Hot Pursuit or No Pursuit?
The F. V. South Tomi Arrest in 2001

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Introduction

"Southern Ocean Hot Pursuit Nets $1.5 million Fishing Suspect"[1] and "Record Hot Pursuit Vessel Berths in Fremantle Harbour"[2] were the headlines which adorned media releases in relation to the pursuit and apprehension of the Republic of Togo registered vessel *'South Tomi'* for suspected illegal fishing in the Australian Fishing Zone ("AFZ") off Heard and McDonald Islands. These media releases claim that the apprehension of the *'South Tomi'* followed the "longest hot pursuit of a suspected illegal fishing vessel in Australia's history"[3] and, upon an initial examination of the facts and the legislation, that claim may appear to be correct. However, under closer scrutiny, it is writer's opinion that it is not clear whether there was, in fact, a hot pursuit at all, either under Australian or international law.

Accordingly, if the pursuit and apprehension of the *'South Tomi'* was ever challenged by her owners or by the Republic of Togo, significant questions would be raised over the Commonwealth of Australia's prescriptive and enforcement jurisdiction[4] in relation to the hot pursuit of vessels suspected of illegal fishing in the AFZ.

This paper will examine whether the provisions of the United Nations Convention on the Law of the Sea[5] ("UNCLOS") impact upon the validity and/or operation of those sections of the *Fisheries Management Act* 1991 (Cth) ("the FM Act") which the Australian Fisheries Management Authority ("AFMA") reply upon to assert that their pursuit and apprehension of the *'South Tomi'* was lawful. This paper will also consider

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[1] Australian Fisheries Management Authority Media Release 05/01 20 April 2001.

[2] The Hon Wilson Tuckey MP, Minister for Forestry and Conservation, Media Release AFFA01/35TU 5 May 2001.

[3] Ibid.

[4] Prescriptive jurisdiction is a sovereign States authority to make laws, while enforcement jurisdiction is that sovereign States' capacity to enforce compliance with these laws: See Morgan, A, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom for Action", (1996) 27 *Ocean Development and International Law* 5 at 6.

[5] United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982.

what the ramifications are for the Commonwealth of Australia in the event that the pursuit and apprehension of the *'South Tomi'* was found to be unlawful.

Background to the Hot Pursuit

In providing the background to the pursuit and apprehension of the *'South Tomi'*, it is imperative to consider the following matters:

(a) Commonwealth of Australia's prescriptive jurisdiction in its exclusive economic zone ("EEZ");
(b) Commonwealth of Australia's enforcement jurisdiction in its EEZ; and
(c) material facts surrounding the pursuit and apprehension of the *'South Tomi'*.

Prescriptive Jurisdiction

The Commonwealth of Australia's ability to claim an EEZ derives from customary international law as codified in the provisions of UNCLOS. The Commonwealth of Australia is a signatory to, and has ratified[6], the provisions of UNCLOS. As UNCLOS establishes a "comprehensive framework for the regulation of all ocean space"[7], a component of this framework is the concept of an EEZ. Articles 55 and 57 of UNCLOS provide a coastal State with the right to claim an EEZ. An EEZ is a body of water adjacent to the coastal State's territorial sea that extends up to 200 nautical miles from the baselines from which the coastal State's territorial sea are measured. Article 56 of UNCLOS vests "sovereign rights [in a coastal State] for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and its subsoil ...." Therefore, a coastal State does enjoy sovereign rights over the fisheries resources of its EEZ.[8] However, the coastal State does not enjoy full sovereignty in the EEZ. The coastal State enjoys:

> a right of jurisdiction that is related to certain purposes. Beyond the jurisdiction so defined, there is no special basis for coastal State rights, and the traditional rule developed for the high seas will continue to apply. On the other hand, in so far as the specific purposes are concerned, the coastal State is "sovereign": it has the exclusive right of decision in regard to the rules which are to apply within the extended zone, and the exclusive right to enforce the measures on which it has decided.[9]

A coastal State's rights in relation to its EEZ are also subject to two specific obligations, namely, the conservation and utilisation of the living resources in the EEZ.[10] In order to fulfil these obligations a coastal State may enact laws and regulations for the EEZ including: licensing of fisherman and vessels[11], determining the species which may be caught[12], fixing quotas of catch[13] and enforcement procedures[14].[15]

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[6] Commonwealth of Australia ratified UNCLOS on 5 October 1994.
[7] "Introduction", in United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982, p xxiv.
[8] Barrett, M, "Illegal Fishing in Zones Subject to National Jurisdiction", (1999) 5 *JCULR* 1 at 8.
[9] Fleisher, C, "The Exclusive Economic Zone under the Convention Regime and in State Practice", 17 *Law of the Sea Institute Proceedings*, 1984.
[10] Articles 61 and 62 UNCLOS.
[11] Article 62(4)(a) UNCLOS.
[12] Article 62(4)(b) UNCLOS.
[13] Article 62(4)(b) UNCLOS.
[14] Article 62(4)(k) UNCLOS.
[15] For a complete list see Article 62(4) UNCLOS.

The Commonwealth of Australia has declared an EEZ in section 10A of the *Seas and Submerged Lands Act* 1973 (Cth)("the SSL Act"). Section 10A provides that "it is declared and enacted that the rights and jurisdiction of Australia in its exclusive economic zone are vested in and exercisable by the Crown in right of the Commonwealth." Kennedy J in *Aruli –v- Mitchell; La Nunu –v- Mitchell; La Bau –v-Mitchell* [16] stated that "the source of authority for this declaration would seem to have been customary international law." However, more accurately, it is the customary international law as codified in the provisions of UNCLOS. This is demonstrated in that section 3 of the SSL Act defines an EEZ as "having the same meaning as Articles 55 and 57 of" UNCLOS, which, together with Parts II, V and VI of UNCLOS, are set out in a schedule to the SSL Act.

Section 10B of the SSL Act provides that the outer limits of the EEZ can be declared by the Governor General, provided that they are not inconsistent with Articles 55 or 57 of UNCLOS or any relevant international agreement to which Australia is a party. The Governor General did make such a declaration, which was gazetted in the Government Gazette on 29 July 1994, which stated that the Commonwealth of Australia's EEZ is a line that is 200 international nautical miles seaward of the base line as determined by a proclamation under section 7 of the SSL Act for the areas of Australia other than its external territories, and in relation to the external territories the lines that are 200 international nautical miles seaward of the base line established under international law.

Given that the Commonwealth of Australia has declared and enacted an EEZ, it can now define that body of water where it enjoys sovereign rights over with respect to fish resources. Therefore, section 4 of the FM Act provides that the AFZ means:

(a) the waters adjacent to Australia within the outer limits of the Exclusive Economic Zone; and

(b) the waters adjacent to each external territory within the outer limits of the Exclusive Economic Zone.

The term "Exclusive Economic Zone" is also defined in section 4 of the FM Act to mean the EEZ within the meaning of the SSL Act.

Heard Island and McDonald Island

The *'South Tomi'* was suspected of illegally fishing for Patagonian Toothfish, off Heard and McDonald Islands. Heard Island and McDonald Island are external territories of Australia as declared under section 3 of the *Heard Island and McDonald Island Act* 1953 (Cth). Therefore, pursuant to the declaration of the Governor General under section 10B of the SSL Act, the EEZ of Heard Island and McDonald Island is 200 nautical miles seaward of the base lines that can be established under the provisions of UNCLOS ("the HIMI EEZ").

Enforcement Jurisdiction

Article 73 of UNCLOS "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."[17] Article 73(1) provides 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

[16] Unreported, Full Court, Supreme Court of Western Australia, 31 March 1999 BC9901401 at 4.

[17] Barrett, *op. cit. supra* n.8, at 10.

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.

There are, however, some restrictions on the enforcement powers of a coastal State in relation to foreign fishing activities. Some of these restrictions include that:

(a) arrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security;[18] or

(b) coastal State penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.[19]

The rights conveyed on a coastal State under Article 73(1) of UNCLOS are supplemented by the rights of hot pursuit granted under Article 111 of UNCLOS. Specifically, Article 111(2) of UNCLOS grants a coastal State the power of hot pursuit of a foreign vessel for a violation of that coastal State's fisheries laws in the EEZ. Article 111 of UNCLOS provides that for a valid hot pursuit of a foreign vessel to be maintained, the following elements must be present:

(a) the coastal State must have good reason to believe that the vessel has violated the laws of that State; [20]

(b) the hot pursuit must be commenced within the EEZ of that coastal State; [21]

(c) the hot pursuit must not be interrupted;[22]

(d) the right of hot pursuit ceases upon the vessel entering the territorial sea of its own State or of a third State;[23]

(e) hot pursuit can only be commenced after a direction to stop has been given;[24] and

(f) hot pursuit can only be exercised by warships or authorised government vessels which are clearly marked and identifiable.[25]

Furthermore, Article 111(8) of UNCLOS provides that where a vessel has been stopped or arrested outside the territorial sea of in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. Therefore, a coastal State can be liable for damages where it abuses the right of hot pursuit.

Acting in accordance with the rights conferred under Article 73 of UNCLOS, the Commonwealth of Australia has enacted various laws and regulations with respect to the enforcement of its fishing laws. Those laws which are applicable to the pursuit and apprehension of the *'South Tomi'* are contained within the FM Act and provide that an authorised fisheries officer may:

(a) board a vessel in the AFZ (section 84(1)(a) of the FM Act);

(b) seize, detain, remove or secure:

(i) any fish that the officer has reasonable grounds to believe has been taken, processed, carried or landed in contravention of the FM Act; or

(ii) any vessel, net, trap or other equipment that the officer has reasonable grounds to believe has been used, is being used or is intended to be used in contravention of the FM Act (section 84(1)(g) of the FM Act);

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[18] Article 73(2) UNCLOS.
[19] Article 73(3) UNCLOS.
[20] Article 111(1) UNCLOS.
[21] Articles 111(1) and (2) UNCLOS.
[22] Article 111(1) UNCLOS.
[23] Article 111(3) UNCLOS.
[24] Article 111(4) UNCLOS.
[25] Article 111(5) UNCLOS.

(c) seize all or any of the following that are forfeited to the Commonwealth under section 106A[26] or that the officer has reasonable grounds to believe are forfeited under that section:
  (i) a vessel;
  (ii) a net, trap or other equipment;
  (iii)fish (section 84(1)(ga) of the FM Act);
(d) if the officer has reasonable grounds to believe that a vessel has been used, is being used or is intended to be used in contravention of this Act, require the master of the vessel:
  (i) if the vessel is at a place in Australia or a Territory, to remain in control of the vessel at that place; or
  (ii) if the vessel is not at a place in Australia or a Territory, to bring the boat to such a place, or to a place at sea, specified by the officer and to remain in control of the Vessel at that place;
  until an officer permits the master to depart from that place(section 84(1)(k) of the FM Act); and
(e) exercise, with respect to vessels or persons at a place a sea outside the AFZ but not within the territorial sea of another country, a power conferred on the officer under section 84 if:
  (i) one or more officers have pursued the vessel or person from a place within the AFZ to such a place; and
  (ii) the pursuit was not terminated or interrupted at any time before the officer concerned arrived at such a place (section 87 of the FM Act).

It is evident from the terms of section 87 of the FM Act that it grants fisheries officers the power to exercise a right of pursuit of vessels. While not couched in terms of "hot pursuit" it is clearly the Commonwealth Parliament's intention to confer rights of hot pursuit.[27]

The Facts of the Pursuit

The relevant facts surrounding the pursuit and apprehension of the *'South Tomi'* are as follows:

(a) on 29 March 2001 authorised fisheries officers were on board a civil charter vessel '*Southern Supporter*' that was patrolling the HIMI EEZ on behalf of AFMA. The '*Southern Supporter*' had displayed in large lettering on both sides signs saying "Australian Fisheries Patrol";
(b) at 0813 on 29 March 2001 a contact was detected on the '*Southern Supporter*'s radar. The '*Southern Supporter*' was approximately 110 nautical miles south-east of Heard Island;
(c) at 0855 visual contact was made with the vessel *'South Tomi'*. Once visual contact was made, the *'South Tomi'* steamed away;
(d) at about 0930 the *'South Tomi'* hove to and began to drift, beam to the sea;
(e) fisheries officers made radio contact with an officer of the *'South Tomi'* and information was passed which included that:
  (i) the '*Southern Supporter*' was identified as an Australian Fisheries Patrol Vessel having Australian Fisheries Officers on board;

[26] Section 106A of the FM Act provides for the automatic forfeiture of vessels, catch and equipment to the Commonwealth of Australia where those items have been used in specific offences under the FM Act. This section is discussed in detail below.
[27] Fisheries Management Bill 1991 Explanatory Memorandum p32, discussed in detail below.

(ii) the name of the vessel was '*South Tomi*', that its international call sign was 5VSHI and it was registered in the Port of Lome, Republic of Togo;
(iii) the master of the *'South Tomi'* was Renaldo Cigali (later correctly identified as Leonardo Aviles), a Spanish national;
(iv) fisheries officers stated that they believed that there is strong evidence to suggest that the *'South Tomi'* had been fishing inside the AFZ; and
(v) fisheries officers stated that "we are going to have to ask you to follow our vessel, so that we can escort you back to an Australian port for further investigation. Do you understand";[28]

(f) at 1100 the *'South Tomi'* headed off at a speed of 11-12 knots with the *'Southern Supporter'* behind her;
(g) at 1135, inside the HIMI EEZ, the master of the *'South Tomi'* informed the fisheries officers that he would not go to a port in Australia. Fisheries officers ordered the master to the Port of Fremantle in Western Australia purportedly exercising powers under section 84(1)(k) the FM Act;
(h) at 0130 on 30 March 2001 the *'South Tomi'* states that it was the master's intention to set his own course when he reaches international waters. Fisheries officers again advised the *'South Tomi'* that they were within their rights to order them from one part of the AFZ to another and that the *'South Tomi'* must set a course for Fremantle, Western Australia;
(i) at about 0300 the *'South Tomi'* exited the HIMI EEZ;
(j) fisheries officers advised the *'South Tomi'* that they intended to remain in contact with them, at a separation of 1 nautical mile, maintaining hot pursuit of them while they waited for support to arrive;
(k) at 1100 on 12 April 2001, the *'South Tomi'* was intercepted by two naval vessels from the Republic of South Africa, the *'Galeshewe'* and the *'Protea'*. The *'Protea'* was carrying Australian Defence Force personnel ("ADF Personnel");
(l) at 1110 fisheries officers directed the master of the *'South Tomi'* to stop the vessel and permit a boarding party to come aboard. The *'South Tomi'* replied that it was navigating in international waters and that the fisheries officers did not have a right to stop the vessel, but if the miliary vessels were present they would stop the engine;
(m) at 1137 the *'South Tomi'* was boarded by ADF Personnel about 250 nautical miles south of Cape Town, South Africa in international waters. The ADF Personnel took control of the vessel by confining the master and crew to the accommodation deck. Fisheries officers then subsequently boarded the vessel and took command;
(n) on boarding the *'South Tomi'*, fisheries officers gave the master a document ordering him to take the vessel to the Port of Fremantle and remain in control of the vessel there, pursuant to section 84(1)(k) of the FM Act;
(o) on 13 April 2001, fisheries officers gave the master of the *'South Tomi'* a document securing the vessel, its nets, its traps, its equipment and all fish on board, pursuant to section 84(1)(g) of the FM Act;
(p) the *'South Tomi'* was then sailed to the Port of Fremantle, Western Australia by fisheries officers and ADF Personnel, where it arrived on 5 May 2001; and

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[28] This was a finding of fact made by Senior Magistrate Cicchini at the subsequent criminal trial of the master of the *'South Tomi'*: *O'Dea v Aviles* (Unreported, Court of Petty Sessions of Western Australia, Mr Cicchini SM, 18 September 2001).

(q) the master of the 'South Tomi' was subsequently charged with:
  (i) illegal fishing pursuant to sections 100A and 101A of the FM Act, to which he pleaded guilty and was fined $136,000.00;[29] and
  (ii) failing to obey the lawful direction of a fisheries officer pursuant to section 108 of the FM Act, which he successfully defended at trial.[30]

Was the pursuit valid?

Section 87 of the FM Act provides fisheries officers with a right to exercise powers under section 84 of the FM Act outside the AFZ where they have been pursing a vessel from within the AFZ. Therefore, determining whether there has been a valid exercise of power under section 84 of the FM Act outside the AFZ, it is necessary to determine whether section 87 of the FM Act has been validly enacted and, if so, whether it has been validly exercised.

Is section 87 of the FM Act valid?

At first glance, section 87 of the FM Act would appear to be invalid as exceeding the Commonwealth of Australia's legislative power by purporting to confer jurisdiction on fisheries officers to exercise powers under section 84 of the FM Act outside the AFZ.[31] However, the Commonwealth of Australia does have valid legislative powers, pursuant to sections 51(x) (the fisheries power) and 51(xxix) (the external affairs power) of the *Commonwealth of Australia Constitution Act* 1900, to enact provisions which have extraterritorial effect provided that there is a sufficient connection with Australia.[32] The necessary connection with Australia for section 87 of the FM Act to validly fall within the Commonwealth of Australia's legislative power is found in the requirement that the pursuit must have been commenced within the AFZ.

Does international law effect the validity of section 87?

It is clear, from a consideration of the respective provisions, that Article 111 of UNCLOS prescribes more obligations that must be complied with for a valid pursuit than section 87 of the FM Act. However, what is not clear, is whether these additional requirements under Article 111 of UNCLOS have any significance under Australia Law.

The status of international law in Australian domestic law is complex. The two sources of international law that have implications for Australian domestic law are the rules of treaty law and those of customary international law.

Treaty Law

The law of treaties is concerned with the content of obligations between sovereign States resulting from express agreements.[33] In *Minister for Immigration and Ethnic Affairs –v- Teoh*[34] Mason CJ and Deane J summarised the status of an international convention in Australian domestic law when they said:

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[29] *Queen v Aviles* (Unreported, District Court of Western Australia, Jackson J, 11 October 2001 Indictment No014/1585).
[30] *O'Dea v Aviles* (Unreported, Court of Petty Sessions of Western Australia, Mr Cicchini SM, 18 September 2001).
[31] If it is, in fact, invalid, it does not apply at law pursuant to section 9A of the FM Act.
[32] See generally, *Horta v Commonwealth,* (1994) 181 CLR at 195 and *Chiou Yaou Fa v Morris* (1987) 46 NTR 1 at 34 per Asche J.
[33] Brownlie, I, *Principles of Public International Law*, 4 edition, Oxford: Clarendon Press, 1990, at 2.
[34] (1995) 183 CLR 273 at 286-287.

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statue. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative powers whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.[footnotes omitted] [35]

Therefore, given that Parts II, V and VI of UNCLOS are set out in a schedule in the SSL Act it would appear that the provisions of UNCLOS, or at the very least Parts II, V and VI of UNCLOS, have been incorporated into Australian domestic law. However, in *Aruli –v- Mitchell; La Nunu –v- Mitchell; La Bau –v- Mitchell* [36] Kennedy J said that:

> in my opinion, the United Nations Convention of the Law of the Sea has not been incorporated into Australian municipal law by the amendments made in 1994 to the Seas and Submerged Lands Act 1973 (Cth), except to the limited extent necessary to give effect to those provisions of that Act noted below. The Act has not implemented the provisions of the Convention and it has not created justiciable rights for individuals.

Murray J [37] was in agreement with Kennedy J and stated that:

> S10A [of the SSL Act] is directed to declaring the sovereignty of the Crown in right of the Commonwealth of Australia over the exclusive economic zone as defined. It does that by vesting the rights and jurisdiction of Australia in the Crown. The fact that in the preamble to the Act, the jurisdiction given for that enactment is the possession by Australia of rights and duties in relation to the exclusive economic zone as provided for in the United Nations Convention on the Law of the Sea is insufficient to justify an interpretation of s10A, when it refers to the rights and jurisdiction of Australia in the exclusive economic zone, as incorporating into domestic law all the scheduled provisions of the Convention.

Accordingly, the provisions of UNCLOS, and in particular Article 111, have not been incorporated into Australian domestic law.

Despite this position, UNCLOS does have some significance for Australian law. In *Minister for Immigration and Ethnic Affairs –v- Teoh*[38] Mason CJ and Deane J stated that:

> the fact that ... [a convention] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian Law. Where a statue or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.
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> It is accepted that a statue is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the proceeding paragraph should be stated so as to require the courts to favour a construction, as far as language of the legislation permits, that is in

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[35] See also *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v The Commonwealth* (1973) 128 CLR 557 per Barwick CJ and Gibbs J at 582; *Simsek –v- MacPhee,* (1982) 148 CLR 636 at 641 per Stephen J; *Kioa v West,* (1985) 159 CLR 550 at 570 per Gibbs CJ.

[36] *Op. cit. supra* n.16, at 4.

[37] Ibid at 11.

[38] *Op. cit. supra* n.34 at 286-287.

> conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph."[39]

Mason CJ and Deane J also adopt a wide interpretation of when an "ambiguity" in a statue arises:

> if the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is not more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.[40]

In addition, section 15AB of the *Acts Interpretation Act* 1901 (Cth) permits the use of extrinsic material including, "any treaty or other international agreement that is referred to in the Act"[41] and "any explanatory memorandum relating to the Bill containing the provision",[42] to resolve any ambiguity in the meaning of that provision.

Despite UNCLOS not being expressly referred to in the FM Act, it is clear from the Fisheries Management Bill 1991 Explanatory Memorandum that section 87 "allows officers to exercise the "hot pursuit" powers available with respect to fishing offences under international law." Therefore, the terms of Article 111 of UNCLOS may be resorted too in order to help resolve any ambiguity in section 87 of the FM Act.

Customary International Law

Customary international law is "the generalization of the practice of States"[43] which is accepted as law. It is a general proposition that customary international law is incorporated into domestic common law and will be applied as such by domestic courts.[44] Therefore, as Article 111 of UNCLOS represents the codification of customary international law, it is arguable that it is incorporated into Australian domestic law.[45] However, in *Wright –v- Cantrell* [46] Jordan CJ modified this general proposition when he stated that "international law is recognised as part of the local law save to the extent to which it is inconsistent with that law."[47] Article 111 of UNCLOS imposes more obligations for a valid pursuit than that required by section 87 of the FM Act. Therefore, as a fisheries officer is only required to comply with the requirements of section 87 of the FM Act for a valid pursuit, section 87 of the FM Act can not be rendered invalid by failing to comply with the further obligations set out in Article 111 of UNCLOS.

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[39] See also *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 per Gummow J at 304.

[40] *Op. cit. supra* n.34 at 286-287. See also *R v Secretary of State for Home Department; Ex parte Brind*,(1991) 1 AC 696 at 748.

[41] Section 15AB(2)(d).

[42] Section 15AB(2)(e).

[43] *United Kingdom v Norway (Fisheries Case)*, [1951] ICJ 116 per Read J at 191.

[44] Brownlie, *op. cit. supra* n.33 at 43-47. See also *Polities v Commonwealth*, (1945) 70 CLR 60 per Latham CJ at 69; *Chow Hung Ching v The King*, (1948) 77 CLR 449; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Stephen J at 220-221.

[45] This is certainly the position in the United Kingdom. In *R –v- Mills and Others* (Unreported Judgment of the Croydon Crown Court, Devonshire J 1995), (discussed in Gilmore W, "Hot Pursuit: The Case of R –v- Mills and Others", *International and Comparative Law Quarterly*, 44 (1995) 949) Devonshire J was of the view that the right of hot pursuit given under Article 23 of the 1958 Geneva Convention on the High Seas (the predecessor to Article 111 of UNCLOS) constituted a codification of the pre-existing customary international law and had been incorporated into the Common Law of England.

[46] [1943] 44 SR (NSW) 45 at 46-47.

[47] See also *Polities v Commonwealth* (1945) 70 CLR 60 per Latham CJ at 69.

Although customary international law is subservient when inconsistent with Australian domestic law, like the law of treaties, there is a rule of construction that when a domestic law is ambiguous it should be interpreted in a manner not inconsistent with customary international law.[48] Accordingly, as Article 111 of UNCLOS represents the codification of customary international law, it may be resorted too in order to help resolve any ambiguity in section 87 of the FM Act.

Has section 87 of the FM Act been exercised validly?

Section 87 of the FM Act imposes numerous requirements on fisheries officers for its valid exercise. Whether section 87 of the FM Act has, in fact, been validly exercised is ultimately a question of fact. However, there are questions of law which arise out of the operation of section 87 of the FM Act that must be resolved before the facts of the pursuit and apprehension of the *'South Tomi'* can be applied.

With respect to the pursuit and apprehension of the *'South Tomi'*, particular attention must be given two aspects of section 87 of the FM Act, namely the word "pursued" and whether the pursuit was "interrupted". The remaining requirements under section 87 of the FM Act can be regarded as being uncontentious as they are sufficiently clear from the facts of the case.[49]

"Pursued"

Section 87 of the FM Act authorises fisheries officer to exercise powers under section 84 of the FM Act when they have pursed the boat from a place within the AFZ to such a place. However, interpreting what is meant by "pursued" and how it operates is problematic. The critical question which arises is when does a pursuit begin under section 87 of the FM Act.

The New Shorter Oxford Dictionary defines the word "pursue" to mean "follow with intent to overtake and capture or harm". Therefore, it could be argued that a pursuit under section 87 of the FM Act commences when a pursuer follows an assailant with the intent to capture that assailant. However, such an argument would appear to render the pursuit of the *'South Tomi'* invalid given the findings of fact made Senior Magistrate Cicchini of the Court of Petty Sessions of Western Australia in the criminal trial of the master of the *'South Tomi'*. At this trial, the Crown alleged that the master had been given a valid direction under section 84(1)(k)(ii) of the FM Act to proceed to the Port of Fremantle, Western Australia. However, Senior Magistrate Cicchini acquitted the master on the basis that the direction given by fisheries officers did not constitute a direction at all and, even if it did, it was invalid as it did not contain the additional direction required under section 84(1)(k)(ii) of the FM Act, namely, that the master remain in control of the *'South Tomi'* when it arrived at Fremantle.[50]

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[48] *Op. cit. supra* n.34 at 288.

[49] For example, the *'South Tomi'* was at a place outside the AFZ and not within the territorial sea of another country when the power under section 84 of the FM Act was purported to be exercised.

[50] There was also a third argument which the master's defence counsel propounded at trial. This argument was based upon the proposition that the direction given by fisheries officers under section 84(1)(k)(ii) of the FM Act was invalid as the *'South Tomi'* was "at a place in Australia or a Territory" and therefore the master could only be given a direction under section 84(1)(k)(i), to remain in control of the vessel at that place, which did not happen. The Crown argued that where the 'South Tomi' was detected, namely, 110 nautical miles off Heard Island in the HIMI EEZ was not a "place in Australia or a Territory" as it was not in the Commonwealth of Australia's territorial sea and therefore the direction under section 84(1)(k)(ii) was valid. However, given that section 10A of the SSL Act vests jurisdiction in the Commonwealth of Australia in its

Accordingly, as fisheries officers only purported to give directions to the *'South Tomi'* while it was in the HIMI EEZ under section 84(1)(k)(ii) of the FM Act and those directions were found to be invalid by the Court of Petty Sessions, arguably:

(a) at law, while the *'South Tomi'* was within the HIMI EEZ it did not receive any directions from fisheries officers at all; and

(b) fisheries officers did not have an intention to capture the *'South Tomi'* while it was in the HIMI EEZ, as they only purported to direct it to go Fremantle, and it was not until they were outside the HIMI EEZ that they advised the *'South Tomi'* that they intended to maintain hot pursuit while they waited for support to arrive.

Furthermore, if this argument was made, an additional problem is created, namely, when does an intention to capture the assailant arise? Does it arise after there has been an attempt to subject the assailant to jurisdiction? This proposition would accord with the rationale for authorising a pursuit into international waters: "the 'right' of hot pursuit is really a privilege founded on the breach of a double duty on the part of the offending vessel. The first breach is that of the local law, as in fishing without a licence; the second is that of failure to surrender when the power to compel surrender has been exercised by the local authorities. The latter may then elect to pursue."[51] However, if this argument is correct, given the findings made at trial, it is apparent that the *'South Tomi'* was never actually validly subjected to jurisdiction by fisheries officers while it was within the HIMI EEZ.

In these circumstances, it is clear that the word "pursued" in section 87 of the FM Act is uncertain and ambiguous. Therefore, it is permissible to resort too extrinsic material, including the provisions of Article 111 of UNCLOS, which represents the codification of customary international law, to help resolve the ambiguity in section 87 of the FM Act.

Under Article 111 of UNCLOS there is no ambiguity as to when a pursuit begins: "the pursuit may only be commenced after a visual and auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship." Such an interpretation of "pursued" should be favoured as it accords with the Commonwealth of Australia's obligations under UNCLOS. Therefore, construing "pursued" in this context would mean that a pursuit under section 87 of the FM Act could only commence after a fisheries officer has given the master of a vessel a direction to stop, while that vessel is within the AFZ.[52]

With respect to the pursuit and apprehension of the *'South Tomi'*, such an interpretation of "pursued" would mean that fisheries officers only, in fact, commenced the pursuit of the *'South Tomi'* when they directed the master to stop when the vessel was in international waters off South Africa. As the "pursuit" therefore commenced in international waters, fisheries officers have not "pursued" the *'South Tomi'* from a place within the AFZ as required by section 87 of the FM Act and consequently, the pursuit is unlawful.

In addition to the pursuit being unlawful for not commencing within the AFZ, it is questionable whether in fact a radio communication of a stop order complies with the requirements of Article 111(4) of UNCLOS. The "absence of specific reference to the legitimacy of the use of radio signals in this context ... was not the result of an

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EEZ, a place in the EEZ may be considered to be a "place in Australia" for the purposes of the FM Act. Senior Magistrate Cicchini did not decide this issue or refer to it in his decision.

[51] O'Connell, D, *The International Law of the Sea*, Volume II, Oxford, Clarendon Press, 1982 at1077-78.

[52] A fisheries officer has the power to make such a direction under section 84(1)(aa) of the FM Act.

oversight in the drafting process."[53] When drafting Article 23 of the 1958 Geneva Convention on the High Seas (the predecessor of Article 111 of UNCLOS) the International Law Commission stated "to prevent abuse, the Commission declined to admit orders given wireless, as these could be given at great distance; the words 'visual or auditory signal' exclude signals given at great distance and transmitted by wireless."[54] However, this restriction has been criticised as being impractical.[55] In *R –v- Mills*[56] Devonshire J concluded "that the messages sent by this medium comply with the preconditions of the Convention[57] to the exercise of the right of hot pursuit." Nevertheless, the fact remains that a stop order given by radio communication may fail to comply with the requirements of Article 111(4) of UNCLOS.

"Interrupted"

Section 87 of the FM Act authorises fisheries officer to exercise powers under section 84 of the FM Act provided "the pursuit was not terminated or interrupted at any time". This requirement is directed at the fisheries officers' pursuit being terminated or interrupted, in contradistinction to the pursuit of the vessel those officers are on. However, irrespective of who the requirement is directed at, the critical question in this context is what constitutes an "interruption" under section 87 of the FM Act.

Sections 87(2) and (3) of the FM Act provides some limited guidance as to what may constitute an "interruption" as they state "that the power to pursue a boat is not terminated or substantially interrupted only because sight or sensing devises contact has been lost."[58] However, these provisions do not have relevance to the pursuit of the *'South Tomi'* and indeed have in fact been criticised as a not conforming with the customary international law requirement that a pursuit must involve uninterrupted sight, which includes radar identification.[59]

Again, given the ambiguity as to what constitutes an "interruption" under section 87 of the FM Act, recourse too extrinsic material, including customary international law, may be made to help resolve the ambiguity.

"If pursuit is interrupted it ceases to be hot pursuit, and so terminates"[60] is a rule which "must be applied with some flexibility".[61] There are only a limited number of cases that have considered this issue but they both aptly demonstrate a flexible interpretation of "interrupted" under customary international law. In *The North*[62] a pursuing vessel which deviated and stopped to pick up the pursued vessel's dories was held not to have interrupted its pursuit. Similarly, in *The I'm Alone (Canada –v- USA)*[63] a pursuing vessel which came alongside the pursued vessel and remained there for an hour before the chase resumed was held not to have interrupted its pursuit. However,

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[53] Gilmore, W, "Hot Pursuit: The Case of R v Mills and Others", *International and Comparative Law Quarterly*, 44 (1995) 949 at 956.
[54] (1956) II *YBILC* at 285.
[55] Poulantzas, N, *The Right of Hot Pursuit in International Law*, (1969) at 205.
[56] *R v Mills and Others* (Unreported Judgment of the Croydon Crown Court, Devonshire J 1995).
[57] Article 23 of the 1958 Geneva Convention on the High Seas.
[58] Barrett, *op. cit. supra* n.8 at 18.
[59] Shearer I, *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, 20 June 1997) at 11.
[60] O'Connell, *op. cit. supra* n.51 at 1091.
[61] Ibid.
[62] (1905), 11 Ex. Rep. (Canada) 141.
[63] (1935) 3 UN Reports of International Arbitral Awards 1609.

these cases are of little assistance in determining whether there has been an "interruption" to the pursuit of the *'South Tomi'*.

Despite the lack of assistance from the case law, it is the writer's view that the conduct of the two South African naval vessels in the pursuit of the *'South Tomi'* does arguably constitute an "interruption" of the fisheries officers' pursuit under section 87 of the FM Act. A coastal State may use any necessary and reasonable force to effect an arrest of a vessel believed to have been illegally fishing.[64] The actions of the South African naval vessels, such vessels being the sovereign territory of the Republic of South Africa,[65] in approaching the *'South Tomi'* at speed and taking up station alongside her 100 meters off can be construed as an implied threat of the use of force by the Republic of South Africa. Given the fact that the:

(a) South African naval vessels had the means to forcibly stop the *'South Tomi'* and the fisheries officers did not; and

(b) the *'South Tomi'* only stopped its engines because of the presence of, and the implied threat of force from, the South African naval vessels,

it is arguable that the South African naval vessels took over the fisheries officer's pursuit and therefore "interrupted" it for the purposes of section 87 of the FM Act.[66]

Furthermore, although a pursuit can be maintained by combinations of ships and aircraft in relay under international law, [67] the Republic of South Africa had no right under international law to take over the pursuit of the *'South Tomi'* on behalf of the Commonwealth of Australia because the *'South Tomi'* had not breached any South African laws and was located in international waters.

Whether the fisheries officer's pursuit under section 87 of the FM Act has been interrupted is a question of fact that will be resolved in the context of the special circumstances of this case. However, if in fact it has been interrupted, the pursuit would be unlawful as it would have terminated when the South African naval vessels took over the pursuit.

RAMIFICATIONS OF AN UNLAWFUL PURSUIT

The primary ramification for the Commonwealth of Australia, in the event that the pursuit of the *'South Tomi'* was found to be unlawful, is that it will face significant problems in establishing its jurisdiction over the *'South Tomi'*. Such a problem may be so manifest that the Commonwealth of Australia may be unable to lawfully subject the *'South Tomi'*, its catch and equipment, to the automatic forfeiture provisions of sections 106A-106H of the FM Act. If this were the case, the Commonwealth of Australia would be left in the unenviable position of having to return these items to their owners.

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[64] Barrett, *op. cit. supra* n.8 at 19; McLaughlin R, "Coastal State Use of Force in the EEZ under the Law of the Sea Convention 1982", (1999) 18(1) *UTasLR* 11 at 12 to 13; O'Connell, *op. cit. supra* n.51 at 1071-74.

[65] Article 29 of UNCLOS.

[66] This argument can be drawn from Canada's argument in *The I'm Alone (Canada v USA)* (1935) 3 UN Reports of International Arbitral Awards 1609. "Canada argued that the pursuit was unlawful because the cutter which sank the schooner had not participated in the original pursuit, but had come up from an entirely different direction two days later, and had taken over the pursuit when the pursuing cutter's gun jammed." O'Connell, *op. cit. supra* n.51 at 1092. While this argument did not form part of the reasons for decision in that case, the point to be made is that, arguably, the vessel which has the ability to use force to end a pursuit, when it is involved in a pursuit, must be considered to be the vessel which is in fact maintaining that pursuit.

[67] Article 111 of UNCLOS.

Background to the Forfeiture Provisions

Section 106A of the FM Act provides for the automatic forfeiture of vessels, catch and equipment to the Commonwealth of Australia where those items have been used in illegal fishing offences under the FM Act. The vessel *'South Tomi'*, its catch and equipment, would appear to fall within the operation of this section on its face given that the master pleaded guilty to illegal fishing offences under the FM Act. However, it is the writer's view that section 106A of the FM Act can not operate in isolation and must be read in conjunction with sections 106B -106H of the FM Act, as it is through the operation of these sections that the vessel, its catch and equipment, are actually condemned as forfeit to the Commonwealth of Australia. Accordingly, before these items can be subject to forfeiture under section 106A of the FM Act, a fisheries officer must seize them in accordance with section 84(1)(ga) of the FM Act, in order to satisfy section 106B of the FM Act, and then issue a notice of seizure under section 106C of the FM Act.

When the *'South Tomi'* was apprehended on 12 April 2001, fisheries officers 'secured' the vessel, its nets, its traps, its equipment and all fish on board, pursuant to section 84(1)(g) of the FM Act. On 5 May 2001, fisheries officers issued a notice under section 106C of the FM Act when the *'South Tomi'*, its catch and equipment, were in Fremantle Western Australia. Yet at no time does it appear that fisheries officers ever 'seized' these items under section 84(1)(ga) of the FM Act.

If fisheries officers have not seized these items under section 84(1)(ga) of the FM Act, then it is arguable that section 106A of the FM Act has no application as the condition precedents to the exercise of that section have not been fulfilled. However, given that fisheries officers are not required to give a written notice of a 'seizure' under section 84(1)(ga) of the FM Act, [68] the Commonwealth of Australia may seek to assert that fisheries officers validly seized these items under section 84(1)(ga) of the FM Act when the *'South Tomi'* was apprehended or when the notice of seizure was given under section 106C of the FM Act. It is in the context of this assertion that a finding that the pursuit was unlawful holds great significance.

Unlawful Seizure

If there has been an unlawful pursuit of the *'South Tomi'*, fisheries officers had no jurisdiction to exercise any of their powers under section 84 of the FM Act in international waters when they apprehended the vessel. Therefore, all acts of the fisheries officers and the ADF Personnel[69] that occurred on 12 and 13 April 2001 would be unlawful. Critically, this would also render unlawful any purported seizure of the *'South Tomi'*, its catch and equipment, pursuant to section 84(1)(ga) of the FM Act.

Unlawful Notice of Seizure

The notice of seizure under section 106C of the FM Act was given when the *'South Tomi'*, its catch and equipment, was within the Commonwealth of Australia's jurisdiction. However, if there has been an unlawful pursuit, two significant questions arise. Firstly, can a notice under section 106C of the FM Act be issued at all given the facts of the apprehension of the *'South Tomi'*, and secondly, and perhaps more fundamentally, does the Commonwealth of Australia have jurisdiction to issue such a notice under section 106C of the FM Act?

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[68] Section 84(1A) of the FM Act.

[69] Australian Defence Force personnel are defined in section 4 of the FM Act to be fisheries officers.

Seizure

The Commonwealth of Australia may assert that if the fisheries officers did not validly seize the *'South Tomi'*, its catch and equipment, off South Africa, then fisheries officers could validly seize these items once in the Commonwealth of Australia's jurisdiction. However, in *Scott v Gere*[70] Malcolm CJ, Wallace and Nicholson JJ, considered what is meant by the term "seizure". In a judgment of the Court they stated that:

> seizure means the action or the act of seizing, or the fact of being seized; confiscation or forcible taking possession (of land or goods); a sudden and forcible taking hold .... The ordinary and natural meaning of 'seizure' is a forcible taking of possession.[71]

Applying this definition to the apprehension of the *'South Tomi'*, it would appear that the "seizure" of the *'South Tomi'*, its catch and equipment, occurred when it was boarded and taken under control by ADF Personnel. Despite fisheries officers purporting to merely "secure" the *'South Tomi'*, its catch and equipment, pursuant to section 84(1)(g) of the FM Act, this was clearly an act of "taking forcible possession" which would be consistent with an act of seizure. Accordingly, if the *'South Tomi'*, its catch and equipment were seized when it was apprehended, fisheries officers can not seize these items again when they issue a notice under section 106C of the FM Act as these items are already in their possession.[72] Therefore, if there has been an unlawful pursuit of the *'South Tomi'*, there has also been an unlawful seizure which can not be remedy once these items are within Commonwealth of Australia's jurisdiction.

Jurisdiction of the Commonwealth of Australia

As a sovereign state, the Commonwealth of Australia has jurisdiction, through its courts, to "adjudicate rights and duties with respect to all things or persons found within the territory".[73] However, if there has been an unlawful pursuit and seizure of the Republic of Togo registered vessel *'South Tomi'*, then it has been unlawfully brought within the jurisdiction of the Commonwealth of Australia. Therefore, does this unlawfulness deny the Commonwealth of Australia jurisdiction to subject the *'South Tomi'* to its laws now that it is within jurisdiction?

This issue has been posed as the balancing of competing interests:

> On the one hand, if there are claims to the thing or complaints against the person which require judicial determination, it may be said that the national court should proceed without regard for the antecedent events which gave it the necessary physical control. It may be urged that only the injured foreign state is in a position to protest against the violation of international law and that, in any case, the alleged violation of international law presents an issue which should be resolved by international negotiation or in an international forum. On the other hand, notwithstanding the desirability of a judicial determination of claims against the thing or of complaints against the person, it may be said that since the seizure or arrest was made in excess of the state's proper competence, and in violation of the rights of a foreign state, there is in consequence no national competence to invoke local process or to subject the thing or the person to local law. If there is no national competence, obviously there can be competence in the courts, which are only an arm of the national power.[74]

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[70] (1988) WAR 377 at 386.

[71] *Johnson v Hogg* (1883) 10 QBD 432 at 434 per Cave J.

[72] *Scott v Gere* (1988) WAR 377 at 387.

[73] Dickinson E, "Jurisdiction Following Seizure or Arrest in Violation of International Law", (1934) 28 *American Journal of International Law*, 231.

[74] Ibid.

Given that a State can:

(a) not validly subject any part of the high seas to its sovereignty, as the high seas are open to all States;[75] and

(b) only exercise legislative and enforcement jurisdiction over those vessels on the high seas which it has granted the right to sail under its flag,[76]

where a State unlawfully seizes a foreign vessel on the high seas in violation of international law, "principle would seem to demand that the courts of the seizing state should, by refusing to exercise jurisdiction over the vessel so seized, deny the captor the right to benefit from his illegal conduct."[77] Indeed, this is the position that is demonstrated by the case law.

The principle that "national courts, as an arm of the national power, are incompetent to obligate by their process or to subject to the national law a thing ... seized or arrested in violation of an international treaty"[78] is best explained in the Unites States Supreme Court decision in *Cook –v- United States*.[79]

In *Cook –v- United States*, a British registered vessel '*Mazel Tov*' was seized by the United States Coast Guard on the high seas, outside the limits of jurisdictional zone that was defined by the Treaty of 1924 between Great Britain and the United States for the prevention of the smuggling of intoxicating liquors into the United States. The '*Mazel Tov*' was charged with violation of the Tariff Act of 1930 which, in turn, made it liable for forfeiture.

Despite being found to have been seized unlawfully, it was contended that the "alleged illegality of the seizure was immaterial since the United States, by commencing a forfeiture proceeding, had ratified what would otherwise have been an illegal seizure, since the vessel had actually been brought by the Coast Guard within the reach of the process of the national court, and since the claimant by answering the merits had waived any right to object to the enforcement of penalties imposed by the customs statutes."[80] Brandeis J, on behalf of the United States Supreme Court, rejected this argument and held that the United States had no jurisdiction over the vessel:

> It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial.... The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the government; and that proceedings by the government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize.... The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked the power to seize, since by the Treaty it had imposed a territorial limitation upon its authority. The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our government, lacking the power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that

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[75] Article 87 of UNCLOS.
[76] Article 92 of UNCLOS
[77] Morgenstern, F, "Jurisdiction in Seizures Effected in Violation of International Law", (1952) 29 *British Year Book of International Law*, 265 at 277.
[78] Dickinson, *op. cit. supra* n.73 at 234.
[79] (1933) 288 US 102.
[80] Dickinson, *op. cit. supra* n.73 at 234.

> adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.[81]

Therefore, the United States recognised that its jurisdiction is affected where there has been a seizure in violation of a treaty. The lack of power to seize because of the treaty, resulted in the United States having no power to subject the vessel to its laws: "the objection was not to the jurisdiction of the court alone, but to the jurisdiction of the United States."[82] However, the decision does imply that the United States, "but for the treaty, would consider the seizure on the high seas to be lawful."[83]

The only English case to have considered the issue of jurisdiction following a seizure on the high seas in breach of international law is the decision of the Privy Council in *Naim Molvan, Owner of Motor Vessel 'ASYA' –v- Attorney-General for Palestine.*[84] In this case the vessel *'Asya'* was seized by the British Navy on the high seas off Palestine and the owner was charged with a violation of the Immigration Ordinance 1941 which, in turn, made the vessel liable to forfeiture. While the court held that the seizure was not, in fact, a violation of international law as the vessel was not sailing under a particular State's flag, it did comment upon whether the court would have jurisdiction in the event that the seizure had been in violation of international law. Their Lordships had grave doubt as to:

> whether it is open to the appellant in the circumstances of the present case to challenge the validity of the Ordinance on the ground that the vessel was brought within territorial waters under the compulsion of the British Navy. That act, whether or not it was a breach of any principle of international law ... was not done or purported to be done under the authority of the Ordinance.... But as a result of the act, right or wrong, the vessel was in fact in a Palestinian port and the terms of the Ordinance demanded its forfeiture.[85]

However, these comments are distinguishable as they appear to have been made in support of the proposition that a statue can not be invalid by reason of it being inconsistent with international law:

> the Ordinance is not open to challenge on the ground that it offends against any established principle of international law, even on the assumption that it directly authorised, in the circumstances in which those acts were done, the seizure of the *Asya* on the high seas and her compulsory direction to a Palestinian port.[86]

With respect to the apprehension of the *'South Tomi'*, as the Commonwealth of Australia and the Republic of Togo are signatories to, and have both ratified, UNCLOS, it is clear that they have agreed to limit their powers of pursuit of vessels from their respective States to be in accordance with Article 111 of UNCLOS. This agreement has placed a limitation upon the exercise of executive power of both States in relation to a pursuit. Therefore, if the Commonwealth of Australia has pursued a vessel flying the flag of the Republic of Togo in breach of Article 111(4) of UNCLOS[87] then, based upon the decision in *Cook –v- United States*, it is the writer's view that the Commonwealth of Australia lacks the jurisdiction to subject the *'South Tomi'* to its laws. If there has been

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[81] (1933) 288 US 102.
[82] Dickinson, *op. cit. supra* n.73 at 235.
[83] Morgenstern, *op. cit. supra* n.77 at 278.
[84] (1948) AC 351.
[85] Ibid at 368.
[86] Ibid at 368.
[87] Furthermore, the Commonwealth of Australia has, arguably, conducted a pursuit in breach of its own fisheries legislation.

an unlawful pursuit of the *'South Tomi'*, there has also been an unlawful seizure which will deny the Commonwealth of Australia jurisdiction to issue the *'South Tomi'* with a seizure notice under section 106C of the FM Act.

Conclusion

"Although the general parameters of the right of hot pursuit are not controversial, the proper exercise of the right is less clear in circumstances that do not fall neatly within the black letter rule."[88] This is certainly true in relation the pursuit and apprehension of the *'South Tomi'*.

There are strong arguments to support the proposition that the *'South Tomi'* was unlawfully pursued by fisheries officers as they did not "pursue" the *'South Tomi'* from a place within the AFZ, as required by section 87 of the FM Act, and because the pursuit was interrupted by the conduct of South African naval vessels. If there has been an unlawful pursuit, the seizure of the *'South Tomi'* was also unlawful because fisheries officers' powers under section 84 of the FM Act can only be exercised on a vessel outside the AFZ if section 87 of the FM Act has been complied with.

The primary ramification of the unlawful seizure is that Commonwealth of Australia may be unable to lawfully subject the *'South Tomi'*, its catch and equipment, to the automatic forfeiture provisions of sections 106A-106H of the FM Act. As section 106A of the FM Act must, arguably, be read in conjunction with sections 106B –106H of the FM Act, it can have no application to something that has not been validly seized pursuant to section 84 (1) (ga) of the FM Act. Given that fisheries officers:

(a) had no power to "seize" the *'South Tomi'*, its catch and equipment, under section 84(1)(ga) of the FM Act while it was in on the high seas; and

(b) cannot "seize" the *'South Tomi'*, its catch and equipment, under section 84(1)(ga) of the Act when it is brought into the jurisdiction because they already have it in their possession or because the Commonwealth of Australia now lacks the jurisdiction over the vessel because it has pursued and seized it in violation of Article 111 of UNCLOS,

it is clear that section 106A of the FM Act can have no application.

Should the pursuit and apprehension of the *'South Tomi'* be successfully challenged by her owners or the Republic of Togo[89], it is for the reasons set out above, that this matter may ultimately be remembered as the longest unlawful pursuit in Australia's history.

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[88] Reuland, R, "The Customary Right of Hot Pursuit Onto the High Seas: Annotations on Article 111 of the Law of the Sea Convention", (1993) 35 *Virg.J.Int.L.* 557 at 557.

[89] The Republic of Togo can seek damages under Article 111 (8) of UNCLOS against the Commonwealth of Australia for its actions in relation to the *'South Tomi'* before the International Tribunal for the Law of the Sea.