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### Fishery Law Enforcement

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# Notes and Comments

## Fishery Law Enforcement

Contemporary legal writing treats freedom of the seas as an axiomatic principle of international law, but the law of the sea has historically exhibited a cyclical character. Though actual Roman rule of the Mediterranean was absolute, the Justinian Code declared that the sea was not subject to ownership, and that it and its resources were available to all men.<sup>1</sup> During the Middle Ages, Italian city-states claimed adjacent sea areas and required fees of vessels wishing to transit.<sup>2</sup> Northern European states exercised similar control in the Baltic and North Sea, and it was under the fifteenth and sixteenth century grants of the Papal Bulls to Spain and Portugal that the concept of individual nations' sovereignty over areas of the oceans waxed full.<sup>3</sup> English and Dutch fortunes rose as Spanish and Portuguese influence declined, and, as counsel for the Dutch East India Company, Hugo Grotius introduced the concepts of freedom of the seas that have persisted to the present.<sup>4</sup>

During the last thirty years, there has been a return to the practice of individual nations assuming sovereignty over wide areas of the ocean. The first significant assumption of such wide authority was made by the United States in the Presidential Proclamations of 1945.<sup>5</sup> These proclamations were followed by a series of claims by other nations which exceeded the carefully advanced interests of the United States. In 1966, the United States Congress expanded the area of exclusive fishing rights to a limit of twelve miles,<sup>6</sup> and on March 1, 1977, a new law extending this limit to two hundred miles became effective.<sup>7</sup> Because of the vast area involved and the potential economic impact of the new fishery act, interest in coastal law enforcement has increased.

### *Enforcement Procedure*

There are four requirements that must be met in the successful completion of any enforcement effort, regardless of the interest being protected or the area of the coastal zone in which the suspect activity

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<sup>1</sup> S. SWARZTRAUER, *THE THREE MILE LIMIT OF TERRITORIAL SEAS* 10 (1972).

<sup>2</sup> *Id.* at 11.

<sup>3</sup> *Id.* at 11-12.

<sup>4</sup> *Id.* at 16-20.

<sup>5</sup> Pres. Proc. 2667, 3 C.F.R. 67 (1943-1948 Compilation), Pres. Proc. 2668, 3 C.F.R. 68 (1943-1948 Compilation).

<sup>6</sup> Bartlett Act (Twelve Mile Fishery Jurisdiction), Act of Oct. 14, 1966, Pub. L. No. 89-658, §§ 1-4, 80 Stat. 908 (codified at 16 U.S.C. §§ 1091-94 (1970)).

<sup>7</sup> Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C.A. §§ 1801-82).

arises. The enforcement officer must have the authority to enforce the provision of law violated; he must detect the violation; he must investigate and document the violation; and he must apprehend the violator.

#### A. Responsibility for Enforcement

The legislation creating the fishery conservation zone assigns enforcement responsibility to the Secretary of Commerce and the Secretary of Transportation (in whose department the Coast Guard operates). The two Secretaries are authorized to utilize the facilities of any state or federal agency (including the Defense Department) in their enforcement efforts.<sup>8</sup> It is to be expected that primary enforcement responsibility will fall on the Coast Guard and the National Marine Fisheries Service as it has under previous fishery laws.<sup>9</sup> However, the sheer size of the zone and the fact that Congress specifically addressed the possibility of Defense Department assistance raises the question of whether enforcement responsibilities should be assigned to the military and, if so, what the nature and extent of those responsibilities should be.

International law presents no obstacles to the military enforcement of fishery law. Australia, Britain, Canada, Eire, and New Zealand all give fishery law enforcement authority to their armed forces.<sup>10</sup> In fact:

International law favors the use of naval craft because of their distinctive character, rendering confusion unlikely among fishermen. Thus, the right of hot pursuit may be exercised, under the 1958 Convention of the High Seas 'only by war ships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.'<sup>11</sup>

Within the United States, however, there is a general feeling that law enforcement is not the proper concern of the military. This notion is embodied in the Posse Comitatus Act<sup>12</sup> which prohibits the use of Army and Air Force personnel to enforce civilian laws unless authorized to do so by Congress. Although the act addresses only the Army and the Air Force, Naval Regulation makes the act applicable to the Navy and Marine Corps.<sup>13</sup> There is little difficulty, however, in justifying a fisheries enforcement exception to the Act. The Department of Navy's Law of the Sea Section adopted the position that naval fishery enforcement was not prohibited by the Posse Comitatus Act shortly after the 1970 amendments to the Bartlett Act provided for

<sup>8</sup> *Id.* at § 1861 (a).

<sup>9</sup> See generally, Freeman, *Alaska's Seagoing Detectives*, 17 ALASKA 28 (May, 1976).

<sup>10</sup> Fidell, *Fisheries Legislation: Naval Enforcement*, 7 J. MAR. L. & COM. 355-58 (1976).

<sup>11</sup> *Id.* at 358-59.

<sup>12</sup> 18 U.S.C. § 1385 (1970).

<sup>13</sup> Meeks, *Illegal Law Enforcement*, 70 MIL. L. REV. 83 (1975).

other federal assistance to the Coast Guard.<sup>14</sup> Furthermore, the Fishery Conservation and Management Act of 1976 makes it clear that military fishery enforcement in the two hundred mile zone is lawful.

The fact that military enforcement is legal under both international and domestic law does not necessarily make it desirable from the United States' viewpoint. Involvement of the Navy in all phases of the enforcement work could put the nation's honor at stake in even the most minor incidents and would put an unacceptable strain on the Navy's ability to meet its already burdensome commitments.<sup>15</sup> Additionally, effective fishery enforcement on the part of the enforcement officer requires extensive knowledge of fishing equipment and methods, and the ability to identify a large number of fish species. Either the training of navymen, or the assignment of experienced fishery enforcement personnel to operating naval forces, would be an inefficient application of resources.

The Coast Guard has the enforcement experience gained under the Bartlett Act that can be directly applied to the extended fishery zone. The Department of Defense could most efficiently serve the enforcement by: (1) instructing its operating forces (ships and aircraft) to report suspected fishery violations to the Coast Guard, and (2) being prepared to respond with tactical aircraft and surface naval forces if and when the Coast Guard is faced with a violator accompanied by armed escort. The Coast Guard and Department of Defense, along with the State Department, have already formulated a contingency plan to cover the latter situation.<sup>16</sup>

## B. Detection of Violations

The first step in successful enforcement in the fishery conservation zone is detecting violators in an area that is 2.2 million square miles<sup>17</sup> larger than the contiguous fishery zone. In 1974 the Coast Guard was instructed by Congress to evaluate all surveillance and enforcement techniques including use of satellites, aircraft, radar, and remote sensing devices,<sup>18</sup> with a view toward monitoring this vast area. As the effective date of the exclusive fishery zone drew near, the Coast Guard was greatly increasing the number and capabilities of its aircraft and decided on a patrolling scheme.<sup>19</sup> Recently, the Coast Guard Commandant explained his approach to the detection problem:

<sup>14</sup> Interview with Cdr. Al Walker, USN, Dep't Navy, Law of the Sea Section, in Washington, D.C. (Oct. 15, 1976). The Navy position was based on 16 U.S.C. § 1083 and 14 U.S.C. § 141.

<sup>15</sup> Fidell, *supra* note 10, at 354.

<sup>16</sup> Interview with Cdr. Al Walker, USN, Dep't Navy, Law of the Sea Section, in Washington, D.C. (Oct. 25, 1976); *Navy Times*, Oct. 25, 1976, at 4, col. 1.

<sup>17</sup> *Navy Times*, Oct. 25, 1976, at 4, col. 1.

<sup>18</sup> Fidell, *The Coast Guard and Fisheries Law Enforcement*, U.S. NAVAL INSTITUTE PROCEEDINGS 75 (July, 1975).

<sup>19</sup> *Navy Times*, *supra* note 17.

We know where the fisheries exist at the present time and, obviously, when we expand into a larger area the fish are not going to change. . . . We're going to concentrate on those areas where fishing has gone on over the last several years, with only a certain amount of expansion to make certain that the permit requirements are met and that the quotas are not exceeded. . . .

Also to the extent that we can, we'll be going out beyond, to the 200-mile area, to see if there is any change in those patterns that we're not anticipating.<sup>20</sup>

The Fishery Act itself lays down the basis for requiring that foreign vessels help police themselves. As a prerequisite to the United States entering into an agreement under which a foreign nation's vessels will be allowed to fish in the zone, the nation must agree to follow any requirements concerning the installation and maintenance of transponders, and the presence and funding of observers, on their vessels.<sup>21</sup>

Transponders, upon electronic interrogation, would transmit position and identity data to the Coast Guard. It is questionable, however, if the United States could legally require operation of a transponder outside the zone or while in a vessel merely transiting the zone. It follows that any master of a vessel intending to engage in prohibited activity in the zone is not going to be deterred by the fact that not possessing or operating a transponder is also a violation. Thus, a transponder system would show the Coast Guard the sites at which the provisions of the act are being observed, but not where they are being violated.

The use of people on board the fishing vessels who act as observers is a more orthodox method of monitoring the observance of fishery laws, but is not without problems. The size of the zone and the number of foreign vessels that would be expected to operate in it would require a huge number of observers. Even with the foreign fishing industries supporting the costs of observers, there remains the problem of finding large numbers of qualified people. One possible solution is to give course credit for observing tours by students engaged in ocean related studies.<sup>22</sup> Additionally, the use of observers does not affect the problem posed by unlicensed violators who carry no observers on board.

There appears to be no substitute for the patrolling of the zone. Probably the most effective approach is that of the Commandant of the Coast Guard, set out above, which can be accomplished by patrol aircraft. The aircraft, upon sighting a suspected violator, could vector

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<sup>20</sup> *Id.*

<sup>21</sup> 16 U.S.C. §1821 (c) (2) (C) & (D) (1976).

<sup>22</sup> It is estimated that to put an observer on each foreign vessel fishing off Alaska alone, and allowing for a relief every three to three and one-half months, would require 6,000 men per year. Freeman, *supra* note 9, at 60.

surface vessels to the scene, or if the violation was sufficiently apparent, make the apprehension itself. This method has been successfully applied by the Coast Guard in the enforcement of the contiguous fishery zone.<sup>23</sup>

### C. Investigation

The goal of the enforcement effort is not realized in an individual case until the successful completion of court action. To this end, the enforcement officer must not only satisfy himself that a violation has taken place; he must also document the circumstances surrounding the violation. For successful prosecution, it is necessary that evidence be obtained regarding the offending vessel's position and activities.

Accurate position fixes are of critical importance at the extreme edges of the area to be enforced. In the case of the territorial sea and contiguous fishery zones, the distances involved are such that radar ranges are adequate to accurately fix a suspect vessel's position relative to the nearest point of land. But radar alone will not be sufficient to fix positions along the fringe of the two hundred mile zone.<sup>24</sup> The method employed in this area must involve a combination of electronic navigation systems such as an inertial navigation system, Loran, or Omega, with the enforcement craft's radar. Thus, the enforcement unit, whether ship or aircraft, will accurately fix its position in the zone and, with the use of radar range and bearing to the suspect vessel, fix that vessel's position relative to the limits of the zone. After allowing for the maximum possible error in both the radio or inertial system and radar fixes, the enforcement officer will know whether or not the position element of the case will be supportable in court.<sup>25</sup>

After a vessel's position is fixed within the zone, it is necessary to document any activity violative of the laws governing the zone. This may be done by photographing the illegal activity or by conducting an inspection on board the suspect vessel. Photographs may be used not only to document illegal activity but also as proof that a pursuit subsequent to the photographing was justified.

<sup>23</sup> Commandant of the Coast Guard Message R 0406412 NOV. 75.

<sup>24</sup> Radar frequencies are basically line of sight, therefore 200 miles is greater than the maximum range of surface-mounted radars due to the curvature of the earth. G. DUNLAP & H. SHUFELOT, *DUTTON'S NAVIGATION AND PILOTING* § 1608 (12th ed. 1969).

<sup>25</sup> Accuracy of radar depends on the type of equipment used, its maintenance and the experience of the operator. Radio navigation systems accuracy depends on the type, atmospheric conditions, and whether a skywave or groundwave is received. Loran-A is the least accurate with a maximum error of 5-7 miles over 80% of the coverage area. G. DUNLAP & H. SHUFELOT, *supra* note 24, §§1604 (radar), 1808 (Loran-A), 3206 (Loran-C), 3101-3109 (Omega); for an example of the examination of the accuracy of position fixing in a fisheries case involving radar fixes see *The Red Crusader*, 35 I.L.R. 485 (1962). In the enforcement of the CFZ it has been discovered that some violators deliberately misadjust their navigation equipment in order to make it appear to enforcement personnel that their violation was unintentional. *Seagoing Detectives* at 28.

Boarding and inspection can turn up evidence of violations that photographs cannot show conclusively. Thus when a vessel is observed taking starfish in its nets, a search may turn up continental shelf creatures that the vessel is not authorized to take.<sup>26</sup> Similarly, a vessel that has been observed in the zone regularly over an unusually long period may be found to be exceeding its quota. The suspect vessel's own logbook may contain entries concerning activities in positions that violate the laws of the zone.<sup>27</sup>

#### D. Apprehension of Violators

When after detection and investigation by enforcement authorities a violating vessel complies with directions to accept a boarding party and be escorted to port, the enforcement officer need only turn over the vessel, crew, and any evidence to the United States Attorney and his immediate mission in that particular case is complete. But if, as is often the case, the offending vessel attempts to flee, the enforcement effort may only be beginning. The right of the enforcement craft to pursue and seize offenders in such a situation is the subject of the doctrine of hot pursuit.

The doctrine of hot pursuit came about through custom and has been influenced by change of custom and the writings of publicists.<sup>28</sup> Initially the doctrine applied to violations occurring in the internal or territorial waters of a state.<sup>29</sup> When the concept of the contiguous zone was accepted in international law, the right of hot pursuit of contiguous zone violators from that zone was recognized.<sup>30</sup> In more recent years, the doctrine has been invoked against violators of two hundred mile exclusive fishery zones.<sup>31</sup> In order to determine the present prerequisites to applying the doctrine, it will be expedient to examine the doctrine as codified in 1958 and determine what changes in the doctrine have been worked by the changing usage and circumstances of the past nineteen years.

The Convention on the High Seas provides in part:

#### *Article 23*

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or

<sup>26</sup> As was the case in the Bartlett Act violation by the *Tontini Pesca*. Fidell, *The Law and Fishery Enforcement of the High Seas*, U.S. NAVAL INSTITUTE PROCEEDINGS 96 (July, 1975).

<sup>27</sup> As was the case in the *Yamasan Maru* No. 85 in a CFZ violation, Secretary of State Message P 172218Z JUL 76.

<sup>28</sup> N. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW*, 42-266 (1969).

<sup>29</sup> *Id.* at 158-59.

<sup>30</sup> Convention on the High Seas, *opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200.

<sup>31</sup> Fidell, *Hot Pursuit From a Fisheries Zone*, 70 AM. J. INT'L L. 95, 100-101 (1976).

one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraph 1 to 3 of this article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft or ships which continue the pursuit without interruption. . . .

7. Where a ship has been stopped or arrested on the high seas 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.<sup>32</sup>

Since 1958 the principal question to arise regarding the doctrine is whether it is applicable only to violations of the contiguous fishery zone or to the larger two hundred mile exclusive fishery zones and continental shelf areas.

Clearly Congress intended the contiguous fishery zone to give rise to the right of hot pursuit as is evidenced by the language: "[t]he United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in the territorial sea . . .".<sup>33</sup> The rights

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<sup>32</sup> Convention on the High Seas, opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200.

<sup>33</sup> 16 U.S.C. § 1091 (1966).



claimed by the United States over the two hundred mile fishery zone and continental shelf areas are no less exclusive.<sup>34</sup>

A challenge to the power of the United States to conduct hot pursuit from the contiguous fishery zone came in the case of the fishing vessel *Taiyo Maru No. 28*.<sup>35</sup> The vessel was detected fishing one and one-half miles inside the contiguous fishery zone. After being signaled to stop, the vessel fled the zone and was seized 67.9 miles at sea. The defendants in the case sought dismissal of all civil and criminal charges on the grounds that the United States had by international agreement territorially limited its power to seize foreign vessels for violations of its fishery laws.<sup>36</sup> Defendants contended that the hot pursuit and seizure violated Article 23 of the 1958 Convention of the High Seas. The court held that, "Article 23 does not deny a coastal State the right to commence hot pursuit from a contiguous zone established for a purpose other than one of the purposes listed in Article 24" of the Convention on the Territorial Sea and the Contiguous Zone.<sup>37</sup> The court further noted that there is no provision of international law preventing coastal States from establishing contiguous fishery zones, and held that the above-mentioned Conventions "[c]ontain no specific undertaking by the United States not to conduct hot pursuit from a contiguous fisheries zone extending 12 miles from its coast," and that therefore "[t]he United States has not by treaty 'imposed a territorial limitation upon its own authority'."<sup>38</sup>

Dr. Poulantzas, lecturer in international law at the University of Utrecht, would disagree with the method used by the court in achieving this result. He states that regarding Article 23 of the Convention on the High Seas:

In case it is objected that the term contiguous zone — which is also embodied in three other places in Article 23 on hot pursuit — refers to any other contiguous zone of the coastal State than that of Article 24, [of the Convention on the Territorial Sea and Contiguous Zone], it is submitted that such a sophistic and misleading interpretation, which might only be used to serve the interests of certain coastal States should be condemned as contrary to the context and the *raison d'être* of this provision.<sup>39</sup>

However, he goes on to say that:

Nevertheless, notwithstanding what was laid down in the Geneva Convention on the High Seas, if coastal States establish adjacent zones for other purposes within the limit of twelve miles, claiming within them exclusive rights of use, control and enforce-

<sup>34</sup> 16 U.S.C. § 1812 (1976).

<sup>35</sup> *United States v. F/V Taiyo Maru, No. 28*, 395 F. Supp. 413 (1975).

<sup>36</sup> *Id.* at 415.

<sup>37</sup> *Id.* at 419.

<sup>38</sup> *Id.* at 420, quoting from *Cook v. United States*, 288 U.S. 102 (1933).

<sup>39</sup> N. POULANTZAS, *supra* note 28, at 166.

ment, it would be quite unrealistic to refuse these States the rights of hot pursuit for the protection of such adjacent zones.<sup>40</sup>

Thus, in his 1969 work, Dr. Poulantzas declares that an exclusive fishery zone of twelve miles, "according to recent developments in international practice is no longer considered as contrary to international law."<sup>41</sup> He then condemns unilateral extension of exclusive fishery authority beyond twelve miles.

But events have been moving so rapidly in the last half decade that one can paraphrase Dr. Poulantzas and state that an exclusive fishery zone of two hundred miles, "according to recent developments in international practice is no longer considered as contrary to international law." If the treaty law concepts of *rebus sic stantibus* and *jus cogens* are applicable anywhere, they are applicable to this area of the law.<sup>42</sup>

Thus, the enforcement officer can look to the 1958 Convention on the High Seas for guidance on what rules govern hot pursuit, but any provision that can be read as limiting the initiation of a pursuit to an area within twelve miles of the coast has lost its effect. This fact is further evidenced by the contents of the Informal Single Negotiating Text from the 1975 UN Law of the Sea Conference, which provides for hot pursuit from the two hundred mile zone and continental shelf areas.<sup>43</sup>

When a vessel, reasonably believed to be violating the provisions of a particular zone, attempts to flee or otherwise resists apprehension, the enforcement officer is faced with the problem of how to physically effect the apprehension. The use of force in enforcing national laws over foreign vessels is, of course, a matter of great concern to those charged with carrying out the will of Congress in the coastal zone. It should be the goal of every enforcement officer to effect apprehensions of suspect vessels in a professional manner, indicating that the integrity of the zone must be respected, while at the same time minimizing the potential for international friction. Professionally meeting resistance to apprehension is the greatest challenge to enforcement personnel.

The standard for the use of force was set out in the reports of commissioners concerning the claim of the British vessel, *I'm Alone*.<sup>44</sup> During the prohibition era, the *I'm Alone* was the subject of hot pursuit by the Coast Guard. After two days of unsuccessful pursuit, the

<sup>40</sup> *Id.* at 167.

<sup>41</sup> *Id.* at 185-86.

<sup>42</sup> See Fawcett, *Problems Concerning the Establishment of Exclusive Fishery Rights*, U.N.C. Sea Grant Publication UNC-SG-74-01 at 1 (1974).

<sup>43</sup> U.N. Doc. A/CONF. 62/WP/8/Part II, Art. 97(2) at 36 (1975), 14 INT'L LEG. MAT. 682 (1975), cited in Fidell, *Hot Pursuit From a Fisheries Zone*, 70 AM. J. INT'L L. 95, 101 (1976).

<sup>44</sup> Claim of the British Ship, "*I'm Alone*" v. United States, 29 AM. J. INT'L L. 326 (1935).

pursuing vessel intentionally fired into the *I'm Alone*, sinking her. The commissioners held that the United States might "use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing, and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless."<sup>45</sup> However, the intentional sinking was held to be unjustified by any principle of international law.<sup>46</sup>

Another well-documented incident involving the use of force in fishery law enforcement arose between the British trawler, *Red Crusader*, and the Danish enforcement vessel, *Neils Ebbsen*.<sup>47</sup> Having gained control over a Danish boarding party,<sup>48</sup> the master of the *Red Crusader* attempted to flee Danish territorial waters. *Neils Ebbsen* pursued, and while in Danish waters, fired solid shot of different calibers at the masts and antenna of *Red Crusader*. The firing stopped without inflicting serious damage and, enroute to British waters, the vessels were joined by *H.M.S. Troubridge* whose officers maneuvered her in such a manner as to allow *Red Crusader's* escape. A Commission of Enquiry found that *Neils Ebbsen's* officers "exceeded legitimate use of armed force" and further found that "officers of the British Royal Navy made every effort to avoid any recourse to violence between *Neils Ebbsen* and *Red Crusader*. Such an attitude and conduct were impeccable."<sup>49</sup> Professor O'Connell, a reserve naval officer and professor of international law, comments:

The *Red Crusader* case suggests that every device, including, presumably, harassment by navigational means, must be employed and for a sufficient period of time before force is justified. This puts the commander in a difficult position, for harassment can lead to situations where the rule of the road becomes unclear, and a collision may result.<sup>50</sup>

The enforcement officer must apply the principles of international law to situations involving circumstances that vary from case to case. From these two reported cases it appears that force that may result in the sinking of the pursued vessel may be lawfully employed if "necessary and reasonable" to effect the apprehension, but that the firing of solid shot at the masts of a vessel attempting to escape and

<sup>45</sup> *Id.* at 328.

<sup>46</sup> *Id.* at 330.

<sup>47</sup> *The Red Crusader*, 35 I.L.R. 485 (1962), facts digested with comment in D. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 66 (1975).

<sup>48</sup> Apparently abduction is one of the hazards of the fishery enforcement field. In October, 1974, "Ohio fish and wildlife authorities surprised the Canadian fishing tug *Cliffside* on Lake Erie. The vessel was boarded, a scuffle ensued, and the Ohio enforcement agent (who had used 'chemical mace' in the process) found himself the recipient of a free, involuntary trip to Canada." Fidell, *supra* note 26, at 96.

<sup>49</sup> 35 I.L.R. 485 and D. O'CONNELL, *supra* note 47, at 66-67.

<sup>50</sup> D. O'CONNELL, *supra* note 47, at 67.

simultaneously to kidnap a boarding party exceeds "legitimate use of armed force."

Exactly determining the actual international custom and usage regarding employment of force in fishery protection is complicated by the numerous cases of use of extreme force by Latin American nations in fishery incidents which never reach an international tribunal. In one such incident, in June 1968, the Soviet vessels *Pavlovo* and *Golfstrim* were detected fishing in an area that might, arguably, be deemed to be a portion of Argentina's two hundred mile territorial sea. After the fishing vessels ignored an order to stop and attempted to proceed toward high seas, the Argentine destroyer *Santa Cruz* fired five explosive rounds resulting in considerable damage to the *Golfstrim*. After paying a fine under protest and making a formal protest, the Soviet Government received only a verbal reply from the Argentine Government to the effect that the incident was a matter for the local courts.<sup>51</sup>

The greatest danger of international conflict arising out of the use of force in fishery protection arises when a nation which does not recognize a fishery zone sends armed escorts to protect its vessels from seizure. Such situations arose in the French-Brazilian lobster dispute of 1964 and the extended British-Icelandic "Cod War." Such confrontations are not expected to occur in the United States fishery zone, but plans to cover such a contingency have been made.<sup>52</sup> Professor O'Connell notes that:

[F]or the purpose of asserting or protecting rights in sea areas which are subject to legal dispute, a primary axiom is that the force used must be superior, or at least capable to the requisite degree of support in the event of challenge. . . [Brazil acted consistently with this axiom] when she dispatched the 6 in. cruiser *Barroso*, five destroyers and two corvettes to overawe the French fishery protection vessel *Tartu* during the 'spiny lobster war.'<sup>53</sup>

Presumably, the Department of Defense is ready to provide such superior force if the need arises. In such a situation the object would be to make resistance to the force so futile as to avoid the necessity of its application. In the enforcement of the fishery zone, it is probable that the United States will limit, by strict rules of engagement, the use of force to situations in which it would be "necessary and reasonable." Just which situations fall into that category is a question to be determined by the drafters of the rules and the officers who must apply them.

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<sup>51</sup> *Id.* at 67-68.

<sup>52</sup> Navy Times, *supra* note 17.

<sup>53</sup> D. O'CONNELL, *supra* note 47, at 7.

*Conclusion.*

Lack of effective international regulation has allowed many valuable fisheries to become depleted. If adoption of the two hundred mile exclusive fishing zone is to be worth the political costs, enforcement must be strict and thorough. The prosperity of the United States fishing industry and the preservation of a reliable and renewable food supply are at stake.

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