



AFRICAN UNION
**INTERAFRICAN BUREAU
FOR ANIMAL RESOURCES**

FISHERIES ENFORCEMENT - A MANUAL ON BASIC ELEMENTS OF THE PROSECUTION AND COURT PROCESS



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FOREWORD

The African Large Marine Ecosystems (LMEs) generate some of the world's most productive fishing grounds and contain significant marine biodiversity. The continent is also endowed with massive lakes and rivers, many of which are transboundary. Current total fishery production from capture fisheries is estimated at about 8.6 million metric tonnes constituting about 84 % of total African fish production and approximately 9 % of global capture fish production.

However, it is sadly the case that these current benefits are under threat due to a variety of reasons, principally illegal fishing practices resulting in overfishing and stock depletion. Africa's LMEs and inland freshwater bodies are experiencing the cumulative effects of growing populations, over-fishing (particularly Illegal, Unreported and Unregulated (IUU) fishing), pollution and degradation of key habitats, climate change impacts as well as inadequate governance of the sector. It is estimated at 4.7 million tonnes total catch due to IUU with the socio-economic value of lost fishing opportunities due to IUU estimated to be at least US\$10 billion per year.

AU member states have serious challenges in putting in place mechanisms for effective monitoring, control and surveillance (MCS) systems that would act as deterrence for IUU fishing. Even where the capacity exist to mount effective patrols and effect arrest for infractions, the success rates for prosecution in court of alleged offenders are far from satisfactory. The primary reason is the paucity of knowledge on essential elements and procedures for enforcement of laws, regulations and prosecution of cases in ocean governance in general and fisheries management in particular. Enforcement procedures, identification of fisheries crimes, technique for gathering and presenting evidence for prosecution and court process are integral components that underpin effective MCS systems. Prosecution therefore plays a key role in ensuring that any criminal proceedings pertaining to alleged cases of illegal actions are successful. The threat to sustainable fisheries and fish resource perpetuity would not subside if the possibility for failed prosecution of offenders exists due to knowledge and capacity gap in the legal process for fisheries crimes.

The manual has therefore been developed against backdrop of weak legal process to combat IUU fishing on the continent.

The manual has thus been developed with the cardinal purpose of strengthening capacity of personnel from the Ministries/Departments in charge of fisheries, the Judiciary Departments, the Navy, Immigration and Customs Departments and other agencies that may be involved in enforcing fisheries laws and prosecuting case in the member states of African Union. The manual is also intended to be of valuable use to regional fisheries institutions since fish crimes are invariably always almost transboundary. The manual targets both the Senior Personnel as well as the 'Enforcers' who are the boarding and inspection officers in the frontline of enforcement and hence evidence 'gatherers'.

Professor Ahmed El-sawalhy
Director AU-IBAR/Head of Mission

THE PURPOSE OF THE MANUAL

Enforcement is the act of demanding observance of or compliance with a law, rule, or obligation. Fisheries enforcement is a specialised type of enforcement that aims to ensure the correct application of regulations regarding fisheries and to impose compliance with these rules where necessary. Enforcement activities are designed to respond to non-compliance and include:

- Formal inspections to verify compliance using overt and covert means;
- Investigation of suspected breaches of the law;
- Measures to enforce compliance without resorting to formal court action (for example, warning letters, directions, notices, penalty notices, Ministerial orders or a combination of these);
- The use of maximum sanctions as effective deterrents such as the seizure of fish, fishing gear, boats, trailers and vehicles; and
- Withdrawal of access to a fishery through the suspension or cancellation of licences.

Prosecutors play a key role in ensuring that any criminal proceedings pertaining to alleged cases of illegal actions are successful. However, before credible prosecutions can be undertaken, a system for monitoring, control and surveillance over the fisheries must be in place.

As defined by the UN Food and Agricultural Organisation (FAO) and as implemented by fisheries agencies and departments all over the world, Monitoring, Control and Surveillance (MCS) is a three-part process:

Monitoring includes the collection, measurement and analysis of fishing activity including, but not limited to: catch, species composition, fishing effort, by-catch, discards, areas of operation, etc. This information is primary data that fisheries managers use to arrive at management decisions. If this information is unavailable, inaccurate or incomplete, managers will face handicaps when developing and implementing management measures;

Control involves the specification of the terms and conditions under which resources can be harvested. These specifications are normally contained in national fisheries legislation and other arrangements that might be nationally, sub-regionally, or regionally agreed. The legislation provides the basis for which fisheries management arrangements, via MCS, are implemented. For maximum effect, framework legislation should clearly state the management measures being implemented and define the requirements and prohibitions that will be enforced; and

Surveillance involves the regulation and supervision of fishing activity to ensure that national legislation and terms, conditions of access and management measures are observed. This activity is critical to ensuring that resources are not over-exploited, poaching is minimised and management arrangements are implemented.

This Manual is a contribution to achieving these objectives. It is one of a set of two Manuals intended to provide guidance on the following issues:

1. Successful monitoring, surveillance and control – Manual 1; and
2. Successful prosecutions based on sound gathering of evidence and a properly conducted trial process – Manual 2 (this Manual).

Data and information to support Monitoring Control and Surveillance

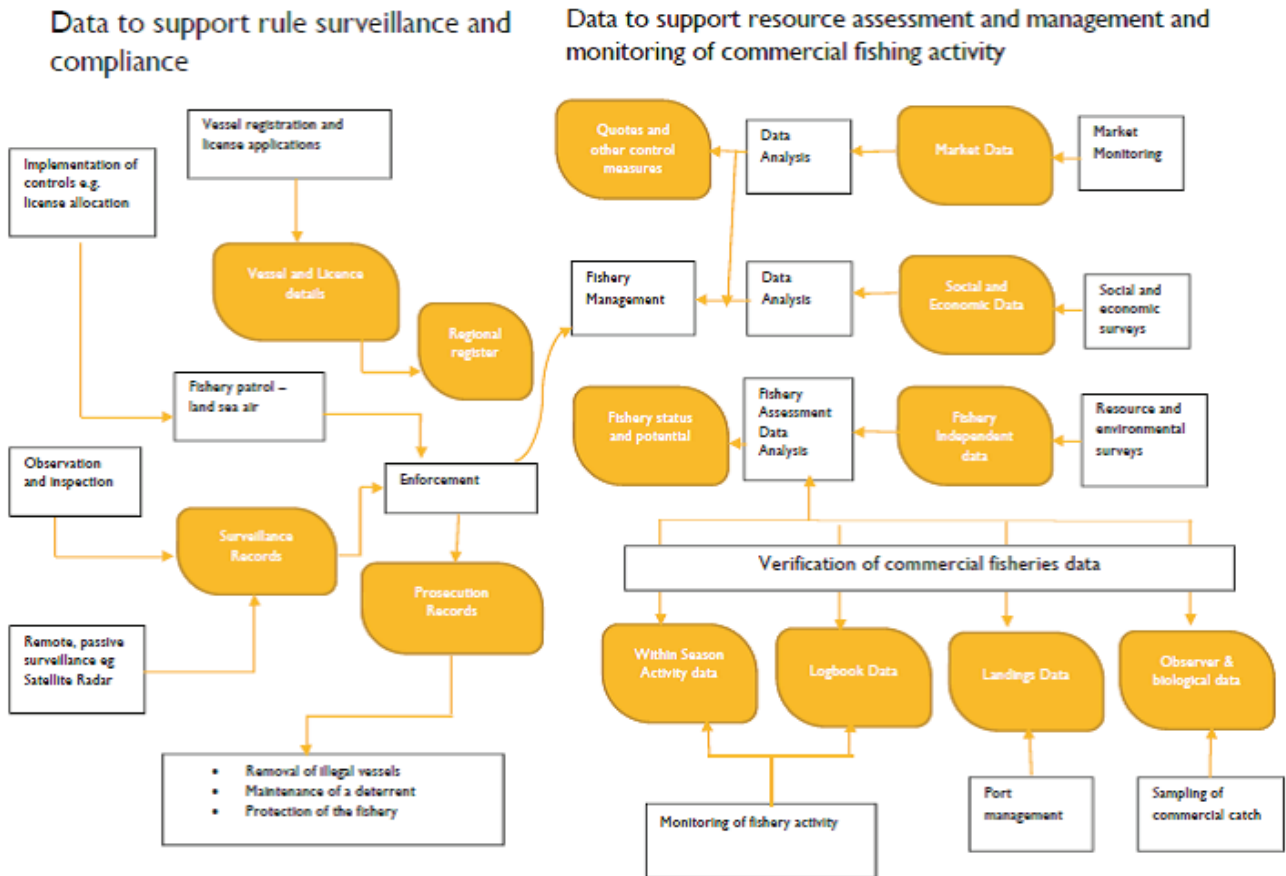


Figure 1: An overview of monitoring, control and surveillance

SECTION 1: THE ROLE OF PROSECUTION IN THE FISHERIES ENFORCEMENT PROCESS

1.1. THE RELATIONSHIP BETWEEN PROSECUTION AND THE FISHERIES MCS PROCESS

One of the most onerous yet important tasks for fisheries officers and administrators is to prepare for the prosecution of those who contravene fisheries laws. It is essential that cases are prepared properly, with strict adherence to the criminal procedures and rules applicable in the State concerned. Even if a decision is made not to prosecute, other forms of sanction (such as some administrative penalties) may require – as a matter of law and/or policy – that cases are prepared and considered by the same strict standards as those contained in the criminal procedures and rules. The prosecutor will need to be familiar with all stages of the MCS operation.

1.2. APPROACHES TO PROSECUTION

International standards and good practice emphasize the importance of prosecutors who play a leading role in the initiation and pursuing of prosecution, conducting, directly or through investigators and overseeing co-operation and exchange of information on specific cases. The prosecutor has the power to enter the premises of public authorities, citizens' associations, enterprises, institutions and organisations and to obtain full access to their documents. The prosecutor can request that decisions, instructions, orders and other acts and documents be produced for verification. Given the comprehensive nature of the power to supervise the observance of laws, these powers are very far-reaching indeed.

There are two types of prosecution approaches within various legal systems around the world. First is the discretionary prosecution approach whereby the prosecutor has the discretion to decide whether or not to pursue the prosecution of a specific offence. This approach is often used in common-law countries. Second is the mandatory prosecution approach, whereby criminal proceedings must be started in all cases when there is sufficient information to conclude that an offence has been committed. This approach is found in civil-law countries. Both systems have certain advantages and disadvantages.

The main advantage of the discretionary system is that it allows the prosecutors to focus their resources on the most important cases and thus to use the criminal justice system efficiently without inundating it with minor cases. However, if left without proper regulation this can create the impression of arbitrariness in prosecution policy and leave room for abuse by prosecutors. The main advantage of the mandatory prosecution approach is the equal application of criminal law which prevents any form of favouritism, as well as shielding prosecution from undue outside pressure. However, this system may burden the criminal justice system with too many cases, cause delays and lead to wasted resources.

International standards on the role of prosecutors state that prosecutors must enjoy such independence or autonomy as is necessary for the exercise of their duties. In particular, they should be able to act without unjustified interference from any other authority.

In addition to the independence of the prosecutorial service as a whole, the independence of individual prosecutors should also be ensured; prosecutors should be enabled to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

1.3 BASIC OR STRAIGHTFORWARD PROSECUTION FOR SIMPLE FISHERIES OR IUU OFFENCES

Most fisheries prosecutions do not involve complex activities by offenders. The offences that need to be dealt with are usually of the types set out below where the offender:

- Does not hold a valid fishing licence;
- Does not provide or record catch data;
- Fishes in a closed area;
- Fishes for unauthorised species;
- Uses prohibited or non-compliant fishing gear;
- Falsifies or conceals his/her identity;
- Falsifies or conceals evidence relating to an investigation; and/or
- Obstructs the work of inspectors or observers.

There is seldom any type of link with other criminal activity or with a larger and/or more complex criminal operation.

1.4 COMPLEX FISHERIES OFFENCES AND PROSECUTIONS – ENVIRONMENTAL AND WILDLIFE CRIME

A new type of fisheries crime or offence situation has however since emerged according to which fishing vessels, fishing companies, vessel owners and vessel crews are increasingly engaged in complex on-going activity to make large illegal profits (see Figure 2).



Figure 2: Understanding Environmental and Wildlife Crime as conceptualised by the United Nations

These types of complex operations typically involve activity in more than one country and across many borders. Activities undertaken often include: deliberate avoidance of surveillance; flag-hopping/name changing; frequent changes of vessel and company ownership; abuse of vessel registers; abuse of licences; forged documents; customs fraud; corruption; insurance fraud; and fraudulent use of company law and

accountancy and tax regulations. All these activities are backed by support from sophisticated computer systems and technicians, including accountants, lawyers and registered offshore companies.

A related trend is one in which fishing activities, vessels, companies, crews or owners are associated with other types of crime in addition to fishing crimes.

The remainder of this section of the Manual explains these types of complex situation, operation or arrangement. In these situations fisheries officials, departments, prosecutors and other actors in the fisheries sector will have to ask for assistance from other agencies, stakeholders or actors. Where the situation is complicated, it may even be necessary to request assistance from INTERPOL. All the aspects of prosecution, including evidence gathering, that are described in this Manual are still relevant. However, response to this type of activity is often undertaken by specialised and highly trained task forces supported by INTERPOL and other international organisations. Fisheries departments play a role, but they are only part of a much larger picture.

1.5 COMPLEX OFFENCES INVOLVING PEOPLE SMUGGLING

People smuggling is a low-risk, high-profit business that can occur by air, sea or land, often by complex routes which change rapidly and frequently. People smugglers procure, usually for financial or material gain, the illegal entry of an individual into a country of which he/she is neither a citizen nor a permanent resident. Generally speaking, individuals work with a smuggler voluntarily and once payment is completed, the relationship between the illegal immigrant and the smuggler ends. Thousands of illegal immigrants die each year in transit to their destinations. Fishing vessels are central to people smuggling in all parts of the world. Enforcement activities to catch fisheries offenders now have to factor in the possibility that they will come across situations involving people smuggling.

1.6 COMPLEX OFFENCES INVOLVING HUMAN TRAFFICKING AND SLAVERY

Human trafficking is a modern-day form of slavery involving the illegal trade of people for exploitation or commercial gain. Every year, millions of men, women and children are trafficked in countries around the world, including the United States. It is estimated that human trafficking generates many billions of dollars of profit per year, second only to drug trafficking as the most profitable form of transnational crime.

Human trafficking is a hidden crime as victims rarely come forward to seek help because of language barriers, fear of the traffickers and/or fear of law enforcement.

Traffickers use force, fraud or coercion to lure their victims and force them into labour or commercial sexual exploitation. They look for people who are susceptible for a variety of reasons, including psychological or emotional vulnerability, economic hardship, lack of a social safety net, or wider contextual conditions such as natural disasters or political instability. The trauma caused by traffickers can be so great that many victims may not identify as such or ask for help, even in highly public settings.

There is now a clear international tendency for fishing crews and fishers to be trafficked and held in conditions of bondage and semi-slavery.

1.7 COMPLEX OFFENCES INVOLVING PIRACY

The term “piracy” covers two distinct types of violent offences: the first is robbery or hijacking, where the purpose of the attack is to steal a maritime vessel or its cargo; the second is kidnapping, where the vessel and crew are threatened until a ransom is paid. Piracy is transnational by nature because a ship is

considered the sovereign territory of the nation whose flag she flies. It is an organised crime because considerable planning and some specialised expertise is required to commandeer a ship at sea. Again, there is a straightforward relationship between fisheries activity, fisheries crime and piracy. Fishing vessels are often used by pirates as operational vessels, as hide-outs or as a means of tricking other vessels and taking them over.

1.8 COMPLEX OFFENCES INVOLVING THE SMUGGLING OF GOODS (DRUGS, GUNS, OTHER ITEMS)

Another dimension is the use of fishing vessels to smuggle goods, particularly arms and drugs. This is either in support of criminal gangs or as part of military operations by rebels, insurgents or terrorists. Again this type of activity is best policed by the armed forces, police or security agencies. Their international dimension means that organisations such as INTERPOL are often involved in the enforcement and prosecution process.

1.9 TRANSNATIONAL CRIME AND FISHERIES CRIME

In summary, all of the above types of crime that have now become linked with the fisheries sector are transnational crimes. Transnational crimes can be: i) crimes that have actual or potential effect across national borders; and ii) crimes which are intra-State but which offend the fundamental values of the international community. The word “transnational” describes crimes that are not only international (that is, crimes that cross borders between countries) but also (by their nature) involve cross-border transference as an essential part of the criminal activity. Transnational crimes also include crimes that take place in one country, but whose consequences significantly affect another country as well as transit countries (where these are involved).

Examples of transnational crime include: human trafficking, people smuggling, smuggling/trafficking of goods (such as arms, drugs and/or illegal animal and plant products and other goods prohibited on environmental grounds (e.g. banned ozone-depleting substances)), sexual slavery, terrorism offences, torture and apartheid. Transnational organised crime (TOC) refers specifically to transnational crime carried out by organised criminal groups.

SECTION 2: PROVIDING SUPPORT FOR PROSECUTION – EVIDENCE AND THE USE OF EXPERTS

2.1 INTRODUCTION

Enforcement agencies, including inspection teams, should always prepare to conduct and document their investigations thoroughly, for the simple reason that cases often end up in a court of law. By preparing adequately, they enhance the probability that their court cases will be successful. Enforcement agencies must understand what is required to establish credible evidence in a court of law and to apply that knowledge at the earliest opportunity while conducting their investigations. Indeed, enforcement personnel – such as inspectors – should be of the mindset that every inspection will go to court. They should anticipate arguments for the defence and provide solid evidence against such arguments before they are presented in court.

2.2 WHAT IS EVIDENCE?

Generally, evidence is “any information or proof that clarifies or helps establish the truth”. Evidence is the means by which facts are proven. Legally, evidence may be defined as “any type of proof that is presented legally at a trial for the purpose of inducing belief in the minds of the court”. Therefore, evidence is any fact, item or document that satisfies the “rules of evidence” for admissibility in a court of law. The “rules of evidence” are rules of law concerned with the proof of fact in a court and are designed to determine who is to prove the facts, what facts must be proven, what facts could prejudice the minds of the Court and must thus be withheld (e.g. details of previous convictions) and how the proof is to be used.

Admissible evidence

Three kinds of evidence are recognised by law. These are:

- **Oral evidence:** This is given by a witness under oath or affirmation with the objective of informing the court of the facts as the witness saw or heard them. However, a person unconnected with the actual incident, such as a fisheries scientist (who has specialised knowledge about technical aspects of the case with which an ordinary member of the public would not be familiar) can be called as an “expert witness” and is entitled, and bound, to give his/her opinions on the matter under consideration;
- **Documentary evidence:** Documentation is anything that provides verifiable information that can be used to establish, certify, prove, substantiate or support an assertion or allegation. Photographs, notes, reports, statements, samples, diagrams, models, and records are all examples of documentation. Documents can be either “public” (such as statutes, registers, maps etc.) or “private” (i.e. documents made for a private purpose such as letters, receipts, statements, tape recordings etc.). All private documents must be shown to be genuine or “proven” and an original copy is usually required; and
- **Real evidence:** This is provided by the production of objects of importance to the case, e.g. fishing net, mesh of unauthorised size, the fish itself or, in certain circumstances, an inspection of the scene of the offence by the court.

Inadmissible evidence

Certain kinds of information are inadmissible in a court and when giving evidence or preparing a statement to be used in court proceedings, care must be taken not to include the following:

- **Hearsay:** This is anything said relating to the offence that was outside the hearing of the defendant, e.g. “XYZ told me that ABC had been fishing without a licence”. However, the statement “Acting on information received” would not constitute hearsay;
- **Prejudicial matters:** This refers to anything not related to the offence which could prejudice or influence the verdict reached by the court, e.g. details of a person’s previous activities or convictions

(unless the accused agrees to its disclosure). Information about a person's previous convictions may, in certain circumstances, be given to the court after they have been found guilty and where they are present in court or have been served with a notice of intention to cite previous convictions if they are found guilty; and

- **Opinion:** A witness cannot give evidence based on what they think or surmise to have happened; this is deemed to be an opinion. However, an “expert” is allowed to give an opinion.

2.3 WHEN IS EVIDENCE ADMISSIBLE OR ACCEPTABLE?

Any kind of evidence will be admissible or acceptable as long as it aids in understanding the truth of the matter in question. Before documentation is “entered into evidence” for use in deciding a fact, it must be verifiable and satisfy the “rules of evidence” for admissibility:

- The three primary criteria that form the cornerstones of credible information are **foundation**, **authenticity** and **relevance**;
- These criteria should be thought of as links in a chain; failure to satisfy just one criterion means the entire chain will fail.

Let us examine the three criteria more closely.

Foundation

A foundation is “a basis on which something stands or is supported”. When giving evidence, it is important to establish that each piece of information leads to the next in a logical sequence (in other words, one piece of information builds on another).

- For example, “John Doe works at ACME Fishing Company. Mr Doe operates the outflow valves at the discharge pipe. On 3 March, Mr Doe was at his duty station when Joseph Smith, the plant manager, directed Mr Doe to discharge untreated fish waste into the storm drain. On 4 March the Environmental Protection Agency took a sample from the pipe and from the storm drain that subsequently indicated levels of offal that were higher than the permissible limits. Process information from the plant reveals that offal is a waste material commonly found in ACME untreated waste”;
- This related information is used as a foundation to show that ACME Dumping was responsible for illegally discharging this waste in a manner contrary to the established regulations.

Authenticity

Something is authentic if it is “worthy of acceptance or belief as conforming to or based on fact” or if it is “fully trustworthy as according with fact”. In our context, this means that the evidence must be demonstrated to be what it is claimed to be.

- For example, was the sample taken from the discharge pipe at ACME Dumping really representative of what was in the pipe? Was the sample analysis conducted with sufficient accuracy for the results to show the true concentrations of chromium in the discharge? Are the lab reports accurate?;
- If there is a perception that the information could have been compromised, then the information will not be accepted into evidence;
- Sampling, analysis of quality assurance efforts, and chain-of-custody procedures are examples of practices that demonstrate the authenticity of the information.

Relevance

Something is relevant if it provides “evidence tending to prove or disprove a matter at issue or under discussion”. Evidence must thus pertain to the fact in question, tending to make the existence of the fact either more or less probable than it would be without the evidence.

In gathering evidence, enforcement officials should therefore ask themselves: Will this documentation have anything to do with the case to be decided?

2.4 DISCHARGING THE BURDEN OF PROOF

As they gather evidence, enforcement officials should remember that they will be required to provide evidence that meets the threshold of proof (which may differ from case to case).

Thus the elements of proof in the case of a crime that requires a mental element will be different from those in the case of a crime that is a strict liability offence.

In the ACME Fishing Company example, the enforcement officials will try to prove that “ACME broke the law by discharging an illegal concentration of a regulated substance”. What elements of proof are required to establish this as a fact?

- That John Doe was told by Joe Smith to discharge the substance;
- That John Doe was in a position to do so;
- That the pollutant came from only one source, namely the ACME Fishing Company;
- That the substance was indeed a regulated substance; and
- That analysis of samples indicated that concentrations found in the storm drain were above the legal limits.

The total body of evidence should tell a story that reveals the whole truth being considered.

2.5 THE “BEST EVIDENCE” RULE

The rules of evidence require that the best evidence be presented to determine the facts of an issue. This means that evidence must be reliable, authentic and in its most original form.

- The “best evidence” rule prohibits the introduction of any secondary evidence (that is, a copy) unless it can be proven that the original document has been lost or destroyed. Thus a copy of a document is not as good as the original. A good copy is acceptable only if the original no longer exists;
- Before information is received into evidence, it must be **authenticated** with proof that shows that it is what it claims to be. For example, a sample must have proof that it came from a specified place and has not been altered either on purpose or by mistake; and
- A chain of custody must be established. This is the complete, unbroken record of all individuals who have maintained control over the evidence since its acquisition. Without a complete record of custody, it becomes impossible to prove that the evidence has not been compromised (and thus to prove its authenticity). For example, the evidence could have been altered or changed between the time it was collected and the time it is presented in court.

2.6 TYPES OF EVIDENCE

There are two classes of evidence:

Direct evidence

This is evidence that establishes a fact without inference or presumption. It may involve a witness or take the form of a photograph, signed statement, film or record.

Circumstantial evidence

This is evidence that proves a fact indirectly by proving another fact from which an inference or presumption may be drawn.

These two classes of evidence may take several forms:

Real evidence

This consists of tangible objects that can be seen or felt. It may be documentary, physical, or scientific.

- **Documentary evidence:** This is written material that “speaks for itself”, such as inspectors’ or investigators’ field notes, observers’ logbooks, documents from the company (such as messages, letters, accounting ledgers, computer printouts or files, and manuals), inspection reports and/or sample results;
- **Physical evidence:** This consists of something tangible that was part of, or related to an actual event (such as a sample of contaminated water); and
- **Scientific evidence:** Scientific evidence consists of an analysis based on known and established methods, materials and means of measurement. The following must be considered:
 - » Authentication is required to establish the precision and accuracy of the analysis; and
 - » Quality assurance (QA) and quality control (QC) are critical requirements.

Testimonial evidence

This consists of information supplied by witnesses.

- A witness may testify to the limit of his/her five senses (I saw, I heard, I smelt, I touched, I tasted something) and competency. An oath or affirmation is required;
- The validity or value of the testimony depends on the truthfulness of the person talking, his/her expertise and believability;
- There are two types of witnesses:
 - » **Lay or fact witnesses:** These are allowed to testify only to experiences detected through their five senses. Opinions are allowed only under very limited circumstances; and
 - » **Expert witnesses:** These are used where the average person would not be able to make a reasonable judgment based on the facts or data presented.
- In general, fisheries crime involves highly complex or technical issues where professional standards and credentials are required.
- Inspectors will usually be called as fact witnesses, unless they have professional credentials in disciplines such as engineering or chemistry;
- Caution should be taken if an agency wishes to establish an inspector as an expert witness (since this places unnecessary emphasis on the inspector’s category of professional competency rather than the credibility of the evidence brought to the court by the inspector).

Demonstrative evidence

This includes diagrams, photographs, models, maps, flowcharts, representations or illustrations that are used to help prove a fact.

Demonstrative evidence is usually used to assist testimonial information and make it more understandable to the court.

It is always more difficult to prove a case by means of circumstantial evidence than by direct evidence as the defence will always come up with an innocent explanation of the circumstances relating to the evidence. A successful prosecution will depend upon all the evidence being shown to be clearly and directly related to the place and time of the offence.

2.7 SEARCHING FOR EVIDENCE

It is often necessary to conduct searches to obtain evidence.

In general, the law regulates how searches may be conducted and any evidence that has been obtained in violation of the requirements of law may be rejected by the court.

- Such legal requirements seek to protect the constitutional rights of those under investigation. If a search warrant is deemed necessary (for example a consensual search has been denied), then the criminal investigator should articulate the “probable cause” or likelihood that a crime has been committed (or is being committed) and that the location requested for the search contains evidence of the crime;
- The criminal investigator may articulate probable cause through evidence gathered from a variety of sources including witness interviews, surveillance of suspects and the use of informants, as well as the sampling of suspected discharges from the targeted facility;
- The criminal investigator should anticipate who will be physically present, what samples will be collected and what documents will be seized. If releases of regulated pollutants into the air, water or land are suspected and sample evidence is to be collected, a field team leader should be identified;
- The field team leader is responsible for ensuring that conditions are safe for workers, that the proper evidentiary samples are collected and that field activities and observations of on-site conditions are documented;
- Any field measurements must be performed according to accepted procedures and must be documented.

The field team leader should maintain contact with laboratory personnel to discuss sampling activities and ensure that: i) appropriate analytical techniques are available for use; and ii) the resources are available to complete the analyses within applicable holding times (that is, the established time limitations for sample analysis).

Laboratory personnel should be involved as early as possible in the planning process.

Preservation of evidence

Preservation of evidence is a critical step in the prosecution of any case. Challenges may be made to every step of the investigative process in an attempt to show that evidence was handled improperly.

- These steps include sampling, transportation, physical and chemical analysis, and sample storage;
- If care is not taken to properly preserve evidence and maintain the chain of custody in every step of the investigative process, then the evidence may be inadmissible at trial.

2.8 FISHERIES SECTOR EVIDENCE OR POTENTIAL COURT EXHIBITS

These are of many different types. The Authorised Officer must ensure that all evidence to be exhibited during the court process has in fact been collected. (It is very embarrassing to ask a court for an adjournment so an exhibit can be found.) The exhibits must be clearly labelled, protected and preserved in the most appropriate manner.

Neither is evidence ever static. For example there may be:

- **Charts:** rubbed-out lines or faint marks around the area in question, such as an exclusive economic zone (EEZ) or closed area;
- **Freezer logs:** fluctuations in freezer temperatures at times of alleged fishing;
- **Logs:** twelve-hourly positions that are inconsistent with the master version of events; distances that could not possibly have been covered in the time stated. Is the log a dummy? Are entries consistent with other logs and charts?
- **Photographs:** these may show different stowage of gear on boarding from when the vessel arrived at port;
- **Vessel markings:** these may be covered, or rubbed off; and/or

- **Fishing positions:** adjustment of fishing position readings on global positioning systems (GPS).

The following is a list of the types of observation which may be used as evidence of recent fishing, all of which must be properly documented:

On Sighting Vessel

- *Hasty departure:* sudden increase in speed, clouds of engine exhaust, bow wave, anchor being quickly hauled in, and location of vessels;
- *In the water:* dead fish, offal, seabirds picking at objects, muddy water drawn up from bottom (shallow water), sharks taking rubbish;
- *Gear:* buoys, flags nearby, wires, ropes dangling over side, small boats at the reef/by the vessel/ being hauled in, divers;
- Crew reaction to the presence of Authorised Officers;
- Any change in vessel and/or crew behaviour during approach by the surveillance vessel/team.

On Boarding Vessel

- Bloody water and offal running from scuppers and/or on decks;
- Noise of engine being started;
- Crew hastily stowing gear, bringing in anchor, pushing objects out of sight, looking generally agitated, freshly cut or scratched, wet or as though they have been diving;
- Gear wet and/or not stored or secured, wires still attached to gear, winches not disconnected, diving gear lying about or in small boats;
- Fresh fish lying about on the deck or elsewhere.

On Inspection of Vessel

- *Wheelhouse:* entries in logs, marks on charts, possible dummy logs or charts. Are the instruments (radar setting, SATNAV reading, echo sounder, GPS, etc.) working?
- *Freezers:* fresh, half-frozen fish, colour of eyes and gills. Temperature temporarily higher than usual, temperature records showing rises and falls, machinery working, no signs of breakdown/repair;
- *Engine room:* is the main/auxiliary engine hot or cold? Test-run, are there any signs of malfunction or recent repair? Is the refrigeration machinery working? Check the log for variations in temperature, check fuel soundings;
- Logbooks and charts should be signed by two or more persons (members of the boarding crew including the captain) after the captain has given positions and made entries;
- Presence of explosives or noxious substances.

On Passage and Entry to Port

- Engine functioned well on passage to port;
- Freezers operated normally;
- Master had no difficulty navigating and instruments worked;
- Gear tidied up by crew on passage (e.g. photograph of state of gear when first boarded).

Some exhibits require special care or procedures, e.g.:

- Photographs: the person who took them must produce them; have the untouched negatives been retained in the event that a conventional camera has been used?
- Fish and other perishables: can these be kept as exhibits and do they need to be? Note any statutory power to sell and retain proceeds of sale, or dispose thereof if unsaleable;

- Radio buoys (beepers): these can be damaged if dropped or knocked, and are expensive;
- Fishing gear: nets, spear-guns, lines, tanks, etc.

2.9 THE USE OF EXPERTS

Experts

- An expert is a person with special skill, technical knowledge or professional qualifications whose opinion on any matter within his/her cognisance is admitted in evidence, contrary to the general rule that mere opinions are irrelevant. It is for the court to decide whether a witness is so qualified as to be considered an expert;
- Experts can be valuable, especially when they understand and communicate the interplay between legal requirements, science and technology, and the crime allegedly committed. Experts should not only understand their own field, but should also be able to explain their opinions clearly and openly to other team members, the prosecutor and the court without bias or condescension;
- Experts are expensive. An expert witness' primary duty is to the court, not the "client", and they must give an open and objective assessment. However, any case involving technical matters will at least require the assistance of an expert and possibly his/her evidence;
- As such, the first question to ask is "Might the advice of an expert assist the prosecution's case?" If the answer is "yes" then it should be ensured that the correct expert is engaged; it is not a good idea to send a navigation expert into a freezer. He/she should also be well briefed on the matters on which his/her opinion will be needed, although general comments will also be useful. Expert evidence can often be used to rebut defences put forward by vessel masters and other potential defendants;
- The decision to engage an expert can be made at a number of different times. The next section lists some of the types of expert that might be involved in a fishing case, when they might be engaged and for what purpose.

Types of experts that will often be needed

- **Expert in Fishing Methods:** to inspect the seized vessel immediately upon arrival at port; to report on the type and status of the gear and on how it is normally stowed; to detail evidence of recent use; to explain the general method of use of the gear to the prosecutor; to state if the gear on inspection in port is placed differently to that which appears in photographs taken or observations made immediately after boarding; and to explain to a court in detail the method of fishing involved;
- **Expert in Fish:** to inspect the seized vessel as soon as possible and comment on the state (and in particular the freshness) of all fish on board; to identify the species of fish aboard and total weights; and to give opinions on the factors affecting and rate of spoilage of fish in different circumstances;
- **Engineer:** to inspect and report on the vessel's engines, and particularly to report any evidence of a recent breakdown and/or repairs to the vessel's engines, winches, etc.;
- **Freezer Engineer:** to inspect and report on the freezing gear, and particularly to report any evidence of a recent breakdown and/or repairs;
- **Navigation Expert:** to give evidence of how the position of the apprehended vessel was fixed (if he/she was aboard the patrol vessel) and to relate the readings of the machines involved, what checks were made thereon, how they work and possible percentage error;
- **Valuation Expert:** to give advice and if necessary evidence as to the value of a seized vessel for bonding purposes (this would avoid concerns which could arise when a vessel has been released on, e.g., a bond of \$100,000 but on "forfeiture" its real value turns out to be \$500,000); and the value of the fish aboard; and
- **Experts in the interpretation of VMS data, satellite imagery and remote sensing:** to give evidence of Vessel Monitoring System (VMS) data collection, satellite imagery and remote sensing.

SECTION 3: PROSECUTING THE CASE

3.1 INTRODUCTION

To effectively prosecute a criminal case, the Government must prove, beyond reasonable doubt, that an individual or a corporation violated a statute containing criminal sanctions. They may do so intentionally or knowingly or they may do so recklessly. They might also have committed the act but it is not necessary to prove intention, knowledge or recklessness.

Proving that fisheries offences have occurred can be difficult because of technical and legal complexities. It is even more difficult when the fisheries offence is linked with other types of crime.

3.2 DECIDING TO PROSECUTE

Under most criminal justice systems, prosecutors have wide latitude in determining when, whom, how and even whether to prosecute for apparent violations of the criminal law. The prosecutor has the power to:

1. Initiate or forgo prosecutions;
2. Select or recommend specific charges; and
3. Terminate prosecutions.

Note:

- Prosecutions should contribute to the fair, even-handed administration of the criminal law;
- The manner in which prosecutors exercise their decision-making authority has far-reaching implications in terms of both justice and effectiveness in law enforcement, and the consequences for individual citizens;
- A decision to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal law to a particular set of circumstances; and
- While serious violations of the criminal law should be prosecuted, prosecution entails profound consequences for the accused and the family of the accused, regardless of whether a conviction ultimately results.

Other prosecutorial decisions can be equally significant, such as decisions regarding the specific charges to be brought, or concerning plea dispositions.

In view of the seriousness of the power to prosecute, there is a need to:

- a. Ensure the fair and effective exercise of prosecutorial responsibility; and
- b. Promote confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case.

General factors to consider

A number of factors will typically be taken into account before a decision to prosecute is made. These factors include:

- The existence of prima facie evidence to warrant a prosecution;
- Culpability of the accused person;
- Attitude of the complainant;
- The health of an accused person;
- The humanitarian factor;
- The public interest;

- The nature and seriousness of the offence;
- The deterrent effect of the prosecution; and
- The jurisdiction of the court.

Existence of prima facie evidence

This is a very important factor. Once an investigation is complete, it is the duty of the prosecutor to weigh up all the evidence and subsequently to decide whether the evidence warrants a prosecution.

But what constitutes prima facie evidence?

- This is evidence upon which a court, properly directing itself according to law and evidence, is likely to convict in the absence of an explanation from the accused person.

Culpability of an accused person

Even where the prosecutor has sufficient evidence of guilt, it may be appropriate for him/her to consider the degree of the accused person's culpability in connection with the offence, both in the abstract and in comparison with any others involved in the commission of the offence.

- For example, if the accused person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that a course of action other than prosecution would be appropriate.

Attitude of the complainant

In minor offences, the attitude of the complainant (who is the victim of the crime committed) is taken into account in deciding whether a prosecution is warranted.

- This factor is seldom regarded as important, since crimes in law are deemed to be committed against the State, not the victims of the crimes in question.

Health of an accused person

A prosecution may not be initiated, or continued, where the accused person is suffering from poor health.

- In general, where the accused is suffering from mental illness, a prosecution can be mounted only after the accused has been certified fit to stand trial.

Humanitarian factor

The condition and circumstances of the accused, other than his/her health, may be taken into account.

- This is because it is a cardinal rule that a prosecution has to be fair and not oppressive;
- This factor should therefore be taken into account when deciding whether a prosecution is warranted.

Public interest

The prosecutor has to decide whether it is in the public interest to mount a prosecution.

- "Public interest" is notoriously difficult to define. Nevertheless, it expresses the idea that something is of great public or national concern;
- The question that the prosecutor needs to answer is: Will the prosecution promote or prejudice the public interest?;
- Ultimately, the decision to prosecute involves striking a balance between the competing forces of the public interest and compliance with the requirements of the law.

Nature and seriousness of the offence

How grave is the offence? The prosecutor should take into account the circumstances surrounding the commission of the offence:

- Limited public resources should not be wasted on prosecuting inconsequential cases or cases in which the violation is only technical;
- One relevant factor is the actual or potential impact of the offence on the community and on the victim.

Deterrent effect of prosecution

As we have learnt, deterrence of criminal conduct is one of the primary goals of the criminal law.

- This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offence that appears to be relatively minor;
- While some offences may not seem to be of great importance by themselves, they may have a substantial cumulative impact on society if they are committed repeatedly. It may thus be desirable to prosecute such offences.

Jurisdiction of court

Before a court proceeds to try an accused person, it must be shown that the court has the power to hear the case. In the context of fisheries offences and fisheries crime, this is likely to be an important factor when the case has an international dimension.

3.3 DRAFTING CHARGES

Once a decision to prosecute has been made, there are rules governing the conduct of prosecutions that must be complied with until the conclusion of the trial.

- These include the presentation of all the facts to the court;
- This process begins with ensuring that the accused person is charged with the correct offences.

What is a charge?

A charge is a written statement of complaint against an accused person in a court of law.

The purpose of the charge is to inform the accused person of the nature and particulars of the offence with which he/she is charged in order to enable him/her to prepare for his/her defence.

A charge consists of two parts: the statement of the offence; and the particulars of the offence.

1. **The statement of the offence** states the law and the particular sections of the law that have allegedly been breached;
2. **The particulars of the offence** contain the date and location of the alleged offence, the subject matter of the charge and the identities of both the complainant and the accused person.

Because crimes are deemed to be committed against the State, charges will be brought in the name of the state or republic, for example: Republic versus John Dory.

Factors to consider in drafting charges

- A charge must be in writing;
- It must be drafted in simple language, informing the accused of the offence with which he/she is charged;
- Where there is more than one offence, each offence must be set out separately (a “count”);
- A count which charges two separate offences is “bad for duplicity”; therefore, a conviction based on

it cannot stand;

- If there is doubt that the charge will be made out, the prosecution can seek one main charge and an alternative;
- A flawed charge can result in the case being dismissed by the court;
- The charge is issued in the name of a court of law. In many countries, the law permits the court to amend or replace the charge in the course of a trial, if the prosecutor makes an application. This may be done, for example, where the original charge is shown to be defective;
- However, the practice is that such an application should be made at the earliest opportunity before the close of the prosecution case, so as not to disadvantage or prejudice the accused person.

In addition, the prosecutor should charge the most serious offence that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.

The selection of charges may also be complicated because different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure the selection of the proper charge or charges.

3.4 NATURE OF THE TRIAL PROCESS

Presenting evidence in court

All facts of a case should be presented to the court. This includes any evidence from witnesses which may be unfavourable to the case a prosecutor has built. This is because a prosecutor has certain duties to the court:

- He/she acts as a "minister of justice" for the State and as an agent of justice;
- He/she represents the public interest, as well as:
 - » Helping to build public confidence in the administration of justice;
 - » Gaining the trust of the courts;
 - » Gaining the trust of fellow professionals; and
 - » Gaining a good reputation and standing in the profession;
- He/she has a duty to ensure all relevant evidence and material facts are presented before the court and must act with fairness;
- He/she must make available both the favourable and unfavourable evidence concerning a case;
- If the prosecutor has witnesses who are unfavourable to his/her case then he/she should report this to the defence and the court. In practice the prosecutor will not call such witnesses, but will offer them to the defence;
- To effectively discharge his/her duties, the prosecutor must maintain a professional detachment in the case;
- In the event of a conflict of interest, the prosecutor should disqualify him/herself from such prosecution; and
- The investigating officer should not also be the prosecuting officer in a trial.

The trial process

A plea is entered once a person is charged with a crime.

- The accused will have the opportunity to enter a plea (guilty or not guilty) once all charges have been read to him/her in a language he/she understands;
- Where a guilty plea is entered, the court will proceed to considering an appropriate sentence;
- Where a not guilty plea is entered, a case will be heard before the court;
- At the hearing:

- » The case is opened by the prosecutor and any witnesses supporting the charges are called;
- » The main facts are outlined in support of the charges by the prosecutor;
- » Evidence in chief is presented by the witnesses;
 - **Note:**When questioning any appearing witnesses, the prosecutor cannot use “leading questions” (that suggest an answer or direct a witness toward an answer);
- » Once a witness has presented his/her testimony, the counsel for the defence is given the opportunity to “cross-examine” the witness;
- » The right to cross-examine a witness is a fundamental right of the accused;
- » During the cross-examination process, the defence counsel generally uses leading questions;
- » Finally, the prosecutor is given the opportunity to re-examine his/her witness to address any discrepancies or ambiguities arising from cross-examination.

Once all witnesses have been called:

- The closing statements for the prosecution are heard. At this point, the prosecutor addresses the court affirming the case needing to be answered by the defence;
- The defence also has a right to address the court, and assert that no case has been made;
- If the court determines that a prima facie case has been made, the accused person will be called to be defended;
 - » **Note:**A prima facie case is established when the evidence meets the required burden of proof on a particular issue and given this, a court could convict if no explanation is offered by the defence;
- If the court finds that there is no case to answer, they should at this point acquit the accused;
- Where there is a case to answer, the defence is given the opportunity to present its case.

The defence case:

- As for the prosecution case, the defence will open its case and call any witnesses;
 - » **Note:**The prosecution has the burden of proof and must prove its case beyond any reasonable doubt;
- The defence cannot ask leading questions of its witnesses; however, the prosecutor is entitled to cross-examine and to ask leading questions;
- After witness testimony, the defence closes its case;
- After the defence has closed its case, the prosecution (if permitted by the court) may offer evidence in reply to rebut any new evidence given by the accused that the prosecutor, through the exercise of reasonable diligence, could not have foreseen.

End of the trial proceedings:

- The judge/tribunal member will adjourn the proceedings to consider the evidence and form a view prior to delivering his/her judgement;
 - » **Note:**In a criminal matter, the court will decide whether the accused is guilty or not guilty of any/all offences with which they are charged;
- A guilty verdict means the court will proceed to conviction and sentencing;
- A not guilty verdict means the court will proceed to acquit and release the accused;
 - » **Note:**A judgment needs to be written and delivered to the court. This helps parties understand the reasons for a decision and enables the lodgement of any appeal if required by either party.

Common defences

A defence is an answer to any allegations of criminal behaviour, an explanation/response to the contentions of the prosecution that the accused person committed an offence.

Constitutional grounds

- Prosecution violates due process;
- A fair trial cannot be reasonably held because the crime the person is charged with is vague.

Other defences

- The accused reasonably relied on administrative State action (e.g. inspection);
- The accused person voluntarily identified and disclosed any violations.

3.5 PROSECUTING CORPORATIONS

The enforcement of fisheries laws and criminal sanctions against large companies, including multinational corporations, can have a beneficial impact on law enforcement and the public interest. Corporate actors have an incentive to resolve any potentially criminal action. Public awareness of illegal actions by corporations can result in damage to reputations and the loss of relevant licences, etc. Given the increased use of corporations to commit the various types of complex transnational crimes that are now linked with fisheries activity, prosecutors should always consider the possibility of prosecuting the corporation itself.

Who should be charged?

Charges can be pressed against any one of: the corporation as a whole, its individual directors, officers, employees or shareholders.

- Since a corporation can act only through its individual employees, the imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing;
- Corporations are 'legal persons', capable of suing and being sued, and capable of committing crimes;
- Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees and/or other agents;
 - » Note: To hold a corporation liable for the actions of its directors, officers, employees and/or other agents and build a successful case against the corporation, it must be established that: i) the actions of the employee/shareholder/director were within the scope of his/her duties; and ii) the actions were intended, at least in part, to benefit the corporation;
 - » Note: It is not necessary to prove that the company actually benefited as a result of the actions of the agent, only that there was an intention to benefit the corporation;
- When deciding whether to lay charges against a corporation, it is suggested that the same factors are considered as when determining any charges against an individual.

3.6 WITNESSES

Witnesses should be able to swear an oath or take an affirmation that any evidence they give will be the truth. Perjury, or lying/failing to tell the truth on the stand, is a crime in itself and witnesses can be charged with a criminal offence if they are found to be lying on the stand.

- The obligation to the court is paramount.

In many cases, witnesses will be called to testify long after the occurrence of the crime they witnessed. In some cases, this can be months or even years. By that time, it is natural that time and events might have clouded the memory of the witness.

Preparing the witness for testimony

In preparing the witness, the prosecution should explain the court process, including any documentation that will be used in the court proceedings and how the witness will be questioned.

There are four components of, or steps in, preparation:

- Knowledge of case materials;
- Knowledge of current relevant law, evidence and procedure;
- Analysis to develop a case theory (what to do); and
- Performance preparation (how to do it).

At this point, it is important to analyse where the case/documentation is weak and how this will be addressed.

The prosecution should confer with the witnesses well before the hearing. This will give them the opportunity to shape the case further and to obtain additional evidence if necessary.

- This time should be used as an opportunity to correct and clarify any impressions from the instructions or written material;
- In conference with each witness, the prosecution should explore:
 - » The witness' personal background, if relevant;
 - » His/her full version of events, particularly in the light of other versions and obvious gaps;
 - » The witness' explanations or reasons for his/her behaviour;
 - » The witness' instructions about documents that he/she prepared or can identify;
 - » Further information to assist in cross-examination.
- The prosecution should have the witness prepare any visual aids (such as plans, diagrams, charts or graphics) that may help to explain his/her version of events;
- It is often a good idea to visit the court to become familiar with the surroundings. Courtrooms can be intimidating, even for counsel!

In preparing the witness, the prosecutor should identify:

- What questions will be asked and what answers the witness should give;
- Any recorded statements which may jog the witness' memory.
 - » NOTE: It is important to be prepared. The defence will have the opportunity to review the documentation prepared by the prosecution and to anticipate the arguments of the prosecution before the trial begins.

Generally a witness should be instructed:

- Not to ramble but rather to answer only the question put to him/her;
- To say "I don't know" if there is something he/she doesn't know;
- To pause and think about a question if they do not immediately understand it; and
- Not to answer a question of which he/she has no direct knowledge.

It is permissible for the witness to ask for a question to be rephrased. In addition the witness may ask the judge to allow him/her to refer to field notes, photographs, and inspection reports.

Expert Witness Testimony

- » Note: The most common attacks on a witness are competency, credibility, and impeachment.
- The witness must be credible, and the defence will definitely seek to undermine the credibility of each witness if it can. It is therefore important to establish beforehand whether: i) the witness was qualified to make the observation; and ii) there are any reasons why the court should not believe what he/she will say.

The choice of expert is important in preparation when an expert is to be called as an independent consultant to support a case. In choosing the consultant expert, the prosecution should consider:

- What aspect of the case requires expert opinion;
- Whether the expert has the specialised knowledge in his/her own discipline to express that opinion, based on his/her training, study and/or experience;
- Whether the expert is sufficiently independent, open-minded and credible;
- Whether the expert is of good standing among his/her colleagues and among lawyers and judges;
- How thorough and well-prepared the expert will be;
- How the expert's qualifications, experience and opinion will compare with those of any opposing expert;
- How the expert will withstand cross-examination;
- How experienced the expert is in giving evidence in court; and
- Whether the expert is able to communicate in such a way as to be an effective witness, and to explain technical concepts to a lay audience.

To prepare expert evidence effectively, the prosecution should:

- Inform the expert of the issue on which the expert's opinion is sought;
- Ensure that the expert is instructed in a way that does not affect his/her objectivity;
- Provide all relevant material to the expert;
- Give the expert sufficient time to conduct a comprehensive assessment and prepare a report;
- Ensure it understands the expert's report; and
- Assess the strengths and weaknesses of the expert's opinion.

During the pre-trial conference, the prosecution will need to:

- Review with the expert how they will elicit his/her qualifications;
- Prepare the expert for examination in chief by the prosecution and cross-examination by the opponent;
- Identify weaknesses in the opinion of any opposing expert;
- Instruct the expert in the need to:
 - » Answer the questions;
 - » Use as little technical language as possible;
 - » Have all relevant materials available in court, organised and ready to produce if required;
- If the expert is not experienced, inform the expert of relevant legal terminology, procedure and the manner in which the expert will give evidence;
- Explain that the expert is limited to answering the questions asked in cross-examination, but that they may re-examine if necessary; and
- Ensure that the expert prepares any helpful visual aids, such as graphs, charts, or simple illustrations, in a way that clearly communicates the point to be made.

3.7 WORKING WITH SCIENTIFIC EVIDENCE

Data and scientific opinions will be admitted into evidence if the scientific information is relevant and reliable. In deciding whether to admit scientific evidence, the court will seek to determine whether:

- **The opinion is relevant:** Does the opinion presented deal with the issues in the case? Do the scientific studies or research cited to support the opinion have a direct relationship to the issues in the case?;
- **The science is reliable:** Is the methodology that was used "good science"? (For example, was the method validated?) How were all aspects of the measuring process performed (from sampling to the laboratory analysis)? Were all the necessary quality control actions taken to ensure the reliability of

the data? Were established procedures for each action followed in the field, in the laboratory and at all the steps in between?

3.8 SENTENCING

Sentences may be divided into two types:

- Punitive: for example death, imprisonment or the imposition of fines (these sentences are usually imposed on those who have been convicted of serious crimes, such as murder, and differ across jurisdictions); and
- Non-custodial: for example probation, extramural penal employment or discharge.
- Note that fines or imprisonment will not restore the degraded environment. Courts often order:
 - » That the substance, equipment or appliance used in the commission of the crime be forfeited to the State;
 - » That any licence, permit or other authorisation given to the defendant be cancelled;
 - » That the defendant do community work which promotes the protection of the environment;
 - » That the defendant restores or improves the degraded environment; and/or
 - » That the defendant adopts specific measures to eliminate the consequences of the conduct on which the criminal liability was founded.

Factors influencing sentencing

Previous convictions will likely impose more severe sentences while first-time offenders may find the court to be more lenient,

3.9 THE APPEALS PROCESS

A party who is found guilty of an offence by a court of law has the right to appeal against the decision. This right must be exercised within a prescribed period. Laws dealing with criminal procedure will normally determine who is entitled to appeal, and the grounds for appeal.

The appeal process has a number of purposes, most importantly:

- It provides a basis for the court to prevent any potential miscarriage of justice as a result of errors committed by the trial court; and
- To interpret the law, with a view to setting precedents to be followed by subordinate or lower courts.
 - » Note: A person who has pleaded guilty to a charge and is convicted cannot appeal against the conviction. However, he/she may appeal against the sentence.

4. **BIBLIOGRAPHY**

1. Anderson et al (2009). Gang Prosecution Manual, Office of Juvenile Justice and Delinquency Prevention, U.S Department of Justice, July 2009
2. Australian National Center for Oceans Resources and Security, Monitoring, Control and Surveillance (MCS) Curriculum and Training Programme, Australian National Center for Oceans Resources and Security, November 2009: University of Wollongong, Australia
3. Charron et al (2005). Basic Trial Techniques for Prosecutors, American Prosecutors Research Institute, Alexandria: Virginia
4. Dunn et al (2013). Implementation of Port State Measures: Port Inspection Workshop for Trainees, Asia-Pacific Fishery Commission, Food and Agriculture Organization of the United Nations, Bangkok
5. Dunn et al (2013). Implementation of Port State Measures: Port Inspection Workshop Workbook for Trainers, vol. 2 Asia-Pacific Fishery Commission, Food and Agriculture Organization of the United Nations, Bangkok
6. Dunn et al (2013). Implementation of Port State Measures: Technical Guide to Port Inspection of Fishing Vessels, vol. 1 Asia-Pacific Fishery Commission, Food and Agriculture Organization of the United Nations, Bangkok
7. Dunn et al (2013). Implementation of Port State Measures: Port Inspections Guide to Activities and Tasks, vol. 3 Asia-Pacific Fishery Commission, Food and Agriculture Organization of the United Nations, Bangkok
8. DWI Prosecutor's Handbook (n.d). The National Traffic Law Center, U.S. Department of Transportation
9. EPA (2002). Conducting Environmental Compliance Inspections, Inspector's Field Manual International Edition, Environmental Protection Agency, Washington, DC
10. European Union (2015). 'Chapter 1: Inspection at sea' in: Core Curriculum for the training of Fisheries Inspections and Union Inspections, European Fisheries Control Agency, Publications Office of the European Union: Luxembourg
11. European Union (2015). 'Chapter 2: Port Inspections' in: Core Curriculum for the training of Fisheries Inspections and Union Inspections, European Fisheries Control Agency, Publications Office of the European Union: Luxembourg
12. European Union (2015). 'Chapter 2b: Transshipment inspection' in: Core Curriculum for the training of Fisheries Inspections and Union Inspections, European Fisheries Control Agency, Publications Office of the European Union: Luxembourg
13. European Union (2015) 'Chapter 3: General principles and specific types of fisheries inspection' in: Core Curriculum for the training of Fisheries Inspections and Union Inspections, European Fisheries Control Agency, Publications Office of the European Union: Luxembourg
14. Huremagic et al. (n.d). Manual Criminal Prosecution of Corruption and Economic Crime Offences, Council of Europe
15. Laxton, I (1995) .FFA Report 95/24, Fisheries Officers' Boarding Manual Part I, Pacific Islands Forum Fisheries Agency, c.1995
16. Mending Nets: A handbook on the prosecution of fishery and coastal law violations,' Environmental Legal Assistance Center, 2004: Cebu City, Philippines
17. PNG Department of Fisheries, Technical Document Prosecution Manual, Fisheries Development Project, October 2002: Papua New Guinea
18. Swan, J (1995). FFA Report 95/65, FFA/FAO Enforcement Skills Upgrading Course, Pacific Islands Forum Fisheries Agency, November 1995



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