁹⁰

186. *Id.* art. 264.

187. *Id.* art. 294.

188. *Id.* arts. 294, 340.

189. *See, e.g., Japan Arrests China Boat Captain amid Island Row*, AGENCE FR.-PRESSE (Mar. 5, 2013, 12:53 PM), <http://newsinfo.inquirer.net/368811/japan-arrests-china-boat-captain-amid-island-row>; *Seoul Mulls Addressing China over Illegal Fishing Incident*, YONHAP NEWS (Oct. 8, 2012, 5:02 PM), <http://english.yonhapnews.co.kr/national/2013/10/08/22/0301000000AEN20131008009400315F.html>.

190. It is difficult to know whether Chinese vessels are fishing legally or illegally off the coast of West Africa given the secrecy of access agreements. *See, e.g.,* Daniel Pauly et al., *China's Distant-Water Fisheries in the 21st Century*, 15 FISH & FISHERIES 474, 475–76 (2014) (finding that China underreports a large amount of fish captures in distant-water fisheries such as West Africa, where it extracts around 3.1 million tons of fish per year). While it is unclear whether these fish are illegally captured, one can assume by extrapolation that China is not prosecuting for these unreported fishing catches, which may still qualify as IUU fishing products. *Id.*

d. Taiwan

The Taiwanese Fisheries Act identifies a right to inspect and possibly detain any Chinese mainland fishing vessel entering Taiwanese waters.¹⁹¹ The Fisheries Act does not specifically identify a crime of IUU fishing for its own nationals but requires all vessels within Taiwanese waters to obtain a license,¹⁹² which may include restrictions on operations.¹⁹³ For a violation involving either restrictions or prohibitions on the catching, harvesting, processing, sale, or possession of aquatic organisms, the maximum imprisonment is three years.¹⁹⁴ If a vessel's captain or owners commit a violation, they may be subject to up to five years imprisonment.¹⁹⁵ For parties violating restrictions on the use of certain fishing equipment, imprisonment is limited to no more than six months.¹⁹⁶ A party that alters its registration or name may be subject to a short-term imprisonment.¹⁹⁷ Other violations of the fishing code are punishable with fines.¹⁹⁸ Some of the violations that are only subject to a fine may be precursors to or indicators of illegal fishing. For example, a fisher who refuses to cooperate in providing information about catch volume, operation period, fishing gears, or fishing methods to Taiwanese authorities is only subject to a maximum \$2500 fine. As with most of the other fisheries codes described here, there is no clear indication from the code itself that the penalties will apply to extraterritorial IUU fishing activities, though the government appears to have applied its code against extraterritorial activity.¹⁹⁹ The Taiwanese criminal code does not contain any specific section involving illegal fishing and the types of activities associated with IUU fishing.²⁰⁰

A set of fishing regulations promulgated under the Fisheries Act governs any vessel registered to the Republic of China.²⁰¹ Fishermen are required not to “engage in illegal fishing activities during fishery operation.”²⁰² Based on the regulations, it is not clear what the punishment is for failure by fisherman operating Taiwanese registered vessels to comply with this provision. In another set of regulations involving Taiwanese nationals who are investing in

191. Fisheries Act, amended Aug. 21, 2013, art. 42, *compiled in* LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, *available at* <http://law.moj.gov.tw/eng/LawClass/LawParaDeatil.aspx?Pcode=M0050001&LCNOS=%20%2041%20%20%20&LCC=2>.

192. *Id.* art. 6.

193. *Id.* arts. 44–51.

194. *Id.* art. 60.

195. NATIONAL PLAN OF ACTION OF THE REPUBLIC OF CHINA (TAIWAN), *supra* note 31, at 17, § 2.2.4. The NPOA does not explain how to calculate a five-year sentence.

196. Fisheries Act, *supra* note 191, art. 61.

197. *Id.* art. 62.

198. *Id.* arts. 63–66.

199. NATIONAL PLAN OF ACTION OF THE REPUBLIC OF CHINA (TAIWAN), *supra* note 31, at 25.

200. Criminal Law of the People's Republic of China, *supra* note 181, art. 349.

201. Regulations on the Management of the Crew of Fishing Vessels art. 2, amended Feb. 8, 2013, *compiled in* LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, *available at* <http://law.moj.gov.tw/eng/LawClass/LawParaDeatil.aspx?Pcode=M0050006&LCNOS=%20%20%201%20%20%20&LCC=2>.

202. *Id.* art. 31.

foreign-flagged vessels,²⁰³ Taiwanese nationals are expected to submit an investment application to the Taiwanese authorities, which may be rejected if the vessel has been listed as an IUU fishing vessel by a RFMO.²⁰⁴ While loss of the investment opportunity in the IUU vessel impacts the individual investor, there is no other apparent penalization of either the would-be investor or the ship owner under the regulation. The lack of designation of IUU fishing as a “serious crime” in the Taiwanese codes may reflect a lack of interest on the part of the Taiwanese state to actively combat IUU fishing by criminal groups that may have some Taiwanese connection. As with the law of other states described above, IUU fishing by organized crime is not clearly identified as a part of the fishing code. A “serious crime” prosecution for IUU fishing would require a more complicated legal strategy than simply applying the Fisheries Act.

Taiwan has relied upon the Fisheries Code to prosecute its nationals. In 2004, the district court in Kaohsiung sentenced one Taiwanese crew member working on a foreign-flagged vessel to five months imprisonment because of illegal driftnet fishing on the high seas.²⁰⁵

e. United States

Under the Magnuson-Stevens Fishery Conservation and Management Act, the United States has specifically identified IUU fishing as a subject for regulation.²⁰⁶ Congress observes that “[i]nternational cooperation is necessary to address illegal, unreported, and unregulated fishing and other fishing practices which may harm the sustainability of living marine resources and disadvantage the United States fishing industry.”²⁰⁷ The Magnuson-Stevens Act requires the secretary of commerce to define IUU fishing.²⁰⁸ The definition promulgated in the Code of Federal Regulations includes fishing activities that violate conservation and management measures of international fishery agreements to which the United States is a party, overfishing of fish stocks shared by the United States where there is no management plan or no RFMO, and fishing activities in vulnerable habitats (such as seamounts, hydrothermal vents, and cold water corals) where there are no applicable fishery agreements or RFMOs.²⁰⁹ Potential high seas IUU fishing by U.S. vessels may result in

203. Regulations on the Approval of Investment in the Operation of Foreign Flag Vessels, amended Oct. 16, 2009, compiled in LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, available at <http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=M0050041>.

204. *Id.* art. 4.

205. NATIONAL PLAN OF ACTION OF THE REPUBLIC OF CHINA (TAIWAN), *supra* note 31, at 25.

206. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801(a)(12) (2012).

207. *Id.*

208. *Id.* § 1826j(e)(2).

209. *Id.* § 1826j(e)(3); 50 C.F.R. § 300.2 (2014).

“civil and criminal penalty provisions, permit sanctions, and forfeiture provisions.”²¹⁰

Recognizing the problems with lax flag state enforcement, the United States has also promulgated regulations giving the Department of Commerce authority to block shipments from states engaged in IUU fishing. Under 50 C.F.R. section 300.202, the National Marine Fisheries Service has the power to list states as systematically supporting IUU fishing activities in a biennial report to Congress.²¹¹ On the basis of this listing, the secretary of commerce, in cooperation with the secretary of state, must notify countries of their listing as an IUU fishing state and open consultations with the state.²¹² In January 2013, Colombia, Ecuador, Ghana, Mexico, Panama, South Korea, Spain, Tanzania, and Venezuela were all listed as states who had failed to control IUU fishing.²¹³ Based on individual state-to-state consultations, states that are alleged to support IUU fishing activities will receive either a positive or negative certification from the United States depending on whether they are addressing their IUU fishing challenges. Vessels from a state with a negative certification will be denied entrance to U.S. ports and navigable U.S. waters.²¹⁴

Similarly, vessels that appear on RFMO IUU fishing lists may also be denied entrance to U.S. ports and marine jurisdictions, and prevented from engaging in transshipment, refueling, or landing.²¹⁵ Individuals who provide transshipment, refueling, resupplying, chartering, and processing services to IUU vessels may be found liable.²¹⁶ Under the regulations implementing the Magnuson-Stevens Act, there is only limited criminal enforcement. Most of the enforcement involves administrative forfeiture, civil fines, and criminal fines.²¹⁷ Parties may receive up to a ten-year sentence, but only when the violation of the Act coincided with the use of a dangerous weapon, conduct that caused bodily injury to a fisheries observer or enforcement officer, or conduct that put an observer or officer in fear of imminent bodily injury.²¹⁸ Ordinarily, criminal violations of the Act that involve IUU fishing would carry no more than six months of imprisonment unless the crime is committed under a treaty such as the Convention for the Conservation of Antarctic Marine Living Resources.²¹⁹

210. 50 C.F.R. § 300.16(a)–(b) (permitting sanctions prescribed by 15 C.F.R. pt. 904).

211. 16 U.S.C. § 1826j(a).

212. *Id.* § 1826j(c).

213. NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, IMPROVING INTERNATIONAL FISHERIES MANAGEMENT: REPORT TO CONGRESS 21–31 (2013), available at http://www.nmfs.noaa.gov/ia/iuu/msra_page/2013_biennial_report_to_congress__jan_11_2013_final.pdf.

214. 50 C.F.R. § 300.205.

215. *Id.* §§ 300.302–300.303.

216. *Id.* § 300.304.

217. 15 C.F.R. §§ 904.100–904.108 (2014).

218. 16 U.S.C. § 1859(b) (2012).

219. See, e.g., *id.* §§ 973–973r (South Pacific Tuna Act of 1988) (providing for criminal sanctions from six months to ten years), 1859(b), 2435 (providing criminal sanctions of up to ten years), 3631–

Under the Lacey Act from 1900²²⁰ and the Lacey Act Amendments from 1981,²²¹ the United States can exercise its authority to impose significant sanctions against individuals and companies engaged in trafficking illegally taken fish and wildlife. Specifically, the Act prohibits the import, export, transport, sale, possession, or purchase of any fish or wildlife taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or any international law.²²² For purposes of implementing the Act, it does not matter that the fish or wildlife originated in the jurisdiction of another state and may not violate U.S. policy. In tuna offloading ports, including Guam and American Samoa, the Lacey Act has been used to deal with violations of the laws of a number of Pacific Island states.²²³ Criminal sanctions are available under the Act and the sanctions appear to constitute a “serious crime” under the Organized Crime Convention, with a criminal sentence of up to five years.²²⁴ Still, in practice, criminal prosecution resulting in prison time seems to be rare. In its biennial report to Congress, the National Oceanic and Atmospheric Administration provided a sampling of enforcement activities from 2011 associated with IUU fishing. Notably, while some of the sentences involved criminal fines, none of the reported enforcement actions included parties serving prison time.²²⁵ Instead the cases generally involved a combination of probation and creative resolutions such as requirements to write articles about the Lacey Act.²²⁶

f. Summary

What does a review of the existing domestic fisheries and criminal laws tell us about domestic efforts to combat IUU criminal networks? The laws suggest that criminalizing IUU fishing within fisheries codes has not been a particularly high priority for states. While it is possible to make an argument that, under the Russian and Chinese law, IUU fishing by an organized criminal group qualifies as a “serious crime” with at least the possibility of a four to six year imprisonment sentence, it is not apparent from either of those two states’ existing fishery laws what specific activities might constitute criminal IUU fishing. Regarded as a whole, the laws reviewed in this section lack clarity about the relationship between IUU fishing and organized crime.

3644 (Pacific Salmon Treaty Act of 1985) (providing for criminal sanctions of up to ten years), 5001–5002 (North Pacific Anadromous Stocks Convention).

220. 18 U.S.C. §§ 42–44 (2012).

221. 16 U.S.C. §§ 3371–3378.

222. *Id.* § 3372(a).

223. HIGH SEAS TASK FORCE, *supra* note 40, at 33.

224. 16 U.S.C. § 3373.

225. NAT’L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 213, at 94–95 (describing a \$1.8 million criminal penalty for an illegal coral trade of almost 14,000 pounds of endangered coral).

226. *Id.* at 94 (requiring United Seafood Import to serve 200 hours of community service, teach Lacey Act seminars, and write an article for publication regarding the mislabeling of products).

While many of the leading fishing nations have made a commitment to combat IUU fishing through greater international cooperation, with the exception of the Lacey Act, this commitment has largely failed to translate into legal mechanisms for prosecuting IUU fishing crimes by organized groups.²²⁷ It is critical that the fisheries codes for all major fish importers and exporters criminalize certain activities, such as flag-hopping, that contribute to the viability of IUU fishing operations. This would put potential criminals on notice that combating IUU fishing is a priority for states and provide clearer statutory authority for fisheries enforcement officials to prosecute specific acts that contribute to IUU fishing. Presently, IUU fishing is given only minimal attention by customs officials and police agents.²²⁸ The United States is the only state surveyed in this Article that has identified sales of IUU fish as a potentially serious crime.²²⁹ Since most IUU fishing activities require at least a structured group of three or more persons acting in concert with the aim of illegally fishing, there is a critical need for IUU fishing operations to be conceived of by national lawmakers as more than a fishing management problem. IUU fishing is organized transnational crime.

IV. NECESSARY DOMESTIC INTERVENTIONS TO CREATE PUBLIC GOVERNANCE NETWORKS CAPABLE OF COMPETING WITH CRIMINAL IUU FISHING NETWORKS

This Part explores four necessary domestic interventions that will fill the holes in domestic fishery laws identified above and contribute to ending IUU fishing worldwide. First, prosecute IUU fishing as a “serious crime.” Second, harmonize a “serious crime” element across domestic fishing laws. Third, create concurrent extraterritorial jurisdiction over IUU fishing as a “serious crime.” Fourth, require transparency regarding ownership of flagged vessels.

A. Prosecute IUU Fishing Operations as Violations of the Organized Crime Convention

One of the great challenges facing efforts to combat IUU fishing is the need for frequent prosecutions to create a penal culture around IUU fishing. A

227. See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, JAPAN-RUSSIAN ACTION PLAN § 4 (2003), available at <http://www.mofa.go.jp/region/europe/russia/pmv0301/plan.html> (“[S]ince January 2002, focused Japan-Russian Federation consultations have taken place concerning illegal fishing and trade in marine products”); see also Natalya Kovalenko, *Russia and U.S. to Fight Poaching Together*, VOICE OF RUSS. (May 7, 2013, 3:38 PM), http://voiceofrussia.com/2013_05_07/Russia-and-US-to-fight-poaching-together (describing an agreement that may require certification of fish products).

228. HIGH SEAS TASK FORCE, *supra* note 40, at 24.

229. 16 U.S.C. § 3373(d)(1), (d)(3)(A) (false labeling). In April 2014, California Senator Alex Padilla introduced Senate Bill 1138, which would criminalize the sale of seafood that is not clearly identified. See S.B. 1138, 2013–2014 Leg., Reg. Sess. (Cal. 2014), available at http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1138. The European Union has taken action against IUU fishing products. Most recently, it prohibited fishery product imports from Belize, Cambodia, and Guinea as noncooperating countries. See Press Release, European Comm’n, EU Takes Concrete Action against Illegal Fishing (Mar. 24, 2014), available at http://europa.eu/rapid/press-release_IP-14-304_en.htm.

quick review of the literature indicates that IUU fishing is not readily prosecuted as a criminal act; where it is prosecuted it is often not widely reported, leading to vessels registered to flags of convenience being repeat offenders.²³⁰ Given the gravity of the environmental crime, states must invest additional resources to pursue criminal prosecution of organized IUU groups—in part to comply with existing obligations under the Organized Crime Convention.

It is not easy to win a conviction for IUU fishing. First, due process requires that criminal allegations be supported with credible evidence. A prosecution for an IUU fishing operation is difficult to obtain because parties are quick to literally throw logbooks, computers, and navigation equipment overboard.²³¹ Nevertheless, this challenge is not insurmountable. Courts may be willing to entertain certain presumptions about IUU fishing, such as the reliability of isotopic analysis to prove the geographic origin of a particular marine cargo.²³² Perhaps in order to build accountability in the fishing industry and to keep within the framework proposed under the Organized Crime Convention, a court may in the future require an IUU fishing operator to carry the burden of proof and demonstrate that they are not guilty of an IUU infraction.²³³

Even when evidentiary standards and the burdens of proof are more favorable to the prosecution, bringing an IUU case will still be difficult.²³⁴ As described earlier, IUU operations tend to be diffuse, with critical information

230. See Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Austl., May 15–19, 2000, Transform Aqorau, *Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries*, U.N. Doc. AUS:IUU/2000/18, para. 34, available at <http://www.fao.org/docrep/005/y3274e/y3274e0k.htm#bm20> (describing the need for a global violations and prosecutions database because many developing states do not have the capacity to investigate the historical records of fishing vessels to determine whether a vessel poses a threat of IUU fishing).

231. HIGH SEAS TASK FORCE, *supra* note 40, at 32.

232. Cf. Clive N. Trueman et al., *Identifying Migrations in Marine Fishes through Stable-Isotope Analysis*, 81 J. FISH BIOLOGY 826 (2012) (suggesting that carbon, nitrogen, sulfur, and other elemental isotope analyses can help scientists differentiate among the chemical environments of various fishing locations and reconstruct fish migration patterns between different feeding locations); Sahar Zimmo et al., *The Use of Stable Isotopes in the Study of Animal Migration*, NATURE EDUC. KNOWLEDGE PROJECT (2012), <http://www.nature.com/scitable/knowledge/library/the-use-of-stable-isotopes-in-the-96648168>.

233. Convention Against Transnational Organized Crime, *supra* note 132, art. 12(7) (“States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.”).

234. As a case in point, the Tanzanian government brought an IUU fishing case against a Chinese national and a Taiwanese national who were convicted by a lower court of fishing crimes and then ordered to either pay a fine of one billion Tanzanian shillings (the equivalent of \$586,000 U.S. dollars) or be sentenced to ten years in jail. Faustine Kapama, *Tanzania: Appeal Court Quashes Illegal Fishing Trial*, TANZ. DAILY NEWS (Mar. 29, 2014), <http://allafrica.com/stories/201403310306.html>. The case was overturned because of procedural problems, including the failure of the prosecution to consult with the director of public prosecutions before bringing the case. *Id.* The Tanzanian government recently refiled the charges. See Karama Kenyunko, *Government Files Fresh Charges against Fishing Convicts*, GUARDIAN (Apr. 1, 2014), <http://ippmedia.com/frontend/index.php/iatio/?l=66440>.

dispersed across the network rather than concentrated in one location. Assuming, for example, that an IUU vessel is seized within the EEZ of a coastal state, the captain and crew may know little or nothing about the larger operations of the network. While the ship may be forfeited as part of the coastal state's penalties for violating fisheries law and regulations, the crew may not face even a brief term of imprisonment "in the absence of agreements to the contrary by the [s]tates concerned."²³⁵ In practice, this means that IUU fishing in a coastal state's EEZ by a nonnational will only ever be treated as a "serious crime" if the crew member's state of nationality or the vessel's flag state chooses to prosecute, and has provisions under its code for a minimum sentence of four years. In reality, there is little deterrence since the flag state and the nationality states of the crew rarely penalize their flagged ships or crews.²³⁶

The January 2014 case of the Russian-flagged *Oleg Naydenov* exemplifies this quandary for states that wish to enforce fishery management laws against vessels with weak or absent flag state oversight.²³⁷ The ship had been accused of multiple violations of Senegalese fishing law and had already been fined three times.²³⁸ Apparently the fines had little deterrent effect since the *Oleg Naydenov* repeatedly returned to Senegalese waters to fish. Finally, Senegal detained the vessel and its crew of sailors from Russia and Guinea-Bissau for alleged IUU fishing.²³⁹ Yet instead of expressing appreciation for the Senegalese intervention to assist Russia in combating potential IUU fishing by its vessels and nationals, the Russian government threatened to file a case before ITLOS.

In part, this behavior may be the result of Russia's failure to connect its obligations under the Organized Crime Convention to the routine practices of IUU fishing in foreign waters. However, as a party to the Organized Crime Convention, Russia has an obligation to investigate and prosecute these actions as "serious crimes" if there is a linkage between the fishing activities and transnational organized criminal groups.²⁴⁰ Specifically, Article 11 of the Convention provides that "[e]ach [s]tate Party shall make the commission of an offense" based on violations of certain Convention obligations "liable to sanctions that take into account the gravity of that offense."²⁴¹ Additionally, parties "shall endeavor to ensure that any discretionary legal powers under [their] domestic law relating to the prosecution of persons for offences covered

235. Convention on the Law of the Sea, *supra* note 57, art. 73(3).

236. There are some exceptions to this rule. In the subsection on Taiwanese law above, Taiwan publicized an IUU prosecution against one of its nationals for IUU fishing activities on the high seas. See *supra* note 205 and accompanying text.

237. *Senegal Seizes Russian Trawler for Illegal Fishing*, REUTERS, Jan. 5, 2014, available at <http://www.reuters.com/article/2014/01/05/us-senegal-russia-idusBREA040EL20140105>.

238. *Id.*

239. Thomas Fessy, *The Unequal Battle over West Africa's Rich Fish Stocks*, BBC NEWS (Jan. 8, 2014, 8:26 PM), <http://www.bbc.com/news/world-africa-25660385>.

240. Convention Against Transnational Organized Crime, *supra* note 132, art. 5(3).

241. *Id.* art. 11(1).

by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences.”²⁴² As this Article and other recent pieces have suggested, it is becoming essential that the apathy on display in the *Oleg Naydenov* case be replaced with states’ recognition of the connection between fulfilling obligations under the Organized Crime Convention and ending unsustainable natural resource exploitation.²⁴³

Cases like the *Oleg Naydenov* demonstrate why states need to shift their attention to criminal prosecutions of transnational networks. The case is not merely about “growing competition for biological resources on the western coast of Africa” as the Russian fisheries agency commented,²⁴⁴ but rather is about potential criminal participation in an organized crime group²⁴⁵ and possible laundering of criminal proceeds.²⁴⁶ As a party to the Organized Crime Convention, Russia has an obligation not to justify the actions of its flagged vessels but to investigate and, if there is a linkage between the fishing activities and transnational organized criminal groups, to prosecute.²⁴⁷

Indeed, where prosecutions of repeat IUU actors have been thwarted by provisions such as U.N. Convention on the Law of the Sea Article 73(3), which requires bilateral agreements for imprisonment, applying the language from the Organized Crime Convention has the potential to shift the conversation from competition over marine resources to combating criminal networks.²⁴⁸ In fact, the Organized Crime Convention provides an excellent blueprint for states to strengthen horizontal government networks for IUU enforcement. Specifically, Article 27 of the Organized Crime Convention provides that “[s]tates shall cooperate closely with one another . . . to enhance the effectiveness of law enforcement action to combat the offences covered by [the] Convention” by establishing channels of communication “to facilitate the secure and rapid exchange of information,” conducting inquiries regarding alleged criminal actors and criminal proceedings, and possibly even exchanging law enforcement experts.²⁴⁹ Fisheries experts have noted the value of connecting IUU fishing to the Convention.²⁵⁰ What is especially significant is that no additional international negotiations are necessary for states to incorporate criminal sanctions for IUU fishing that reflect the goals of the existing Organized Crime Convention.²⁵¹ In fact, as suggested in the discussion in Part

242. *Id.* art. 11(2).

243. *Cf.* ROSE & TSAMENYI, *supra* note 24, at 41.

244. *Oleg Naydenov Vessel Could Again Set Sail on Monday*, VOICE RUSS. (Jan. 20, 2014, 12:34 PM), http://voiceofrussia.com/news/2014_01_20/Oleg-Naydyonov-vessel-could-be-go-back-to-sea-on-Monday-ship-owner-2708.

245. *See* Convention Against Transnational Organized Crime, *supra* note 132, art. 5.

246. *See id.* art. 6.

247. *See id.* arts. 5(3), 11.

248. *See* Convention on the Law of the Sea, *supra* note 57, art. 73(3).

249. Convention Against Transnational Organized Crime, *supra* note 132, art. 27.

250. *See* ROSE & TSAMENYI, *supra* note 24, at 4.

251. *But see id.* (arguing instead for the application of a new protocol to the Convention Against Transnational Organized Crime that encompasses IUU fishing crimes).

III above, a number of agreed upon transnational crimes such as corruption and participation in an organized crime group make it straightforward to convert particularly large-scale IUU fishing or activities that facilitate such fishing into a “serious crime.”²⁵²

It is possible that certain states will refuse to comply with their obligations under the Organized Crime Convention to prosecute nationals or that a state will not consider itself legally bound to the terms of the treaty because it is not a party.²⁵³ Because of this possibility, the second intervention this Article proposes is harmonizing domestic fishing laws that explicitly identify IUU fishing as a “serious crime” as the term is understood under the Organized Crime Convention.

B. Harmonize Fishery Statutes to Designate IUU Fishing as a “Serious Crime”

The current legal situation restricts the capacity of coastal states to combat transnational organized criminal groups through imposing serious criminal sanctions. In the case of the *Oleg Naydenov*, the Law of the Sea limited Senegal to merely seeking forfeiture of the boat. The same would be true if the *Oleg Naydenov* had entered a port state in violation of the FAO Agreement. Under existing international law, if the captain and crew are nonnationals of the coastal or port state, they remain at liberty to commit the same crimes again if the flag state or the nationality states fail to prosecute. When the Law of the Sea was negotiated, these limits to the capacity of the coastal state to enforce its laws with prison sentences may have been more rational. Without having a bilateral agreement in place between two states, the parties to the Law of the Sea may have wanted to prevent unnecessary diplomatic incidents where states would assert coercive control over parties who were generally law-abiding or subsistence fishers. Few states appear to have entered into such agreements permitting imprisonment.²⁵⁴

252. See, e.g., UNODC ORGANIZED CRIME STUDY, *supra* note 9, at 114 (describing South African fisheries officers that received bribes to create fraudulent catch reports to hide IUU fishing).

253. It is possible that, with the participation of 179 parties, some components of the Organized Crime Convention may be considered customary international law. All states, including nonparties, may have the obligation to domestically criminalize as “serious crimes” certain violations of the Convention, particularly those involving Convention-defined crimes such as corruption. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

254. A review of the FAO webpage did not produce any bilateral agreements permitting imprisonment under the U.N. Convention on the Law of the Sea, Article 73. In fact, an FAO report reviewing bilateral agreements shortly after the close of the Convention found that at least two international agreements—a 1976 Agreement between Mexico and Cuba and a 1976 Agreement between Mexico and the United States—explicitly excluded imprisonment as a penalty. World Conference on Fisheries Management and Development, Rome, It., Apr. 11–15, 1983, *Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zones*, U.N. Doc. 293 FIPP/R293 (En), annex 2 n.43, available at <http://www.fao.org/docrep/x5608e/x5608e00.HTM>.

The drafters of the Law of the Sea did not appear to contemplate the extent to which criminal enterprises would become involved in high value, low-risk IUU fishing. Hypothetically, the Law of the Sea could be renegotiated to reflect this new reality. However, in today's climate of multinational negotiation fatigue, this is an unlikely outcome. Efforts by Australia in 2002 to simply amend the application of Article 73(2) of the Law of the Sea so that the prompt release provisions would not apply to IUU vessels within the Law of the Sea Convention area was rejected at the Convention on the Conservation of Antarctic Marine Living Resources meeting.²⁵⁵

Instead, as this Article suggests, more emphasis must be placed on implementing existing domestic obligations to combat transnational criminal networks. One way to assist national enforcement efforts would be to harmonize fisheries laws that identify the acts of IUU fishing operations that make them profitable (including using shell companies to avoid taxes, flag-hopping, laundering legal and illegal cargos in transshipment, and dumping illegal fish into wholesale markets) and criminalize these acts as "serious crimes."

Harmonization is important because it creates an incentive across each legal system to prosecute the numerous individual acts that contribute to the IUU fishing chain. It also theoretically creates strong disincentives for actors to participate in the IUU chain. Even where it remains impossible to identify the true kingpins of IUU operations because they are intentionally well-insulated from events in the field, harmonizing fishery codes that designate IUU fishing acts as "serious crimes" with minimum sentences of four years could lead to more prosecutions. Successful prosecutions could substantially reduce the willing workforce for IUU fishing enterprises. This proposal would also bring IUU fishing into alignment with other areas of marine governance, such as marine pollution controls, where there has already been a harmonization of domestic laws necessitated by the fact that global marine transport is a geographically mobile activity.²⁵⁶ Similar harmonization in the area of IUU fishing would help states engage in effective horizontal governance.

One potential model for developing a harmonized law capable of combating IUU fishing as a "serious crime" is the United States' Lacey Act,

255. Rachel Baird, *Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence*, 5 MELB. J. INT'L L. 299, 324 (2004).

256. Convention on the Law of the Sea, *supra* note 57, art. 194:

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

States may have more readily adopted harmonization in the area of marine pollution because of a recognition that vessels serving a transatlantic shipping route can easily be redeployed as transpacific shippers. Requiring compliance with multiple pollution standards would have been inefficient for cargo companies that maintain multiple fleets.

which prohibits the import, export, transport, sale, possession, or purchase of any fish or wildlife taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or any international law.²⁵⁷ Including the possibility of a five-year criminal sentence in the case of a felony charge, this law has been used successfully to seek criminal prosecutions for parties engaged in IUU fishing.²⁵⁸ In 2003, the High Seas Task Force recommended the adoption of legislation similar to the Lacey Act to combat IUU fishing actors, in particular on the high seas.²⁵⁹ A version of the Lacey Act has already been adopted by Papua New Guinea, Nauru, and the Federated States of Micronesia.²⁶⁰ The U.S. Department of Justice has provided instruction on the Lacey Act to China, Belgium, Switzerland, Indonesia, Vietnam, Malaysia, and the United Kingdom.²⁶¹ If a Lacey Act-like law that included wildlife trafficking as a serious crime were to be broadly adopted across domestic legal systems, this type of harmonization would have the potential to serve as a powerful legal mechanism to deter actors engaged in illegal fish trade. In terms of boosting criminalization of large-scale IUU fishing, adopting legislation structured on the Lacey Act may prove one of the most effective international deterrents to transnational criminals.

C. *Create Concurrent Extraterritorial Jurisdiction*

Far more controversial than the previous two suggestions is a recommendation for the application of concurrent jurisdiction to IUU crimes that states agree are “serious crimes” regardless of the location of the crime. Even assuming both a recognition that organized IUU fishing is a criminal act and that states need to harmonize their laws across boundaries, numerous implementation challenges remain, since most laws do not reach the activities of nonnationals. And until there is a credible threat of prosecution and prison time, IUU fishing will continue largely unabated. Yet a credible threat of prosecution requires that states authorize agencies to pursue concurrent extraterritorial jurisdiction over actors in the IUU fishing chain regardless of their nationality. For without the possibility of being subject to extraterritorial jurisdiction, IUU actors will be able to rely upon a continuing safe harbor within states who neither adopt nor enforce harmonized laws that reflect the serious criminal nature of IUU fishing. Often these states fail to prosecute IUU fishing either because of fear of upsetting domestic businesses that depend on it, or because of an inability to prosecute due to a lack of enforcement

257. 16 U.S.C. § 3372(a) (2012).

258. *See, e.g.*, *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011); *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003); *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991); *United States v. Rioseco*, 845 F.2d 299 (11th Cir. 1988).

259. HIGH SEAS TASK FORCE, *supra* note 40, at 79–80.

260. *Id.* at 79.

261. *History of the Law and Policy Section*, U.S. DEP’T JUST., <http://www.justice.gov/enrd/4648.htm> (last updated Sept. 2014).

resources. To address this global lacunae, it may be possible through a set of horizontal fishery law reforms to authorize a global network of committed government prosecutors or citizen private attorney generals who can assert extraterritorial jurisdiction over IUU fishing activities that constitute “serious crimes” even when the activities in question did not originate within their territory or involve their nationals.

This proposal is not without precedent. Extraterritorial jurisdiction has been formally integrated into international law as a tool for combating global crimes such as piracy on the high seas, where multiple courts can assert concurrent jurisdiction.²⁶² There has been a debate among the members of the U.N. International Law Commission over the value of extending jurisdiction beyond territorial borders.²⁶³ On the one hand, a policy of extraterritoriality has the potential to combat a culture of impunity. On the other hand, extraterritoriality if abusively applied might challenge state sovereignty. Yet given the transnational nature of large-scale IUU fishing crime, the international community must be open to the idea of extending the jurisdictional reach of states capable of protecting fisheries resources to ensure legal accountability. When states can assert jurisdiction over IUU fishers that would otherwise be foreclosed due to a lack of a traditional jurisdictional connection between the defendant and the prosecuting state, the threat of being charged with IUU fishing activities becomes a more concrete possibility for criminal networks that would otherwise profit from the rigidities of territorial and national jurisdiction.²⁶⁴ In order to avoid due process issues of double jeopardy and wasting limited judicial resources through redundant actions, this proposal for concurrent jurisdiction would require states to incorporate some language of general principles of conflicts of law into any authorizing legislation.

If states agree that IUU fishing by transnational organized groups is a crime like piracy over which all states can exercise concurrent jurisdiction, then the risk-to-reward ratio for IUU fishing might shift for transnational criminal networks. If states expressly adopted concurrent jurisdiction over IUU crimes and undertook key prosecutions of nonnationals who engaged in these crimes, then state government networks would be in a better position to respond

262. See Convention on the Law of the Sea, *supra* note 57, art. 105 (“On the high seas, or in any other place outside the jurisdiction of any [s]tate, every [s]tate may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”).

263. See, e.g., Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int’l Law Comm’n, U.N. Doc. A/C.6/64/SR.12 (June 10, 2010) (by Roman Anatolevich Kolodkin), *translation available at* <http://www.un.org/law/ilc> (follow the “Search” hyperlink; then search “A/C.6/64/SR.12”).

264. Traditional jurisdictional standards for prosecutions include the nationality of the perpetrator, territoriality of the crime, nationality of victims, and state security interests. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (describing bases of jurisdiction to prescribe).

flexibly to the needed prosecutions of IUU fishing. The creation of concurrent jurisdiction for these crimes would not just increase flexibility for states seeking prosecutions but would also improve the capacity of weakly governed registration states by contributing new and possibly additional judicial venues for prosecution. While frontline IUU fishing operations may continue to pursue their activities in areas of relatively low governance such as West Africa, concurrent extraterritorial jurisdiction would allow for the prosecution of key IUU decision-making players based on acts that might occur anywhere in the world.

A potential model for how concurrent extraterritorial jurisdiction might be incorporated into a fishing code can be found in the U.S. Foreign Corrupt Practices Act. The Act provides for extraterritorial jurisdiction over corrupt acts by both U.S. nationals and nonnationals who have some nexus with the United States.²⁶⁵ For example, a nonnational can be prosecuted for any use of interstate commerce in furtherance of a corrupt payment to a foreign official, including “placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States”²⁶⁶ The same idea might be translated into U.S. domestic law so that a nonnational could be prosecuted for any conspiratorial IUU fishing activities based on fish that travelled through or were destined for the United States.²⁶⁷ Using a general Foreign Corrupt Practices Act model for extraterritorial jurisdiction that permits prosecution of nationals and nonnationals rather than the existing Lacey Act model focused on nationals would provide for the possibility to prosecute foreign nationals involved in a transnational environmental crime even without seeking the approval of the foreign country. This approach would increase worldwide legal capacity across states to address IUU fishing at every stage while also combating flag state apathy and potential corruption.

D. Require Transparency Regarding Ownership of Flagged Vessels

One of the great challenges in ending IUU fishing is determining who profits from the IUU enterprise. These individuals may or may not be the persons captaining the boats. In some cases, their identity is shrouded by corporate firewalls and shell corporations. Nonflag states need to be able to ascertain who the beneficial owner of a vessel is if they are to prosecute a case that might deter future IUU fishing behavior. Beneficial owners may be the

265. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2012).

266. U.S. DEP’T OF JUSTICE & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

267. Even if only the United States extended its extraterritorial reach and prosecuted non-U.S. nationals under an expanded Lacey Act, a “serious crime” law could still have a deterrent effect on transnational criminal businesses engaged in IUU fishing, given that the United States is historically the third largest importer of fish in the world after the European Union and Japan. *Fish and Fishery Products Statistics*, GLOBEFISH HIGHLIGHTS, Apr. 30, 2011, at 53, available at http://www.globefish.org/upl/Publications/files/GSH_April_2011.pdf.

parties ultimately responsible for command decisions regarding what a vessel captures and where it fishes. Thus in many cases it is necessary to pierce multiple corporate veils to determine who is actually directing an IUU fishing venture.²⁶⁸

If states are able to identify the true owners of IUU fishing vessels hiding behind the front companies, strategic arrests that will effectively deter IUU fishing become possible. Even though states are investing substantial resources in pursuing IUU vessels and seizing cargos, large-scale IUU fishing continues, and its ongoing viability can be attributed in part to the corporate structures behind criminal fishing. When a single vessel is seized from an IUU fleet, government enforcement resources are drained, but the corporate veil protects the rest of the criminal network.

For example, in an ITLOS opinion known as the *Volga Case*, Australia requested that the true identity of the beneficial owner of a vessel alleged to have IUU fished in the Antarctic region be disclosed as a condition of the ship's release.²⁶⁹ In order to protect the interests of the Russian-flagged vessel, the Russian Federation argued that Australia's precondition exceeded the obligations under the Law of the Sea for prompt release.²⁷⁰ ITLOS agreed with the Russian position and indicated that "keeping in view the overall circumstances of [the] case," it was not reasonable to require information about a beneficial owner.²⁷¹ The ITLOS ruling unintentionally provided new security to IUU fishing fleet beneficial owners as they make command decisions to flag-hop between registries. This result is unfortunate since a recent study suggests IUU fishing vessels are highly adaptive and will quickly change fishing grounds, ports of landings, and flag registrations in order to avoid detection, particularly when states and RFMOs threaten enforcement.²⁷² Indeed, the lengths that some vessels will go to avoid disclosing their identity is astonishing.²⁷³

Given the *Volga Case*, this reform may require an amendment to the Law of the Sea, which may not be politically viable. Instead of waiting for an unlikely multilateral process to conclude, a better governance option would be

268. Lynden Griggs & Gail Lugten, *Veil Over the Nets (Unraveling Corporate Liability for IUU Fishing Offences)*, 31 MARINE POL'Y 159, 162 (2007).

269. Judgment para. 75, The "Volga" Case (Russ. Fed'n v. Australia) (No. 11) (Dec. 23, 2002), available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/Judgment.Volga.E.pdf.

270. *Id.* para. 60.

271. *Id.* para. 88.

272. Henrik Österblom et al., *Adapting to Regional Enforcement: Fishing Down the Governance Index*, PLoS ONE, Sept. 17, 2010, available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0012832>.

273. For example, when approached by the Australian fisheries officers in Antarctic waters, the *Zeus* claimed to be registered to the Togolese government. *Ex-Togolese Fishing Vessel Changes Flag in the High Seas*, STOP ILLEGAL FISHING, http://www.stopillegalfishing.com/sifnews_article.php?ID=66#sthash.4w5BuDOc.dpuf (last visited Oct. 4, 2014). When the boarding vessel informed the crew that Togo did not recognize the *Zeus* as a vessel on its registry, the Australian patrol vessel watched the crew change its flag to a Mongolian flag, paint over its previous name identification, and then depart. *Id.*

for each of the NESTs organized in conjunction with Interpol and described in Part V below to pressure domestic registration offices to require that vessels' beneficial owners be traceable as part of flag registration. NESTs should also attempt to verify the traceability of companies to ensure that there is a potentially responsible party. Critics may respond that this proposal is naïve since only a select number of registry states will have either the resources or political will to engage in this type of activity. These concerns can be partially addressed through capacity-building support from some of the leading fishery protection states such as Australia and the United States. Such concerns can also be addressed through the economic coercion of recalcitrant states. For example, Belize is in the process of reforming some of its fisheries laws after the European Union listed the country as a noncooperating third country whose fisheries products would be rejected from E.U. ports.²⁷⁴ Unfortunately, the European Union did not insist on Belize reforming its tax laws.²⁷⁵ In addition to harmonizing IUU fishery crime law, harmonizing tax laws would be effective at combating the money laundering associated with IUU fishing. Indeed, in light of the recent Organisation for Economic Co-operation and Development report on tax evasion and IUU fishing, harmonizing tax laws in order to eliminate impenetrable tax havens may prove to be an effective strategy in increasing the accountability of IUU fishing operations.²⁷⁶

E. Summary

As with so many policy proposals, it will take great political will to implement these suggestions as they diverge from the current trend of low-sanction fishery management practices. Yet because transnational crime is not easily deterred, identification of crimes and harmonization becomes even more important. As political scientist Todd Sandler reflects, "the globalization of crime also requires that laws are harmonized among targeted countries . . . [but] [t]here is little progress on this harmonization."²⁷⁷ As some states have become stricter in their IUU fishing regulations, it is possible that a lack of harmonization could lead to the displacement of illegal activities to countries with weak governance. Given that the IUU fishing chain is a form of transnational organized crime, it has become increasingly important to also deterritorialize criminal law systems to effectively combat it; using one well-publicized standard instead of approaching the problem through a variety of sometimes conflicting procedural and substantive laws.²⁷⁸ If this Article's

274. Press Release, European Comm'n, Question and Answers on the EU's Fight against Illegal, Unreported and Unregulated (IUU) Fishing (Nov. 26, 2013), http://europa.eu/rapid/press-release_MEMO-13-1053_en.htm.

275. See *supra* note 104 and accompanying text.

276. See generally *EVADING THE NET*, *supra* note 103.

277. TODD SANDLER, *GLOBAL COLLECTIVE ACTION* 161 (2004).

278. ADVISORY COUNCIL ON INT'L AFFAIRS, *CRIME, CORRUPTION AND INSTABILITY: AN EXPLORATORY REPORT* 53 (2013), available at http://www.aiv-advies.nl/ContentSuite/upload/aiv/doc/wfverisie_AIV85_ENG%281%29.pdf.

proposals for increasing resources for detection, treating IUU fishing as a transnational crime, harmonizing criminal penalties, and increasing transparency were to become domestic realities, they would strengthen horizontal government networks and might ultimately “close the net” on transnational criminal fishers.²⁷⁹

V. EMERGING INTERNATIONAL NETWORKS FOR IUU FISHING ENFORCEMENT

In addition to the existing efforts described in Part III to create a system of effective port state measures, there has been a recent, encouraging flurry of institutional network building based on fishery enforcement goals. Creating national and regional institutions flexible enough to respond to a diversity of criminal networks is essential to ensuring there is sufficient governmental capacity to enforce the criminalization of IUU fishing. Criminalization without the threat of detection and enforcement is ineffective.²⁸⁰ Simply harmonizing laws as recommended in Part IV will not be sufficient to eliminate IUU fishing unless a number of key states importing and exporting IUU fish invest in a combination of detection and prosecution regimes that are capable of exchanging information and prosecuting across borders. The remainder of this Part highlights a few advances that may contribute to international networking to combat organized fishing crime.

A. *Multilateral Efforts: London Declaration on the Illegal Wildlife Trade*

While fishing crimes have been generally low priorities for criminal justice systems because they may have been perceived as victimless crimes, the political will necessary to prioritize coordinated efforts to combat illegal wildlife trade is emerging. In February 2014, forty-six countries agreed to the London Declaration on the Illegal Wildlife Trade.²⁸¹ This agreement provides that “poaching and wildlife trafficking and related crimes” should be considered “serious crimes” within the context of the Organized Crime Convention.²⁸²

Marine resources are never specifically mentioned in the London Declaration, with the focus largely on identifying the devastation of elephant

279. See HIGH SEAS TASK FORCE, *supra* note 40.

280. JUDY PUTT & KATHERINE ANDERSON, AUSTRALIAN INST. OF CRIMINOLOGY, A NATIONAL STUDY OF CRIME IN THE AUSTRALIAN FISHING INDUSTRY xiv (2007), available at <http://www.aic.gov.au/documents/5/D/6/%7B5D6D36A1-3D6F-47BA-82AC-56DA79114CA6%7Drpp76.pdf>.

281. Adam Vaughan, *Global Accord on Combatting Illegal Wildlife Trade Agreed by 46 Nations*, GUARDIAN (Feb. 13, 2014), <http://www.theguardian.com/environment/2014/feb/13/global-accord-illegal-wildlife-trade-london-46-nations>.

282. Declaration art. 16(VIII), London Conference on the Illegal Wildlife Trade (Feb. 12–13, 2014) [hereinafter London Declaration], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/280890/london-wildlife-conference-declaration-140213.pdf.

and rhinoceros populations as “serious crimes.”²⁸³ While it is not apparent that the trade in illegal fish motivated the declaration at all, the campaign to end IUU fishing may receive a boost from the London Declaration.²⁸⁴ The London Declaration does recognize a number of themes of particular significance for IUU fishing, including the recognition that wildlife crime is a predicate for a number of other crimes including money laundering, tax fraud, and “trafficking in other illicit commodities.”²⁸⁵ The London Declaration further calls for a concerted investment in law enforcement and the building of horizontal networks through “national cross-agency mechanisms.”²⁸⁶ In spite of the lack of specific engagement on marine resources as part of the London Declaration, fishing crimes might be read into the potentially broad coverage of the London Declaration as an embodiment of existing general political will for those large fish-importing countries that have indicated a commitment to combat poaching and wildlife trafficking.²⁸⁷

B. Interpol-Led Efforts: Project Scale and NESTs

In February 2013 Interpol, with the cooperation of civil society groups and the government of Norway, launched Project Scale, which focuses on combating illegal fishing.²⁸⁸ The project will attempt to create a plan for vertical integration of Interpol with domestic fishing enforcement entities, develop a multilateral Fisheries Crime Working Group, provide expert support on environmental law compliance and enforcement, and, perhaps most importantly, “conduct region- or commodity-specific operations tailored to the needs of vulnerable areas.”²⁸⁹ While Project Scale documentation is not specific about what might constitute a “region or commodity-specific operation,” the “operations” referred to by the project likely contemplate enforcement support for vulnerable coastal states such as West African states

283. China and Japan were among the states that participated in the drafting of the London Declaration. *Id.* annex B. Nationals of both countries have been implicated in IUU fishing. *See, e.g., Japanese Vessel Detained for Illegal Fishing in South Africa Waters*, XINHUANET (Sept. 14, 2013), http://news.xinhuanet.com/english/world/2013-09/14/c_132719663.htm; *US Coastguard Releases Chinese Boat Accused of Illegal Fishing in North Pacific*, S. CHINA MORNING POST (June 4, 2014), <http://www.scmp.com/news/china/article/1525111/us-coastguard-releases-chinese-boat-accused-illegal-fishing-north-pacific> (describing a U.S. Coast Guard escorting a vessel suspected of IUU fishing to Chinese authorities 2250 kilometers away from where it was fishing).

284. *What is the Issue?*, LONDON CONF. ON ILLEGAL WILDLIFE TRADE 2014 (ARCHIVED), <https://www.gov.uk/government/topical-events/illegal-wildlife-trade-2014/about#what-is-the-issue> (last visited Oct. 4, 2014).

285. London Declaration, *supra* note 282, pt. B, para. 16(x).

286. *Id.* pt. C, para. 17(xiv).

287. While there is almost no overlap between flags of convenience states and the countries that have signed the London Declaration, there is some limited overlap between ports of convenience and the London Declaration states. *See id.* annex B.

288. *Projects*, INTERPOL, <http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Scale> (last visited Oct. 4, 2014).

289. *Id.*

who have only limited monitoring and enforcement capabilities over their EEZs.²⁹⁰

While Project Scale is just getting underway, Interpol has already witnessed improved communication among states regarding IUU fishing. Several Purple Notices have been issued since late 2013 for vessels suspected of long histories of global IUU fishing.²⁹¹ In September 2013, Norway identified *Snake* as a suspected IUU fishing vessel last seen engaged in potential IUU activities on the high seas in an area under regulation of the RFMOs.²⁹² Currently flying a Libyan flag, the vessel has had thirteen different names and eight flags over the course of the past ten years.²⁹³ In October 2013, the government of Costa Rica requested that a Purple Notice be issued to alert other states to an illegal shark-finning technique that Costa Rica discovered in 2011, which involved maintaining a band of skin to keep a shark fin attached to the spine while discarding the body at sea.²⁹⁴ In December 2013, the governments of New Zealand, Australia, and Norway requested location information about a vessel named the *Thunder* suspected of illegal fishing and known to change its identity using a Mongolian, Nigerian, and unknown flag.²⁹⁵ By issuing the Purple Notice, the requesting countries hoped to use other states to identify the individuals and networks that owned, operated, and profited from the IUU vessel.²⁹⁶ In January 2014, South Africa reported the *Samudera Pasific No. 8* and *Berkat Menjala No. 23* as absconded stateless vessels that were two of a fleet of ten fishing vessels that had been arrested by the South African authorities in November 2013 on suspicion of IUU fishing on the high seas without a license.²⁹⁷

290. The amount of illegal fishing in the West African states, which include some of the most vulnerable states, like Sierra Leone, was estimated to be between 31 to 40 percent of the reported catch between 1980 and 2003, reflecting the highest percentage of illegal fishing in the world. Agnew et al., *supra* note 7, at 2 (referring to Table 2, Eastern Central Atlantic).

291. Interpol issues Purple Notices to seek information on “modi operandi, objects, devices and concealment methods used by criminals.” See *Purple Notices—Public Versions*, INTERPOL, <http://www.interpol.int/INTERPOL-expertise/Notices/Purple-notices-%E2%80%93public-versions> (last visited Oct. 3, 2014).

292. Purple Notice No. 133, Interpol, Modus Operandi on Illegal Fishing Activities (Sept. 6, 2013), available at <http://www.interpol.int/content/download/20839/190379/version/21/file/PN%20133%20E%20PUBLIC.pdf> (listing Norway as the “Requesting Country”).

293. *Id.*

294. Purple Notice No. 139, Interpol, Modus Operandi on Shark Finning (Oct. 29, 2013), available at [http://www.interpol.int/content/download/21890/206470/version/5/file/PN%20139%20EN%20\(PUBLIC\).pdf](http://www.interpol.int/content/download/21890/206470/version/5/file/PN%20139%20EN%20(PUBLIC).pdf) (listing Costa Rica as the “Requesting Country”).

295. Purple Notice No. 143, Interpol, Modus Operandi on Illegal Fishing Activities (Dec. 5, 2013), available at [http://www.interpol.int/content/download/22524/211951/version/18/file/PN%20143%20EN%20\(PUBLIC\).pdf](http://www.interpol.int/content/download/22524/211951/version/18/file/PN%20143%20EN%20(PUBLIC).pdf) (listing New Zealand as the “Requesting Country”).

296. *Id.*

297. Purple Notice No. 151, Interpol, Modus Operandi on Absconded Stateless Fishing Vessel—*Samudera Pasifica No. 8* (Jan. 21, 2014), available at <http://www.interpol.int/content/download/23447/221452/version/21/file/PN151%20-%20public.pdf> (listing South Africa as the “Requesting Country”); Purple Notice No. 152, Interpol, Modus Operandi on Absconded Stateless Fishing Vessel—*Berkat Menjala No. 23* (Jan. 21, 2014), available at <http://www.interpol.int/content/download/>

This set of Purple Notices indicates a willingness on the part of states to communicate intelligence about potential illegal fishing vessels. These requests for cooperation to collect information about the location of a vessel or owners of a vessel reflect an evolution in coordination among interested states. Notably, none of the requesting states are associated with flags of convenience or ports of convenience. However, countries that have been known to harbor IUU fishing vessels in the past, such as Indonesia, have been recently cooperating with the countries requesting assistance through the Interpol network. For example, in the request by South Africa for information about the two vessels that it arrested, Indonesia indicated that the Indonesian registration papers on board the vessels had been forged and that the vessel was not under Indonesian jurisdiction.²⁹⁸ The knowledge that a vessel is a stateless vessel creates new enforcement opportunities for all states under the Law of the Sea, since a vessel may be boarded if it lacks proper flag state registration.²⁹⁹

Interpol, with the cooperation of its members, is also attempting to launch a movement for NESTs. At this juncture, it is unclear how these institutions might operate across national boundaries. A graphic presented by Project Scale organizers suggests that one model for the NEST is an office or entity that consists of a senior criminal investigator, criminal analysts, a prosecutor, training officers, a financial specialist, and a forensic expert who will operate within each of the domestic Interpol National Security Bureaus.³⁰⁰ The domestically based NEST then appears to initiate liaisons with the police, customs agencies, environmental agencies, justice department, and intergovernmental partners while also possibly receiving support from nongovernmental organizations.³⁰¹ While its organizational concept as a multistakeholder framework is sound in theory and should substantially bolster domestic efforts by creating a focal point for enforcement efforts, it is unclear what the nature of the transboundary relationships and obligations between the various state NESTs will be. This question is particularly critical for IUU fishing because the IUU operations quickly span boundaries given the probability of financial transactions associated with IUU fishing operations, fish capture, and sales taking place in different locations in the world. Perhaps state NESTs will be able to coordinate their efforts across boundaries through either informal bilateral memoranda of understandings or more formal multilateral treaty arrangements. As states appoint NESTs, there should be

23449/221460/version/15/file/PN152%20-%20public.pdf (listing South Africa as the “Requesting Country”).

298. Purple Notice No. 151, *supra* note 297; Purple Notice No. 152, *supra* note 297.

299. Convention on the Law of the Sea, *supra* note 57, arts. 92, 110.

300. ENVTL. CRIME PROGRAMME, INTERPOL, PROJECT SCALE (2013), available at http://www.interpol.int/content/download/20471/184400/version/9/file/project%20Scale_09%202013ENweb.pdf. Each country that is a member of Interpol has a preexisting National Central Bureau. U.S. DEP'T OF JUSTICE, THE UNITED STATES NATIONAL CENTRAL BUREAU OF INTERPOL i (2009), available at <http://www.justice.gov/oig/reports/plus/a0935/final.pdf>.

301. ENVTL. CRIME PROGRAMME, *supra* note 300.

some cooperation with the ministry of state or foreign affairs offices as to what authority these NESTs can exercise across boundaries.

The success of Project Scale as a governance network building project remains to be seen in the years to come, but the suggestions in Part IV should support the legal effectiveness of the initiative and create opportunities for collaboration between NESTs on drafting new legislation, detecting criminal behavior, and prosecuting. These recommendations should be priority areas in the implementation efforts of NESTs, particularly for those states such as Japan, Spain, France, Italy, and China that are engaged in the largest amount of fish sales and purchases.³⁰²

C. *Private International Network Efforts*

Even though the focus of this Article has been on the need for individual states to better combat IUU fishing, it is important to recognize that nonstate actors can also play a critical role in detecting criminal behavior. In 2014, WildLeaks was launched as a nonstate initiative intended to operate in parallel to state efforts. As a digital platform for collecting anonymous tips including the names of wildlife traffickers, shippers, and buyers as well as financial transactions linked to a wildlife crime, WildLeaks is intended to provide a secure space for whistle-blowing on the industry.³⁰³ The site may prove a valuable resource for individuals who have information but are unwilling to share it with government officials for fear of retribution. Some information from the site will be passed to government officials and other information may be used for private investigations by nonstate actors.

CONCLUSION

There are immense challenges to creating a rational fishing system that will meet the livelihood needs for this generation and generations to come. There have been a number of voluntary steps in the right direction. Small-scale fisherman who are concerned about livelihoods are creatively cooperating with nongovernmental organizations in projects such as the Morro Bay agreement to restrain self-interested fishing activities through “no-trawl zones” in the short-term to collaboratively restore the long-term health of stocks and create local economies of scale.³⁰⁴ The International Maritime Organization is extending

302. See FAO, UNITED NATIONS, FACT SHEET: THE INTERNATIONAL FISH TRADE AND WORLD FISHERIES (2010), available at http://www.fao.org/fileadmin/user_upload/newsroom/docs/fact_sheet_fish_trade_en.pdf.

303. See Laurel Neme, *New WildLeaks Website Invites Whistle-Blowers on Wildlife Crime*, NAT'L GEOGRAPHIC (Feb. 10, 2014), <http://news.nationalgeographic.com/news/2014/02/140210-wildleaks-wildlife-crime-trafficking-whistleblower>.

304. See *How We Work*, MORRO BAY COMMUNITY QUOTA FUND, <http://www.morrobaycommunityquotafund.org/how-we-work> (last visited Oct. 4, 2014) (describing a community-based cooperative fund created to permit small-scale fishing groups to continue to

the use of permanent numbers, which uniquely identify ships, to fishing vessels to assist monitoring, control, and surveillance operations focused on fishery management.³⁰⁵

Yet, these significant efforts to change the trajectory of IUU fishing will fail to achieve results if unaccompanied by coercive regulation designed to combat actors who have no intention of making any investment in sustainable fish or the communities that rely upon these limited and precious resources.³⁰⁶ It is essential that this generation increase the business risks of IUU fishing, particularly for those criminal actors who profit handsomely from a lack of meaningful deterrents. Forfeitures of ships and relatively high fines are insufficient to change the behavior of inveterate criminal networks that are prepared to absorb financial losses.³⁰⁷ Only two possible outcomes will stop these groups: a lack of fish or a credible fear of actual incarceration.

Pursuing the organized crime element of IUU fishing is a daunting proposition for both fishery managers and law enforcement. It is also essential. While most states acknowledge that IUU fishing is not just an environmental security threat but also a human security threat, this recognition has not, with some notable exceptions such as the Lacey Act, been reflected in the fishery laws. While states fail to coordinate their fishing management and enforcement regimes across boundaries, criminal networks find themselves facing few obstacles and many new opportunities for markets that remain relatively unregulated. Today, for example, illegal fish can theoretically be bought and sold using bitcoins on “deep web” portions of the internet with little

participate in a fishery managed under an individual transferable quota system); *see also* Jon Christensen, *Unlikely Partners Create Plan to Save Ocean Habitat Along with Fishing*, N.Y. TIMES (Aug. 8, 2006), http://www.nytimes.com/2006/08/08/science/earth/08fish.html?pagewanted=all&_r=0.

305. *Exemption on Fishing Vessels Having IMO Identification Numbers Lifted*, FISH SITE (Dec. 6, 2013), <http://www.thefishsite.com/fishnews/21963/exemption-on-fishing-vessels-having-imo-identification-numbers-lifted>.

306. *See, e.g.*, Sander et al., *supra* note 24, at 115 (contrasting fishermen pursuing need with fishermen pursuing greed).

307. *See, e.g.*, *Oversight Hearing on the 2008 Lacey Act Amendments Part 1 and 2 before the Subcomm. on Fisheries, Wildlife, Oceans & Insular Affairs of the H. Comm. on Natural Res.*, 113th Cong. (2013) (statement of Marcus A. Asner, Partner, Arnold & Porter LLP), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80980/html/CHRG-113hhrg80980.htm>. Marcus Asner led the investigation for and prosecuted the Lacey Act case, *United States v. Bengis*. *Id.* The case involved IUU lobster catches in South Africa. *Id.* As Asner explained to congressional representatives, criminal sanctions are essential because IUU fisherman approach their activities as a business enterprise. In Mr. Asner’s words:

And let me give you an example from the case that I prosecuted, the Bengis case. That was, as I mentioned before, a massive scheme for decades to over-harvest rock lobster and bring it into the United States. At one point, and they had all sorts of shenanigans to hide it, and they just raped the economy of South Africa, or at least the fish in South Africa, at one point one of Arnold Bengis’s lieutenants said to him, ‘What will happen if you get caught?’ And this is in the record, and I apologize for my language. His response was, ‘I will never get caught. I have f-you money.’ And that is what happens when you have just civil violations, is that somebody has f-you money, and can make it go away.

Id.

oversight.³⁰⁸ While neither bitcoins nor the “deep web” are truly anonymous, they provide flexibility for criminal networks since the use of these tools demands yet more surveillance resources from government networks.

Characterizing IUU fishing as a “serious crime” shifts the focus from the ecological emphasis on overfishing to an emphasis on the transnational crime that is in part driving the current overfishing crisis. It is not simply a question of semantics, but of tapping into already existing political and financial commitments by states to protect states from transnational criminal activities. Our existing environmental protection networks have failed to effectively combat IUU fishing networks because they are underfunded and lack coordination among responsible government actors. In spite of these public governance challenges, we must not be resigned to a future of collapsing marine fish stocks. Given the recent international spotlight on wildlife crime by Interpol and the London Declaration, political will is finally emerging to strengthen the criminal penalties for IUU fishing and alleviate some of the ongoing plunder of the seas.

308. Fleming, *supra* note 105.

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