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Arrests in a Cold Climate (Part2) - Shaping hot pursuit through State practice

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(This article is an independent article in its own right, but also an extension of the earlier Baird Hot Pursuit Study: “Arrests in a Cold Climate – A Tale of Hot Pursuit and other adventures on the Southern Ocean” (2007) 11 Antarctic and Southern Ocean Law and Policy 1-37)

Introduction

The right of hot pursuit has a long history in the international law of the sea. It was codified in Article 23 of the 1958 *Geneva Convention on the High Seas*¹ (High Seas Convention) and was adopted virtually unaltered in Article 111 of the *United Nations Law of the Sea Convention* (LOSC).² Whilst this heritage gives the doctrine legitimacy, yet it is also restrictive, for although the right as articulated in the High Seas Convention has remained unchanged for the past 50 years, the environment in which maritime operations are conducted has been dramatically transformed. This is particularly the case in the context of marine capture fisheries.³

Global catch levels and world trade in fish and fish products continue to increase whilst the majority of fish stocks remain classified as fully exploited to over exploited.⁴ Illegal Fishing⁵ in coastal State waters is a constant and serious threat to coastal State sovereignty and effective marine resource management. Like other aspects of our lives, the fishing industry has benefitted from industrial and technological innovation such as state of the art communications systems, GPS

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¹ Geneva Convention on the High Seas (1958) (opened for signature 29 April 1958) 450 UNTS 82, entry into force 30 November 1962.

² Article 111 is almost identical to Article 23, except that it allowed the right of hot pursuit from the EEZ as well as the continental shelf. Article 23 of the Geneva Convention did not address hot pursuit from the EEZ or the continental shelf, and as such, a right of hot pursuit from these areas did not exist under customary international law at that time.

³ See, generally, Rachel Baird, ‘Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence’ [2004] *Melbourne Journal of International Law*, 299.

⁴ State of the World Fisheries and Aquaculture (2008) Part 1, 7. “An overall review of the state of marine fishery resources confirms that the proportions of overexploited, depleted and recovering stocks have remained relatively stable in the last 10–15 years.” Particularly worrisome is the statement that: “Most of the stocks of the top ten species, which together account for about 30 percent of world marine capture fisheries production in terms of quantity, are fully exploited or overexploited.”

⁵ Illegal fishing is a subset of IUU fishing (Illegal, Unreported and Unregulated). In the context of this article, the discussion of hot pursuit and the rights and obligations of coastal States, the term illegal fishing will be used. IUU fishing is defined in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) adopted by the 25th session of the FAO Committee on Fisheries on 2 March 2001. For the purposes of this paper illegal fishing refers to fishing within coastal State waters (territorial sea and exclusive economic zone) without a license or permit.

systems and satellite radios are common place on illegal fishing vessels.⁶ Those seeking financial gain through illegal fishing can easily take advantage of these developments to stay one step ahead of coastal authorities.

Illegal fishing has graduated from an opportunistic venture to one that is planned and often centrally organised.⁷ There is also evidence of organised corporate backing of some illegal fishing ventures.⁸ Yet the tools with which coastal States are equipped to address the increasing incidence of illegal fishing have not changed, indeed, they have become blunted through years of combating the ever evolving illegal fishing industry. This is because any action taken by coastal States must be consistent with their obligations under the LOSC and illegal fishers know full well the limitations such compliance entails.

An uneasy balance was struck during the long negotiations of the Third United Nations Conference on the Law of the Sea between the rights of coastal and long distance fishing States.⁹ It is argued that circumstances have changed dramatically and that balance needs recasting. As Judge *ad hoc* Shearer noted, albeit in a dissenting opinion, in the *Volga* case:

But it should be recognised that circumstances have now changed. Few fishing vessels are state-owned. The problems today arise from privately owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalised and efficient, and some of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners. A new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.¹⁰

Revisiting the right of hot pursuit?

The aim of this paper is to examine recent State practice (mainly by Australia) in the exercise of hot pursuit in the Southern Ocean. During the late 1990s and early 21st

⁶ Baird, 'Illegal, Unreported and Unregulated Fishing', above n.3, 308.

⁷ *Ibid.*

⁸ For example, when the *South Tomi* was boarded in 2001 by Australian authorities there was evidence that the vessel's Master had received advice from the vessel owners on the conduct of the pursuit.

⁹ This statement is made in reference to the balance struck in Article 73 and 292 and acknowledged by ITLOS in the *The "Monte Confurco" Case (Seychelles v. France)*, No 6. ITLOS 18 December 2000, paragraphs 70-72.

¹⁰ The *Volga Case (Russian Federation v Australia)* No. 11, ITLOS 23 December 2002, Judge *ad hoc* Shearer, dissenting opinion.

century, the waters falling under CCAMLR's area of application were inundated with illegal fishers. Enforcement action, within coastal State maritime zones, in the vast and inhospitable Southern Ocean was problematic. Three of the longest hot pursuits on record were conducted by Australia, two of which were successfully concluded.¹¹ Several aspects of those pursuits warrant further analysis as they illustrate the very forceful manner in which illegal fishing ventures are now conducted and the limitations a strict and literal application of Article 111 has on the ability of coastal States to deter illegal fishers.

This paper also suggests what might be done, within the framework of international law, to assist coastal States in their battle with illegal fishing. In this context, it is noted that as long as twenty years ago, authors acknowledged that the right of hot pursuit needed modernising to adapt to the current fishing environment. Allen stated:

[S]ome elements of the traditional doctrine of hot pursuit are largely founded on assumptions better suited to the era of 'local fisheries, three-mile territorial seas, and observation by long glass than to the current era characterised by distant-water fleets of factory trawlers, 200-mile exclusive economic zones, and observation by radar, aerial photography, underwater sensors, and satellites.¹²

The same author posed a number of questions which, though still unresolved, are of significant importance. These questions, the first two of which are raised in the facts of the hot pursuit of the *Viarsa* by Australian vessel the *Southern Supporter* in 2003, are:

- Can radio signals be used to give the required order to stop?
- Can radar be used to track vessels not subject to visual observation?
- Can high altitude aircraft or satellites keeping vessels under continuous observation satisfy this requirement of hot pursuit?¹³

To address these questions one needs to appreciate the framework within which the right of hot pursuit sits before then examining State practice. The central questions considered in this paper are: (1) has the actual exercise of the right become so hamstrung by the prescriptive and cumulative requirements of Article 111 of the LOSC that in the current maritime environment it is little more than a hollow promise of coastal State authority? Further,; (2) has State practice in the pursuit and arrest of illegal fishing vessels been sufficient to bring a new understanding of (and agreement on) *how* the right may be exercised?

The right of hot pursuit under the international law of the sea

The right of hot pursuit is based upon principles of customary international law.¹⁴ It represents an exception to the principle of exclusive flag State jurisdiction on the high

¹¹ See Table 1 below.

¹² Craig Allen, *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices*, (1989) 20 *Ocean Development and International Law*, 310.

¹³ *Ibid.*

seas. It enables coastal States to enforce their laws upon the commission of an offence and to continue to pursue the offending vessel beyond coastal State maritime zones. As this represents an impingement upon flag State sovereignty, there are a number of procedural conditions to be satisfied in the valid exercise of hot pursuit. These are listed in Article 111 of the LOSC.

The International Tribunal for the Law of the Sea has stated that these “conditions for the exercise of the right of hot pursuit...are cumulative. Each of them has to be satisfied for the pursuit to be legitimate under the Convention.”¹⁵ These conditions are examined in detail further below.

The right of hot pursuit and fisheries enforcement

In relation to fisheries management the right of hot pursuit is generally linked to a violation of a Coastal State fisheries law. In the enforcement of its fisheries laws, Australia has been involved in three of the longest hot pursuits on record.¹⁶ Two of these pursuits resulted in successful boarding's but they have not been without controversy.

In a 2004 speech to commemorate the passing of ten years since UNCLOS entered into force, the then Minister for Foreign Affairs announced that the Australian Government was working toward a 21st century definition of ‘Hot Pursuit’.¹⁷ This speech was made at a time when the practicalities of exercising the right of hot pursuit were under close scrutiny and was possibly more about political posturing than actual conduct for there has been no direct action taken to further Australia’s position. The central issue, according to the Minister, was applying the doctrine of hot pursuit in a modern context. That is, by taking into account satellite-based and other remote sensing technologies to enable both the identification and pursuit of ‘illegal vessels’.¹⁸ This sentiment echoes the questions posed by Allen in 1989.

¹⁴ Nicholas Poulantzas, *The Right of Hot Pursuit in International Law* (2002, 2nd edition) 39-40 and generally Chapter II.

¹⁵ *M/V Saiga Case* (No.2) (St Vincent and the Grenadines v Guinea) ITLOS Case No.2. 1 July 1999, paragraph 146.

¹⁶ See Table 1 below.

¹⁷ The Hon. Alexander Downer, Minister for Foreign Affairs, University of Sydney Symposium ‘Strategic Directions for Australia and the Law of the Sea, 16 November 2004 at

www.foreignminister.gov.au/speeches/2004/041116_unclos.html)

¹⁸ Ibid.

Table 1: Hot Pursuits conducted by Australia

Vessel	Date	Length of Pursuit	Outcome	Nature of Assistance
<i>South Tomi</i>	April 2001	3,300 n miles (14 days)	Vessel arrested 320 n miles south of Cape Town (outside South African EEZ) and escorted back to Fremantle, Australia	Australian military personnel boarded via South African military vessels
<i>Lena</i>	February 2002	14 days	Vessel escaped arrest in December 2001. <i>Southern Supporter</i> ran low on fuel. Vessel boarded on subsequent sighting in February 2002.	none
<i>Viarsa</i>	August 2003	3,900 n miles (21 days)	Vessel arrested 2000n miles south west of Cape Town and escorted back to Fremantle, Australia.	Support provided by South African officers on board South African tug the <i>John Ross</i> and UK fisheries patrol vessel, <i>Dorada</i> and South African ice breaker, <i>Agulhas</i>

Satisfying the elements of hot pursuit

One of the fundamental requirements is that the pursuit be ‘hot’ or immediate.¹⁹ That is, the pursuit commences immediately upon the commission of an offence. The basis

¹⁹ In civil law countries the term *in flagrante delicto* (in the very act) is an analogous concept. The term ‘fresh’ has also been used.

of allowing a pursuit is to place the alleged offender in the same position as if he had been arrested at the time of the commission of the offence.²⁰

In addition to the requirement that the pursuit be immediate, the wording of Article 111 identifies a number of preconditions for the valid exercise of the right. These are:

- the coastal State must have good reason to believe that the vessel has violated the laws and regulations of that State;²¹
- the hot pursuit must be commenced when the foreign vessel is within the internal waters, archipelagic waters, territorial sea, EEZ or contiguous zone of that coastal State;²²
- the hot pursuit must not be interrupted;²³
- the right of hot pursuit ceases upon the vessel entering the territorial sea of its own State or/ of a third State;²⁴
- hot pursuit can only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship;²⁵ and
- hot pursuit can only be exercised by warships or authorised government vessel, which are clearly marked and identifiable.²⁶

These preconditions are discussed further below, some immediately below and others under ‘Challenges for coastal States’.

Good Reason

Article 111(1) requires there be ‘good reason to believe’ that a vessel has violated the laws of the State. This wording was adopted by the International Law Commission (ILC) in 1956 and is understood to provide for a distinction between a certainty that an offence has been committed and a mere suspicion. Hence ‘good reason to believe’ is founded upon strong indications and not on mere suspicion or suppositions that an offence has been committed.²⁷

In the context of modern marine fisheries, there is sometimes a strong desire by authorities to deter all illegal foreign fishers by adopting a hard line with respect to enforcement. Is the mere sighting of a foreign fishing vessel with fish on board within the Australian EEZ enough for there to be ‘good reason to believe’ that the vessel has engaged in fishing without a licence or is simply exercising a right of innocent

²⁰ Glanville Williams, *The Juridical Basis of Hot Pursuit*, (1939) 20 *British Year book of International Law* 84.

²¹ LOSC, Article 111(1).

²² LOSC, Article 111(1) and (2).

²³ LOSC, Article 111(1).

²⁴ LOSC, Article 111(3).

²⁵ LOSC, Article 111(1) and (4).

²⁶ LOSC, Article 111 (5).

²⁷ Poulantzas, above n. 14, 156-657.

passage loaded with fish caught on the high seas? The vessel may be equipped to fish without a licence, itself an offence under the *Fisheries Management Act (1991) Cth*.

Consider the acquittal of five fishers onboard the *Viarsa* when she was apprehended. They had been charged with illegally fishing within the AFZ. Upon the acquittal, the Defence counsel were reported as saying: ‘the authorities had not seen the men fishing in the Australian fishing zone and the case had been based entirely upon circumstantial evidence.’²⁸ The acquittal for fisheries offences does not translate to the absence of a ‘good reason’ to believe the *Viarsa* had committed an offence. It might be argued that one does not sail into a high sea state some 4000 kilometres from the nearest port for a pleasure cruise. There was also evidence from crown witnesses that crew aboard the fleeing vessel threw nets and fish overboard during the pursuit, blacked out the vessels name and number making identification difficult.²⁹

Nevertheless the case does illustrate the point that persons accused of illegal fishing can be expected to test all of the evidence. It would however be highly undesirable to rely upon an acquittal to question the judgement of the fisheries officer (acting for the coastal State) in assessing that there was ‘good reason’ to believe there has been an offence committed. Article 111 requires only that there is ‘good reason to believe’, not, that the officer is satisfied beyond a reasonable doubt. In any case Article 111 does contain provision for the compensation of the vessel should the pursuit be proven to have been unlawful.³⁰

In the *M/V Saiga* case, ITLOS considered the conditions to be satisfied for a valid hot pursuit and found a number had not been met. In relation to the requirement that there be a ‘good reason’ to believe the laws of the coastal State had been violated, the Tribunal held that on the basis of information available to them, the Guinean authorities could not have had more than a suspicion a tanker has violated the laws of Guinea in the EEZ.³¹

The matter of a ‘good reason’ has been elaborated upon in the 2007 treaty between France and Australia on cooperative surveillance and enforcement within their respective maritime zones in the Southern Ocean.³² The parties agreed upon the following conditions for the exercise of hot pursuit.

²⁸ Amanda Banks, ‘\$30 m claim after fishers freed’ *The Australian*, 7 November 2005, 4.

²⁹ Mark Philips, ‘Fish Poachers show colours’ *The Herald Sun*, 25 August 2003, 15.

³⁰ Article 111(8), LOSC.

³¹ *M/V Saiga*, above n.15, paragraph 146. See also the Separate Opinion of Judge Anderson where he states: “Secondly, the evidence produced...discloses no more than suspicions on the part of the patrol vessels at 0400 hours on 28 October 1997. A suspicion is something less than the “good reason to believe” required by paragraph 1 of article 111. The Customs document PV29 contained much information concerning the bunkering of the three fishing vessels which was first obtained from the *Saiga*’s log book and the questioning of the Master. From a reading of the terms of the judgments handed down by the two criminal courts in Conakry, much of the evidence produced in the proceedings against the Master of the *Saiga* was obtained only after the arrest of the ship, thereby putting in doubt the existence before that time of sufficient information to amount to “a good reason to believe”.”

³² Agreement on the Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories and Heard and McDonald Islands, Paris 8 January 2007. Not yet in force. [2007] ATNIF 1.

Article 4

2. *Hot pursuit may be commenced upon fulfilling the following conditions:*

a. *the authorities of the relevant Party have good reason to believe that the fishing vessel or one of its boats has violated the laws of the Party within whose maritime zone the vessel is detected. The basis for such belief may include:*

i. *direct visual contact with the fishing vessel or one of its boats by the authorised vessel; or*

ii. *evidence obtained by or on behalf of the authorised vessel by technical means; and*

b. *a clear signal to stop has been given to the fishing vessel by or on behalf of the authorised vessel which enables it to be seen or heard by the fishing vessel.*

The treaty contemplates that evidence may be gathered through *technical means* which would include aerial surveillance photography, radar or satellite imagery of a vessel which can show not only location but tracking consistent with fishing or collecting lines. Whilst such evidence may satisfy the Treaty provisions and possibly Article 111, it is less clear that the requisite standard of proof for domestic offences would be met.

Breach of coastal state law

The laws and regulations alleged to have been violated must be within the scope and sovereignty of the coastal State to legislate. For example, there is no coastal State jurisdiction over criminal offences beyond the breadth of the territorial sea and as such a murder on board a foreign flagged ship within the Australian EEZ does not give rise to the right of hot pursuit under Article 111.³³

With respect to fisheries regulation, coastal States have jurisdiction to 200 n. miles so the satisfaction of this requirement would appear, on its face, to be straightforward. However, frequently there are evidentiary issues surrounding the location of the vessel at the time of sighting for illegal vessels tend to 'sit' on the 200 n. mile line and move inside when safe to do so.

With the extension of some coastal States' continental shelves³⁴ consideration of the rights they have in relation to these areas is required. There is no fisheries jurisdiction attached to the extended continental shelf. However, what are the rights of the coastal

³³ If the murdered person is an Australian citizen, jurisdiction over the alleged murder would be asserted on the basis of the nationality principle and the flag State would be requested to hand the accused over to Australian authorities.

³⁴ Australia's claim to an extended continental shelf was accepted by the United Nations' Commission on the limits of the Continental Shelf in April 2008.

State in relation to vessels breaching laws relating to oil and gas exploration in the extended continental shelf? Article 111 (2) states that:

The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

Hence it would seem that the right of hot pursuit would apply with respect to offences related to the extended continental shelf.

Commencement within the coastal State zone

The pursuit must be commenced whilst the vessel is still within the relevant coastal State zone. Establishing this as a matter of fact is not without problems.

During the hearing of charges against the Fishing Master of the *South Tomi*, the Crown submitted that the Master had been given a valid direction under section 84(1)(k)(ii) of the *Fisheries Management Act* 1991 (Cth) to proceed to the port of Fremantle.³⁵ The Senior Magistrate found (after hearing evidence from the accused that the order was simply to proceed to port) that the direction given was not a direction for the purposes of the Act and acquitted the Master of the charge of failing to obey a lawful direction of a fisheries officer pursuant to section 108 of the *Fisheries Management Act*.³⁶ The consequence of this finding is that it is arguable that the *South Tomi* did not receive any directions from the *Southern Supporter* whilst within the Heard and MacDonal Islands' EEZ. Indeed it was argued that it was not until the *South Tomi* was outside the EEZ that the *Southern Supporter* advised the vessel of its intention to engage in pursuit.³⁷

A weak argument may be possible on the facts that there was no commencement of the pursuit until after the *South Tomi* left the Australian EEZ, by virtue of the fact that the order to stop was not given and hence one of the cumulative requirements of the right is not met. Such a conclusion however, runs counter to the intent behind the right of hot pursuit, which is to enable the coastal State to exercise its jurisdiction against offending vessels which flee the jurisdiction. Without such a right the State becomes powerless to exercise its jurisdiction. As Lauterpacht observed, absent the right of hot pursuit: "the enforcement by the State of its protective jurisdiction within its territorial waters tends to become nugatory."³⁸ It would therefore defeat the purpose of the right to accept the argument that the pursuit did not commence within the Australian EEZ simply because whilst within the EEZ the offending vessel did not indicate an intention to flee.

³⁵ James Marissen, Hot Pursuit on No Pursuit? The F.V. South Tomi Arrest in 2001, (2002) 16 *Australian and New Zealand Maritime Law Journal* 66.

³⁶ *O'Dea v Aviles*, unreported, Court of Petty Sessions of Western Australia, Cicchini SM, 18 September 2001.

³⁷ Marissen, above n.35, 76.

³⁸ Hersch Lauterpacht, *International Law: being the collected papers of Hersch Lauterpacht* (edited by Elihu Lauterpacht) 1977, 173.

A more troublesome matter to the Australian authorities in the *South Tomi* pursuit was satisfying the requirement that a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

Visual or auditory signal to stop

The LOSC clearly states that the signal is to be visual or auditory and to be given at a distance that enables the signal to be seen or heard by the foreign ship. In an age of technology which has created a wide range of communications techniques, is this 50 year old requirement too restrictive?

In 1956 before the adoption of the text for the High Seas Convention, the ILC did consider the use of signals, via radio, to communicate the order to stop to an offending vessel. However, at the time it was considered that in order to prevent abuse, orders via the radio would not be permitted as they could be given at great distance and transmitted by wireless.³⁹ This is thought to be because the ILC was concerned there may be no limit on the distance from which a signal may be given.⁴⁰ Of interest, the ILC also noted that same year that: ‘the important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which the right was exercised.’⁴¹

The use of radio broadcasts to signal the order to stop has been judicially considered. In the *M/V Saiga* case, Justice Anderson considered the use of radio signals in his separate opinion. His comments are worth quoting in their entirety.

*[...article 111, paragraph 1, requires that an order to stop must be received before pursuit begins. Even if the Tribunal had been willing in principle (and after due consideration of the point) to consider the possibility of accepting as an auditory signal a radio message sent over a distance of 40 miles or so, the alleged signal from P328 could still not have been deemed to constitute a valid signal in the absence of any evidence of: (1) the sending of the message from P328 (e.g. a recording on board P328 or an entry in its log book setting out the text of the order and the time of its transmission); and (2) more importantly, the receipt of the message by the Saiga and the latter’s understanding of the message as an order to stop by officials of Guinea (e.g. from the Saiga’s tape recordings of its incoming radio traffic or an entry in its log book). Moreover, there was other evidence which tended to show that, far from having received any intimation of the approach of the patrol vessels, the Saiga was taken completely by surprise by their arrival, whilst drifting outside Guinea’s EEZ, over four hours after the time of the alleged signal. In the circumstances, the Judgment in paragraph 151 rightly concludes that there was insufficient evidence to establish that an order was given and received.*⁴²

³⁹ (1956) Volume II, Yearbook of the International Law Commission, Vol II, 285.

⁴⁰ Allen, above n.12, 319 (see n.148).

⁴¹ [1956] Year Book of the International Law Commission, Vol 1, 54

⁴² *M/V Saiga* above n.16, Separate Opinion of Justice Anderson.

These comments may be explained in part by the particular circumstances of the *Saiga* case as alluded to in the above quote. The International Tribunal for the Law of the Sea (ITLOS) found that there was an unnecessary use of force against the vessel from St Vincent and the Grenadines.⁴³

Some authors have commented that the requirements of Article 111(4) act to place “an increased burden on the pursuing vessel.”⁴⁴ On some occasions coastal States have argued that the need to give a signal to stop is obviated by the offending vessels’ decision to flee the jurisdiction.⁴⁵ Others submit that the type or kind of signal is unimportant as long as the arresting vessel arrives in time.⁴⁶ This is consistent with the decision of the English Court in *R v. Mills* in which it was held that the use of VHF radio to issue the signal to stop was sufficient when used in conjunction with a hovering helicopter.⁴⁷ The 2007 treaty between France and Australia supports the interpretation that it is enough that the signal is clear and can be seen or heard by the fishing vessel.⁴⁸

The turn of the 21ST century has seen significant increases in illegal fishing in coastal zones throughout the world. There are now forceful arguments to be put supporting the use of radio signals to communicate an order to stop, to an illegal foreign fishing vessel. These arguments include enabling the coastal State vessel to commence the hot pursuit of a vessel which flees before it has come within visual or auditory range.⁴⁹ The underlying aim of the ILC in 1956 and the intent of Article 111, is that the signal be given at a distance which enables it to be seen or heard. The rationale being that there is no surprise for the vessel when a coastal patrol vessel closes in on it. In 1956 and to a lesser extent in 1982, the means of communication were more limited and less reliable. Radio signals can now be effectively given at some distance and a record of the signal, date, time and distance at which it was sent, and the frequency over which it was sent, can be kept by the coastal State as proof of compliance with this requirement.

The communication to the *Volga* by Australian naval personnel illustrates the complexities of the modern fisheries environment and the challenges in meeting the requirement to issue the order to stop whilst the fishing vessel is still within the coastal State EEZ. Evidence was put before J. French of the Australian Federal Court that the order to stop was actually given after the *Volga* had exited the EEZ.⁵⁰ In fact, counsel for Olbers submitted that “at no time prior to boarding did the helicopter or any Australian military ship require or order the vessel to stop in the AFZ, nor did the vessel receive any communication from the helicopter or from any Australian military ship.”⁵¹ The Australian Federal Court held that the vessel was forfeited to the

⁴³ *M/V Saiga Case* (No.2) (St Vincent and the Grenadines v Guinea) ITLOS Case No.2. 1 July 1999, paragraph 159.

⁴⁴ John Colombus, *The International Law of the Sea*, (1962 5th ed) 154.

⁴⁵ In 1989 a Polish vessel, the *Wlocznik*, was apprehended off the Alaskan coast even though it fled the US EEZ before the Coast Guard cutter could give the signal to stop. See Allen, above n 8, 319, note 142.

⁴⁶ M.S.McDougal and W.T.Burke, *The Public Order of the Oceans*, 1962, 897.

⁴⁷ *R v Mills and Others* (Unreported Judgement of the Croydon Crown Court, Devonshire J) 1995

⁴⁸ 2007 France/Australia Treaty Article 4.2.b.

⁴⁹ Allen, above n.12, 323.

⁵⁰ *Olbers Co Ltd v. Commonwealth of Australia* (2004) 136 FCR 67, per French J, paragraph 31.

⁵¹ *Ibid.*

Commonwealth by the operation of s106A of the *Fisheries Management Act* 1991 and accordingly found that arguments in relation to the validity of boarding were not relevant.⁵²

The validity of the hot pursuit was raised by Russia, the flag State of the *Volga*, during proceedings before ITLOS for prompt relief.⁵³ The factual matters raised to challenge the pursuit under domestic law were aired before the Tribunal. The Australian government's position was that the 'order to stop' requirement was satisfied by the broadcast from the naval helicopter that the *Volga* was about to be boarded. It was argued that stopping was an implicit requirement of cooperating with the boarding. In relation to the argument that the broadcast was made when the *Volga* was beyond the EEZ, Australia argued that the premise of the right of hot pursuit would be undermined if an otherwise lawful hot pursuit were held to be unlawful because of a mistaken but reasonable determination of the precise location of a vessel.⁵⁴

Continuous and uninterrupted pursuit

Article 111 requires that the pursuit be continuous and uninterrupted. The term 'interrupted' has not been defined in the LOSC however a substantial interruption such as diverting the pursuing vessel from the path of pursuit to attend a vessel in distress call would seem to qualify as an 'interruption'. This occurred when the *Lena* was being pursued by a fisheries patrol vessel in 2001. The patrol vessel was forced to break off the pursuit to attend a nearby SOS call which later proved to be false when no vessel in distress could be found in the vicinity.⁵⁵

Under the *Fisheries Management Act* the pursuit of a person or boat is not taken to be terminated or substantially interrupted only because the officer concerned loses sight of the person or boat. Section 87(3) further provides that this includes the loss of radar signal. Arguably, short gaps in observation due to weather, darkness or other such factors are acceptable, as is stopping to pick up evidence (ie a dory from illegal fishing). As long as the pursuing vessel can continue with the pursuit and can readily identify the offending vessel, the pursuit should be considered to be uninterrupted.

Longer periods of a loss of visual or radar contact are more problematic. There is also no international consensus on the length of time or even how long a pursuit can be maintained. Indeed pursuit of the *Viarsa* continued for 21 days or almost 4000 n. miles.

Challenges for coastal States in the practice of hot pursuit in modern international fisheries

Entering third State territorial waters

The entry of the pursued vessel into the territorial waters of its own or a third neutral State will bring the pursuit to an end. The signing of a bilateral treaty between

⁵² Ibid, paragraph 95.

⁵³ The *Volga* case, above n.10. (Oral Proceedings, 12 December 2002) 13

⁵⁴ Ibid.

⁵⁵ M.Saunders. 'Toothfish pirate uses SOS to escape' *The Australian*, 8 October 2002.

Australia and France on cooperative surveillance with respect to Southern Ocean maritime zones specifically addresses this issue.⁵⁶ Under the terms of the Treaty each State has prior authorisation to continue a hot pursuit through the territorial sea of the other State, provided the other party is informed and no physical law enforcement or other coercive action is taken against the vessel pursued whilst in territorial waters.⁵⁷

The provision in Article 111 is consistent with Article 2 the LOSC in that a coastal State's sovereignty extends to the territorial sea. Vessels have the right of innocent passage through third State territorial seas, however enforcement action by a pursuing State's vessel, such as continuing a hot pursuit, would be contrary to the right of innocent passage.

Accepting that premise, it would also be contrary to innocent passage for the pursued vessel to loiter within the territorial seas of a third State, for the LOSC requires passage to be continuous and expeditious.⁵⁸ It could be argued that the pursuit can recommence once the vessel re-enters the high seas after sailing into the territorial waters of another State. Poulantzas has argued that it is appropriate to recommence hot pursuit in situations whereby the offending vessel has had a short stay or passage through the territorial waters with the intent to evade the law.⁵⁹ The intent of entering the territorial waters of another State is not 'innocent', and hence the right of 'innocent passage' should not be used as a shield. Another author has stated that if this were to be the position at international law, the offending vessel would be 'washed clean of its sins by the territorial waters of a third state'.⁶⁰

Following the arrest of the *Lena* in 2002, Australian Fisheries Officers uncovered evidence of instructions the vessel received whilst under hot pursuit, as to how the pursuit might be negated under international law by entering nearby French waters.⁶¹ Evidence discovered after the boarding of the *South Tomi* in 2001 suggested similar information was provided by the vessels' owners to the Captain during the pursuit.⁶² These two examples support the case that illegal fishing vessels should be denied the protection provided by Article 111 where entry into a third State's territorial sea has been a deliberate act to avoid apprehension.

Colombos argues that the reasoning behind the UNCLOS rationale for cessation as opposed to suspension of hot pursuit is to prevent the pursuing ship from lying in wait outside territorial waters with the object of resuming the pursuit when the pursued ship emerges. Such resumption appears undesirable as it prolongs a right, which ought to be exceptional, and is a narrow derogation from the general rule prohibiting any

⁵⁶ Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard and McDonald Islands [2007] ATNIF 20.

⁵⁷ *Ibid*, Article 4.

⁵⁸ LOSC, Article 18(2).

⁵⁹ Poulantzas, above n.14,231.

⁶⁰ R.C.Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the law of the Sea' (1993) 33 *Virginia Journal of International Law* 557-589, 581.

⁶¹ Australian Broadcasting Corporation, 4 Corners Program, 'The Toothfish Pirates' (30 September 2002).

⁶² Interview with Australian Fisheries Management Authority Officer, October 2001. The vessel was apparently advised as to how the hot pursuit might be terminated by entering French territorial waters adjacent to the Kerguelen Isles.

interference by a State with foreign vessels on the high seas.⁶³ This argument holds less weight in the modern era of illegal fishing.

There is nothing under Article 111 to prevent coastal States permitting third states to continue a pursuit through its territorial sea. This is what Australia and France have agreed through the 2003⁶⁴ and 2007 bilateral Treaties. Hence any challenge to the legitimacy of a pursuit continued by Australia through the French Southern Ocean EEZ (say off Kerguelan Isles) would be presumably answered by producing evidence of the Treaty and the consent of France for the right to continue to be exercised.

Co-operative hot pursuit/ third State assistance

The LOSC already recognises that a ship can take over from an aircraft in conducting a hot pursuit,⁶⁵ and it has been argued that although not specifically mentioned, it would be “both unreasonable and illogical” to reject the notion that a ship can take over from another ship.⁶⁶ This is what occurred in the 1929 pursuit of the Canadian ship the *I'm Alone* by an American vessel. The pursuit was commenced by one vessel and ended by a second U.S. vessel entering the pursuit from another direction.⁶⁷

If the international community has accepted that a pursuit by one vessel can be ended by a second, then it is argued that assistance through third State involvement should be equally valid. The ILC recognised that more than one vessel can be used in a hot pursuit. Commenting on the exercise of the right in 1957, the ILC stated:

The ship finally arresting the ship pursued need not necessarily be the same as the one which began the pursuit, provided that it has joined in the pursuit and has not merely effected an interception.⁶⁸

There have been instances of co-operative hot pursuit in recent years. Australia has been involved in two high profile Southern Ocean pursuits. Whilst the LOSC does not address the possibility of third party assistance in bring the pursuit to a conclusion,⁶⁹ perhaps it can be argued that to read limitations into the wording unduly fetters the ability of coastal States to address the problem of emboldened illegal fishers. Pursuits of over 3000 n. miles would not have been envisaged in 1958 and they are hardly the norm today. Why should the coastal State be prevented from using a second platform from which to effect the arrest, provided the pursuit is still on foot?

⁶³ C. John Colombos 1967, *The International Law of the Sea, (Sixth edition)*, Longmans, London, pp.169-170.

⁶⁴ Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime areas adjacent to the French Southern and Antarctic Territories (TAAF) and Heard and the McDonald Islands, Canberra 24 November 2003. In force, 1 February 2005. [2005] ATS 6.

⁶⁵ LOSC, Article 111(6).

⁶⁶ Erik Jaap Molenaar, ‘Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsal* and the *South Tomi*’ (2004) 19(1) *International Journal of Marine and Coastal Law* 19, 30.

⁶⁷ *Ibid.*

⁶⁸ Yearbook of the International Law Commission (1956) Vol.II, 285 (paragraph 2 (c)).

⁶⁹ LOSC, Article 111(5) provides that the right of hot pursuit ‘may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.’ Article 111(6) can be read as requiring the aircraft or ships to be those of the coastal state.

The *South Tomi* was pursued for 14 days across the Southern Ocean in April 2001 after being detected fishing within the Heard and McDonald Islands' fishing zone. The vessel initially tracked towards Perth as ordered, however, once it was clear of the Australian EEZ, it altered its course and steamed due west. The *Southern Supporter*, a civilian manned vessel with no fire power was unable to force the *South Tomi* to stop. The pursuit was successfully brought to an end with the aid of the South African government through the provision of military vessels manned by Australian personnel.⁷⁰ The *Southern Supporter* was present throughout the whole pursuit so the arrival of the South African vessel cannot be viewed as an 'interruption'.

Similarly the pursuit of the *Viarsa* in 2003 involved the assistance of South African and British vessels.⁷¹ This pursuit continued for 21 days across the Southern Ocean to waters south west of Cape Town, South Africa. The *Southern Supporter* maintained the pursuit throughout this time.

It is submitted that although novel, these two instances of multi-lateral hot pursuit do not undermine the principle of hot pursuit. Rather they illustrate the adaptation of State practice to an evolving environment and in recognising their validity, hot pursuit remains a cogent right in the 21st century.

The 2007 Treaty between Australia and France extends the current state of international law. It provides that an authorised vessel of one State can take over the pursuit commenced by an authorised vessel of the other State.⁷² Whether this extension of international law is valid is uncertain. It would be expected that as a minimum the coastal State vessel maintain its role in the pursuit.

Shiprider agreements, have been used successfully in criminal law enforcement in maritime zones. The existing arrangements between Jamaica and the U.S.A are a helpful illustration.⁷³ Shiprider agreements allow cooperation in vessel boarding, riding and overflight. They typically allow an officer of one State to operate from foreign government vessels in boarding suspected offenders. Multi-lateral hot pursuit is conducted on the same premise.

Interruption

During the trial of the five accused fishers on board the *Viarsa*, defence counsel submitted that the hot pursuit was terminated or interrupted when the master of the *Southern Supporter* decided not to pursue the *Viarsa* into the dangerous ice pack.⁷⁴ The *Southern Supporter* lost visual contact of the fleeing *Viarsa* however tracked the vessel on radar and recommenced the pursuit when she emerged from the ice. In such

⁷⁰ Rachel Baird, 'Coastal State Fisheries Management: A Review of Australian enforcement action in the Heard and McDonald Islands' Australian Fishing Zone' Deakin Law Review Vol9(1) (2004)91, 100.

⁷¹ Table 1, above.

⁷² Treaty between the Government of Australia and the Government of the French Republic, above n.50, Article 4(4).

⁷³ See the 1991 U.S. Jamaica Maritime Counter Narcotics Cooperative Agreement.

⁷⁴ The accused were Ribot-Cabrera; Perez; Olveira; Perez and Guerrero.

instances where there has been a deliberate attempt to shake off a pursuing vessel, yet the fleeing vessel has been tracked on radar equipment, can a valid argument be made that there has been an interruption? A loss of visual, but not radar contact, should not constitute an interruption in the conduct of modern fisheries law. To acknowledge the usefulness and legitimacy of vessel monitoring systems used to track vessel movements (and hence assist with fisheries management), yet deny radar surveillance an equally legitimate role, is contradictory.

As noted above, when pursuing the *Lena* in late 2001, the Australian fisheries patrol vessel was forced to break off the pursuit to attend a nearby SOS call, a call which was later shown to be false when no vessel in distress could be located.⁷⁵ The patrol vessel was unable to relocate the *Lena* on that occasion (although the vessel was apprehended in 2002) and the pursuit was (it is alleged) successfully broken by the actions of the *Lena's* Captain.

Conclusion

The State practice reviewed in this paper does not upset the balance struck at UNCLOSIII between coastal States and vessel owners. The fundamentals of the right of hot pursuit have still been observed. Indeed to restrict the ability of a coastal State to use modern technology such as radio broadcasts to signal an order to stop or bilateral treaties to deal with the entry to third State territorial seas, would do far more damage to the balance.

As an aside, it is submitted that the adaptation of the exercise of hot pursuit to fit 21st century circumstances should not be linked to other coastal State initiatives to address maritime security concerns related to terrorism threats. This is because these initiatives,⁷⁶ which are largely a response to terrorism, raise legitimate issues at international law including the creep of coastal State jurisdiction. Adapting hot pursuit rights to meet the modern era (such as using radio signals to communicate in a world of email, texting, faxing, blogging and satellite communications) is simply ensuring the right remains relevant.

The right of hot pursuit is firmly anchored in international law. However its exercise should not be weighed down to the same extent. It has been adapted by State practice to meet the evolved nature of modern marine fisheries and the increasingly bold practices of illegal fishers. To restrict its development would be to signal to illegal fishers (and their corporate backers) that coastal States are limited in their ability to exercise their rights.

⁷⁵ Saunders, above n.54.

⁷⁶ For example the Proliferation Security Initiative was adopted in 2003 by over 90 States as a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide.