

Illegal Fishing in Zones Subject to National Jurisdiction

Malcolm Barrett *

And Jesus said unto them, Come ye after me and I will make you to become fishers of men. And straightway they forsook their nets, and followed him.

Mark 1: 17-18

INTRODUCTION

The fishers of the 1990s are not as willing to leave their chosen occupations as the fishers from Galilee. In fact many modern fishers are willing to break the laws of man by engaging in illegal fishing in waters subject to national jurisdiction in order to continue fishing.

This paper examines the extent to which international law both authorises and restricts the exercise of coastal states' prescriptive and enforcement jurisdiction over the activities of illegal fishers. States' prescriptive jurisdiction is their authority to make laws, while enforcement jurisdiction is states' capacity to ensure compliance with their laws.¹ First the paper will offer reasons why illegal fishing has become a problem of international concern. Secondly, the paper will focus on the provisions of the 1982 United Nations Law of the Sea Convention² (LOSC) which

* BA (Tas), LLB (Tas), James Cook University, Townsville, Queensland.

¹ A. L. Morgan, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action" (1996) 27 *Ocean Development and International Law* 5 at 6.

² The LOSC entered into force on the 16 November 1994, twelve months after the deposit of the sixtieth instrument of ratification (see: Article 308). One hundred and twenty three states including Australia are bound by the LOSC (as of the 23 December 1997).

authorises, but also restricts, coastal states' rights to take action against illegal fishing that occurs within the territorial sea and the exclusive economic zone (EEZ). Thirdly, two controversial areas of coastal states' prescriptive jurisdiction within the EEZ will be considered. They are the rights of coastal states to control the activities of foreign vessels that are not directly involved in fishing but provide support services, and the rights of coastal states to place restrictions on foreign fishing vessels transiting the EEZ. Finally, the paper will address the emergence of non-binding international laws which impose increasingly specific obligations on both coastal and flag-states to take enforcement action to ensure that fish stocks are not subject to unsustainable levels of exploitation.

I BACKGROUND TO THE PROBLEM OF ILLEGAL FISHING

The crisis in the demand for fish.

Although not a new phenomenon, the extent of illegal fishing is to a large degree caused by the crisis currently facing marine fishing stocks. In its recent review of the world's fishery resources the Food and Agriculture Organisation (FAO) of the United Nations drew attention to the high level of exploitation of valuable fish stocks.³ Stock analyses show that about 35 percent of the 200 species-areas that are the most commercially valuable are senescent, about 25 percent are mature, 40 percent are still developing and none remain at low exploitation levels. The FAO analysis indicates "that around 60% of the major world fish resources are either mature or senescent and, given that few countries have established effective control of fishing capacity, these resources are in urgent need of management action to halt the increase in fishing capacity or to rehabilitate damaged resources." The FAO research shows that over half of the sixteen statistical groupings that divide the world oceans are being overfished.⁴ Two of the four statistical groupings that include waters subject to Australian jurisdiction are classified as overfished. In the Southwest Pacific statistical area, the biomass of many of the major fisheries are between 25 to 35 percent of their unfished levels⁵ and some species have

³ *Review of the State of World Fishery Resources: Marine Fisheries* (FAO Fisheries Circular No. 920. Rome, FAO, 1997) 173.

⁴ *Ibid.*

⁵ *Ibid.* Catches of snook have declined by 40 percent since 1993, orange roughy catches have declined by over 50 percent since 1990 and there was a 90 percent reduction in the landing of greenback horse mackerel between 1991 and 1992. Other species such as southern bluefin tuna and southern shark are either overexploited or fully exploited.

reached commercial extinction.⁶ In the Southern Oceans statistical area,⁷ all components of the commercial catch have peaked and have subsequently decreased.⁸ Even in the East Indian Ocean and the Western Central Pacific,⁹ which are not over-fished, certain stocks are under pressure.¹⁰ In a recent background paper to the Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21 it was claimed that unless sweeping changes are made to fishing practices and remedial action is taken to regenerate endangered fish stocks "the world's fisheries face possible collapse."¹¹ The Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security of 1996¹² recognised that on the basis of current trends, demand for fish and fishery products will be substantially higher than supply by the year 2010. The shortage of fish will in turn have an adverse effect of world food security.¹³

A major cause of the current levels of unsustainable exploitation of fish stocks is the over-capitalisation of the fishing industry.¹⁴ The landing capacity of fishing fleets exceeds the capacity of the resource to be harvested at a sustainable level. Ambassador Nadan, Chairman of the Earth Summit Conference, characterised the problem stating that there are simply "too many vessels chasing too few fish".¹⁵ Research by the FAO found that between 1970 and 1990 the size of the world's fishing fleet increased at twice the rate of the world's marine catch.¹⁶ Over-investment

⁶ *Ibid.* Despite the fact that the total allowable catch for silver gemfish has been set at zero since 1993 the stock continues to decline.

⁷ *Ibid.* FAO Statistical areas 48, 58 and 88.

⁸ *Ibid.* Two stocks, that of the *Notothenia spp.* and the icefish, have collapsed so dramatically that they are no longer commercially targeted.

⁹ *Ibid.* The East Indian Ocean and the Western Central Pacific are not expected to reach their full exploitation potential until 2037 and 2003 respectively,

¹⁰ *Ibid.* The catch of southern bluefin tuna and herring peaked in the mid 1980s and subsequently declined.

¹¹ *The Agreement on High Seas Fishing: An Update* (United Nations Department of Public Information 1871/SD 1997).

¹² For the text of *The Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to food Security* see: (1997) 12 *The International Journal of Marine and Coastal Law* 99-104.

¹³ *Ibid.* Art. 3.

¹⁴ *Oceans and the Law of the Sea: Law of the Sea* (United Nations Report of the Secretary-General A/52/487 1997) para 191.

¹⁵ *The Agreement on High Seas Fishing* supra n. 11.

¹⁶ *Ibid.*

means that many fishing vessels are not commercially viable, and continue to operate only with the support of state subsidies.¹⁷ Alternatively, some fishers are willing to disregard coastal states' laws and regulation and engage in illegal fishing.

The problem of illegal fishing

Illegal fishing has become a major international problem. In 1994 the United Nations General Assembly passed a resolution requesting that the Secretary-General prepare a report on the steps taken to resolve the problem of unauthorised fishing in zones of national jurisdiction (poaching).¹⁸ Since 1995 the Secretary-General has reported annually to the General Assembly on the impact of unauthorised fishing.¹⁹ In the 1997 report, the South Pacific Forum Fisheries Agency recorded that in 1996 there had been 25 detected incidents of illegal fishing within waters under the jurisdiction of FFA member nations.²⁰ Australian authorities have also reported significant incidents of illegal fishing. In the year prior to the end of June 1997 there had been 108 detected incidents of illegal fishing by foreign vessels in Australia's waters.²¹ The majority of apprehensions involved Indonesian and Taiwanese vessels which were apprehended in

¹⁷ *Ibid.* "Worldwide, government subsidies to the fishing industry total some US\$ 54 billion annually."

¹⁸ *Unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas*, (United Nations, Resolution 49/116, 1994).

¹⁹ See: *Unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas* (Report of the Secretary-General, A/50/549, 1995), *Law of the Sea: Large-Scale Pelagic Drift-Net Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas; Unauthorized Fishing in Zones of National Jurisdiction and its Impact on the Living Resources of the World's Oceans and Seas; and Fisheries By-Catch and Discards and their Impact on the Sustainable Use of the World's Living Marine Resources* (Report of the Secretary-General, A/51/404, 1996) and *Oceans and the law of the sea: Large-scale pelagic drift-net fishing, unauthorized fishing in zones of national jurisdiction and fishing by-catch and discard*, (Report of the Secretary-General, A/52/557, 1997).

²⁰ *Ibid.*

²¹ *Annual Report*, (Australian Fisheries Management Authority, 1996-97) 111. In the previous year there had been 93 incidences of foreign vessels fishing illegally. See: *Annual Report*, (Australian Fisheries Management Authority, 1995-96) 72.

the northern sector of the Australian Fisheries Zone (AFZ).²² Since October 1997 a new phase in Australian fisheries enforcement began with the arrest of three vessels allegedly illegally fishing for Patagonian toothfish in the AFZ that surrounds Herd and McDonald Islands.²³

The negative effect of illegal fishing on the targeted species is two fold. First, it exposes the species to the likelihood of overfishing as managers struggle to determine what level of fishing is sustainable without full knowledge as to the extent to which the stock is being fished. Secondly, illegal fishing is likely to be less discriminating as to the fish taken. Therefore, large quantities of juvenile fish are at risk of being taken prior to reproduction, making it difficult for stocks to be replenished. Illegal fishing also seriously endangers the populations of non-targeted species that are caught as the bycatch of such operations.²⁴ Extensive illegal fishing can also drive down the market value of a species, making it more

²² Although Australia proclaimed a 200 nautical mile EEZ in 1992 the *Fisheries Management Act* 1991 (Cth) applies to the area known as AFZ (see s. 4 of the Act). See: B. R. Opekin, *The Law of the Sea* in S. Blay, R. Piotrowicz and B. M. Tsamenyi (eds), *Public International Law: An Australian Perspective*, (Oxford University Press Melbourne 1997) 336-7.

²³ The Scientific Committee of the Commission for the Conservation of Antarctic Marine living Resources reported that the Patagonian Toothfish has been subjected to widespread illegal fishing. The Commission also reported that the fish had been subject to widespread unregulated fishing, that is unauthorised fishing within the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) area which is not subject to state jurisdiction (see Article I of CCAMLR). See: *Report of the Sixteenth Meeting of the Commission* (Commission for the Conservation of Antarctic Living Resources, Hobart, 1997) 4-5. If the current level of illegal and unregulated fishing continues the Patagonian Toothfish is expected to be commercially extinct within three to five years. See: *International Southern Oceans Longline Fisheries Information Clearing House* [Isolfish] (Briefing Paper, Tasmanian Conservation Trust, 1997).

²⁴ For example, longlining has so depleted the population of albatross that the Australian government has taken action under the *Endangered Species Protection Act* 1992 (Cth). It has been estimated that as illegal fishers do not use mitigation measures the bycatch of sea birds in the Southern Oceans has risen to as many as 145, 000 per year (see: B. Foster, "Profitable Piracy in the Southern Ocean," (1998) 21 *The Australian Marine Conservation Society Bulletin* 3.) See also N. Evans, "Current Legal Developments: Australia" (1996) 11 *The International Journal of Marine and Coastal Law* 387 and A. Bergin, "Albatross and longlining - managing seabird bycatch" (1997) 21 *Marine Policy* 63.

difficult for legal fishers who work within the conservation measures developed to protect the species.²⁵

II COASTAL STATES' RIGHTS WITHIN WATERS UNDER NATIONAL JURISDICTION

Prescriptive jurisdiction over the territorial sea

The proximity of the territorial sea to the coastal states' land territory²⁶ acts as a deterrent to fishers who are willing to conduct their operations in violation of the coastal states' laws. This does not mean that territorial seas are immune from the problem of illegal fishing. Territorial sea adjacent to unpopulated or remote landmasses, for example those of Australia's external territories of Heard and McDonald Island, are difficult to monitor and could therefore be targeted by illegal fishers. Illegal fishing in coastal states territorial sea may also be conducted by foreign vessels that are authorised to fish within the waters under coastal state jurisdiction but which in the course of their activity breach the coastal states' fishing laws (illegal treaty fishers).

Coastal states have the authority to legislate to protect marine resources within the territorial sea, generally exercising the same sovereignty over their territorial sea as they exercise over their land territory.²⁷ Indeed, coastal states' authority to apply their laws prohibiting or restricting fishing and related activities is considered to be plenary.²⁸ The only significant restraint on coastal states is that they exercise their sovereignty subject to the right of ships of all states to innocent passage through the territorial sea²⁹ and to the right of transit passage through straits used for international navigation.³⁰ These restrictions do not, however,

²⁵ For example, it is estimated that the annual wholesale value of the illegal and unregulated catch of Patagonian Toothfish is half a billion Australian dollars. See *Report of the Sixteenth Meeting of the Commission*, supra n. 23 at 12.

²⁶ Art. 3 LOSC. The breadth of a state's territorial sea may extend 12 nautical miles measured from its baselines.

²⁷ Art. 2 LOSC. See: D. P. O'Connell, *The International Law of the Sea, Volume 1* (Clarendon Press, Oxford, 1982) 18-28 for a historical account of the states' claims to a territorial sea.

²⁸ W. T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press, Oxford, 1994) 311.

²⁹ Art. 17 LOSC.

³⁰ Arts. 34-45 LOSC. See also article 53 for the right of archipelagic sea lane passage.

significantly fetter coastal states' rights to apply their laws to prohibit fishing and related activities. This is because the LOSC states that passage is not innocent if a foreign ship engages in any fishing activity while traversing the territorial sea.³¹ Furthermore, the coastal state may adopt laws for the benefit of the conservation of living resources of the sea.³² It is an accepted and common practice for coastal states to enact laws that regulate the stowage of fishing gear and require fishing vessels to report to the coastal states authorities while passing through the territorial sea.³³

Enforcement jurisdiction over the territorial sea

Although the LOSC is silent as to coastal states' general rights to enforce their laws in the territorial sea, it is presumed that coastal states' full sovereignty within the territorial sea includes the authority to enforce its laws.³⁴ Indeed, it is common practice for coastal states to apprehend and punish (such punishment possibly including imprisonment) those found in breach of the coastal states' fishing laws.³⁵ Article 25(1) of the LOSC, however, does provide general enforcement authority for coastal states to take the necessary steps against foreign vessels that violate their right of innocent passage.³⁶

Consistent with the exercise of sovereignty over the territorial sea, the LOSC regime does not impose obligations on coastal states to conserve and manage the living resources of the zone. Nor are they obliged to take action to ensure that their laws are enforced. Importantly however, coastal state sovereignty over their territorial sea is exercised subject to the LOSC

³¹ Art. 19 LOSC.

³² Art. 21(1)(d) LOSC. Although coastal states may regulate the rights of fishing vessels to transit their territorial sea, there are some limitations on the exercise of these powers. States are prevented from enacting laws that would have the practical effect of denying or impairing the right of innocent passage (see: Art. 24(1)(a) LOSC).

³³ Burke *supra* n. 28 at 311. Coastal states' laws regulating innocent passage cannot, however, "apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards" (see: Article 21 (2) LOSC).

³⁴ I. Shearer, *Enforcement of Laws Against Delinquent Vessels in Australia's Maritime Zone* (Paper presented to the Protection of the Marine Environment: Contemporary Issues of the Law of the Sea Conference Townsville, 20 June 1997) 6.

³⁵ *Ibid.*

³⁶ Art. 25(1) LOSC.

and to other rules of international law.³⁷ As will be discussed below, a body of international obligations has been adopted which apply to all the maritime zones subject to coastal state jurisdiction. Although these obligations do not bind states and therefore cannot be classified as 'hard law', they do set standards which states are expected to adopt. Over time, if state practice is consistent with these obligations, they may crystallise into accepted binding principles of international law.³⁸

Prescriptive jurisdiction over the exclusive economic zone

The overexploitation of marine living resources in the 1960s and 1970s resulted in the acceptance of a regime that authorises coastal states' to exercise jurisdiction over most of the exploited fish stocks of the ocean.³⁹ The LOSC provides that coastal states may claim an EEZ,⁴⁰ which is an area adjacent to the territorial sea and that may extend for 200 nautical miles from the baseline from which the territorial sea is measured.⁴¹ It is estimated that about 90 percent of world's total marine catch occurs within the 200 nautical mile zone.⁴² Coastal states' have sovereign rights⁴³ to exploit, conserve, and manage the fishery resources of the EEZ.⁴⁴ These rights are subject to two specific obligations. First, in accordance with article 61(2) of the LOSC, coastal states are required to guard against over-

³⁷ Art. 2(3) LOSC.

³⁸ See: P. W. Birnie and A. E. Boyle, *International Law and The Environment* (Oxford, Clarendon Press, 1992) 15-18 on the crystallisation of state practise into customary law and 26-30 on the distinction between 'soft law' and 'hard law'.

³⁹ M. S. Sullivan, "The Case in International Law for Canada's Extension of Fisheries Jurisdiction Beyond 200 Miles" (1997) 28 *Ocean Development and International Law* 203 at 205.

⁴⁰ The right of coastal states to claim an exclusive fishing zone beyond its territorial sea was first recognised in international law in the *Fisheries Jurisdiction Case* (UK v Iceland), 1974 ICJ 3. It was not until the United Nations Conference on the Law of the Sea, 1973-1982 (UNCLOS) that a consensus was reached on the width of this area.

⁴¹ Arts. 55 and 57 LOSC.

⁴² L. Juda, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique" (1997) 28 *Ocean Development and International Law* 147 at 148.

⁴³ The distinction between sovereignty and sovereign rights is somewhat blurred. See E. D. Brown, *The International Law of the Sea* (Dartmouth, Sydney 1994) 217-221.

⁴⁴ Art. 56 LOSC.

exploitation of the fisheries resources of their EEZ.⁴⁵ This obligation is further reinforced by articles 63 to 67 of the LOSC, which deal with specific types of species, and by articles 192 and 193 which provide that states are obliged to protect and preserve the marine environment.⁴⁶ Secondly, they must promote the optimum utilisation of the fisheries resources without prejudicing their obligation to conserve and manage those resources.⁴⁷ Coastal states are required to determine the total allowable catch of living resources,⁴⁸ and where coastal states are unable to

⁴⁵ Art. 61 LOSC. States are required to determine the allowable catch of the living resources found within their EEZ.

⁴⁶ Note that article 68 of the LOSC which relates to sedentary species has been subject to differing interpretations. The article states that part five of the convention, which included articles 61, 62 and 73, does not apply to sedentary species. Scholars interpret article 68 as meaning that the obligations to conserve and utilise marine living resources and coastal states' powers of enforcement over marine living resources of the EEZ do not apply to sedentary species. In accordance with such an interpretation sedentary species, like mineral resources, are subject to the continental shelf regime of part six of the convention. In accordance with Article 77 of the LOSC coastal states have the sovereign rights of exploration and exploitation of such resources. Part six is silent as to coastal states' rights to take enforcement action to protect their interests in the continental shelf resources. It must be assumed however that as coastal states have "exclusive" sovereign rights to the resources of the continental shelf, their powers of enforcement must be plenary (see: Article 77(2)). This approach to sedentary species has been criticised by prominent international jurist Judge Oda as being illogical and undesirable. From an environmental viewpoint there is no reason why sedentary species should not be treated as subject to the same conservation and management obligations as other living resources of the EEZ. Kwiatowska is one scholar who argues that article 68 should be treated as having no practical importance. Sedentary species found on the continental shelf below a coastal states EEZ should be subject to the same regime as other living resources within the zone, while sedentary species of the continental shelf beyond the EEZ should be subject to the high seas high seas regime (see: Articles 116-119). In accordance with Kwiatowska's approach sedentary species found within the EEZ would be subject to coastal state powers of enforcement while those found beyond the zone would be subject to flag state enforcement. The latter approach is clearly preferable as sedentary species found both within a coastal state's EEZ and beyond would be fished subject to obligation imposed on states to conserve the resource (see: Articles 62 and 117). See: B. Kwiatowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, (Martinus Nijhoff Publishers, London, 1989) 74-6.

⁴⁷ Art. 62 LOSC.

⁴⁸ Art. 61 LOSC. In determining the total allowable catch states take into account the best scientific evidence available.

harvest the entire allowable catch, they must agree to allow the nationals of other states to access the surplus.⁴⁹ Coastal states can determine the conditions upon which access is granted. In determining the conditions of access, the coastal state may pass laws and regulations limiting the activities of those foreign fishers. Amongst other things the laws may relate to the matters set out in article 62(4)(a)-(k) which include: licensing of fishers, determining the species that may be caught, fixing quotas on catch limits, regulating the size and number of fishing vessels that may be used, specifying the information that must be supplied by fishing vessels including catch statistics and vessel position, and regulating enforcement procedures.⁵⁰

Enforcement jurisdiction over the exclusive economic zone

Unlike the regime governing the territorial sea, the LOSC sets out the enforcement authority which coastal states may exercise in the discharge of their obligation to conserve and manage the living resources of the EEZ. Article 73(1) of the LOSC states that:

"[t]he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention".

From the wording of article 73 it is clear that coastal states' powers of enforcement are not limited to the specific actions identified within the provision. The specific measures of boarding, inspection arrest and judicial proceedings are examples of actions that can be taken, and are not intended to limit the exercise of states' enforcement jurisdiction.⁵¹ Furthermore, the broad scope of the provision when read in conjunction with article 62(4), demands that the specific examples identified should not be given the limited interpretation they are given elsewhere in the treaty.⁵² The term "inspection" in article 73(1) should not be restricted to mean simply the examination of documents as it is used in article 226(1)(a) of the LOSC. As coastal states' have the authority to regulate the type, size and amount of gear that fishing vessels can use,⁵³ and the species, volume,

⁴⁹ Art. 62(2) LOSC.

⁵⁰ Art. 62(4)(a)-(k) LOSC.

⁵¹ Sullivan, *supra* n. 40 at 206.

⁵² Burke, *supra* n. 28 at 314.

⁵³ Art. 62(4)(c) LOSC.

age and size of fish that may be caught,⁵⁴ the term "inspection" must be interpreted as meaning an unrestricted examination of the vessel and cargo.⁵⁵ It is also clear that given the reference to the "[a]rrested vessels and their crew",⁵⁶ the term arrest is not to be given its normal maritime meaning of referring only to the arrest of vessels.⁵⁷

Although broadly defined, coastal states' powers of enforcement are restricted by the LOSC. The restrictions are intended to protect the interest of world trade, and must be viewed in light of the fact that ocean vessels transport a large portion of the world's exports.⁵⁸ The international community therefore has a strong interest in ensuring that ships are entitled to exercise the right of navigation⁵⁹ and the powerful Distant Water Fishing Nations (DWFN)⁶⁰ have a strong interest in ensuring that their fishing vessels are not subjected to arbitrary or extended periods of detention.⁶¹ Accordingly, the LOSC's enforcement provision should be read as an attempt to balance the interests of coastal states in the exploitation, conservation and management of the natural resources of the EEZ, and the interests of flag-states in ensuring that their vessels are subject to an efficient navigation regime. Article 73 of the LOSC imposes three restrictions on the enforcement jurisdiction of coastal states. First, in accordance with paragraph 73(2), any arrested vessel and its crew must be promptly released upon the posting of reasonable bond or security. Secondly, paragraph 73(3) imposes a prohibition on imprisonment or any form of corporal punishment for a violation of coastal state fisheries regulations unless there is an agreement between the concerned states that allows such punishment. Thirdly, paragraph 73(4) requires that the coastal

⁵⁴ Art. 62(4)(b) and (d) LOSC.

⁵⁵ Burke, *supra* n. 28 at 314.

⁵⁶ Art. 73(2) LOSC.

⁵⁷ Burke, *supra* n. 28 at 314.

⁵⁸ *Ibid*, 310.

⁵⁹ Art. 58(1).

⁶⁰ *The Agreement on High Seas Fishing*, *supra* n. 11. Japan, Russia, Spain, the Republic of Korea, Poland and Taiwan province of China are responsible for ninety percent of distant water fishing. The United States and China also have significant distant water fishing fleets.

⁶¹ Art. 73(2) and (3) LOSC. Although not specifically restricted in application to fishing vessels the powers exercised in accordance with article 73 are to protect the coastal states sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ. See: R. Lagoni, "The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report" (1996) 11 *The International Journal of Marine and Coastal Law* 147 at 148.

state promptly notify the flag-state of any action taken when an arrest or detention occurs and of any penalty that is subsequently imposed. The application and effect of the first and second restriction are discussed below.

Prompt release

DWFN's interests are protected by article 292, which provides for the compulsory settlement of disputes arising as a result of a coastal states non-compliance with the provisions of the LOSC for the prompt release of a vessel and crew.⁶² Parties may agree on the appropriate court or tribunal to hear the dispute. If such an agreement cannot be reached, the flag-state can submit the dispute to a court or tribunal that has been accepted by the detaining state under article 287 of the LOSC or to the International Tribunal for the Law of the Sea.⁶³ The flag-state can commence proceedings against the coastal state for its alleged failure to comply with the requirement of prompt release of vessels and crew, its failure to post a bond and the posting of a bond that is not considered to be reasonable.⁶⁴ The requirement of promptness is given meaning by article 292, which provides that a flag-state may immediately submit a question of release to a court or tribunal if a vessel has been detained for more than ten days.⁶⁵

The question as to what constitutes a reasonable bond is very important when the coastal state has detained and charged poachers. As all fishers detained for alleged violations of fishing laws must be promptly released, they are free to leave the jurisdiction of the coastal state. In circumstances where poachers are subsequently found to have violated the laws of the coastal state, it is unlikely that the fishers will return to the coastal state in order to pay fines or fulfil any other orders made by the courts. Although the bond imposed should not be excessive so as to constitute an abuse of right,⁶⁶ it is important that the bond be adequate to meet any adverse finding against the poachers. The reasonableness of the bond should therefore be determined by reference to the maximum fine that may be imposed, and any other order that a domestic court is authorised to impose. Some scholars have advocated a different test/criteria. Professor Traves,

⁶² Article 292 applies to articles 73(2), 220(6) and (7) and 226(1)(c).

⁶³ E. D. Brown, "Dispute settlement and the law of the sea: the UN Convention regime" (1997) 21 *Marine Policy* 17 at 20.

⁶⁴ *The M/V "Saiga"* (Saint Vincent and the Grenadines v Guinea) (1997) International Tribunal for the Law of the Sea, paras. 76 and 77.

⁶⁵ Brown supra n. 63 at 20 and Lagoni, supra n. 61 at 151.

⁶⁶ Art. 300 LOSC.

who is currently a Judge on the International Tribunal for the Law of the Sea, argues that the bond should be calculated by reference to the value of the vessel, which may include the value of the cargo. He argues that the bond should be no higher than the value of the vessel and the cargo, because the flag-state would be placed at greater financial risk by paying the bond than it would if the vessel is left in detention.⁶⁷ The practical effect of a bond that is in excess of the value of the vessel and cargo would likely to be the continued detention of the vessel. It could be argued that a bond that is likely to result in continued detention of a vessel must be considered unreasonable. A potential problem with setting bonds that are equal to or greater than the value of the vessel is that it may result in illegal fishers using vessels of little value, so called "leaking wrecks", to conduct their operation.⁶⁸ In such circumstances the cost of apprehension to the fishers would be reduced, as they could simply abandon the detained vessel or pay a bond that is low relative to the potential economic gain of the sale of the illegal catch.

Illegal treaty fishers do not pose the same problems as the access agreement between the coastal state and flag-state are likely to include provision whereby the flag-state agrees to ensure that its nationals comply with the fishing laws of the coastal state.⁶⁹ Even in the absence of such an agreement, the incentive of continued access is likely to motivate flag-states to ensure that its nationals comply with the findings of the coastal states' courts.

When paragraph 73(2) is read in conjunction with article 292 it is clear that the provision is concerned only with the preliminary action against a vessel and crew arrested for an alleged breach of the coastal states' laws and regulation. Both articles require that the decision as to release should be made expeditiously and paragraph 292(3) states that the issue of release shall not prejudice the merits of any case brought before a domestic forum against either the vessel or its crew.⁷⁰ The requirement of prompt release

⁶⁷ T. Treves, "The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea," (1996) 11 *The International Journal of Marine and Coastal Law* 179 at 196-197.

⁶⁸ B. Montgomery, "Fishing pirates cut their leaky losses," (*The Australian*, 19 December 1997 at 5) It is claimed that following enforcement action by Australia and France to stop illegal fishing for Patagonian toothfish the illegal fishers have begun to use "leaking wrecks" to conduct their operations.

⁶⁹ See, for example, article IV of the Agreement on Fisheries between the Government of Australia and the Government of Japan 1979.

⁷⁰ See: *The M/V "Saiga"* (Saint Vincent and the Grenadines v Guinea) (1997) International Tribunal for the Law of the Sea, paras. 51 and 56.

protects against arbitrary detention for extended periods of time, and militates against the drastic economic impact of detention. The requirement of prompt release does not protect illegal fishers from certain forms of punishment⁷¹ although, as discussed above, the requirement of prompt release may, in the case of poachers, make it difficult to enforce court orders against fishing vessels and crew. Coastal states, for example, can order the forfeiture of a foreign vessel found to have engaged in illegal fishing.⁷² In Australia the difficulty of enforcing a forfeiture order is addressed by linking the bond to the value of the fishing vessel. In circumstances where the vessel is no longer within Australia's jurisdiction, the bond is forfeited in place of the vessel.⁷³ Therefore the requirement of prompt release is a barrier to solving the problem of illegal fishing. Even when the forfeiture of a vessel is ordered the requirement of prompt release may mean that the vessel is not within the coastal state's jurisdiction and therefore cannot be confiscated. In circumstances where fishers do not have legal access to sufficient stocks to be economically viable it is likely that those detained for poaching and then released will return to resume illegal fishing.⁷⁴

Imprisonment and corporal punishment

The general prohibition on including imprisonment and corporal punishment as a penalty for a fisheries offence does not necessarily prevent coastal states from imprisoning foreign fishers who conduct illegal

⁷¹ M. Tsamenyi and T Aqorau, *Fishing Rights and Responsibilities at Sea: Analysis of Relevant Provisions of the United Nations Convention on the Law of the Sea*, in M. Tsamenyi and M. Herriman (ed.) *Rights and Responsibilities in the Maritime Environment: National and International Dilemmas*, (Wollongong Papers on Maritime Policy No. 5, Centre for Maritime Policy University of Wollongong, Wollongong, Australia, 1996) 67 at 74.

⁷² Forfeiture of a foreign vessel, for example, is provided for in Australia's *Fisheries Management Act 1991* (Cth) s. 106 (1)(a). See: *Re Director of Public Prosecutions; Ex parte Lawlor* (1994) 179 CLR 270 where the master of a New Zealand vessel was found fishing without a licence in the AFZ, and a fine of \$9,000 and the forfeiture of the vessel was imposed.

⁷³ The forfeiture of the bond rather than the vessel relieves the Commonwealth of the responsibility of disposing of the vessel as provided for by s. 106(3) of the *Fisheries Management Act 1991* (Cth).

⁷⁴ See: B. Montgomery, "Navy frigate snaps up toothfish poacher", (*The Australian* 26 February 1998 at 4) where it is reported that a vessel detained by the Australian Navy for illegal fishing, had been arrested by the French Navy for illegal fishing in the previous month.

fishing operations. Illegal fishers could face imprisonment in one of two situations. First, the LOSC provides that a coastal state and a flag-state may enter into an agreement which allows imprisonment to be included as a possible punishment for the violation of fisheries laws.⁷⁵ Secondly, although the LOSC prohibit the imposition of a term of imprisonment as a punishment for the violation of fisheries laws, imprisonment as a form of punishment may be imposed against fishers who violate a coastal state's administration of justice laws. For example, if a fisher wilfully refuses to pay a penalty or breaches a bond condition imposed by a domestic court, a term of imprisonment may be imposed.⁷⁶ Imprisonment for an administration of justice offence is likely to be imposed only once the illegal fisher has been detained and prosecuted for the second time.

Although imprisonment for offences other than fisheries laws and regulations are not inconsistent with coastal states' enforcement powers under the LOSC, the requirement that vessel and crew be promptly released could make the enforcement of a custodial sentence on poachers difficult, and maybe impossible. The problem has been further exacerbated by The International Tribunal for the Law of the Sea's decision in the *M/V "Saiga" Saint Vincent and the Grenadines v Guinea* 1997.⁷⁷ The majority of the Tribunal found that, provided the Applicant

⁷⁵ Australia has not entered into such an agreement. The enforcement provisions of the Agreement on Fisheries Between the Government of Australia and the Government of Japan 1979 makes no reference to penalties for violation of fisheries laws. The Memorandum of Understanding Between The Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf (MOU) simply states that Indonesian fishing vessels found fishing in an area outside of the MOU "shall be subject to the provisions of Australian law". Note that the LOSC does not authorise states to enter agreements that allow the imposition of corporal punishment for violations of fisheries laws.

⁷⁶ D. H. Anderson, "Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements," (1996) 11 *The International Journal of Marine and Coastal Law* 165 at 170. Note s. 98 of the *Australian Fisheries Management Act* 1991 (Cth) which, provides that domestic and foreign fishers who breach a condition imposed by a court for a commercial fishing offence may be imprisoned for up to 12 months. See: *Annual Report*, Supra n. 21 at 111 where it is stated that a number of foreign fishers who have been caught illegally fishing in the AFZ for the second or subsequent time have been jailed for breaking the conditions of the bond imposed for a previous offence.

⁷⁷ (1997) International Tribunal for the Law of the Sea.

made an "arguable"⁷⁸ or "sufficiently plausible"⁷⁹ allegation that the respondent had not complied with the requirements of prompt release, the Tribunal would make an order that the detained vessel be released.⁸⁰ Furthermore, the majority of the Tribunal found that it was not bound by the characterisation of the laws by the coastal state. The fact that the detaining state charged the captain of the M/V Saiga with "customs" and "smuggling" offences did not restrict the Tribunal. The Tribunal was free to find that the coastal state, when arresting the vessel, was not acting pursuant to its customs laws but arguably acting pursuant to its sovereign rights to explore, exploit, and manage the living resources of the EEZ.⁸¹ The application of the Tribunal's decision to foreign fishers charged with failing to comply with a court order would mean that those fishers are protected by the prompt release requirements. Compliance with the Tribunal's decision could undermine coastal states' enforcement programs, as they would be required to release illegal fishers, upon the posting of a bond, regardless of the charges and of the number of times the fishers violated the state's laws. There is much to be said for the opinions of the dissenting judges, who argued that the majority's decision to apply the "arguable or sufficiently plausible" test in conjunction with their disregard for the coastal state's characterisation of its laws has "radically upset" the balance of the LOSC in favour of flag-states.⁸²

The practical result of paragraph 73(3) is that the punishment imposed on illegal fishers may have no correlation to the severity of the offence committed, and penalties are inequitably imposed between illegal treaty fishers and poachers. For example, a treaty fisher could be imprisoned for the inaccurate reporting of the size of the catch in circumstances where its flag-state has agreed to the imposition of imprisonment as a form of punishment, while poachers cannot be imprisoned even though they are caught taking a large volume of fish or taking juveniles before they have reproduced.⁸³ Furthermore, although poachers may be sentenced to imprisonment for administration of justice offences, the prompt release requirements may mean that such fishers would never be in the jurisdiction to serve the sentence. While the prohibition on imprisonment for

⁷⁸ *Ibid*, para 51.

⁷⁹ *Ibid*, para 59.

⁸⁰ *Ibid*, para 95.

⁸¹ *Ibid*, paras 71 and 72.

⁸² *Ibid*, para 9 of the dissenting judgement of Vice-President Wolfrum and Judge Yamamoto.

⁸³ See the *Two International Agreements on Tuna* (Joint Standing Committee on Treaties, 1996) Chapter 2 para 2.77 for the difficulties of weighing fish at sea.

violations of fishing laws and regulations protects the interest of DWFNs, it limits the coastal state's ability to administer punishment, which stops fishers from immediately returning to illegal fishing, and which may have a significant deterrent effect. Accordingly, reviews of state practice have revealed that not all states comply with the prohibition on imprisonment as a form of punishment for foreign fishers found to have violated fishing laws.⁸⁴

Hot pursuit and use of force⁸⁵

For the purpose of arrest, coastal states' powers to enforce their fisheries laws and regulations are supplemented by Article 111, which grants the power of hot pursuit where the coastal state has good reason to believe that an offence has been committed in the internal waters, the territorial sea, or the EEZ of the state.⁸⁶ If the fisheries offence is committed within the internal waters or the territorial sea, the pursuit must commence⁸⁷ while the

⁸⁴ See Burke, *supra* n. 28 at 315, Kwiatkowska, *supra* n. 87 at 67 and O. P. Sharma, "Enforcement Jurisdiction in the Exclusive Economic Zone- The Indian Experience," (1993) 24 *Ocean Development and International Law* 155 at 163. Kwiatkowska explains the lack of compliance with article 73(3) as a response by states to the high cost of surveillance and enforcement. The imposition of a prison term is seen as an effective deterrence, which reduces the need for future enforcement action.

⁸⁵ For a detailed analysis of coastal states' rights to hot pursuit see: D. P. O'Connell, *The International Law of the Sea - Volume 11* (Clarendon Press, Oxford, 1982) at 1075-1093. Note that the right of hot pursuit was recognised under customary international law in the case of *I'm Alone (Canada v USA)* (1935) 3 UN Reports of International Arbitral Awards 1609.

⁸⁶ The right to hot pursuit from the internal waters and the territorial sea is not limited to fisheries violations but applies to violations of the coastal laws generally. The right of Hot pursuit appears in Part VII of the convention titled the High Seas, however, article 111 expressly states the right applies to the zones subject to national jurisdiction. Furthermore article 58(2) states that article 88 to 115 apply to the to the EEZ so far as they are not incompatible with the EEZ regime. Hot pursuit from the contiguous zone and the EEZ or the continental shelf may only be conducted in respect of violations of the rights for which the zones were established (see: Article 111 (1) and (2)). The contiguous zone and the EEZ overlap. For the purpose of fisheries laws the contiguous zone is no different from any other part of the EEZ.

⁸⁷ Hot pursuit commences once 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" (see: Article 111(4)).

offending vessel, or one of its boats is within either of the zones or within the contiguous zone.⁸⁸ If the fisheries offence is committed within the EEZ, which includes the contiguous zone, it must commence while the offending vessel or one of its boats is within the EEZ.⁸⁹ Hot pursuit may continue until the vessel is arrested or until the vessel enters its own territorial sea or that of a third State.⁹⁰ The right of hot pursuit is also terminated once the chase has been interrupted. Australian legislation states that the power to pursue a boat is not terminated or substantially interrupted only because sight or sensing devices contact has been lost.⁹¹ This has been described as a "somewhat courageous"⁹² interpretation of the customary international law requirement that "hot and continuous" pursuit must involve uninterrupted sight, which includes radar identification.⁹³ Article 111(6) provides that an aircraft may commence and continue a pursuit until such time as a vessel arrives to take over the pursuit. Of particular importance for states with large EEZ or distant isolated fishing grounds is that the LOSC provides that hot pursuit may be commenced by aircraft and later continued by another aircraft or a ship which has been summoned by the original pursuing aircraft.⁹⁴ This enables states to use aerial surveillance as an effective means of patrolling their EEZs.

⁸⁸ It is not necessary that the pursuing vessel be within the internal waters or the territorial sea at the time the hot pursuit commences (see: Article 111(1)).

⁸⁹ The right of hot pursuit applies *mutatis mutandis* to violations in the EEZ (see: Article 111(2)) therefore, it is not necessary that the pursuing vessel be within the EEZ at the time the hot pursuit commences. Note that a coastal state fisheries authority may only use a warship, military aircraft or other ship or aircraft clearly marked as being on government service and authorised to that effect to pursue a vessel believed to be engaged in illegal fishing (see: Article 111(5)). Australia's compliance programs, involving illegal foreign fishing activities, are carried out by AFMA and State fisheries authorities in co-operation with the airforce and the navy (see Annual Report 1995-96 supra n 21 at 72). Australian navy vessels are used to pursue illegal fishers particularly when the illegal activities are carried out in remote and distant fishing grounds (see: Minister for Defence, *Another Foreign Fishing Vessel Apprehended in Southern Ocean* (Media Release, 25 February 1998)).

⁹⁰ Art. 111(3) LOSC.

⁹¹ See s. 87 of the *Fisheries Management Act* (1991) (Cth) and s. 48A of the *Great Barrier Reef Marine Park Act* (1975) (Cth).

⁹² Shearer, supra n. 36 at 11.

⁹³ *I'm Alone (Canada v USA)* (1935) 3 UN Reports of International Arbitral Awards 1609.

⁹⁴ Art. 111(6).

Coastal states are restricted as to the degree of force that may be used to effect an arrest of a vessel believed to have been illegally fishing. The only reference to degree of force that may be used appears in article 225, which states that in taking "enforcement [action] against foreign vessels, States shall not endanger the safety of navigation". This restriction on the use of force must be understood in light of the customary international law principle that a pursuing vessel may use any necessary and reasonable force for the purpose of arrest, though the use of force must be a measure of last resort.⁹⁵ Once an arrest has been effected the detained vessel may be escorted to a port of the coastal state for the purpose of an inquiry.⁹⁶

III COASTAL STATES' PRESCRIPTIVE JURISDICTION OVER ANCILLARY ACTIVITIES AND TRANSIT PASSAGE

Ancillary activities

When article 73(1) is read in conjunction with article 62(4), it is clear that coastal states have broad powers to enforce their laws against foreign fishing vessels believed to be engaged in illegal fishing. It is less certain, however, whether the coastal state has the authority to enforce its laws against those involved in ancillary activities such as the provision of services to a fishing vessel. Does the coastal state's "sovereign right to explore, exploit, conserve and manage the living resources in the exclusive economic zone" entitle the state to enforce its laws against merchant ships, which are otherwise entitled to freedom of navigation, simply because they provide a service such as bunkering (refuelling) to a fishing vessel? There are strong conservation arguments as to why coastal states should be able

⁹⁵ *I'm Alone (Canada v USA)* (1935) 3 UN Reports of International Arbitral Awards 1609 and *Red Crusader* (1962) 35 International Law Reports 485 (see: O'Connell, supra n. 85 at 1071-1074). See s. 3ZC of the Australian *Crimes Act* 1914 (Cth) which sets out how force may be used, by anyone acting pursuant to Federal laws, to make an arrest.

⁹⁶ Art. 111(7) LOSC. The voyage from the point of detention to the port may include crossing part of an EEZ or the high seas. Therefore fishing vessels arrested in the AEZ of the external territories of Heard and McDonald Islands can be escorted some 4000km to the Western Australian port of Fremantle. To escort fishing vessels to Heard Island could possibly be in violation of a states obligation not to escort a vessel to an "unsafe port or anchorage" (see: Article 225). Heard Island although inhabited in the past is currently uninhabited while Macdonald Island has never been inhabited and is rarely visited (see: S. Kaye and D. R. Rothwell, "Australia's Antarctic Maritime Claims and Boundaries," (1995) 26 *Ocean Development and International Law* 195 at 212-213).

to enforce their laws against fishing vessels and crews involved in such activities. For example, one of the solutions applied by coastal state to restrict foreign fishers' activities is to limit the size of foreign vessels entitled to fish within its EEZ a measure specifically provided for by article 62(4)(c).⁹⁷ Small vessels have small tanks. This restrict the length of time that the vessel can spend fishing and limits the areas that can be reached within the EEZ. Conservation and management laws restricting the size of a vessel would be undermined if the coastal state could not also take action to enforce its laws prohibiting bunkering. The first decision of the International Tribunal for the Law of the Sea, the *M/V "Saiga" Saint Vincent and the Grenadines v Guinea* 1997⁹⁸ addressed the issue of coastal state rights to enforce their laws regulating activities that are ancillary to fishing. Unfortunately, the discussion fails to clarify the law, but rather adds to the uncertainty. The *M/V "Siaga"*, a Saint Vincent and the Grenadines oil tanker had entered the EEZ of Guinea and supplied gasoil to three fishing vessels. Following the bunkering, the *M/V "Saiga"* was pursued by Guinean Customs patrol boats and arrested. The Guinean authorities detained the vessel and its crew without setting a bond or security for their release.⁹⁹ The Saint Vincent and the Grenadines subsequently commenced proceedings before the International Tribunal of the Law of the Sea on the basis that the Guinean authorities had not complied with article 73 of the LOSC.¹⁰⁰ The Tribunal acknowledged that arguments can be advanced as to why bunkering of fishing vessels is an activity that can be regulated in accordance with coastal states sovereign rights to conserve and manage the living resources of the EEZ. The Tribunal noted that there are examples of state practice where ancillary activities are included within the definition of fishing. Article 1 of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific 1989 defines driftnet fishing activities to include "co-operation in the provision of food, fuel and other supplies for vessels equipped for or engaged in driftnet fishing".¹⁰¹ The Tribunal also acknowledged the contrary argument that the need for efficient and free international commerce requires that activities, such as bunkering, are not subjected to coastal state control, but come within the legal regime of freedom of navigation.¹⁰² Having canvassed the arguments for and against the application of coastal state laws to ancillary activities, the Tribunal stated

⁹⁷ Kwiatkowska, *supra* n. 87 at 87.

⁹⁸ (1997) International Tribunal for the Law of the Sea.

⁹⁹ *Ibid*, paras. 25- 33 for the facts of the case.

¹⁰⁰ *Ibid*, para 55.

¹⁰¹ *Ibid*, paras. 56-57.

¹⁰² *Ibid*, para 58.

that in the circumstances it was not necessary to decide which view is better founded in law.¹⁰³ However, the majority ordered the release of the M/V Saiga on the basis that the arguments in favour of prompt release were well founded.¹⁰⁴ As pointed out by the dissenting judges, there is an inconsistency in the majority judgment.¹⁰⁵ On the one hand, the majority states that it is not necessary to decide whether the regulation of bunkering is within coastal states' authority. On the other hand, the majority's decision is based on the assumption that article 73 authorises the regulation of bunkering.

The arguments in favour of coastal state authority to prescribe and enforce laws regulating ancillary activities are compelling. Without such authority, coastal states would not be able to take advantage of cost-effective resource management strategies such, as limiting the size of vessels that may access the EEZ. If coastal states could not control the transshipment of fish, an activity that could be classified as ancillary, the capacity of foreign vessels to take fish would be greatly increased as vessels could engage in nonstop fishing.¹⁰⁶ In such circumstances, coastal states would be required to rely on high cost monitoring and inspection programs to ensure that foreign vessels comply with catch restrictions. Furthermore the argument that freedom of navigation needs to be protected to ensure unimpeded trade in goods is not valid when merchant vessel are simply acting as supply or transport facilities for fishing vessels.

Restrictions on transit in the exclusive economic zone

Many states, including Australia, place restrictions on unlicensed foreign fishing vessels which are transiting their EEZs.¹⁰⁷ The restrictive measures are taken in an effort to prevent or to improve detection of illegal fishing. Constraints commonly adopted include regulations on how fishing gear is stowed and restrictions on the routes that may be taken.¹⁰⁸ Other less

¹⁰³ *Ibid*, para 59.

¹⁰⁴ *Ibid*, para 73.

¹⁰⁵ *Ibid*, para 22 for the dissenting judgement of President Mensah, and para 20 for the dissenting judgement of Vice-President Wolfrum and Judge Yamamoto.

¹⁰⁶ Article 62(4) of the LOSC makes no reference to transshipment.

¹⁰⁷ A literal interpretation of s. 95 and s. 4 of the Australian *Fisheries Management Act* (1991) (Cth) leads to the conclusion that unlicensed fishing vessels are prohibited from carrying fish through the AFZ.

¹⁰⁸ See for example s. 101(1)(d) of the Australian *Fisheries Management Act* (1991) (Cth). See also Burke, *supra* n. 28 at 319 – 333 for a comprehensive

common practices include requiring all non-licensed foreign fishing vessels to seek authorisation prior to transiting the EEZ, or requiring that they use prescribed sea lanes whilst doing so.¹⁰⁹ Commentators disagree as to the extent to which coastal states can take enforcement action against fishing vessels that are passing through the EEZ.¹¹⁰ One view is that article 58 of the Convention preserves freedom of navigation in the EEZ, and that that freedom is to be exercised in the same manner that it is exercised on the high seas.¹¹¹ Therefore, coastal states have no authority to regulate fishing vessels transiting the EEZ. The opposing view is that the right to freedom of navigation is subject to the relevant provisions of the convention, and that therefore the freedom is subordinate to the coastal states prescriptive jurisdiction within the EEZ.¹¹² Accordingly the coastal state may limit the right of fishing vessels to transit its EEZ if such restrictions are for the conservation and management of the living resources of the zone. Burke propounds a third, more pragmatic, view. He argues that the extent to which a coastal states may interfere with foreign fishing vessels' freedom of navigation should be determined according to the degree of difficulty the coastal state has in "securing adequate enforcement and the contribution that the fishery make to the national economy".¹¹³ There is much to be said for the approach argued by Burke as it gives additional flexibility to states that may otherwise struggle to exercise their rights and fulfil their obligations within the EEZ.

discussion of the type of restrictions that states have adopted and whether they are consistent with international law.

¹⁰⁹ It is difficult to argue that the convention allows such restriction in the EEZ as it is generally accepted that coastal states do not even have the right to take such measures in their territorial sea (see: Burke, supra n. 28 at 322-322). Article 22 of the LOSC restricts the use of sea-lanes in the territorial sea to where they are necessary for the safety of navigation.

¹¹⁰ Kwiatkowska, supra n. 87 at 88.

¹¹¹ Burke, supra, n. 28 at 315- 316.

¹¹² *Ibid*, at 316.

¹¹³ *Ibid*, at 327-28. Therefore Island states such as those of the South Pacific, which have large EEZ relative to the size of their land mass and where the living resource of the EEZ are extremely important economically are justified in enforcing a regime that restricts fishing vessels rights to pass through their national waters. Likewise, Australia with its remote external territories and its large EEZ is justified in restricting the right to passage.

IV STATES' OBLIGATION TO PREVENT ILLEGAL FISHING

Coastal state obligations

The LOSC requires states to take proper conservation and management measures to ensure that living resources in the EEZ are not endangered by over-exploitation.¹¹⁴ However it does not impose specific enforcement obligations on coastal states or set minimum enforcement standards.¹¹⁵ As the result of the unsustainable overexploitation of fishing stocks in the 1980s and 1990s the international community has adopted a number of instruments aimed at regulating fishing activities. Two of the instruments include statements on measures that coastal state should take to improve their enforce regimes.¹¹⁶ First, Agenda 21, which was adopted at the 1992 United Nations Conference on Environment and Development and later endorsed by the General Assembly, is a goal-setting, non-binding document. In Chapter 17 of Agenda 21, states commit themselves to the sustainable use of marine living resources under national jurisdiction and on the high seas.¹¹⁷ Chapter 17 paragraph 79 proposes that:

[c]oastal States, individually or though bilateral and/or multilateral cooperation ... should *inter alia*: ... Strengthen their legal and regulatory frameworks, where appropriate, including management, enforcement and surveillance capacities.¹¹⁸

Second, the FAO Code of Conduct for Responsible Fisheries¹¹⁹ (the Code) consists of an agenda for further action in attaining the sustainable

¹¹⁴ Art. 61 LOSC.

¹¹⁵ See E. Hay, "Global Fisheries Regulations in the First Half of the 1990s," (1996) 11 *The International Journal of Marine and Coastal Law* 459 at 462 for a discussion of the extent to which international natural resource law and international environmental law should set standards in areas traditionally considered to be within the jurisdiction of an individual state.

¹¹⁶ P. Birnie, "Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part 1" (1997) 12 *The International Journal of Marine and Coastal Law* 307 at 315.

¹¹⁷ Chapter 17: Part C para 46 and Part D para 74. Chapter 17 is reproduced in (1992) 22 *Environmental Law and Policy* 284-287.

¹¹⁸ *Ibid.*

¹¹⁹ Adopted unanimously on 31 October 1995 by the Food and Agricultural Organisation Conference (FAO, Rome 1995). The Code has its geneses from the work of the FAO Committee on Fisheries in 1991 and from the 1992 Conference on Responsible Fishing, the Declaration of which was endorsed by UNCED in Agenda 21 (see: W. R. Edeson, *Current Legal Developments: Food and Agriculture Organisation of the UN* (1996) 11 *The International Journal of Marine and Coastal Law* 233).

development of fisheries. It states that as a general principle: "States should ensure compliance with and enforcement of conservation and management measures and establish effective mechanisms, as appropriate, to monitor and control the activities of fishing vessels and fishing support vessels".¹²⁰ The Code also provides that Coastal states have a duty to ensure that only fishing operations allowed by them are conducted within waters under their jurisdiction and that these operation are carried out in a responsible manner.¹²¹

Flag-state obligations

It is argued that all states have an obligation under the LOSC to take measures to prevent fishing vessels entitled to fly their flag from conducting fishing operations in violation of coastal states' laws that apply to the zones under national jurisdiction.¹²² Flag-states' obligations are derived from the LOSC's acceptance of coastal states sovereign rights to regulate for the living resources of the waters under national jurisdiction.¹²³ The obligation is further reinforced by article 62(4) which provides that "[n]ationals of other States fishing in the exclusive economic zone shall comply with the convention measures and with the other terms and conditions established in the laws and regulations of the coastal State." In the context of the coastal states right to require fishing vessels to be licensed, it is clear the reference to "[n]ationals of other States fishing" includes the nationals of states that are not licensed or not otherwise permitted and therefore should not be fishing in the EEZ.

The argument that flag-states have an obligation to prevent their fishing vessels from violating coastal states laws and regulations is consistent with commitment states made at UNCED to the sustainable use and conservation of marine living resources of areas under national jurisdiction. It is also consistent with the commitment, within Agenda 21, to take action to strengthen enforcement measures.¹²⁴ Other international instruments also address the responsibilities of flag states. The United

¹²⁰ Article 6 para 10 of The Code states that it applies both waters under national jurisdiction and to the high seas.

¹²¹ Art. 8(1.1). The Code.

¹²² *Oceans and the law of the sea: A/52/557* supra n. 19 para 66.

¹²³ Art. 56(1) LOSC.

¹²⁴ See Agenda 21, Chapter 17 Part D paras. 74 and 79(d) which lists improvement in enforcement measures as an activity which states agree to adopt. The obligation applies equally to flag-states as it does to coastal states.

Nations resolution 49/116 of 1994 calls on flag states to ensure that its fishing vessels do not fish in zones under national jurisdiction unless authorised and if the authorisation has been given, then to ensure that its fishing vessels comply with the terms of the authorisation. The Code of Conduct is even more specific in its description of the enforcement action that is expected of responsible flag states. Article 8 (2)(7) provides that:

[f]lag States should take enforcement measures in respect of fishing vessels entitled to fly their flag which have been found by them to have contravened applicable conservation and management measures, including, where appropriate, making the contravention of such measures an offence under national legislation. Sanctions applicable in respect of violations should be adequate in severity to be effective in securing compliance and to discourage violations *wherever they occur* and should deprive offenders of the benefits accruing from their illegal activities. Such sanctions may, for serious violations, include provisions for the refusal, withdrawal or suspension of the authorization to fish. (Italics added)

Although the Code is voluntary in nature,¹²⁵ it is expressly based on rules of international law and it is intended to provide a path by which states can achieve responsible fisheries.¹²⁶ The expectation therefore is that flag states will take quite specific actions to discourage their nationals conducting fishing operations in violation of coastal states' laws and regulations.

V CONCLUSION

The problem of illegal fishing is unlikely to be resolved until such time as the size of the world's fishing fleet is reduced. In this respect the requirement of prompt release restricts coastal state authorities from enforcing permanent confiscation of foreign vessels. A possible solution is that coastal states may impose large bonds, which would deter fishers from seeking the release of a vessel. As discussed above, a bond must be reasonable. However if a bond is calculated by reference to the cost of the arrest and the detrimental impact on the targeted and nontargeted species, the bond could be substantial. It would therefore deter illegal fishers from having their vessels released. Furthermore, it is important to note that it is only the flag-state which can bring an action before an International court or tribunal pursuant to article 292 of the LOSC. Given that states have

¹²⁵ Art. 1 The Code.

¹²⁶ Edeson, *supra* n. 119 at 232.

agreed to take action to prevent illegal fishing it maybe that those states whose nationals are detained for illegal fishing will refrain from taking action to have fishing vessels released.