Ocean and Coastal Law Journal

Volume 13 | Number 2 Article 3

2007

A State Of Necessity: IUU Fishing In The CCAMLR Zone

Dr. Phillip Bender

Follow this and additional works at: http://digitalcommons.mainelaw.maine.edu/oclj

Recommended Citation

Dr. Phillip Bender, *A State Of Necessity: IUU Fishing In The CCAMLR Zone*, 13 Ocean & Coastal L.J. (2007).
Available at: http://digitalcommons.mainelaw.maine.edu/oclj/vol13/iss2/3

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

A STATE OF NECESSITY: IUU FISHING IN THE CCAMLR ZONE

Dr. Philip Bender[*]

I. INTRODUCTION

Throughout the world, overexploitation threatens the future viability of many fish stocks. This threat extends to the most remote areas on earth, including the Southern Ocean—that vast body of water surrounding the Antarctic continent. Indeed, the geographic isolation of the Antarctic is no longer an insurmountable barrier to the large-scale exploitation of fish stocks in that region. The Southern Ocean, however, is not without regulatory structure.

The Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR, or The Convention, or Convention), a treaty that aims to achieve sustainable exploitation of marine stocks in the Antarctic, is the primary international instrument that applies to living resources in the Southern Ocean.[1] The institutional bodies formed under CCAMLR act as a regional management regime that enacts conservation measures to ensure the sustainable use of Antarctic marine species.[2]

This management regime, however, faces its own difficulties. In particular, CCAMLR's effectiveness is threatened by continued illegal, unreported and unregulated (IUU) fishing in the Southern Ocean region. The problem is particularly prevalent in the Antarctic, because a large part of the area constitutes high seas, thereby allowing states to fish freely under

---

* Philip Bender has completed a Ph.D. in international law at the University of Tasmania, Australia. This paper was written during an internship at the International Tribunal for the Law of the Sea in 2007 and was presented to the legal department of that organization.

1. *See* Convention for the Conservation of Antarctic Marine Living Resources Homepage, http://www.ccamlr.org (last visited Mar. 18, 2008) [hereinafter CCAMLR Website].

2. *See generally* Commission Introduction, CCAMLR Website, http://www.ccamlr.org/pu/e/cc/intro.htm (last visited Mar. 18, 2008).

international law. Another factor contributing to the IUU problem is that CCAMLR conservation measures on the high seas do not apply to countries who are not parties to the treaty (non-party states). This article will outline the weaknesses in the CCAMLR regime and weaknesses in other international instruments in dealing with the IUU problem. It will also discuss applicable defenses that a state may raise in the event that it decides to take direct action against IUU fishing vessels in the high seas of the Southern Ocean, thereby exposing itself to potential liability under international law.

One such defense is to claim a "state of necessity" that makes it imperative for a CCAMLR party state to take action in breach of international law. This paper will examine whether the dire threat to the Antarctic ecosystem posed by IUU fishing could sustain such a defense. Finally, this paper will consider the consequences of a defense of necessity and whether this would be an effective means to combat IUU fishing.

II. THE CONVENTION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES: A BRIEF OVERVIEW

As stated in the Introduction, Southern Ocean fisheries are regulated predominantly by the international treaty, CCAMLR. The fisheries are further governed by a host of binding and non-binding international conservation instruments, such as the United Nations Law of the Sea Convention 1982 (UNCLOS), the Convention for Biological Diversity, and the United Nations Food and Agriculture Organization Code of Conduct for Responsible Fishing (UN FAO Code of Conduct). While these other sources of international law are general in nature and do not apply to the Antarctic region exclusively, CCAMLR does.

CCAMLR came into force in 1982 and the treaty is essentially part of the Antarctic Treaty system.[3] CCAMLR's provisions only apply to a specific region of the Antarctic—all areas south of sixty degrees latitude, and those areas between that latitude and a phenomenon known as the "Antarctic Convergence."[4] The "Antarctic Convergence" is an area of the Southern Ocean where warmer waters moving from more northerly latitudes mix with the colder waters of the Antarctic. The point of

3. *See* Scientific Committee on Antarctic Research, http://www.scar.org/treaty/ (last visited Mar. 18, 2008).

4. Convention for the Conservation of Antarctic Marine Living Resources, art. 1, sec. 1, May 20, 1980, 33 U.S.T. 3476 [hereinafter CCAMLR]. For a diagram of the CCAMLR zone, see the Appendix.

convergence has a higher level of nutrients and a correspondingly higher concentration of marine plant and animal life.[5]

Article II(1) of CCAMLR states that the treaty's objective is the conservation of Antarctic marine living resources.[6] However, "conservation" is defined to include "rational use."[7] Accordingly, CCAMLR addresses both species protection and their "rational use." CCAMLR therefore includes potentially conflicting goals of exploitation and conservation of marine species in Antarctica. In this respect, through its institutional bodies (i.e. the CCAMLR Commission, and the Secretariat and Scientific Committee), CCAMLR acts as a regional fisheries organization that manages living resources in the Southern Ocean area.

The Convention gives the CCAMLR Commission (the Commission[8]) the power to formulate, adopt and revise conservation measures pertaining to particular species.[9] In this respect, the Commission maintains an "ecosystem approach" to fisheries management. This approach envisions managing marine living resources by examining the effect of maintaining particular population and harvesting levels on the entire ecosystem. The ecosystem approach also uses "feedback management." Using this technique, scientists set a species-specific target population and monitor changes from that target.[10] If the actual population level begins to deviate from this target, various management control techniques of the system can be altered to maintain the target population.[11]

As part of its approach to fisheries management, CCAMLR has released a number of conservation measures aimed at the conservation and rational use of both certain species and fisheries practices in general.[12] These conservation measures include "precautionary" fisheries catch limits for particular species.[13] The effectiveness of these precautionary catch

---

5. Australian Antarctic Division—Antarctic Convergence, http://www.aad.gov.au/default.asp?casid=6558 (last visited Mar. 18, 2008).

6. CCAMLR, *supra* note 4, art. 1, sec. 1.

7. *Id.* art. 2, sec. 2. The term "rational use" is not itself defined in the Convention.

8. *See* Commission Introduction, CCAMLR Website, http://www.ccamlr.org/pu/e/cc/intro.htm (last visited Mar. 18, 2008).

9. CCAMLR, *supra* note 4, art. 9, sec. 1(f).

10. Understanding CCAMLR's Approach to Management, http://www.ccamlr.org/pu/E/e_pubs/am/p6.htm#3.4Application (last visited Mar. 18, 2008).

11. *See id.*

12. *See* CCAMLR Website, http://www.ccamlr.org/pu/e/e_pubs/cm/drt.htm (last visited Mar. 18, 2008).

13. Such limits are conservative catch limits that take into account the scientific uncertainty surrounding particular species including population levels, recruitment rates, and interactions with other species.

limits is hampered, however, by several problems, which will now be discussed.

III. THE IUU FISHING PROBLEM

A. An Overview of the Problem

There are currently thirty-four states party to (party states), nine acceding states to, and several observers to CCAMLR. The relatively small number of party states creates several problems for the management regime. In particular, the regulatory scope of CCAMLR's conservation measures would be quite limited if these measures were only enforceable against party states. The question remains as to whether these measures can be enforced against the flag vessels of non-party states on the high seas. Currently, CCAMLR does not impose any legal obligations against non-party states.[14] Instead, CCAMLR enforcement power over non-party states is limited to alerting the offending state that its activities are negatively affecting CCAMLR's goals.[15] Such efforts are frustratingly ineffective and arguably futile.

Without legal effect on non-party states, CCAMLR is powerless to stop the flag vessels of third party states from acting in contravention of CCAMLR's conservation measures. The most prevalent of such contravening action is IUU fishing.[16] CCAMLR and other regional fisheries management organizations have been plagued by this problem. By definition, IUU fishing can occur both within a state's jurisdiction and in a zone under the control of a regional fisheries management organization. The Food and Agriculture Organization of the United Nations (U.N. FAO)

---

14. Arguably, Antarctic claimant states may be able to enforce CCAMLR measures within maritime zones they have claimed, even though all Antarctic claims were frozen under the Antarctic Treaty. This question will not be considered in this paper, but it should be noted that this also involves an issue as to the relationship between the land-based Antarctic claims and other maritime claims.

15. CCAMLR, *supra* note 4, art. 10.

16. "Illegal" fishing involves fishing by vessels within a state's jurisdiction in contravention of its laws, or fishing by flag vessels in contravention of the conservation measures of regional management organizations of which the flag state is a member. *See* International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, 2001, art. 3.1 [hereinafter IPOA-IUU]. "Unreported" fishing refers to the misreporting, or the failure to report, fishing activities occurring within the zone of control of a particular regional management organization. *Id.* art. 3.2. "Unregulated" fishing refers to harvesting activities carried out by vessels from flag states that are not members of the relevant regional management organization. *Id.* art. 3.3.

has produced estimates suggesting that in some fisheries the proportion of total catches coming from IUU fishing is as much as thirty percent.[17] The High Seas Task Force also released a report on the problem of high seas illegal fishing in 2006, which highlighted the massive value of the illegal fishing industry.[18]

B. The Legal Issue of IUU Fishing and CCAMLR

According to UNCLOS, a state can seize an IUU vessel within its Exclusive Economic Zone (EEZ).[19] This right arises as a consequence of coastal states' sovereign rights over the exploitation of natural resources within their EEZ.[20] Several states, such as the United Kingdom, France, and Australia have sovereign territories within the Southern Ocean that generate EEZs under UNCLOS. Under Article 62 of UNCLOS, nationals of states fishing within another EEZ are required to comply with conservation and other measures of the coastal state.[21] Australia, for example, has detained fishing boats with illegally obtained Patagonian Toothfish in its declared EEZ around Heard and MacDonald Islands.[22] The greater capacity, and perhaps a greater willingness, of coastal states to exercise control over foreign vessels operating in their EEZs may make it easier to achieve a reduction in IUU fishing in these zones. There are, however, still enforcement problems due to the geographical barriers of operating in the Antarctic region.

As previously discussed, one of the major problems with CCAMLR is that flag vessels of non-parties are not legally bound by the Convention's provisions. They are not bound to fish in compliance with the conservation measures introduced under the Convention, including the precautionary catch limits set by the Commission. This has the potential to undermine CCAMLR's efforts to conserve and promote the rational use of marine

---

17. UN FAO Website, http://www.fao.org (last visited Mar. 18, 2008).

18. High Seas Task Force, *Closing the Net: Stopping illegal fishing on the high seas* (2006), *available at* http://www.high-seas.org/docs/HSTFfinal/HSTF-Final-Report-09-03-06.pdf.

19. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 73 [hereinafter UNCLOS].

20. *Id.* art. 56.

21. *Id*. art. 62.

22. CCAMLR, CCAMLR REPORT OF MEMBER'S ACTIVITIES IN THE CONVENTION AREA 2001-02—AUSTRALIA (2002), *available at* http://www.ccamlr.org/pu/E/e_pubs/ma/01-02/Australia_ 02.pdf. In early 2002, an Australian navy patrol boat detained two Russian vessels, the *Lena* and the *Volga*, that were engaged in illegal harvesting of Toothfish within these EEZs.

living resources in the Southern Ocean. The danger posed to CCAMLR's efforts is further compounded by the uncertainty that exists as to the level of IUU catch.

That a large part of the geographic area covered by CCAMLR (the CCAMLR Zone, or the Convention Zone) constitutes high seas areas outside of any EEZ further enhances the problem of third party compliance. This is largely due to the customary legal principle of the freedom of the high seas, which applies under UNCLOS.[23] This freedom functionally provides flag vessels of non-parties to CCAMLR the right to fish in high seas areas of the Convention Zone in breach of the Commission's conservation measures. UNCLOS explicitly grants states the right of its nationals to engage in fishing on the high seas.[24] However, this right is purportedly tempered by the states' duty to take measures necessary for the conservation of living resources of the high seas. Such measures may include cooperation with other states, or even the establishment of regional fisheries organizations.[25]

Part XII of UNCLOS outlines the states' further obligations in respect to the protection and preservation of the marine environment.[26] These obligations include a general obligation to protect and preserve the marine environment[27] by cooperating to formulate standards and practices for that purpose while taking into account regional characteristics.[28] States are also responsible for fulfilling such obligations under Article 235 and will be held liable under international law if they fail to do so.[29]

The effectiveness of these conservation provisions is endangered by the breadth of the provisions. The UNCLOS provisions do not place any specific obligation on third party states to abide by CCAMLR's conservation measures or to ratify CCAMLR.[30] A second international agreement, the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species 1995 (Fish Stocks Agreement), was introduced

---

23. UNCLOS, *supra* note 19, art. 87.
24. *Id.* art. 116.
25. *Id.* art. 116-19.
26. *See id.* part XII.
27. *Id.* art. 192.
28. *Id*. art. 197.
29. *Id*. art. 235.
30. *See* Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), 117 I.L.R. 148 (Int'l Trib. L. of the Sea 1999). Australia did argue in the *Southern Bluefin Tuna Cases* that Japan had breached its conservation and cooperation obligations under UNCLOS. As the case was not decided by ITLOS on its merits, one can only speculate as to how the Tribunal would have interpreted the conservation provisions of UNCLOS.

as a supplement to UNCLOS. [31] It applies to high seas areas beyond national jurisdiction, and was enacted to remedy the deficiencies of that agreement in respect to straddling fish stocks and highly migratory species.[32]

"Highly migratory" species are not defined in the Fish Stocks Agreement.[33] The main objective of the Fish Stocks Agreement is the long-term conservation and sustainable use of these species through *effective* implementation of UNCLOS.[34] Other objectives include optimum utilization of stocks and maintenance of stock levels that produce a maximum sustainable yield.[35] The Fish Stocks Agreement contains numerous generalized provisions, such as the Article 5(e) requirement directing states to "adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened."[36] Despite its application in the high seas, this provision is limited both in scope (to particular species) and in its effectiveness by overly broad language. Furthermore, the provisions do not provide an effective means of combating the problem of third party enforcement in the CCAMLR zone.

Several other international instruments have also attempted to stem the problem of IUU fishing. The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) was adopted in November 1993 by the Twenty-Seventh Session of the FAO Conference.[37] The Compliance Agreement is legally binding and has a broad scope because it applies to all fishing vessels on the high seas.[38] The Compliance Agreement also intends

---

31. The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species, art. 3(1), Sept. 8, 1995, 34 I.L.M 1542 [hereinafter Fish Stocks Agreement].

32. *Id.* art. 2.

33. Although it should be noted that Annex 1 of UNCLOS, itself, contains a list of highly migratory species, which may apply in respect of the Fish Stocks Agreement.

34. Fish Stocks Agreement, *supra* note 31, art. 2.

35. *Id.* art. 5.

36. *Id.* art. 5(e).

37. *See* David J. Doulman, *The Code of Conduct for Responsible Fisheries: The Requirement for Structural Change and Adjustment in the Fisheries Sector*, part I (1998), *available at* http://www.fao.org/DOCREP/006/AD364E/AD364E00.htm.

38. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, art. 2, *available at* http://www.ftp.fao.org/docrep/fao/Meeting/006/x3130m00.pdf [hereinafter Compliance Agreement].

to encourage compliance of non-parties.[39] These generalized provisions require encouragement and cooperation, but do little to strengthen the legal regime against non-party fishing in the CCAMLR Zone.

Other international agreements have a similar intent. The FAO Code of Conduct for Responsible Fisheries, for example, mirrors large parts of the Compliance Agreement.[40] Other provisions of the Compliance Agreement were also included within the International Plan of Action to Prevent, Deter and Eliminate IUU fishing (IPOA-IUU).[41]

Both the Code and IPOA are limited because they include only voluntary provisions that do not require states to implement effective IUU controls. A recent survey by the FAO reveals the ineffectiveness of these voluntary provisions; only twenty-four percent of reporting FAO member states indicated that they were currently formulating a national plan of action to put the IPOA into place.[42] Thus, while the Code makes flag states responsible for enforcement, it provides few methods to actually enforce non-party compliance.[43]

Furthermore, states that actively enforce strict flag control measures put themselves at a disadvantage over those states that do not.[44] As a result, some states may publicly endorse enforcement of strict flag control

---

39. *Id.* art. 8. Parties are required to both encourage non-parties to act consistently with the Compliance Agreement, and to cooperate consistently with international law so that flag vessels of non-parties do not undermine the Agreement. *Id.*

40. Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213, 233-34 (2001). The Code, in Article 1.1, specifically acknowledges that FAO Conference resolution 15/93 states that the Compliance Agreement forms an "integral" part of the Code. U.N. FAO, *Code of Conduct for Responsible Fisheries* art. 1.1, *available at* ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf [hereinafter FAO Code of Conduct].

41. U.N. FAO, COMMITTEE ON FISHERIES, REPORT ON THE TWENTY-FOURTH SESSION OF THE COMMITTEE ON FISHERIES, 14-17, FIPL/R655 (2001).

42. U.N. FAO, *Technical Consultation to Review Progress and Promote the Full Implementation of the IPOA to Prevent, Deter and Eliminate IUU Fishing and the IPOA for the Management of Fishing Capacity*, ¶ 68 (2004), *available at* ftp://ftp.fao.org/fi/DOCUMENT/tc-iuu-cap/2004/inf3e.pdf [hereinafter Technical Consultation].

43. Bratspies, *supra* note 40, at 235. Article III(1)(a) of the Compliance Agreement also requires states to take such measures "as may be necessary" to ensure that their flag vessels do not undermine the effectiveness of international conservation and management measures. *Id.*

44. Ian J. Popick, *Are There Really Plenty of Fish in the Sea? The World Trade Organization's Presence is Effectively Frustrating the International Community's Attempts to Conserve the Chilean Sea Bass*, 50 EMORY L.J. 939, 964 (2001) (arguing that the "tragedy of the commons" in the Southern Ocean has led to the failure of informal environmental protection because flag states, realizing their restrictions on fishing put them at an economic disadvantage, lighten the burden of their regulations, thus minimizing their protective effect).

measures but do not enforce such measures in practice. A recent survey by the FAO did, however, report that fifty-nine percent of reporting member states had taken appropriate action to ensure that their flag vessels do not undermine high seas conservation and management measures.[45] It is difficult to effectively enforce controls over flag vessels because vessel owners are motivated by private interests.[46] Competition from vessels under weaker controls can force some flag state vessels to engage in IUU fishing so that they remain economically viable. Hence, even with stricter controls, there is still a risk that vessels will make greater use of "flags of convenience."

C. Flags of Convenience

The introduction of strong control measures by flag states to regulate their vessels could actually lead to an increase in IUU fishing. Strong enforcement measures taken by states against their nationals often results in the "reflagging" of vessels with "flags of convenience."[47] Fishing vessels often change their flag registration to states with little regulation or to states that are not parties to regional fisheries organizations.[48] This allows them to avoid stricter regulatory controls and monitoring. For example, a large number of tuna vessels changed their registration from the United States to other countries to avoid strict dolphin protection legislation.[49] The "flags of convenience" problem extends to member states of CCAMLR whose national's fishing vessels also occasionally fly under the flags of non-member states to circumvent restrictive regulations.[50]

Some international instruments made attempts to deter reflagging.[51] For example, one method of deterrence is the adoption of uniform

---

45. Technical Consultation, *supra* note 42, ¶ 39.

46. *Id.* ¶ 74.

47. Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 60 (2002).

48. Deirdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 232 (2000).

49. Carr & Sheiber, *supra* note 47, at 61.

50. Rachel Baird, *Fishing the Southern Ocean: The Development of Fisheries and the Role of CCAMLR in their Management*, 16(2) U. TASMANIA L. REV. 160, 169 (1997).

51. U.N. FAO, Fisheries and Aquaculture Department, *The Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries*, art. 12(J) (Mar. 10-11, 1999), *available at* http://www.fao.org/docrep/005/x2220e/x2220e00.htm (endorsing a global action plan to deal with IUU and the "flags of convenience" problem) [hereinafter Rome Declaration].

standards.[52] If states uniformly adopt the same level of strict control over flag vessels, then there is little reason to reflag. Practically, however, it will be difficult for all states to impose uniform standards. It would be particularly difficult for developing states that may not have the necessary resources to introduce and monitor significant new regulatory requirements. To aid developing countries in this respect, the United Nations General Assembly has established an Assistance Fund. States are also required to take all "practicable" steps to prevent "flag hopping" of vessels.[53] Such steps could include denying a vessel the right to reflag and an authorization to fish. [54]

Unfortunately, attempts made by international agreements, such as the IPOA and the Compliance Agreement, seem to have had little real impact on the use of flags of convenience. The FAO has looked at reflagging in the wake of the Compliance Agreement to gauge its impact on the practice.[55] Only a small proportion of all reflaggings (around fifteen percent) were motivated by a desire to use a flag of convenience.[56] However, even after implementation of the Compliance Agreement, around five percent of the world's fleet appears to still use flags of convenience.[57] Compounding the problem are funding shortfalls; a recent survey by the FAO reported that over half of the reporting member states had inadequate financial resources to develop a national plan of action to combat IUU fishing and enforce fisheries management measures.[58] Accordingly, it seems that international agreements have been ineffective in dealing with the "flags of convenience" problem. This remains a burden for regional management regimes like CCAMLR. "Flags of convenience" vessels continue to engage in IUU fishing in the CCAMLR zone. As a result, the effectiveness of CCAMLR's conservation measures is threatened in high seas areas of the CCAMLR zone because that treaty does not apply to non-parties to the Convention.

---

52. Under IPOA-IUU, flag states are required to adopt uniform standards so that there are no incentives to reflag. The IPOA also generally requires states to deter their flag vessels from reflagging to avoid compliance with conservation and management measures. *See* IPOA-IUU, *supra* note 16, art. 38.

53. *Id.* ¶ 39.

54. *Id.*

55. *See* Doulman, *supra* note 37.

56. *Id.* part IV, n.27.

57. *Id.*

58. Technical Consultation, *supra* note 42, ¶¶ 74, 76.

D. Stateless Vessels

UNCLOS prohibits state flag vessels from changing flags during a voyage[59] and prevents vessels sailing under two or more flags as a means of convenience.[60] Such vessels can be classified as stateless ships.[61] Under pressure from the international community, some states are even deregistering many vessels found using flags of convenience.[62] The IPOA requires states to take measures consistent with international law in relation to stateless vessels engaged in IUU fishing on the high seas.[63] Because stateless vessels do not come under national or international law, any state can exercise jurisdiction over them.[64] Because of this, freedom of the high seas and non-membership of regional management organizations will not provide barriers to enforcement against such vessels. This would give other states greater power to reduce IUU fishing conducted by stateless vessels previously flying under flags of convenience. Action taken against stateless vessels on the high seas, though perhaps not in accordance with customary international law, is not without precedent. For example, the United States took action against stateless vessels on the high seas to combat narcotics trafficking.[65]

E. IUU Vessel List

The CCAMLR Commission established an "IUU Vessel List," which reports any vessels of CCAMLR party states that have engaged in IUU fishing.[66] Party states who acquire information concerning the IUU fishing activities of flag vessels of other party states are required to submit a report to the Commission outlining evidence of that activity. Those vessels on the

---

59. UNCLOS, *supra* note 19, art. 92(1).

60. *Id.* art. 92(2).

61. *Id.*

62. Warner-Kramer & Canty, *supra* note 48, at 227.

63. IPOA-IUU, *supra* note 16, art. 20.

64. H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 141 (1996). *See also* Molvan v. A.G. for Palestine, 81 L.I.L. Rep. 277 (1948) (holding that stateless vessels are not protected by any state, and suggesting that any state can assert jurisdiction over these vessels); United States v. Victoria, 876 F.2d 1009 (1st Cir. 1989) (holding that the United States had jurisdiction over a vessel captured on the high seas because it was stateless). Such cases may make it easier to limit IUU fishing.

65. *See* United States v. Marino-Garcia, 679 F.2d 1373, 1386-87 (11th Cir. 1982).

66. Commission for the Conservation of Antarctic Marine Living Resources, *CCAMLR Conservation Measure 10-06* (2004), *available at* http://www.ccamlr.org/pu/e/e_pubs/cm/04-05/10-06.pdf.

list face considerable restrictions and prohibitions.[67] These may include prohibition from member state ports, revocation of licenses to fish in the Convention Zone, and in extreme cases, deregistration of vessels. The IUU Vessel List is not the only effort to publish and control offending ships. In a recent 2005 United Nations report, it was proposed that the General Assembly urge states to establish lists of vessels that had engaged in IUU fishing.[68] Like the CCAMLR Commission's IUU Vessel List, such lists would enable identification of problem vessels so that states can ban these vessels from their ports.

F. Port State Measures

The IPOA, Compliance Agreement, and Fish Stocks Agreement all contain measures to prevent IUU fishing that are specific to port states. For example, vessels must have permission to enter ports and must further provide documentation relating to their license, catch quantities, and fishing trip.[69] These measures work together as a control mechanism on fishing vessels trying to unload IUU catches. The control mechanism, of course, is not perfect; the details of catch quantities and fishing trips are open to fraud.

The CCAMLR Commission has also recently introduced measures applying to non-member states in an attempt to garner their compliance with CCAMLR conservation requirements. At each of its annual meetings, the Commission will identify non-member states whose vessels have been engaged in IUU activities in contravention of the treaty's conservation requirements.[70] In addition, the Commission now makes a presumption that *all* non-party state vessels fishing in the CCAMLR Zone are undermining the effectiveness of CCAMLR conservation measures. Accordingly, any such vessel entering a port of a member state is not permitted to offload its catch unless the vessel establishes that the fish were caught in compliance with all CCAMLR conservation requirements.

---

67. *Id.*

68. U.N. General Assembly, *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its sixth meeting*, ¶ 6, U.N. Doc. A/60/99, July 7, 2005, *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/ 414/01/pdf/N0541401.pdf?OpenElement [hereinafter Consultative Process Report].

69. IPOA-IUU, *supra* note 16, art. 55.

70. Commission for the Conservation of Antarctic Marine Living Resources, *CCAMLR Conservation Measure 10-07* (2003), *available at* http://www.ccamlr.org/pu/e/e_pubs/cm/03-04/10-07.pdf.

IV. ACTION AGAINST THIRD PARTY STATES

A. Implications of Such Action

In light of the continued ineffectiveness of efforts to combat IUU fishing, delegations to the 2005 United Nations Consultative Process suggested other solutions.[71] Some states expressed support for a network of high seas protected areas as proposed by the Johannesburg Plan of Implementation and drafted at the World Summit for Sustainable Development in 2002. Other states expressed concern that this approach could restrict a state's high seas freedoms unless the state's consent was required.[72] This disagreement among the states further illustrates the difficulties of controlling fishing activities in high seas areas, such as the Southern Ocean.

The inability of states to effectively control fishing activities on the high seas raises the issue of whether CCAMLR members can fight the problem by taking any form of action against non-member flagged IUU fishing vessels within the CCAMLR zone. To explore this issue, the CCAMLR Commission has considered commissioning a legal review of high seas enforcement capacity. This review would seek to determine if actions sanctioned by UNCLOS could be taken against non-party flag vessels fishing in the CCAMLR Zone.[73]

If such actions were permitted, CCAMLR party states could take more aggressive steps against IUU vessels, including boarding the vessel, seizing any catch harvested in the CCAMLR Zone, and impounding the vessel to prevent future IUU fishing activities.

Such actions, however, may conflict with state's freedom to fish in the high seas under Article 87 of UNCLOS.[74] This freedom is not without limitation. UNCLOS itself contains conservation requirements which limit freedom to fish the high seas. These conservation requirements include: a duty to cooperate, directly or through regional management organizations, with other states to conserve high seas living resources; and a duty to formulate practices and standards for that purpose.[75] States are also

---

71. Consultative Process Report, *supra* note 68, at 15, ¶ 44.

72. *Id.*

73. *Final Report of the Twenty-ninth Antarctic Treaty Consultative Meeting*, *in* ANTARCTICA: LEGAL AND ENVIRONMENTAL CHALLENGES FOR THE FUTURE (Gillian Triggs & Anna Riddell, eds., 2007).

74. UNCLOS, *supra* note 19, art. 87.

75. *Id.* art. 116-19 and Part XII.

responsible for fulfilling such obligations under Article 235 and will be held liable under international law if they fail to do so.[76]

To reconcile this conflict, CCAMLR states could argue that their unilateral action against non-member IUU vessels is permissible because the UNCLOS conservation requirements supercede the UNCLOS freedom to fish the high seas. Furthermore, the non-member states themselves, in failing to control their nationals within the CCAMLR zone, may be in violation of UNCLOS for failure to cooperate with a regional management organization (CCAMLR) to conserve high seas living resources. Similar arguments may also be possible under the Fish Stocks Agreement and Compliance Agreements which also apply to high seas areas.

The merits of this line of argument will not be considered in detail in this article. It will be assumed for the purposes of this article that measures taken by CCAMLR members on the high seas against non-party flag vessels could potentially breach the high seas fisheries rights of those non-party states under UNCLOS. Even with this assumption, the question remains as to whether those parties to CCAMLR in breach would be held responsible under international law.

B. Vienna Convention and Non-parties to Treaties

The Vienna Convention on the Law of Treaties 1969 (the Vienna Convention) establishes in Article 34 that a treaty does not create either obligations or rights for a third-party state without that state's consent.[77] Consequently, CCAMLR, as a treaty, does not obligate third-party states to observe its conservation provisions within the CCAMLR zone. Article 34 of the Vienna Convention is not conclusive on the issue. Article 73 of the Vienna Convention provides that its provisions "shall not prejudge any question that may arise . . . from the international responsibility of a state."[78] Accordingly, Article 34 of the Vienna Convention, relating to the application of treaty obligations to third-party states, is not determinative as to whether a CCAMLR member state would be internationally responsible for taking measures on the high seas against non-member states in furtherance of CCAMLR conservation measures.

---

76. *Id.* art. 235.

77. The Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

78. *Id.* art. 73.

C. An Internationally Wrongful Act

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts provides that an internationally wrongful act occurs when conduct is attributable to a state under international law and constitutes a breach of an international obligation of the state.[79] Under Article 12, there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation.[80]

A CCAMLR member taking action against non-party IUU fishing vessels in the CCAMLR zone may violate the UNCLOS high seas fishing freedom if the conservation provisions of UNCLOS do not apply. The CCAMLR member could therefore have breached an international obligation. If the state's official flag vessels participate in the breach, that act will be attributable to the CCAMLR member. Accordingly, the CCAMLR member may have committed an internationally wrongful act.

The issue is, therefore, whether responsibility for such an unlawful act can be absolved, justified or excused based on some defense in international law. There are a number of potential defenses available against an internationally wrongful act. This paper will focus specifically on the defense of "necessity" and whether such a defense could be successfully used by CCAMLR members with respect to actions taken against non-party fishing vessels on the high seas.

D. Duties Under the UN Charter

A key consideration is whether the defense of necessity can be used where the internationally wrongful act involves a use of force. In the case under consideration, forceful action may be required when non-party states' IUU flag vessels do not voluntarily surrender their IUU fishing catch when requested by the party state. The United Nations Charter contains specific prohibitions against the use of force.[81] Force can include, it has been argued, economic actions or physical actions other than military actions. [82] Accordingly, it might be argued that trade restrictive actions taken against

---

79. International Law Commission, *Responsibility of States for Internationally Wrongful Acts, 2001* art. 2 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft9020articles/9_6_2001.pdf.

80. *Id.* art. 12.

81. U. N. Charter art. 2, para. 4.

82. Chris Bordelon, *The Illegality of the US Policy of Preemptive Self-Defense Under International Law*, 9 CHAP. L. REV. 111, 117 (2005).

IUU fishing in the CCAMLR zone constitute a "use of force" prohibited by the UN Charter.[83] The particular prohibition on the use of force in the UN charter applies as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[84]

The prohibition on the use of force in the circumstances set out in the United Nations Charter is a *jus cogens*—its principles cannot be derogated from by any state or organization with international legal personality (save in the limited circumstances enunciated in the Charter).[85] The consequences of the defense of necessity may be that the defense cannot be relied upon where force is involved. The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts codifies many aspects of state responsibility, including the doctrine of necessity.[86] These articles do not make it clear whether the doctrine of necessity can be used to avoid the prohibition on the use of force in Article 2(4) of the U.N. Charter.[87] The ILC, in the commentaries to its original Draft Articles, contemplated whether or not necessity applied to breaches of Article 2(4). The ILC questioned whether the Charter implicitly excluded necessity because Article 51 of the Charter only explicitly mentions self-defense as a legitimate use of armed force.[88] The ILC did not, however, answer this question and so it remains an unresolved issue.

Before examining whether actions by CCAMLR against non-party fishing vessels would breach Article 2(4), it is important to examine the potential defenses to a breach of Article 2(4) that are present in the U.N. Charter itself. The main defense is the inherent right to self-defense that has been codified in Article 51 of the U.N. Charter. Specifically, Article 51 provides that:

---

83. The application of the necessity defense to a situation involving trade restrictions will not be considered in this paper.

84. U.N. Charter art. 2, para. 4.

85. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 3 (1999).

86. *Article 9 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l Comm'n 31, 49, U.N. Doc. A/CN.4/L.602/Rev.1 [hereinafter 2001 Commentaries to Draft Article 9].

87. Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM .J. TRANSNAT'L L. 337, 346 (2005).

88. *Article 33 of the Draft Articles on the Responsibility of States for Intentionally Wrongful Acts, with Commentaries*, [1980] 2 Y.B. Int'l L. Comm'n 26, 34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (part 2) [hereinafter 1980 Commentaries to Draft Article 33].

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[89]

Thus, for an act of force to be justified as self-defense the act must have been taken in response to an "armed attack." However, as "armed attack" is not defined in the U.N. Charter, it is subject to interpretation. One view of an "armed attack" is that it must come from a state, meaning that the standard for self-defense will not be met if only private entities are involved.[90] For example, under this interpretation, a CCAMLR party state's flag vessel could not claim self-defense against a non-party IUU fishing vessel that acted aggressively towards it, where the fishing vessel is privately owned.

An alternative view is that an armed attack can indeed originate from a private entity.[91] However, low-level violence is unlikely to be sufficient to constitute an "armed attack." Therefore, low-level violence by an IUU fishing vessel is unlikely to support a claim of self-defense under the U.N. Charter.

In any event, this article examines whether CCAMLR parties would be justified in taking action against non-party IUU vessels and whether it is likely that CCAMLR parties would need to be the instigators of force in order to, for example, seize IUU catch held on such a vessel. Accordingly, self-defense is unlikely to be available as a defense to breaches of the prohibition on the use of force under these particular circumstances. Moreover, it is unclear whether the doctrine of necessity, distinct from a claim of self-defense, could be used to justify force against IUU fishing vessels.

If the doctrine of necessity were not available as an independent claim from that of self defense, there is a question as to whether acts taken by CCAMLR members against IUU fishing vessels in the CCAMLR zone

---

89. U.N. Charter art. 51.

90. *See*, *e.g.*, Major Darren C. Huskisson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law*, 56 A.F. L. REV. 109, 143 (2005).

91. *Id.* at 144. Modern terrorist activities have led to increased support for this view.

would actually breach Article 2(4) of the U.N Charter. Article 2(4) prohibits states from using or threatening to use force "in their international relations . . . against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[92]

If a state argues that one of these conditions is not met, then the prohibition on the use of force may be avoided.[93] In regard to IUU fishing in the CCAMLR Zone, arguably any action taken against IUU vessels would not be "in international relations" because it would be taken against a private vessel, not against a state. Of course, the counter argument would be that because the vessels are flagged to a particular state, any action taken against them on the high seas is a matter "in international relations" because it could be considered a potential breach of the high seas fishing freedoms of the flag state.

A more compelling argument is that action taken against IUU fishers in the CCAMLR zone would not be action against "the territorial integrity or political independence of any state."[94] One commentator contends that, based on the ILC's commentaries to its Articles on State Responsibility, acts that fall short of the use of force to threaten territorial integrity do not breach Article 2(4) of the U.N. Charter because threats to territorial integrity may involve a breach of a peremptory norm.[95] However, lesser degrees of force may not be regarded as a breach of a peremptory norm. A peremptory norm or *jus cogens* is a rule of international law that states cannot derogate, and thus the doctrine of necessity, when examined separately from self-defense, cannot apply to justify breach of *jus cogens*.

The high seas do not constitute part of the territory of any state; therefore, a "territorial integrity" argument does not apply to actions taken by CCAMLR parties on the high seas. States do have certain rights on the high seas, but those rights do not have any bearing on the territorial rights or integrity of any state. Thus, actions taken on the high seas in the CCAMLR zone would not be actions against the territorial integrity of the flag state of an IUU fishing vessel. Similarly, an action taken against a private IUU fishing vessel on the high seas could not be said to infringe on

---

92. U.N. Charter art. 2, para. 4.

93. Bordelon, *supra* note 82, at 116.

94. U.N. Charter art. 2, para. 4.

95. Johnstone, *supra* note 87, at 339. Necessity cannot be asserted as a defense under Article 26 of the ILC's Articles on State Responsibility for breaches of peremptory norms. *Article 26 of the Draft Articles on the Responsibility of States for Intentionally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, 85, U.N. Doc. A/CN.4/L.602/Rev.1 [hereinafter 2001 Commentaries to Article 26].

the political independence of any state. With respect to stateless vessels,[96] the argument would seem to be a *fait accompli,* because the use of force against such vessels would not be action taken against any state.

Similar to action taken on the high seas, action taken against an IUU fishing vessel in one of the maritime areas adjacent to the Antarctic continent may not be a threat to the territorial integrity of that vessel's flag state. Article IV of the Antarctic Treaty froze all claims to sovereignty over the territory of Antarctica.[97] The uncertainty surrounding the land claims makes it equally uncertain as to whether coastal states, which can claim territorial seas, exist in Antarctica.[98] Further, there are issues regarding whether or not maritime claims are covered by Article IV of the Antarctic Treaty (and thus are frozen by that treaty); whether EEZs can even exist in the Antarctic, because the concept of EEZs did not exist in international law prior to the treaty; and whether formal recognition of coastal state sovereignty is required before sovereignty can be physically claimed over a maritime area.[99] These issues may affect whether a CCAMLR party state breaches Article 2(4) of the U.N Charter when it takes action against non-parties in potential maritime claim areas adjacent to the mainland of Antarctica.

One potential argument is that the use of force by CCAMLR party states against non-party fishing vessels in these areas could constitute a use of force against territorial integrity, the reason being that the use of force within a maritime area would ordinarily be within the jurisdiction of the state alone (i.e. the state with sovereignty or sovereign rights over maritime areas). Even if maritime claims were frozen under the Antarctic Treaty, using force in those claimed areas could be a challenge to the claimant state's potential sovereignty and, accordingly, a threat to its potential territorial integrity.

The final question as to whether action by CCAMLR would breach Article 2(4) is whether a use of force in such circumstances would be "inconsistent with the Purposes of the United Nations."[100] The Preamble to the U.N. Charter states that its objectives include "to maintain

---

96. *See* Anderson, *supra* note 64, at 141.

97. Antarctic Treaty, art. IV, Dec. 1, 1959, 402 U.N.T.S. 71.

98. Donald R. Rothwell, *A Maritime Analysis of Conflicting Legal Regimes in Antarctica and the Southern Ocean*, 15 AUSTL. Y.B. INT'L L. 155, 158 (1994). The exercise of sovereignty over maritime areas and the rights conferred by UNCLOS are dependent of the existence of land claims. *Id.*

99. *See id.* at 158; Benedetto Conforti, *Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem*, 19 CORNELL INT'L L.J. 249, 249-58 (1986); Bernard H. Oxman, *Antarctica and the Law of the Sea*, 19 CORNELL INT'L L.J. 211, 226 (1986).

100. U.N. Charter art. 2, para. 4.

international peace and security" and to "ensure . . . that armed force shall not be used, save in the common interest."[101] Furthermore, one of the purposes of the United Nations, as enumerated in Article 1 of the U.N. Charter, is "to maintain international peace and security."[102] It is questionable whether actions taken by CCAMLR party states against non-party IUU vessels in the CCAMLR zone would be inconsistent with these purposes.

On the one hand, such actions are ostensibly taken against private individuals, not states. Therefore, it could be argued that these actions, because they are not being taken against states, are not inconsistent with the maintenance of international peace and security. On the other hand, actions against a vessel of a particular flag state may cause conflict with that state, and could be interpreted as inconsistent with the maintenance of international peace. However, action against a vessel of a particular flag state may be justified if the use of force was "in the common interest."

Arguably, the effective maintenance of a management regime like CCAMLR in the Southern Ocean is indeed in the common interest of the international community as a whole. Because it contravenes CCAMLR's conservation measures, IUU fishing is likely to lead to the degradation of fish stocks in the region. Harm to the Antarctic ecosystem is not in the common interest because it adversely affects the sustainable exploitation of marine living resources in the region by all states and it affects the common interest in preserving the Antarctic environment. Therefore, action taken to protect the CCALMR regime in the Southern Ocean may be justified as being force taken in the common interest.

If CCAMLR action breaches the provisions of U.N. Charter Article 2(4), then whether necessity could be used as a defense is relevant.[103] At least one commentator believes that the ILC in drafting its Articles on State Responsibility, which include a clause specifically dealing with the defense of necessity, did not take a position on whether necessity can be used to defend forcible actions that constitute something less than outright aggression.[104] Thus, it is still unclear whether the defense of necessity justifies a use of force under the U.N. Charter, where CCAMLR party states take action against private vessels (i.e. something less than a direct use of force against another state).

---

101. *Id.* pmbl.
102. *Id.* art.1.
103. This question has been discussed previously in the context of peremptory norms.
104. Johnstone, *supra* note 87, at 339.

V. THE DEFENSE OF NECESSITY

A. Historical Background

"Necessity" refers to exceptional and immediate circumstances where the only way a state can safeguard its essential interests against particular types of threats is to suspend its performance of an international obligation of lesser weight or urgency.[105] The policy rationale for "necessity" is that is creates an avenue for states to avoid harmful results that may occur if they strictly adhere to international law.[106]

The concept of "necessity" is not a new one. The ILC's commentaries to its Articles on the Responsibility of States detail situations where the ILC believes that necessity has previously been invoked. For example, in a dispute in 1832 between Britain and Portugal, Portugal had appropriated property from British subjects in contravention of a treaty between the two countries.[107] Portugal tried to justify this on the grounds of a pressing need to provide for some of its troops involved in subduing domestic disturbances.[108]

Another example is an incident which took place during a civil uprising in Canada in 1837, where Canadian insurgents were supported by Americans from across the border.[109] The Americans used their own ship, *The Caroline*, to supply the Canadians with weapons. To counter this threat, British soldiers destroyed the vessel while it was in American territory.[110] The British government claimed self-defense.[111] However, the ILC believes that this was more a case of a plea of "necessity" than self-defense.[112] It should be noted that the customary international law requirements for self-defense were necessity and proportionality.[113] Accordingly, a successful claim of self-defense was contingent on a showing of necessity and proportionality. Proportionality, as it applies as part of self-defense, requires that the response to the armed attack be

---

105. *See Article 25 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/L.602/Rev.1 [hereinafter 2001 Commentaries on Article 25].

106. Johnstone, *supra* note 87, at 339.

107. Captain Timothy Guiden, *Defending America's Cambodian Incursion*, 11 ARIZ. J. INT'L & COMP. L. 215, 240 (1994).

108. 2001 Commentaries on Article 25, *supra* note 105, at 83.

109. *Id.*

110. *Id.*

111. Guiden, *supra* note 107, at 240.

112. 2001 Commentaries on Article 25, *supra* note 105, at 83.

113. Guiden, *supra* note 107, at 241.

proportional in terms of the extent of the force used, its goals, and the manner in which the responsive force is used. [114]

Necessity can also be applied in the context of the environment and, in particular, conservation. Unilateral conservation measures have previously been justified under the doctrine of necessity.[115] In its Articles on State Responsibility, the ILC has also acknowledged that necessity can be invoked with respect to conservation.[116] For example, in 1893 the Russian Government instituted a ban on seal hunting in certain areas outside of Russian sovereign waters. This ban was justified because of the need to prevent decimation of the seal population by foreign hunters. The Russians used the absolute necessity of acting before the start of the hunting season, which was imminent at the time, as the basis for instituting the ban.[117]

The *Torrey Canyon* disaster also involved the use of the doctrine of necessity as a justification for taking conservation measures. The case involved a foreign oil tanker off the British coast, which was leaking oil and polluting the environment. After several attempts were made to deal with the problem the British government bombed the tanker to destroy the oil. The British government claimed the doctrine of necessity applied because: (1) the leaking oil posed an immediate risk; and (2) the bombing only occurred after other methods to clean up the oil had failed.[118]

In the *Gabèíkovo-Nagymaros* case the International Court of Justice (ICJ) recognized that the necessity doctrine could be applied in a conservation context.[119] However, the ICJ declined to apply necessity in that particular factual situation.[120] Accordingly, it would appear that the doctrine of necessity could potentially apply to a conservation situation involving CCAMLR members taking action against IUU fishing vessels on the high seas to prevent CCAMLR conservation measures from becoming ineffective.

B. Necessity as a Separate Defense

"Necessity" is one of the essential elements of a claim of self-defense. Accordingly, there is an issue as to whether "necessity" can exist as a separate defense to self-defense. If necessity only applies in the context of

---

114. Bordelon, *supra* note 82, at 136.

115. Michael F. Keiver, *The Pacific Salmon War: The Defense of Necessity Revisited*, 21 DALHOUSIE L.J. 408, 411 (1998).

116. *See* 2001 Commentaries on Article 25, *supra* note 105, at 83.

117. *Id.* at 81.

118. *Id.* at 82.

119. Gabèíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 41 (Sept. 25).

120. *Id.* at 45.

self-defense it may not be able to be used in the CCAMLR context. Bodansky and Crook point out that prior to the ILC's Draft Articles, the defense of necessity was not universally accepted by the international community and was sometimes only accepted in the context of self-defense and the use of force.[121] Bodansky and Crook do not seem convinced by the ILC's acceptance of necessity as a defense in international law stating that the "arbitral awards and bits of state practice stitched together in the commentary to support the principle of necessity may strike some readers as dated, ambiguous, or otherwise not particularly compelling."[122]

In the *Gabèíkovo-Nagymaros* case the defense of necessity, was accepted as a separate defense. This suggests that necessity may have international standing, independent of self-defense, in international law. However, the ICJ relied on the ILC Draft Articles to justify the existence of necessity as a separate defense in international law.[123] Therefore, Bodansky and Crook argue that because the Court relied on the ILC Draft Articles, it would be a case of circular reasoning to rely on the *Gabèíkovo-Nagymaros* case as a justification for the existence of a defense of necessity separate from the defense as set out in those articles.[124] These commentators also point out that the ILC itself acknowledges, in its commentaries to the Draft Articles that, in the *Rainbow Warrior* arbitration, the Arbitral Tribunal did not accept the necessity doctrine.[125]

Whether the criticism of Bodansky and Crook is justified or not, the doctrine of necessity has clearly been accepted as a separate defense in international law. Regardless of whether the ICJ's justification of necessity in the *Gabèíkovo-Nagymaros* case is somewhat circular, the fact remains that the Court did accept it as a separate and valid defense. There has also been acceptance of the doctrine of necessity as a separate defense in other contexts and forums by states themselves,[126] supporting the view that, whatever the position in the past, necessity is now firmly entrenched as a separate defense in international law.

---

121. Daniel Bodansky et al., *The ILC's State Responsibility Articles: Introduction and Overview,* 96 AM. J. INT'L L. 773, 788 (2002).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. For example, the defense was raised by a state party at ITLOS in *M/V "Saiga" (No. 2).* M/V Saiga (No. 2) (St. Vincent v. Guinea), 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999). The defense was also argued by Canada with respect to the seizing of the Spanish vessel *Estai* on the high seas because of the affect of fishing on the fish stock. Keiver, *supra* note 115, at 413.

C. Elements of Necessity

The ILC, in its Draft Articles, has codified the international law relating to necessity. Draft Article 25 outlines the defense of necessity as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>   (a) The international obligation in question excludes the possibility of invoking necessity; or
>   (b) The State has contributed to the situation of necessity.[127]

It should be noted, however, that the status of the concept of necessity as set out in the ILC's Draft Articles is far from clear. The U.N. General Assembly adopted a resolution with respect to the Draft Articles which "commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[128] The General Assembly then, in the fifty-ninth session, merely held discussion of the articles over until the sixty-second session.[129] Accordingly, the ILC's Draft Articles have not yet been accepted by the community of nations and so do not necessarily constitute an acceptable source of international law. Their status, therefore, remains questionable in respect of whether they represent a correct statement of the international law relating to necessity. Johnstone contends that the ILC's Articles on State Responsibility could come within the "subsidiary means for the determination of rules of law" as outlined in Article 38(1)(d) of the Statute of the International Court of Justice.[130] The ICJ's acceptance of the concept of necessity in the *Gabèíkovo-Nagymaros* case as set out in an earlier draft of the ILC's Draft Articles, suggests that necessity, as outlined by the ILC, is a true

---

127. 2001 Commentaries on Article 25, *supra* note 105, at 80.
128. G.A. Res. 56/83, pmbl., ¶ 3, U.N. Doc. A/RES/56/83 (Jan. 28, 2001).
129. G.A. Res. 59/35, pmbl., ¶ 4, U.N. Doc. A/RES/59/35 (Dec. 16, 2004).
130. Johnstone, *supra*, note 87, at 341.

representation of the concept in international law. [131] Each of the elements that must be satisfied in order to make out a defense of necessity will now be examined.

1. An "Essential Interest"

The first requirement of the defense of necessity is that the act in question is necessary to safeguard an "essential interest" of a state. The ILC commentaries state that "[t]he extent to which an interest is essential depends on all the circumstances and cannot be prejudged." [132] The ILC asserts that the interests that can be established as "essential" can include the particular interests of the state as well as the international community as a whole.[133]

2. "Grave and Imminent Peril"

In addition, a claim of necessity requires that the action taken by a state be against a "grave and imminent peril." The ILC Commentaries to Article 25 confirm that "peril" must be objectively established and it cannot be something that is a mere possibility.[134] There must also be sufficient temporal proximity between the action taken and the "peril."[135]

The Court in *Gabèíkovo-Nagymaros* held that "peril" suggests the idea of "risk," although in that case a "peril" was not established due to the uncertainties of the risk.[136] The Court also confirmed that "imminence" is synonymous with "immediacy" or "proximity" and does not include a mere "possibility."[137] Therefore, uncertainty can prevent the "peril" from being sufficiently imminent.[138] In this respect, the Court stated that peril appearing in the long-term can be "imminent" if that peril is not any less certain and inevitable, even though it is long-term.[139]

131. 1980 Commentaries to Draft Article 33, *supra* note 88, at 34.
132. 2001 Commentaries on Article 25, *supra* note 105, at 83.
133. *Id.*
134. *Id.*
135. *Id.*
136. Gabèíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 41-42 (Sept. 25).
137. *Id.* at 42.
138. *Id.* at 44.
139. *Id.* at 42.

3. The "Only Way"

The action for which necessity is relied on must be the "only way" by which the state can safeguard the essential interest. Therefore, necessity cannot be relied upon where there are other lawful means that can be used, even where more costly or less convenient. [140]

4. Impairment of Interests of Other States or the International Community

The conduct of the state must also not impair the essential interests of the other state involved or the international community as a whole. As a result, action taken to protect the essential interest of that state must outweigh all other considerations on a reasonable assessment of the competing interests, including collective interests.[141]

D. Can Necessity be Invoked by CCAMLR Parties?

There is an issue as to whether necessity can be pleaded by CCAMLR parties if those states took action against IUU fishing vessels of non-parties in high seas areas of the CCAMLR zone. In particular, a plea of necessity will only be valid if the criteria outlined above have been met. The application of these criteria to the IUU fishing problem in Antarctica will now be examined.

1. An "Essential Interest"

For CCAMLR parties to invoke necessity in defense of action taken against IUU fishers, there must be a need to safeguard an "essential interest." Commentaries to an earlier draft provision of the Articles on State Responsibility, Article 33, suggest that the ILC has previously acknowledged that an "essential interest" might include the ecological preservation of all or some of a state's territory.[142] The Court, in the *Gabèíkovo-Nagymaros* case, recognized that the natural environment could relate to an "essential interest." Referencing its comments in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* the Court recalled the "great significance that it attaches to respect for the environment, not only for states but also for the whole of mankind." [143]

---

140. 2001 Commentaries on Article 25*, supra* note 105, at 83.
141. *Id.* at 84.
142. 1980 Commentaries to Draft Article 33, *supra* note 88, at 34-35.
143. Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 41 (Feb. 5).

Accordingly, conservation of the environment in the Antarctic region may constitute an "essential interest" of a state. The issue, however, would be whether fishing on high seas areas could be an "essential interest" of a state if it did not relate directly to that state.

The first point to make is that some states, such as France and Australia, do have legitimate sovereign areas and resultant EEZs in the Antarctic region. Thus, as already discussed, IUU fishing on the high seas can still impact states' sovereign rights of exploitation within the EEZ because that fishing can affect dependent species in the EEZ or affect species that straddle or migrate between high seas areas and those EEZs. In this respect, IUU fishing on the high seas would relate directly to a state's interests in the EEZ.

The ILC itself, in the Commentaries to Article 33, contemplated that necessity can be invoked even with respect to action that a state takes on the high seas where such conduct is a threat to a vital ecological interest.[144] The particular interests involved are not just limited to those of a state, but can be those of the international community as a whole. As was outlined at the beginning of this paper, the FAO has characterized IUU fishing as one of the major threats to world fish stocks. Accordingly, action taken against IUU fishers is safeguarding an "essential interest" of the international community as a whole because such fishing threatens the interest that the international community has in preserving the Antarctic ecosystem. That is, IUU fishing is an attack on the "essential interest" that the international community has in preserving the Antarctic marine environment, both to allow the equitable sustainable exploitation of living resources by all states and simply to ensure the continued viability of the Antarctic ecosystem for future generations.

It is useful to examine some specific cases. For example, the *M/V "Saiga" Case* involved the arrest by Guinea of a flagged vessel of Saint Vincent and the Grenadines that was "bunkering" in Guinean waters.[145] The Guinean Government alleged that the vessel had breached Guinea's customs laws by importing fuel without declaring it and paying tax on it.[146] One of Guinea's arguments on the merits of the case was that the measures taken by Guinea were justified by a "state of necessity."[147] The Tribunal held that no evidence was given by Guinea to show that its essential

144. 1980 Commentaries to Draft Article 33, *supra* note 88, at 35.

145. M/V Saiga (No. 2) (St. Vincent v. Guinea), 120 I.L.R. 143, 167 (Int'l Trib. L. of the Sea 1999). "Bunkering" is a term that refers to a vessel that refuels other vessels while at sea.

146. *Id.* at 187.

147. *Id.* at 191.

interests were in grave and imminent peril.[148] However, the Tribunal seemed to concur that Guinea's interest in maximizing tax revenue from the sale of fuel to fishing vessels was an "essential interest."[149] It would therefore seem that something like Antarctic fishing, which may not be a *vital* interest of a state in that the state's economy is dependent on that thing, can still be an "essential interest."

Another example relating directly to fisheries is a dispute that occurred between the United States and Canada over pacific salmon. Canadian fishermen believed that Alaskan fishermen were taking an inequitable part of Canada's share of the salmon catch.[150] In response, Canada imposed a transit fee on American vessels in Canadian waters.[151] Kreiver argues that, with respect to this dispute, the critical state of certain salmon stocks at the time could be characterized as an "essential interest" of the state that was in grave and imminent peril.[152] Arguably, fisheries on the high seas in Antarctica are a similar "essential interest."

The doctrine of necessity was also raised in a fisheries context during the "turbot war," a Canadian-European Union fishing dispute over fishing rights off Canada's coast. Specifically, Canada argued that the doctrine of necessity justified its arrest of a Spanish vessel, the *Estai*, outside of Canada's EEZ.[153]

The applicability of the doctrine of necessity with respect to using force to seize a foreign fishing vessel was not resolved in the *Estai* case because Canada had not exhausted all the options available to it before taking unilateral action.[154] Arguably the doctrine of necessity did not apply because Canada could have taken other actions to protect its "essential interest."[155] The ICJ did not, however, rule on the legality of the doctrine of necessity defense with respect to this dispute.[156] The argument raised in the case once again suggests that fisheries on the high seas can be an "essential interest" of a state.

---

148. *Id.*

149. *Id.* However, the Tribunal did not accept that the only means of safeguarding that interest, as required by the ILC's Draft Articles, was to extend its customs laws to part of its EEZ. *Id.*

150. Keiver, *supra* note 115, at 409.

151. *Id.* at 410.

152. *Id.* at 420.

153. *Id.* at 413.

154. *Id.*

155. *Id.*

156. *Id.* at 414.

One final example is the *Fisheries Jurisdiction Case*,[157] which involved a case brought before the ICJ by the United Kingdom. Iceland had instituted national legislation claiming a fisheries zone beyond its territorial sea in which it was preventing British fishers from taking fish stocks.[158] In the provisional measures hearing in the case, the Court instituted provisional measures based on the "exceptional dependence of the Icelandic nation upon coastal fisheries" and "of the need for the conservation of fish stocks in the Iceland area."[159] However, on the merits Judge Ignacio-Pinto made a separate declaration in which he stated that Iceland's special situation could not exempt it from international commitments into which it has entered.[160] Thus, Judge Ignacio-Pinto's declaration and the holding of the Court in the provisional measures hearing would appear to highlight two contrasting views concerning whether fisheries can constitute an "essential interest" of a state.[161]

2. "Grave and Imminent Peril"

For necessity to apply, action taken by CCAMLR parties against IUU fishers must also be characterized as a response to a "grave and imminent peril." As previously discussed, "peril" suggests the idea of risk. In the case of IUU fishing, the "peril" is the risk that IUU fishing will have a detrimental effect on the Antarctic ecosystem, particularly because IUU fishing threatens the effectiveness of CCAMLR conservation measures in the CCAMLR zone. The risk to the future viability of individual species in Antarctica and the Antarctic ecosystem as a whole is sufficiently grave because it affects the future of sustainable exploitation of such species by the international community.

The question remains as to whether the peril, or risk, caused by IUU fishing is sufficiently "imminent" in the Antarctic region. The peril must be more than a mere possibility and must be proximate to the risk, although a long-term peril can still be "imminent." The threat of IUU fishing and the risk from IUU fishing is more than a mere possibility. Accordingly,

157. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

158. *Id.* at 26. The case preceded the formulation of the concept of an EEZ during UNCLOS III.

159. *Id.* at 20-21 (quoting Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12 (Interim Protection order of Aug. 17)).

160. *Id.* at 37. The United Kingdom and Iceland had entered into an agreement with respect to the fisheries resources outside of Iceland's territorial seas which Iceland purported to cancel.

161. It should be noted, however, that necessity was not specifically raised as a plea in this case.

even if IUU fishing only had a major impact on particular species and the Antarctic ecosystem in the long-term, this could still potentially be an "imminent peril." Furthermore, IUU fishing is a major threat to the world's fish stocks in general due, in particular, to the large size of this catch compared to legal fisheries.

However, detractors from this view may argue that there is too much uncertainty with respect to the effect of IUU fishing in Antarctica on particular species. The ILC Commentaries to Article 25 acknowledge that, when peril is defined in terms of a threat to natural resource conservation and the environment, there will often be issues of scientific uncertainty. [162] In the *Gabèíkovo-Nagymaros* case the ICJ found that necessity could still be relied upon where there was uncertainty where the available evidence clearly established the peril,[163] although it was held that there was too much uncertainty in that case to establish an "imminent" peril.

To determine whether a peril is sufficiently "imminent" one would expect to analyze the strength of the scientific evidence and the degree of uncertainty in that evidence. However, some contend that the ICJ in the *Gabèíkovo-Nagymaros* case failed to appropriately consider scientific evidence and environmental risks in respect of ecological necessity.[164] In this author's opinion, it is difficult to see how the existence of a "grave and imminent peril" can be objectively evaluated without an examination of the scientific evidence concerning the particular risk to the environment involved.

It is beyond the scope of this article to conduct an analysis of the scientific evidence concerning the risks of IUU fishing in high seas areas on the Antarctic environment and the uncertainty in that regard. However, one should note that there is evidence that fishing can have a detrimental impact on Antarctic species, especially where fishing activities are conducted in particularly sensitive localities. For example, there is evidence that fishing of Antarctic krill in certain specific localities can have a detrimental impact on land-based predator colonies during their breeding season.[165]

---

162. 2001 Commentaries on Article 25*, supra* note 105, at 83.

163. Gabèíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 40 (Feb. 5).

164. Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle*, 13 FORDHAM ENVTL. L. REV. 375, 399 (2002).

165. *See generally,* T. Ichii et al., *An Assessment of the Impact of the Krill Fishery on Penguins in the South Shetlands*, 1 CCAMLR SCIENCE 107 (1994).

3. A Precautionary Approach

A further counter-argument to the fulfillment of the "grave and imminent peril" criterion with respect to IUU fishing in the CCAMLR zone is that many of CCAMLR's conservation measures are "precautionary" in nature. That is, CCAMLR adopts conservation measures even where scientific uncertainty exists regarding a particular species and the impact of fisheries on that stock and dependent species. In the *Gabèíkovo-Nagymaros* case Hungary argued that the precautionary principle should apply when determining whether a plea of necessity would be successful; specifically whether there was a "grave and imminent peril."[166] Some argue that the ICJ's decision in the *Gabèíkovo-Nagymaros* case demonstrates that the criteria required to satisfy necessity, as outlined by the Court, will mean that, in some circumstances, the precautionary principle will not apply, particularly where there is scientific uncertainty regarding the potential environmental harm of an activity.[167] As a result, there is a lack of clarity as to whether necessity could be invoked with respect to CCAMLR's conservation measures because that organization adopts a precautionary approach.

However, if CCAMLR adopts a precautionary approach to its regional management measures a defense of necessity should not be precluded. The use of the precautionary approach does not mean that sufficient certainty does not exist with respect to the risk of IUU fishing to the Antarctic ecosystem. Dobos contends that the ICJ in the *Gabèíkovo-Nagymaros* case failed to appropriately consider scientific evidence and environmental risks with respect to ecological necessity. [168] Dobos argues that, if scientific evidence is a crucial part of evaluating the "imminence" requirement of necessity, then the precautionary principle consequently should be used to evaluate such evidence.[169] Although the precautionary approach was not explicitly recognized in the *Gabèíkovo-Nagymaros* case, there may be a place for that principle in the necessity plea. There has been a much wider recognition of the principle by the international community since that case, which suggests that the application of the defense of necessity should be adapted to take into account such greater acceptance.[170]

---

166. Dobos, *supra* note 164, at 385.

167. Afshin A-Khavari & Donald R. Rothwell, *The ICJ and the* Danube Dam Case*: A Missed Opportunity for International Environmental Law?*, 22 MELB. U. L. REV. 507, 515 (1998).

168. Dobos, *supra* note 164, at 394.

169. *Id.*

170. *Id.* at 388.

4. Sustainable Development

A related principle to the precautionary approach is that of "sustainable development." "Sustainable development," in a broad sense, refers to balancing humanity's right to development with its right to environmental protection.[171] Thus, "sustainable development" essentially involves balancing economic factors against the need to conserve the environment so that economic benefits from the environment can be realized in the future. This principle is also embodied in CCAMLR in terms of its "rational use" objectives.[172]

One could argue that the burden IUU fishing imposes on the sustainable use objectives and conservation measures of CCAMLR should bolster the case for necessity and justify action against IUU fishers by CCAMLR parties. However, the Court in *Gabèíkovo-Nagymaros* referred to sustainable development as a concept, which may imply that the ICJ did not accept it as a legal principle of customary international law.[173] Accordingly, the principle would not appear to be something that can be taken into account when applying necessity, despite Vice President Weeramantry's separate opinion in that case, which seems to indicate a contrary view.[174]

5. The "Only Way"

As previously discussed, the action taken by a state must be the only way for it to safeguard the essential interest. Therefore, there is a question whether action taken against IUU fishers on the high seas is the only way to prevent detrimental harm to the Antarctic ecosystem and to the effectiveness of CCAMLR conservation measures. As already outlined, if alternative lawful means are available, even if they are more costly or less convenient, then necessity cannot be pleaded.

In the current situation, it is submitted that all lawful alternative means have already been taken and are failing to resolve the IUU problem. The ILC Commentaries to Draft Article 25 outline that the other lawful means for taking action contemplated by the necessity defense are not limited to unilateral action. Other means can include cooperative action among states or through international organizations, such as conservation measures taken

171. *See* Gabèíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Vice President Weeramantry).

172. *See* CCAMLR, *supra* note 4, art. 2.

173. A-Khavari & Rothwell, *supra* note 167, at 522.

174. *See* Gabèíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. at 88.

for fisheries through a regional fisheries organization.[175] In the current situation, cooperative measures have already been attempted through the relevant regional fisheries organization, which is CCAMLR. CCAMLR has already introduced a system of Port State controls in the form of its Catch Documentation Scheme as a control mechanism on IUU fishing.[176] That is, it has already tried a trade-based mechanism to stem the flow of IUU fishing. CCAMLR has also attempted to encourage non-parties to become members of CCAMLR, or at least to abide by the Commission's conservation measures. Therefore, it has already made attempts to seek a multilateral solution to the IUU fishing problem in the CCAMLR zone.

A counter-argument may be made that, for fisheries where CCAMLR sets precautionary catch limits, other states should not have to abide by CCAMLR conservation measures where they are not getting a share of those catch limits under CCAMLR. However, there are already a plethora of international agreements (both binding and non-binding) such as the IPOA, the FAO Code of Conduct, and the Compliance Agreement that require governments to control their flag vessels. As outlined previously, such agreements were poorly implemented and resulted in inadequate flag state control and increased incidences of IUU fishing. The ineffectiveness of international agreements in dealing with the problem of vessel reflagging to "flags of convenience" was also outlined above. Furthermore, those third-party states could join CCAMLR and be allocated their share of any precautionary catch quotas in the CCAMLR zone. This argument may be bolstered if IUU fishing and lack of flag state control over those IUU vessels breached the UNCLOS conservation restrictions placed on the freedom of fishing on the high seas. As mentioned, this issue will not be analyzed in detail in this paper. Accordingly, in light of the plethora of measures that have already been taken (including attempts at multilateral solutions), it is submitted that the only way that this problem can be stemmed is if CCAMLR members take action against IUU fishing vessels on the high seas in the CCAMLR zone.

6. Impairment of Interests of Other States or the International Community

The final requirement for necessity to apply is that action taken by a state must not impair the essential interests of other states or the international community as a whole. Because IUU fishing threatens the interests that the international community has in the Antarctic region's

175. 2001 Commentaries on Article 25, *supra* note 105, at 83.
176. *See* IPOA-IUU, *supra* note 69 and accompanying text.

living resources, action taken by CCAMLR members against IUU fishing vessels in the high seas CCAMLR zone would actually benefit the interests of the international community, rather than impair it. Such action would ostensibly harm the interests of flag states whose IUU flag vessels were targeted, but the impairment of these interests should be outweighed by the need to prevent detrimental impacts to the ecosystem, and, in effect, protect the greater interests of the international community as a whole.

E. Limitations on Necessity—Application to IUU Fishing

There are several limitations on the use of necessity outlined in the ILC's Articles which prevent the necessity defense from being invoked. The first of these limitations is where the international obligation that has been breached excludes the possibility of invoking necessity. There is nothing in UNCLOS which specifically precludes the defense of necessity where the provisions of that treaty have been breached and, in this author's opinion, there is also nothing which impliedly precludes the defense. Accordingly, there is nothing in UNCLOS that excludes the defense from being utilized where the high seas fishing freedom rights under UNCLOS have not been respected. With respect to the prohibition on the use of force, there is no explicit exclusion of necessity as a valid defense (although, as discussed, there remains an unresolved issue as to whether there is an implied exclusion of necessity).

The second limitation is where the state pleading the defense has contributed to the situation of necessity. The current problem is that IUU fishing and non-observation of conservation measures in the CCAMLR zone leading to over-harvesting and degradation of the Antarctic ecosystem. One could argue that CCAMLR member states have contributed to the problem because CCAMLR permits sustainable exploitation of stocks. Because CCAMLR members are able to exploit stocks, a non-party to CCAMLR may argue that these members have therefore contributed to overexploitation. However, this is not a valid argument. CCAMLR is a regional management organization that has specific systems in place to monitor stock levels and the effects of harvesting on other species in the ecosystem. It also has specific monitoring mechanisms and systems in place to ensure that stocks are being harvested sustainably and the viability of species is not threatened. Accordingly, if CCAMLR members act in accordance with CCAMLR's conservation measures, they cannot be said to have contributed to the state of necessity. This is in stark contrast to the IUU fishing vessels which harvest stocks without regard to whether a species is being sustainably harvested or whether their activities are having a detrimental impact on dependent species in the ecosystem.

1. Peremptory Norms

There is a final limitation on the use of a plea of necessity in respect to peremptory norms or *jus cogens*. Article 53 of the Vienna Convention provides that "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." [177]

A basic tenet of international law, as discussed above, is that states cannot derogate from their obligations under a peremptory norm in any circumstances. This principle is reflected in the ILC's Draft Article 26, which provides that, "nothing . . . precludes the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law."[178] Accordingly, the defense of necessity does *not* preclude the wrongfulness of a state's act where that act is in breach of a peremptory norm of general international law. The peremptory norm of the prohibition on the use of force has already been discussed above with respect to forcible actions. However, the question remains whether the high seas fishing freedom is a peremptory norm.

2. High Seas Freedom of Fishing as a Peremptory Norm

The freedom of the seas has been recognized as part of customary international law for centuries. The question is whether it has the customary law status of a peremptory norm from which no derogation is permitted. Hugo Grotius, often described as the "father of international law," argued in his seventeenth-century work, *Mare Liberum*, that the freedom of the seas was a universal law from which derogation was not permitted.[179] Accordingly, one could argue that the freedom of the seas has been a peremptory norm or universal law for centuries. Modern scholars appear to share this view that the freedom of the high seas is a peremptory norm.[180]

Prima facie, it would appear to be highly likely that the high seas fishing freedom is a peremptory norm. Thus, the issue is whether seizure

177. Vienna Convention, *supra* note 77, art. 53.

178. 2001 Commentaries on Article 25, *supra* note 105, at 84.

179. HUGO GROTIUS, THE FREEDOM OF THE SEAS 7-10 (Ralph van Deman Magoffin trans., Oxford University Press 1916).

180. *See*, *e.g.*, A. Mark Weisburd, *The Emptiness of the Concept of* jus cogens, *as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 11 (1995) (citing arguments of Alfred von Verdross).

of IUU fishing vessels on the high seas would breach this peremptory norm and render it impossible to make out a plea of necessity. The key to answering this question is to be found in the codification of the high seas fishing freedom in UNCLOS. As previously discussed, the traditional high seas fishing freedom has been tempered by requirements for conservation on the high seas. At issue is the status of these UNCLOS provisions under customary law and whether those conservation requirements are now themselves part of a peremptory norm of high seas fishing freedom.

3. The High Seas Fishing Freedom as Customary Law

The principles outlined in UNCLOS and, in particular, the conservation restraints/obligations placed on the traditional fishing freedom on the high seas may constitute customary international law. Customary international law requires the existence of a generally accepted and widespread state practice and *opinio juris* (i.e., an intention to be legally bound by the practice) of a majority of the international community. Accordingly, certain provisions of UNCLOS (or even UNCLOS as a whole) could constitute customary law. For example, Lee asserts that UNCLOS "represents customary international law to a wide extent" because it represents codification of pre-existing customary law and represents emergent law that has been accepted by consensus at a conference (i.e., UNCLOS III) by the vast majority of participants.[181] This assertion, particularly Lee's opinion that UNCLOS as a whole could constitute customary law, is open to criticism. However, the validity of this idea will not be examined here.

There is, however, an issue as to the relationship between the conservation obligations/requirements in UNCLOS and the prior high seas fishing freedom. Customary law can continue to exist in parallel to a legally-binding rule in a treaty or convention and, in this respect, the two rules do not need to cover the same content or overlap precisely.[182] However, there may be an implied intention for parties to a convention to exclude incompatible customary law rules (i.e., show a legal intention *not* to be bound by those rules) of similar subject matter to a convention rule.[183] The problem with this contention in the case of the high seas fishing freedom's relationship to UNCLOS is that the freedom, prima facie, represents a peremptory norm.

---

181. Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT'L L. J. 405, 409 (2006).

182. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 156-59 (1985).

183. *Id.* at 158-59.

Many scholars that have examined *jus cogens* highlight that the two main consequences are an absolute prohibition against violating the rule and the invalidity of any legal instrument which contravenes the rule.[184] As discussed above, Article 53 of the Vienna Convention makes clear that no derogation from peremptory norms with respect to binding treaties is permitted.[185] Czapliñksi argues that the mere conclusion of a treaty contrary to a *jus cogens* permits a state to claim the treaty is invalid.[186] Accordingly, if the traditional high seas freedom of fishing was absolute, then UNCLOS's conservation provisions that purportedly place obligations on parties in relation to this absolute freedom would breach the peremptory norm and be invalid. The only two solutions to this legal dilemma, which can result in a valid UNCLOS are: (1) that the conclusion of the UNCLOS treaty itself modified a peremptory norm of absolute fishing freedom on the high seas; or, (2) that the conservation obligations/restrictions already formed part of this peremptory norm before the conclusion of UNCLOS.

4. UNCLOS High Seas Conservation as a Peremptory Norm

To determine the status of the UNCLOS conservation requirements as part of a high seas fishing peremptory norm, it is necessary to examine the nature of peremptory norms and how they are formed. Czapliñksi is of the view that formation of peremptory norms takes place exclusively by way of customary law, although a multilateral treaty could codify an emergent peremptory norm.[187] Czapliñksi also accepts the possibility that peremptory norms could be created by international organizations through resolutions of their political organs.[188]

Consensus showing general approval of a text at a conference such as UNCLOS III can potentially indicate *opinio juris* for the formation of new customary law.[189] Although universal practice among states is not necessary to form customary law, the practice must be "common and widespread among many States."[190] Traditionally, a practice would also need to persist over quite a long period of time, although many commentators believe that customary law can still arise over a relatively short time

184. Wadystaw Czapliñski, Jus Cogens *and the Law of Treaties*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 83, 87 (Christian Tomuschat et al. eds., 2006).
185. Vienna Convention, *supra* note 77, art 53.
186. Czapliñski, *supra* note 184, at 90.
187. *Id.* at 92.
188. *Id.*
189. VILLIGER, *supra* note 182, at 6.
190. *Id.* at 13.

frame.[191] Some commentators have also argued for the concept of "instant" customary law in which a principle is accepted by a majority of states in a form such as a unanimously-accepted UN General Assembly resolution.[192] As discussed above, Czapliñksi argues that peremptory norms are formed exclusively through custom; although, there is a *possibility* that the resolutions of international organizations could create instant custom. Accordingly, UNCLOS III and the subsequent adoption of UNCLOS could *potentially* have created new customary law, but it is unlikely that the conference and the subsequent adoption of the treaty modified an existing peremptory norm.

There is, however, a possibility of a peremptory norm being altered by a subsequent customary law rule, but it should be noted that any new state practice that may lead to new custom could potentially violate the existing peremptory norm.[193] The Vienna Convention describes a peremptory norm as a norm "which can be modified only by a subsequent norm of general international law having the same character."[194] This provision acknowledges that a peremptory norm can be modified by subsequent developments in international law on the subject covered by the norm. This means that if the freedom of fishing on the high seas was absolute (in that no conservation obligations were placed on states), then it could have been modified in light of later practices in international law.

To understand whether and how a peremptory norm can be modified, it is also necessary to analyze the theoretical nature of such norms. Grotius, in *Mare Liberum*, argued that the freedom of the seas was a construct of natural law.[195] As part of this hypothesis, he contended that things like the sea are by their very nature open to the use of all because they were produced by nature and have never come under the sovereignty of anyone.[196] He argued that such things belong to human society as a whole and are the common property of all according to the law of nations.[197] Grotius believed that this principle of common use applied to the exploitation of fisheries as well as the use of the seas for navigation.[198] He argued that things like fisheries resources in the sea were forever exempt

191. *Id.* at 24-25.
192. *Id.* at 28-29.
193. Czapliñksi, *supra* note 184, at 92
194. Vienna Convention, *supra note* 77, art 53.
195. GROTIUS, *supra* note 179, at 7-10.
196. *Id.*
197. *Id.*
198. *Id.* at 32.

from private ownership "by the consensus of opinion of all mankind" because of their susceptibility to universal use.[199]

If peremptory norms are based on natural law, then arguably they cannot be modified, because how can one change a product of nature? Grotius' arguments seem to suggest an absolute freedom of fishing on the high seas, which is not subject to any form of restriction. However, placing conservation obligations on states who fish on the high seas would not be inconsistent with the notion of the high seas as public property or a global commons under natural law, if that were indeed the theoretical basis of a peremptory norm. If the sea is a global commons, as asserted by Grotius, then everyone should have the right to share in its resources because those resources belong to human society as a whole. However, if those resources are depleted by overfishing, then other states and future generations will be unable to share in the common ownership of those resources in the future. Accordingly, a construct whereby resources are the public property of humanity as a whole cannot be observed if certain parties deplete the resources to such an extent that no one can have the benefit of those resources. The only rational conclusion for this line of reasoning is that tempering an absolute high seas fishing freedom by placing conservation obligations or requirements on states is not inconsistent with natural law.

However, Grotius' assertions that high seas freedoms are a product of natural law may not mean that the high seas fishing freedom, as a peremptory norm, is based on natural law. Orakhelashvili contends that *jus cogens* resembles natural law, but that "the crucial question . . . is not whether a norm is part of natural law, but whether it is of such character as to prevail over positive law."[200] Another justification for the existence of peremptory norms, or perhaps an indicator of when they exist, is based upon morality, where rights or obligations are required to protect the international community of states as a whole.[201] Similarly, Verdross refers to the ethics of the international community as a basis for peremptory norms.[202]

Whether one looks at morality, ethics, or any other justification as to why a peremptory norm should prevail over positive law, a conservation obligation restricting the high seas fishing freedom can be justified under any rationale. If states are not obligated to conserve high seas natural

---

199. *Id.* at 29.

200. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 38 (2006).

201. *Id.* at 48.

202. *Id.* at 49 (citing Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937)).

resources, then those fisheries are likely to become depleted through IUU fishing, potentially causing harm to other species in regional ecosystems. Conservation is necessary to protect the global commons fisheries resources so that all states are free to utilize them. IUU fishing also gives rise to issues of equity because, if a limited group of fishers take all the resources, then an inequitable outcome arises for the majority of states that should also have access to those fisheries. Similarly, depleting fish stocks now raises problems of intergenerational equity in that future generations will be unable to benefit from the freedom of fishing on the high seas because of depleted population levels. Furthermore, the depletion of high seas resources can also affect the viability of straddling or highly migratory species in the EEZs of coastal states, therefore directly affecting the sovereign rights of those individual states. All of these issues justify a conservation obligation/restriction forming part of a peremptory norm of high seas fishing freedom.

The question is whether such a peremptory norm does, in fact, exist. It is unlikely that the agreement of states at UNCLOS III and the subsequent adoption of the UNCLOS treaty, as discussed above, has independently modified an existing peremptory norm. Orakhelashvili argues that there must be a clear reason why a peremptory norm is non-derrogable and this must be a reason "independent of the will of States."[203] Such reasons have been discussed above and, if there were originally a peremptory norm constituting an absolute fishing freedom on the high seas, the norm may have been subsequently modified.

As discussed above, some commentators argue that customary law is likely to be the exclusive source of peremptory norms. Accordingly, changes in customary law must be responsible for changes in peremptory norms. Customary law can change where a prior custom is no longer characterized by general, uniform, and constant state practice and *opinio juris*.[204] Thus, a change in the attitudes and practices of states towards conservation of resources on the high seas may have led to a modification of the original peremptory norm of absolute freedom.

Although new state practices could lead to modifications of a peremptory norm, they could also be in danger of *violating* the existing peremptory norm. However, the two principles are not mutually exclusive, for only if conservation is observed can the community of nations take advantage of the high seas fishing freedom. Without conservation the freedom is essentially meaningless because there will be no substantive

203. *Id.* at 44.
204. VILLIGER, *supra* note 182, at 32.

resources for states to exploit. Thus, a change in state practice would likely not constitute a breach of the existing peremptory norm.

While this paper did not conduct a study of actual state practice since the conclusion of UNCLOS, it is useful to provide several brief examples of earlier recognized changes in state practice. In the early twentieth century, states changed practice by expanding their claims for exclusive fisheries zones adjacent to their coasts, mainly because of overexploitation and a need to conserve fish stocks.[205] It was due to consistent state action to designate an extended boundary for exclusive fishing that the international community finally recognized the expansion of the fisheries zone out to 200 miles. This recognition is exemplified by the *La Bretagne* arbitration, in which the tribunal acknowledged the expansion of fisheries zones as state practice and customary international law since 1972, based on developments that took place at UNCLOS III.[206]

Furthermore, at the time of the *Fisheries Jurisdiction Case*, the ICJ stated that:

> It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.[207]

Even before the adoption of UNCLOS, the ICJ recognized that the freedom of fishing on the high seas had been modified by nation states' subsequent recognition of a duty of conservation.

The second possibility is that a new peremptory norm of conservation has arisen, which is separate and distinct from the high seas fishing freedom. That is, the original high seas fishing freedom still exists, but there is also a new peremptory norm relating to fisheries conservation. Some commentators have already speculated that a peremptory norm requiring the conservation of fish may exist.[208] Alternatively, Birnie and Boyle argue that environmental law does not contain any *jus cogens*

---

205. NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY LAW 38 (1994).

206. *Id.* at 123.

207. Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3, 31 (July 25).

208. *See, e.g.,* Michael A. D. Stanley, *International Law and the Pacific Salmon Treaty: An Alaska Perspective*, 6 WILLIAMETTE J. INT'L L. & DIS. RES. 121, 127-29 (1998).

rules,[209] and presumably this view extends to a peremptory norm of conservation of fisheries resources.

If the traditional fishing freedom has been tempered by a duty of conservation, then arguably taking action against IUU fishers in high seas areas of the CCAMLR zone would be consistent with this duty and would not breach a peremptory norm of high seas fishing freedom. As discussed, there are specific conservation obligations/restrictions placed on high seas fishing under UNCLOS which may reflect, or codify to some extent, a customary law duty to conserve fisheries on the high seas. However, as mentioned earlier, this paper will not consider in detail whether IUU fishing by flag state vessels on the high seas in the CCAMLR zone, and breach of the conservation measures of the regional management organization, would breach these conservation requirements.

Following from the above analysis, necessity should be available as a plea with respect to action taken against IUU fishing on the high seas. The ILC, in the Commentaries to its first Draft Articles, contemplated that necessity can be invoked for action that a state takes on the high seas, where such conduct is a threat to a vital ecological interest.[210]

The ILC has also outlined the rationale for the inapplicability of necessity as a justification for actions that violate peremptory norms. The ILC states that such norms "are so essential for the life of the international community as to make it all the more inconceivable that a state should be entitled to decide unilaterally, however acute the state of necessity . . . that it may commit a breach of the obligations which these rules impose on it."[211] The ILC also outlined that a further rationale for this exclusion was that states had abusively invoked necessity in the past as a justification for breaching such norms.[212] In accordance with these policy objectives, action taken against IUU fishing would actually *benefit* the international community because it would fight against threats to the conservation of species and allow those resources to be available to *all* states for future generations. Therefore, it is submitted that action taken against IUU fishers would not be contrary to the policy rationale behind the "peremptory norm" exception to the defense of necessity. In this case, the IUU fishing potentially violates a high seas fishing peremptory norm that has been modified to take conservation into account. Accordingly, action taken against fishers should not breach these conservation considerations.

---

209. PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 99 (2d ed. 2002).

210. 1980 Commentaries to Draft Article 33, *supra* note 88, at 40.

211. *Id.* at 50.

212. *Id.* at 48.

F. Damages and Widespread Breach?

A CCAMLR member may take action against an IUU fishing vessel on the high seas and, for example, seize its IUU fishing catch. However, it is unclear whether there would be any consequences for that member if a defense of necessity could successfully be made out in such circumstances.

The ILC, in the Commentaries to its Draft Articles, stated that necessity did not have the effect of completely absolving a state of the wrongfulness of an act.[213] Accordingly, the defense would not necessarily preclude claims for compensation for the injurious consequences of a nation state's actions, even if those actions are justified by necessity. The ILC stated that the preclusion of the wrongfulness of an act does not automatically mean that the act may not create an obligation for compensation.[214] The ICJ acknowledged, in the *Gabèíkovo-Nagymaros* case, that if Hungary's plea of necessity were successful, it would not exempt it from a duty to compensate the affected state for its actions.[215]

As illustrated by the ILC's comments, just because necessity does not preclude the wrongfulness of an act, it does not necessarily follow that a state will have to provide compensation for a breach. Compensation would, prima facie, be less likely if an argument could be mounted that IUU fishing in the CCAMLR zone breached the UNCLOS requirements of cooperation and conservation of fisheries on the high seas. This is particularly likely if an obligation to conserve fisheries did exist as a peremptory norm in international law.

The flag state of the IUU fishing vessel would be the entity required to seek compensation under international law through the dispute settlement procedures of UNCLOS.[216] A flag state may not necessarily be in favor of taking this course of action. If states were required to pay compensation for action taken against an IUU vessel (for example, to compensate for the value of any seized IUU catch), it would reduce the effectiveness of such action. This would particularly be the case if the flag state passed on the compensation to the owners of the IUU fishing vessel.

---

213. *Id.* at 51.

214. *Id.*

215. Gabèíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 39 (Feb. 5).

216. It should be noted that other parties, such as vessel owners can, in some circumstances, appear before the International Tribunal on the Law of the Sea on behalf of a state.

G. Prompt Release and Necessity

A situation may arise where a CCAMLR member seizes an IUU fishing vessel in its EEZ of the CCAMLR zone and detains that vessel in its own territory. UNCLOS gives a coastal state the power to take such measures (including boarding and arrest of vessels) as are necessary to ensure compliance with its laws for the exercise of its sovereign rights over living marine resources in the EEZ. It should be noted that this power does not extend to areas outside the EEZ.

UNCLOS also requires an arrested vessel and its crew to be promptly released on the posting of reasonable bond or other security.[217] Thus, there is a question as to whether the doctrine of necessity would also justify a CCAMLR member state's non-compliance with its obligations of prompt release. In particular, necessity may be pleaded on the grounds that if the vessel were promptly released, it would pose a threat to the Antarctic environment in the CCAMLR zone through continued IUU fishing.

However, this argument is unlikely to hold weight. As outlined above, necessity requires a sufficient temporal proximity between the essential interest of the state and the risk or peril to that interest. There is unlikely to be sufficient "imminence" in relation to the risk to the Antarctic ecosystem where a vessel is held by a state to contravene the principles of prompt release. As the vessel would not currently be engaging in IUU fishing, it would not, ostensibly, pose a sufficient, immediate risk to the Antarctic environment. Furthermore, it may not be certain that a vessel being held in contravention of the requirement for prompt release would engage in IUU fishing were it released. A "peril" must be sufficiently certain in order for a state to sustain a plea of necessity.

The original set of circumstances that brought about the initial plea of necessity (i.e. IUU fishing by vessels in the CCAMLR zone) could not justify the subsequent holding of a vessel against a state's prompt release obligations. As soon as the original state of necessity is no longer present, a state then has the duty to comply with its treaty obligations. This means that the state could not continue to hold the vessel when those original circumstances no longer existed (i.e. when the vessel was seized it would no longer be IUU fishing). Accordingly, it is unlikely that a plea of necessity could be sustained in these circumstances to justify breaching a state's obligation for prompt release of a vessel.

An alternative to a state continuing to hold an IUU fishing vessel as a means of preventing it from IUU fishing is for the state to comply with its

---

217. UNCLOS, *supra* note 19, art. 73(2).

prompt release obligations by requiring the posting of a bond, which acts as a sufficient deterrent to that vessel returning to IUU fishing. In the *Volga* case, part of the bond amount that Australia had sought for the release of the vessel was to guarantee that the vessel would carry an operational Vessel Monitoring System,[218] and would ensure observance of CCAMLR conservation measures until the conclusion of domestic legal proceedings in Australia.[219] The International Law Tribunal, however, held that a "good behavior bond" was not a bond or security within the meaning of the Convention.[220] Thus, it seems that CCAMLR members are left with a very scant arsenal of deterrents to prevent seized IUU fishing vessels from returning to IUU fishing in the CCAMLR zone once released, particularly if states are prevented from requiring the posting of a sufficiently-sized bond for the prompt release of such vessels.

VI. CONCLUSION

IUU fishing is an enormous problem that threatens fish stocks all around the world. It is of particular concern to the efficacy of Antarctica's regional management regime, CCAMLR, because the high seas constitute much of the CCAMLR zone. This makes it difficult for CCAMLR to regulate marine living resources in the area because its conservation measures do not apply to non-parties. Accordingly, the effectiveness of those measures is under threat, which could lead to depletion of fish stocks in the region and consequent impacts on other dependent species in the ecosystem. The provisions of other international environmental instruments are weak in nature and have done little to curb this problem, and therefore are not useful alternatives.

CCAMLR members could tackle the problem head-on by taking action against non-party IUU fishing vessels in high seas areas of the CCAMLR zone. Such action could, however, potentially breach international law. This paper has examined the ability of CCAMLR members to plead a state of necessity in order to avoid international culpability for such potentially wrongful acts.

Where state actions against IUU vessels involve a use of force, there is an issue as to whether CCAMLR members have infringed the prohibition on the use of force in the UN Charter. However, such a use of force is

---

218. A Vessel Monitoring System is a device that allows authorities to monitor the position of a fishing vessel via satellite.

219. The "Volga" Case (No. 11) (Russ. Fed. v. Austl.), 126 I.L.R. 433, 450 (Int'l Trib. L. of the Sea 2002).

220. *Id.*

arguably of too low a level to breach the prohibition, especially because it is unlikely to infringe the "territorial integrity or political independence of any state.

It is suggested that a defense of necessity could be utilized by CCAMLR members for action taken against IUU fishing vessels. IUU fishing could constitute a risk or "peril" to the essential interest of the international community because it threatens the viability of species and the entire ecosystem. Thus, CCAMLR-member action may be the only way that CCAMLR members can safeguard the interests of the international community against IUU fishing since the plethora of international instruments and other measures have failed to deal with the problem in any meaningful way.

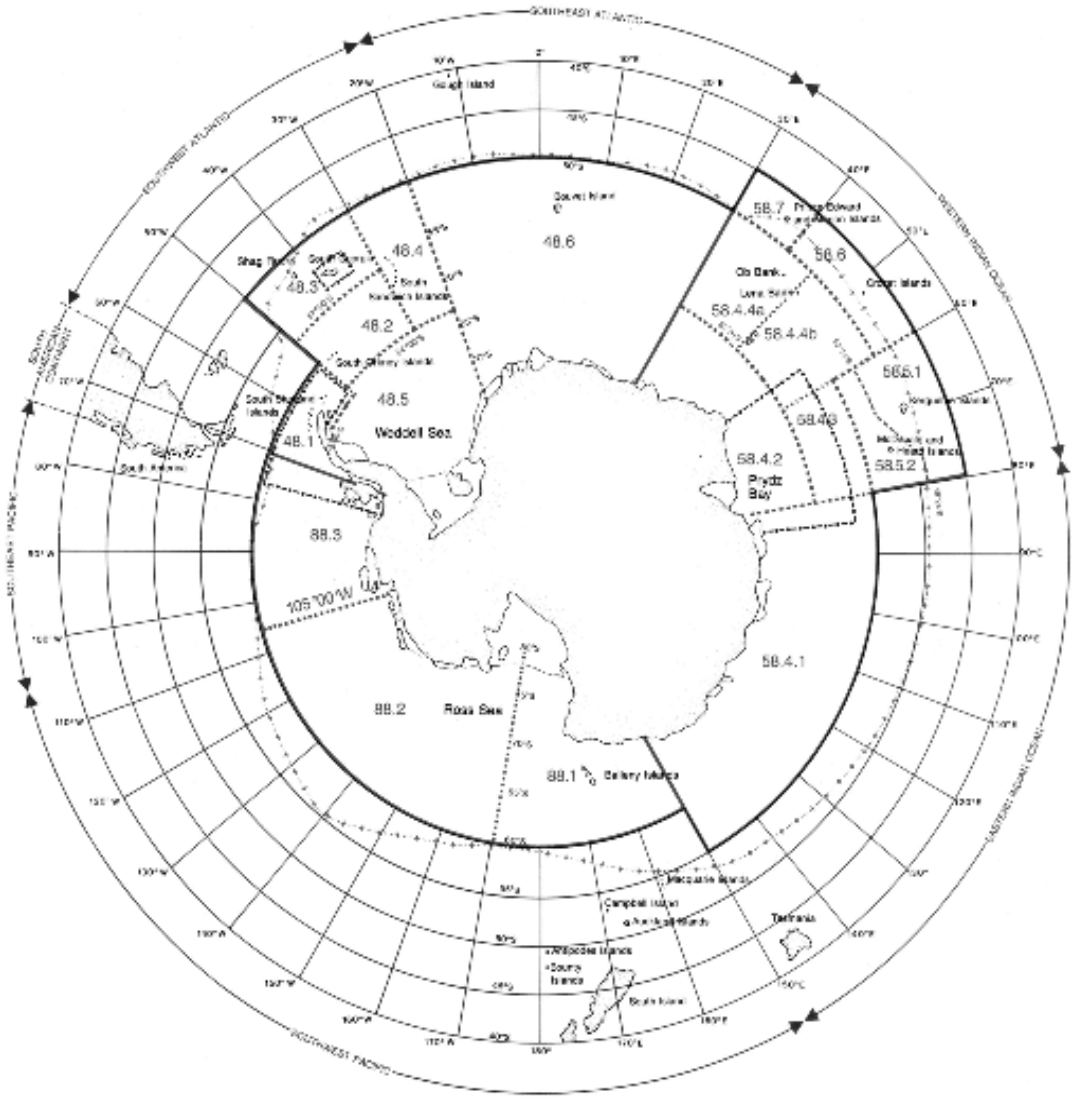
There is a risk, however, that the threat posed by IUU fishing may not be "imminent," as required by the necessity defense. While a long-term risk can still be sufficiently "imminent" where there is uncertainty concerning the risk, this can make it more difficult to establish a defense of necessity. For example, the precautionary-conservation approach used by CCAMLR leaves room for another state to argue that the risks of IUU fishing are not "imminent" because of scientific uncertainty concerning the effect of harvesting on particular species and the ecosystem as a whole. It is also questionable whether a sustained and continuous campaign of action against IUU fishers could be justified under the necessity doctrine. However, there are real and identifiable risks that exist with respect to IUU fishing, particularly in sensitive geographic locations.

Necessity can only be invoked if there has been no breach of a peremptory norm. The high-seas fishing freedom is, ostensibly, such a norm. However, this norm would now appear to be tempered by a duty of fisheries conservation, which arguably means that CCAMLR members would not have breached a peremptory norm by taking action against IUU fishers. Accordingly, they should be able to rely on the defense of necessity, particularly because the ILC has previously confirmed that necessity can apply to actions taking place on the high seas.

If a defense of necessity can be successfully made out, it will not necessarily fully absolve a state of the wrongfulness of its actions. If acts against IUU fishers by CCAMLR members *were* in breach of international law, the flag state of the IUU vessel may be able to claim compensation. For example, there may be a claim of compensation for the value of seized IUU catch. If this were the case, it would likely reduce the efficacy of the action taken against the IUU fishers. Still, flag states may be reluctant to bring an action for compensation on behalf of IUU fishers. Indeed, were flag states to bring such an action, it may be limited in scope due to IUU fishing's breach of UNCLOS conservation duties. Concrete action needs

to be taken to reduce the threat of IUU fishing and, given the persistence of this problem, direct action against IUU vessels may be the only viable means of conserving fisheries resources in the Antarctic.

APPENDIX: THE CCAMLR ZONE IN THE ANTARCTIC



Source: CCAMLR website, http://www.ccamlr.org