

The link between marine living resources

By Prof Hennie van As *

Introduction

South Africa's coastal waters are home to a large variety of valuable marine living resources that can both provide sustenance and industry to coastal communities, as well as contributing to the country's economy. Unfortunately, as with any valuable resource, it is a magnet for abuse and exploitation. This generally takes the form of illegal, unreported and unregulated (IUU) fishing - a problem which until recently has been dealt with as an exclusive fisheries management issue. However there are calls for this to change. Haenlein (2017) for example, views large-scale IUU fishing as transnational organised crime that must be recognised and treated as such. Interpol (2014) also appeals for increased "awareness of some types of illegal fishing as a form of transnational and organised crime". In 2013, Interpol (2017) launched Project Scale, an initiative to enable member countries to identify, deter and disrupt transnational fisheries crime.

In 2017, Hübschle demonstrated the connection between the smuggling and illegal importation of drugs, cigarettes and counterfeit goods into the country, and the smuggling of marine living resources out of the country. **The link between the illegal export of poached abalone (*Haliotis midae*) and drug trafficking (mainly methamphetamine - commonly known as Tik) is so strong that it has been called a "marriage of convenience"** (Hübschle, 2010). This is not a new notion as research conducted almost 20 years ago already linked the presence of organised criminal Chinese triad societies in South Africa with abalone poaching when Gastrow (2001) found that: "The Taiwanese-linked criminal group active in Cape Town was referred to as the 'Table Mountain Gang' at that stage. Police soon discovered that members of these triad societies were also operating in the Johannesburg/Pretoria area as well as in every harbour city in South Africa. Police investigations also revealed that the illicit trade in abalone

constituted a major component of the Chinese organised criminal groups."

Ten years ago, Raemaekers and Britz (2009) found that a large illegal and highly organised network developed from the urban centre of Port Elizabeth and systematically targeted the species across the entire Eastern Cape for transport inland and export to the Far East. The extent of abalone poaching in the Western Cape is well-documented.

This research is backed up by case law. In the recent case of *S v Bignault* (CC20/2018) [2018] ZACPEHC 57, the court stated that "[t]he scale of [this] enterprise's activities extended far beyond provincial boundaries and establishes the reach of its organisational tentacles".

The most threatened and most widely smuggled marine living resources are abalone and West Coast rock lobster (*Jasus lalandii*). According to a recent report (Okes, Bürgener,



organised crime

You will be surprised!

Moneron and Rademeyer, 2018), the rampant illegal harvesting of abalone has resulted in the loss of a commodity worth approximately R628 million per annum, should this resource have been legally harvested and traded. It is, however, difficult to calculate the cost to the economy since it is regarded as a "dark" crime. In *United States v Bengis* two options for calculating restitution were submitted to the court. The first option focused on the cost of remediation and amounted to over \$46.77 million, and the second on the market value of the overharvested resource, which amounted to just under \$62 million (R874 million).

Research conducted by the UN Food and Agricultural Organisation estimates that between \$11 and \$30 billion is lost annually to illegal fishing. Southern and east Africa loses in the region of R12.2 billion to illegal and unreported fishing every year. It further estimates that 85% of fish stocks worldwide are now fully exploited, and illegal fishing is one of the main contributors (www.pescadulus.org/).

The extent of the illegal trade in abalone is illustrated by the fact that between 2000 and 2007, 74% of dried *Haliotis midae* were imported to Hong Kong from South Africa. This dropped to 39% between 2008 and 2015 as new restrictions were enforced, but at the same time exports of abalone from other African countries have increased (Lou, 2018). An analysis of trade routes by Traffic suggests that up to 43% of the illegally harvested abalone were traded through a number of non-abalone-producing sub-Saharan African countries to Hong Kong between 2000 and 2016; 21% originated from Mozambique, 7% from Zimbabwe and 6% from Zambia (Okes et al, 2018). The latter two countries are landlocked and the analysis shows that the commodity is transported from South

Africa into these countries where it is “legalised” and exported to Hong Kong.

West Coast rock lobster, the other commodity that is popular among poachers and crime syndicates, are slow-growing, long-living crustaceans, making them susceptible to overfishing (<http://wwfsassi.co.za/fish-detail/119/>). The WWF estimates that the resource has declined dramatically over the last 50 years as a result of overfishing to the point where it is approximately only 1.9% of its original, pre-fished stock size (WWF, 2018).

Organised criminals don’t necessarily have to be foreigners - South Africans are equally capable to fulfil this role. Arnold Bengis, for example, was described as “[t]he man who destroyed the West Coast rock lobster” (Nombembe and Hyman, 2017). His company, Hout Bay Fishing Industries (Pty) Ltd, conducted fishing operations in South African waters for about four decades before ceasing operations in 2002 (*Bengis and Others v Government of South Africa and Others*). According to facts subsequently admitted in a South African plea bargain, the South African lobster industry was virtually paralysed in 1986 by punitive anti-apartheid sanctions imposed by the United States, but Hout Bay Fishing was able to circumvent these sanctions. However, enhanced regulation in the fishing industry in the 1990s and the drastic reduction of the company’s quotas resulted in the company no longer being financially stable by 1999. It started to harvest fish in excess of its quotas and to buy illegally harvested fish from other catchers in violation of the Marine Living Resources Act 18 of 1998. The illegally harvested fish was exported to the United States, the Far East and Europe. In *US v Bengis* an American court ordered Bengis to pay South Africa \$37 million (approximately R521 million) for illegally harvesting tonnes of rock lobster. However, it is reported that in October 2018 the US court reduced the amount to \$7.1 million as the US government could not access Bengis’ funds (www.law360.com/articles/1088845/ailing-lobster-thief-settles-37m-fight-with-feds-for-7m). This ruling made South Africa the first foreign country to receive compensation under an old US law (https://sherloc.unodc.org/cld/case-law-doc/wildlifecrimetype/usa/2011/us_v_bengis_and_others.html), the Lacey Act of 1900. (In brief, this Act provides that if any commodity is harvested illegally in a country and imported into the USA, even if such harvesting is not a crime in the USA, it can be prosecuted under this Act.

The growth of the illegal fishery industry

The main causes of the rise of the illegal fishery and associated criminal activities have been identified as:

- A significant increase in demand for South African abalone in the Far East (Raemaekers and Britz, 2009);
 - the substantial increase in the abalone price in the 1990s that triggered an abalone fishing “gold-rush”;
 - the failure of post-apartheid marine living resource reforms to accommodate many customary fishers, forcing them to operate illegally. The previously “informal” traditional fishery evolved to become a highly organised illegal fishery assisted by international syndicates exporting the product illicitly (Raemaekers and Britz, 2009);
 - the weakening of the Rand against the US dollar makes the export price of abalone attractive;
 - weak control systems allowed the free flow of illegal products across borders;
 - the low risk of detection and weak deterrence due to low penalties, as well as poor conviction rates (Snijman, 2005); and
 - corruption (Bengis case).
- In 2015, Sundström interviewed senior fisheries officials on the prevalence of corruption within the ranks of FCOs and it was cited that “respondents give a uniform image of the almost endemic state of bribery”.

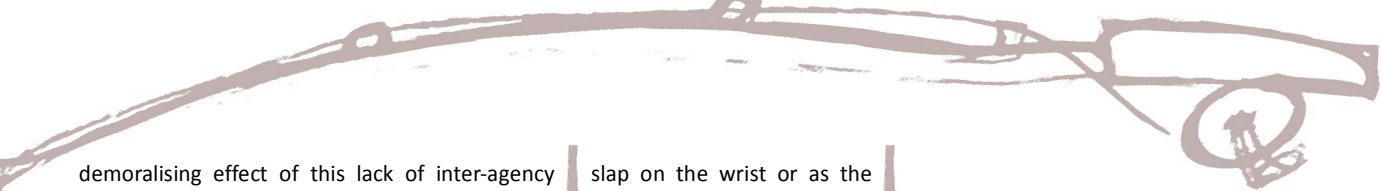
The principal tool to address the pillaging of marine living resources is the Marine Living Resources Act 18 of 1998 (the MLRA), which gives the Minister the power to appoint Fishery Control Officers (FCOs). Their powers are defined in section 51 of the MLRA. These FCOs can enter, search and seize the property of “any vessel” with a warrant, and they are granted extensive powers that they are able to exercise without having to obtain a warrant from the courts. This includes the power to stop vessels, muster the crew, require the master to produce a licence and records of fish caught, and escort a vessel to port for the purposes of investigating. They are also permitted powers of search and seizure for any vessel they reasonably suspect is committing illegal fishing activity in terms of the Act.

Truth of the matter is that although FCOs are granted extensive powers as far as vessels are concerned, the operational ability to exercise those powers is very limited as the Department of Agriculture, Forestry and Fisheries (DAFF) is extremely under-resourced as far as ocean-going vessels are concerned.

The existing legislative framework is insufficient to effectively combat fisheries crimes. This has several knock-on effects such as that the failure of DAFF to secure compliance and the tensions with the communities in which FCOs operate has resulted in the entrenchment of poaching syndicates in these areas, leading to increased gangsterism. Furthermore, the failure to ensure compliance has been shown to have a negative effect on the delicate ecosystems that exist in South Africa’s coastal waters (Pariona, 2017). These knock-on effects would result in damage to other species, which would in turn cause further difficulties to the local communities who rely upon the sea for livelihood and sustenance.

Another knock-on effect is that the powers of FCOs are weak, and that they are reliant upon the support of SAPS in the fulfilment of their duties. While FCOs are able to enter vessels and premises, search and seize property, any confiscated evidence needs to be handed to the police as soon as possible. FCOs are also restricted in other respects, for example the question of whether FCOs are able to apply for a search warrant in terms of the Criminal Procedure Act 51 of 1977 is still unclear (Snijman and Van As, 2018). This demonstrates that FCOs are dependent upon the SAPS to properly exercise their law enforcement function. This is exacerbated by the fact that crimes relating to marine living resources are not priority crimes.

FCOs also have no powers to investigate which in practice means that they apprehend suspects, complete statements and hand the case over to the SAPS. In most instances, they have no idea of how, or even if cases are progressing. The



demoralising effect of this lack of inter-agency cooperation is well-documented such as in correspondence between FCOs, DAFF officials and FishFORCE. Another factor is the proliferation of law enforcement agencies attempting to address abalone poaching. In the south-western Cape, these include the SAPS, DAFF, Cape Nature, SANParks, the Overstrand Municipality Law Enforcement Unit as well as the City of Cape Town with its marine units in the Metro Police as well as its Law Enforcement Department. These units often don't collaborate, don't liaise and don't have common objectives as has been made clear during interviews with members of various units (Van As, 2018). An official employed by the City of Cape Town said: "We chase numbers. CIVOC wants numbers. They are not interested in quality." (CIVOC refers to the Civilian Oversight Committee established in terms of section 64 of the South African Police Service Act 68 of 1995.)

Declining stock - less crime?

It might be tempting to consider whether these entrenched organised crime networks will collapse if the available stock of abalone and rock lobster declines, but it seems not to be the case. These syndicates will find other commodities, which is evident from a consignment of live mangrove or mud crabs (*Scylla serrata*) which was confiscated en route from George to Johannesburg. This species may not be sold, and it has an illegal value of R480/kg. In an attempt to quantify the extent of illegal harvesting, a fisheries scientist working at DAFF indicated that approximately 25 000 crabs are leaving KwaZulu-Natal per annum, mostly through neighbouring countries. The packaging, the routes and the information available at this stage clearly point towards organised crime.

South Africa needs to address this problem urgently together with its National Prosecuting Authority as these criminal networks act with increasing impunity. The reasons for the failure or ineffectual nature of prosecutions for fisheries-related crimes must be established. The question is whether the problem lies with the prosecution itself, the lack of proper evidence collected or even inadequate legislation. The penalties for illegal possession of fish and seafood species and the operating of storing facilities and fish processing facilities are hopelessly inadequate. Criminals are not discouraged from participating in these activities as they consider the penalties meted out as a

slap on the wrist or as the cost of doing business. One example happened in February 2019, where a father and his two sons received "hefty" fines and suspended sentences in the Western Cape High Court for abalone poaching, money laundering and racketeering (Seleka, 2019). The accused were linked to a syndicate that operated illegal abalone facilities. They entered into a plea and sentencing agreement with the State and the court sentenced each of them to five years' incarceration, wholly suspended for five years on stringent conditions, as well as a R50 000 fine each. Compare this to a case where a Port Elizabeth abalone syndicate poacher was sentenced to 20 years' incarceration by the High Court sitting in Port Elizabeth. The syndicate generated a total of R30 million from their criminal activities, described by Chetty J as "the widespread plunder of abalone from our coastal waters" (*S v Blignault* ECLD Case no CC20/2018.)

The inadequacy of penalties, resulting from the classification of offences, is further illustrated by a recent case in which two Taiwanese men were kept in custody following a long bail application where they were arrested for possession of abalone with an estimated value of R9 million as well as R120 000's worth of cannabis, on a farm. The possession of the cannabis was the determining factor because despite its relatively low value, this is a Schedule 5 offence where

bail is not as easily granted. The determination of crimes into schedules is done in terms of the Criminal Procedure Act 51 of 1977. Depending on the schedule under which the offence is grouped, bail may be granted which often means the end of a case as arrested foreign nationals simply leave the country. It is important that the legislature realises that the value of the abalone should play a role in determining factors relating to the schedule applicable for bail purposes similar to what is done with drugs as drugs to the value of more than R50 000 falls within Schedule 5 of the CPA.

The time to act is now

It is time that the authorities pay more attention to this scourge. **What is considered to be instances of poaching are criminal acts that are linked to serious, organised crime, such as human and drug trafficking, the smuggling of contraband such as fake products, cigarettes and firearms, tax evasion, money laundering and a host of other activities.** A recent study by RUSI (2017) clearly indicates the threat that these activities pose to national security.

Nelson Mandela University's Centre for Law in Action, together with the Norwegian Ministry of Foreign Affairs and Operation Phakisa partnered to address this problem. The Norwegian government has agreed to fund an academy called FishFORCE at the University and an amount of approximately R40 million was allocated to the Academy. FishFORCE's main purpose is to combat sea fisheries crime and related criminal activities through the provision of training to law enforcement agencies in South Africa, east African countries, Namibia and the small Indian Ocean States. FishFORCE conducts research and provides post-training support with the aim to enhance intelligence-led investigations and increase successful prosecutions of criminals engaged in fisheries crime. A large part of its work includes advocacy, nationally and also globally. It also enables law enforcement officers to obtain formal qualifications, with access to further academic qualifications. It is hoped that the work conducted by FishFORCE will not only provide an answer to many of the questions and issues raised in this article, but also be at the forefront of the fight to strengthen South Africa's protection of its marine living resources.

Editor's notes

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