FOREIGN FISHERIES ENFORCEMENT: DO NOT PASS GO, PROCEED SLOWLY TO JAIL – IS AUSTRALIA PLAYING BY THE RULES?

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I INTRODUCTION

The number of reported apprehensions of foreign fishing vessels ('FFVs') in the northern reaches of Australia's exclusive economic zone ('EEZ') continues to climb. In late September 2006 government figures suggested that, on average, one FFV per day is apprehended.[1] This adds up to a considerable number of fishers to be processed by Australian authorities. Indeed, the Northern Territory Government has recently raised concerns about the capacity of its courts and jails to deal with the increasing numbers of fishers.[2] It is this matter of processing which forms the focus of this paper. In particular, two issues warrant detailed examination. These are the passage of time between apprehension and court appearance, and the increasing practice of the prosecution to seek jail terms for what are, in substance, regulatory fisheries offences. The issue of default imprisonment for non-payment of fines is also examined.

There has been an emerging practice where there is evidence of resistance to arrest, to charge FFV crews under the *Criminal Code Act 1995* (Cth),[3] rather than s 108(1) of the *Fisheries Management Act 1991* (Cth).[4] The reasoning appears to be that this characterises the offence as something other than a regulatory fisheries offence and casts legitimacy over the imposition of jail terms that would otherwise be unlawful under article 73(3) of the *Convention on the Law of the Sea* ('*LOSC*').[5] This paper examines whether this practice accords with international law.

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1 Senator Eric Abtez, Australian Minister for Fisheries, Forestry and Conservation, Dr Brendan Nelson, Australian Minister for Defence and Senator Chris Ellison, Australian Minister for Justice and Customs, 'Taruman finding welcomed: One illegal fishing vessel; being destroyed per day' (Press Release, 26 September 2006).

2 See Ashleigh Wilson and Cath Hart, 'Blitz on illegal fishing will fill Top End jails', *The Australian* (Sydney), 23 February 2007, 2.

3 *Criminal Code Act 1995* (Cth) ('*Criminal Code*').

4 This is an observed practice rather than a practice officially confirmed. *Fisheries Management Act 1991* (Cth) ('*Fisheries Management Act*') s 108(1) creates a number of offences under the heading 'obstruction of officers'.

5 Opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994).

In relation to the passage of time (sometimes four to five months are spent in pre-trial custody), the paper explores the duty to promptly release the FFV crew under the *LOSC* and the attendant obligations which that duty imposes on the coastal state to charge crew in an expeditious manner, whilst also observing due process.

The issues are examined in the context of the 2006 trial of the master of a Chinese fishing vessel, the *De Yuan Yu 01* with comparative analysis of some other recent convictions. Whilst the relevant legislation is primarily Commonwealth, the *Sentencing Act 1995* (NT) is examined,[6] given the government policy to conduct fisheries prosecutions out of the Darwin office of the Commonwealth Director of Public Prosecutions.[7]

II THE ARREST OF THE *DE YUAN YU 01*

The *De Yuan Yu 01* was arrested on 22 March 2006 in the company of its sister vessel, the *De Yaun Yu 02*.[8] The vessel was detected within the Australian EEZ in an area north-west of the Wessels Islands.[9] The arrest was not straightforward in that the master of the *De Yuan Yu 01*, Mr Lan Delin, did not follow orders broadcasted and transmitted from the *HMAS Ipswich* to heave to for boarding.[10] Evidence was led at the trial of the vessel's master, Lan Delin, to show that the vessel increased speed and manoeuvred erratically away from the *Ipswich* and it was this behaviour which formed the basis of one of the charges against him.[11] The evidence put by the prosecution was that, upon boarding the vessel, the master became cooperative. An inspection of the vessel found fishing nets strewn across the rear deck with fresh pliable fish in the cod end.[12] This placement of the nets formed the basis of a second charge under the *Fisheries Management Act*.

A Charges and Conviction

Lan Delin was charged with two offences that both required the prosecution to prove the element of intent. First, under s 101A of the *Fisheries Management Act,* he was charged with intentionally having in his possession a foreign boat (and being reckless to the fact that the boat was foreign) that was equipped for

6 *Sentencing Act 1995* (NT) ('*Sentencing Act*').

7 The Cth DPP office in Darwin has expanded with up to five officers dedicated to fisheries prosecutions. Recent estimates suggest that 1500 illegal fishing prosecutions will be run through NT courts annually. See Wilson and Hart, above n 2, 2.

8 Some of the factual matters within this paper are drawn from the direct observations of the author as an observer in the trial of Lan Delin. There is a brief summary of proceedings available in the sentencing remarks of Martin AJ. See Transcript of Proceedings, *The Queen v Lan Delin (Sentence)* (Supreme Court of the NT, Martin AJ, 12 September 2006).

9 See Appendix.

10 *HMAS Ipswich* ('*Ipswich*').

11 See also Transcript of Proceedings, *The Queen v Lian Yu Zhong (Sentence)* (Supreme Court of the NT, Martin AJ, 12 September 2006). This case involved the arrest of the sister ship, *De Yuan Yu 02*.

12 The cod end is that part of the net designed to gather the fish and which is drawn apart upon winching the net onto the deck.

fishing at a place within the Australian Fishing Zone ('AFZ').[13] The second charge was laid under s 149.1 of the *Criminal Code* in that the accused, knowing that the commanding officer of the *Ipswich* was a public official, resisted the officer in the performance of his function as a public official. The maximum penalty is two years imprisonment.

It is not clear why Lan Delin was not charged under s 108(1)(a) of the *Fisheries Management Act*, which states that a person must not fail to facilitate by all reasonable means the boarding of a boat by an officer. The maximum penalty is imprisonment for 12 months.[14] Foreign fishing crews have previously been charged under s 108.[15] It is not always an easy charge to prove. The master of the *South Tomi* was charged under s 108(1)(c),[16] and was acquitted on the basis that the prosecution could not establish that specific directions were given. In February 2006, eight crew members from the Indonesian flagged *Sepakat Jaya II* pleaded guilty to charges under s 108(1)(a) for failing to facilitate boarding by naval and customs personnel and were sentenced to imprisonment for nine months.[17]

On 28 August 2006, Lan Delin was found guilty of both offences as charged. In relation to the *Criminal Code* charge, he was sentenced to six months imprisonment with some allowance made for the time he had already spent in pre-trial custody. He was fined $70 000 for the offence of being within the AFZ in a FFV equipped for fishing, with an order that if the fine was not paid within 28 days, the defendant would be imprisoned until his liability to pay the fine was discharged.[18] The master of the *De Yuan Yu 02*, Lian Yu Zhong, was awarded similar sentences.[19] Another foreign fisher, Aceng, (whose conduct is reviewed immediately below) was sentenced to 18 months imprisonment in relation to resisting arrest.

The extent to which this conviction and imprisonment under Australian law can be said to contradict the specific prohibition under international law, which forbids the imprisonment of foreign fishers by a coastal state, is discussed below.

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13 The *Fisheries Management Act* uses the term 'Australian Fishing Zone' and offences are drafted in that context rather than in reference to the EEZ. The AFZ is defined to include 'the waters adjacent to Australia within the outer limits of the EEZ adjacent to the coast of Australia', *Fisheries Management Act* s 4.

14 *Fisheries Management Act* s 108(1).

15 See, eg, *O'Dea v Aviles* (Unreported, Perth Court of Petty Sessions, 18 September 2001).

16 The *South Tomi* was boarded on 21 April 2001. *Fisheries Management Act s* 108(1)(c) creates the offence of refusing or neglecting to comply with a requirement by an officer under s 84.

17 The crew extended long sharpened timber poles at intervals from the sides of the FFV to deter a boarding vessel from puling alongside and attached burning Hessian bags to the poles. Weapons were also brandished at the boarding party. The sentence was reduced after the court took into account time spent in detention awaiting trial as well as the guilty plea. See Senator Eric Abetz, Minister for Fisheries, Forestry and Conservation, 'Prison sentences for fishers who resisted apprehension welcomed' (Press Release, 16 February 2006).

18 This is for a maximum period of three months, *Sentencing Act* s 26(2).

19 See Transcript of Proceedings, *The Queen v Lan Delin (Sentence)* (Supreme Court of the NT, Martin AJ, 12 September 2006).

B Resisting Arrest

As stated, there was no evidence led by the prosecution that once the *De Yaun Yu 02* was boarded, the accused was anything but cooperative. Indeed the defence case submitted that, upon realising that boarding was inevitable, the master slowed his vessel to allow the rigid hulled inflatable boat ('RHIB') to pull safely alongside. The charge in relation to resisting the commanding officer of the *Ipswich* did not turn upon this fact, for there was sufficient evidence of resistance in the prosecution case to satisfy the jury that the elements of the offence had been met. It was, however, common ground that there was no violence directed towards the crew of the *Ipswich* by the foreign fishers.

This can be contrasted to the behaviour of the FFV crew boarded on 14 July 2006 by Australian naval personnel.[20] The defendant, known as Aceng, pleaded guilty to six offences relating to resisting boarding by Australian authorities. The offences included causing harm to a public official, engaging in conduct which threatened to cause serious harm to a public official and causing the official to fear that the threat would be carried out. Active resistance of arrest has become an increasingly frequent scenario, with crew aboard FFVs intercepted within the AFZ engaging in dangerous anti-boarding behaviour, risking their lives and those of the boarding party.[21] In this case, Aceng pleaded guilty to throwing in excess of 35 plastic bottles filled with concrete at members of the boarding party, hitting three of them. After throwing the bottles, Aceng produced a long sword and brandished it in a threatening manner at the boarding party.[22] In the words of the sentencing judge, '[this] was not a case of minor resistance. It was prolonged … and [Aceng was] aggressive'.[23]

III COASTAL STATE SOVEREIGNTY IN THE EEZ

Under the *LOSC* provisions, coastal states have been accorded an expanded jurisdiction over the maritime zones adjacent to their shores. It might even be said that this was a low point in the championing of the freedom of the high seas.[24] However, coastal state jurisdiction within the EEZ is not unlimited and does not equate to full sovereignty. The International Law Commission ('ILC') visited the delicate issues of state maritime sovereignty and the freedom of the seas in a 1956 commentary on the continental shelf.[25] In referring to coastal state

20 This FFV was one of several boarded that day after detection by *HMAS Dubbo* and *HMAS Success*. See also *The Queen v Aceng* [2006] SCC 20624452 (Unreported, Martin CJ, 9 November 2006).

21 See, eg, above n 11.

22 See *The Queen v Aceng* [2006] SCC 20624452 (Unreported, Martin CJ, 9 November 2006).

23 Ibid.

24 The notion of 'creeping jurisdiction' in which coastal States incrementally increased their jurisdiction over maritime waters during the 20th century is well understood. See Robin Churchill and Alan Lowe, *The Law of the Sea* (3rd ed, 1988) 136. During negotiations at UNCLOS III tension was evident between the high seas fishing states and coastal states over coastal state claims to extended maritime zones. See generally Grant Hewison, 'Balancing the Freedom of Fishing and Coastal State Jurisdiction' in Eileen Hey (ed), *Developments in International Fisheries Law* (1996) 161-192 and at 174 for commentary that 'the EEZ represents the triumph of individualism over collectivism in international relations'.

25 ILC Commentary on draft art 68, Yearbook of the ILC (1956) Vol. II, 297.

rights over the resources on the seabed and in the subsoil of the continental shelf, the ILC agreed that these rights necessarily involved jurisdiction to exercise enforcement powers for 'the prevention and punishment of violations of the law'.[26]

Taking law enforcement action to enforce rights under the regime of the EEZ is permitted under international law. Indeed, taking action to enforce coastal state rights such as boarding and inspection is a legitimate exercise of these rights. Flag state consent is not required. When the crew of a FFV does not cooperate in the boarding, it would be a legitimate extension of coastal state authority to use reasonable force to effect the boarding and carry out an inspection. Section 84(1)(aa)(ii) of the *Fisheries Management Act* provides authority under domestic law to use reasonable force in such instances.

A Prohibition on Imprisonment for Fisheries Offences

Whilst recognising the right of coastal states to board and arrest FFVs within their EEZ and to charge crews under fisheries laws, the *LOSC* specifically prohibits the imposition of custodial sentences. The operative words of article 73(3) are 'for violations of fisheries laws and regulations'. The article reads:

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

With respect to Australian fisheries enforcement, there are two separate issues which warrant examination. The first is the practice of imposing imprisonment in default of payment of a fine.[27] The second is the jailing of foreign fishers on conviction of an offence essentially based upon resisting a boarding by an Australian naval or customs patrol vessel.

B Imprisonment in Default of Fine

The issue of default imprisonment has been considered on a number of occasions, most recently by the Queensland Court of Appeal,[28] which upheld the line of predominantly Western Australian authorities. In the 1999 case of *Aruli v Mitchell*,[29] the nature of default periods of imprisonment was addressed,[30] albeit not in the context of compliance with international law. Justice Murray stated that:

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26 Ibid.

27 See, eg, Transcript of Proceedings, *The Queen v Lan Delin (Sentence)* (Supreme Court of the NT, Martin AJ, 12 September 2006).

28 See, eg, *Chief Executive Customs v Labrador Liquor and Ors* [2006] QCA 558 (Unreported, De Jersey CJ, Williams and Jerrard JJA).

29 [1999] WASCA 1042 (Unreported, Kennedy, Pidgeon and Murray JJ, 31 March 1999) ('*Aruli*').

30 In the context of the validity of imposing default periods under Western Australian law for Commonwealth fisheries offences.

> The penalty is a monetary penalty. The enforcement of its payment may be avoided by paying the penalty. In that way it is demonstrated that any imprisonment suffered is not by way of the imposition of a penalty but by way of the ordinary process of providing sanctions to enforce compliance with the law.[31]

In the same case Kennedy J stated:

> [I]t has been recognised for some years that the difficulty of enforcing compliance with fisheries legislation along the length of the Australian coastline calls for a stern deterrent if the legislative restrictions are to be enforced … a fine must reflect the gravity of the offence and must be imposed even though it is known that the offender will inevitably serve a default term of imprisonment.[32]

However, the courts have been careful to emphasise that a period of imprisonment is not to be imposed on the basis that the offence merits imprisonment and the default period represents what would be an appropriate term of imprisonment for that offence.[33] In *Aruli v Mitchell*, Murray J referred to the need to guard against imprisonment 'through the back door'.[34]

Having established the validity of default imprisonment under domestic law, one needs to determine whether the practice is in compliance with international law obligations. The first point to note is that the validity of a practice under domestic law does not remedy non-compliance with international law. In other words, an act pursuant to a law may be valid under national law; however, this determined validity may not be used to avoid international responsibility for breaches of international law.[35]

Leaving the issue of national validity to one side, the question to be determined in an international context is whether default imprisonment is contrary to the intent and spirit of article 73(3) of the *LOSC*. That is, is the default imprisonment a 'penalty for a violation of a fishery law or regulation'? There are no judgements of the International Tribunal for the Law of the Sea ('International Tribunal') to assist in determining this question.

An examination of the domestic legislative framework within which the default imprisonment is imposed may provide some guidance, although as mentioned, national laws cannot be used to validate breaches of international law. Under the *Sentencing Act*, convicted persons are granted 28 days to pay any

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31 *Aruli* [1999] WASCA 1042 (Unreported, Kennedy, Pidgeon and Murray JJ, 31 March 1999) 14.

32 Ibid 9 ff, where Kennedy J referred to *Cheatley v The Queen* (1972) 127 CLR 291, 296 (Barwick CJ) and *Arifin v Ostle* (Unreported, Full Court of the Supreme Court of Western Australia, Pidgeon, Franklyn and Walsh JJ, 18 June 1991).

33 See, eg, *Djou v Commonwealth Department of Fisheries* (2004) 29 WAR 216, [48].

34 *Aruli* [1999] WASCA 1042 (Unreported, Kennedy, Pidgeon and Murray JJ, 31 March 1999). In that instance Murray J was referring to the earlier case of *Arifin v Ostle* (Unreported, Full Court of the Supreme Court of Western Australia, Pidgeon, Franklyn and Walsh JJ, 18 June 1991), in which the Full Court of the WA Supreme Court was concerned that a fine might be imposed upon a defendant with no means to pay and who might as a consequence serve a period of default imprisonment. Justice Pidgeon in that case (at 10) referred to the position that a fine ought 'not ordinarily be imposed unless the offender has the means to pay because otherwise to impose the fine is in truth to imprison through the back door'. However, Pidgeon J went on to state (at 10) that 'where the only option open is a fine … then the fine must reflect the gravity of the offence and must be imposed even though it is known that the defendant will serve a default term'.

35 See *Polites v Commonwealth* (1945) 70 CLR 60; *Horta v Commonwealth* (1994) 181 CLR 183, 195.

imposed fine.[36] The maximum period of imprisonment in default of payment is three months.[37] Courts have previously recognised the inability of foreign fishers to pay fines.[38] As discussed above, the Courts have also held that this is not a reason to not impose a fine or default imprisonment.

In the Northern Territory, the fishers are usually deported before the time to pay expires. In practice, since they are beyond the jurisdiction, a warrant issued for their arrest lies dormant until they re-enter the Australian jurisdiction (usually on another fishing vessel). It appears that, in practice, Australian law makers and enforcers postpone any question of conflict with international law by the simple act of deportation. However, if the defendant re-enters the Australian jurisdiction they are subject to a maximum of three months imprisonment because of the default in the fine.

It is also important to note that the offence provisions in the *Fisheries Management Act* which are applicable to foreign fishers provide for a monetary penalty only. The default imprisonment is authorised under the *Sentencing Act*. This distinction would seem to support the argument that the default imprisonment is not a penalty imposed for a violation of a fisheries law or regulation. It is, as Murray J concluded, part of a process of providing sanctions to enforce compliance with the law.[39] The sanction can be avoided by paying the penalty or by staying out of Australian jurisdiction.

However, there are contrary arguments. The practice of setting a term of default imprisonment has become widespread.[40] Furthermore, it is frequently acknowledged that the defendant has no means of paying the fine. Whilst the Australian courts have been prepared to find this practice acceptable as a means of deterring offenders, the International Tribunal may form a different view. Whilst the merits are not explored in this paper, it is possible that a case might be made against Australia for an abuse of rights granted under the *LOSC*. Article 300 of the *LOSC* states that:

> State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right.

The validity of the Australian practice of default imprisonment under international law may not come to be tested in an international forum. This does not give it any imprimatur under international law, nor should any false sense of comfort be drawn from the blessings of the domestic courts.

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36 *Sentencing Act*, s 26(2). Similar provisions exist under the *Sentencing Act 1995* (WA), although the time frames vary.

37 *Sentencing Act* s 26(3)(c).

38 See *Yusup v The Queen* [2005] NTCCA 19 (Unreported, Mildren, Riley and Southwood JJ, 22 December 2005), [2], where Mildren J states: '[a]lthough the maximum fines which may be imposed are very significant, the deterrent effect of such a fine upon a poor Indonesian fisherman who could not possibly pay is minimal because unless time to pay is refused, the defendant will be deported before he can be imprisoned as a fine defaulter'.

39 *Aruli* [1999] WASCA 1042 (Unreported, Kennedy, Pidgeon and Murray JJ, 31 March 1999) 12.

40 This is an observed practice from the many case reports and interviews the author has conducted.

C Imprisonment for Resisting Arrest

Whilst default imprisonment might be regarded as being borderline compliant with the *LOSC* prohibition of imprisonment for violations of fisheries laws or regulations, the imprisonment of fishers charged with resisting arrest or resisting a public official in the course of his duties, is more worrisome. The crux of the Australian government's position appears to be that, if charges are laid under the *Criminal Code*, the offence loses its nexus with a fisheries law or regulation. It becomes a criminal offence, as distinct from a regulatory offence. Hence, any imprisonment is imposed under the *Criminal Code* and is not contrary to article 73 of the *LOSC*.

With respect, it is not such a straightforward matter, however attractive the argument is from an enforcement perspective. Arguably the substance of the offence remains one which relates to illegal fishing within the AFZ. The usual scenario is that a FFV is detected and ordered to stop or heave to, on suspicion of breaching Australia's fisheries laws. The source of authority to order the vessel to stop lies in the *Fisheries Management Act*.[41] The conduct which gives rise to a charge is integrally linked to fishing (or being equipped to fish) within the AFZ. In failing to stop the boat as required under s 84(aa)(i), the master of the FFV is violating an Australian fisheries law. Seeking to compartmentalise the conduct into discrete events so that part of the conduct can be presented as a non-fisheries offences is an exercise in semantics. The substance remains the same.

The case of the *Sepakat Jaya* referred to above, involved foreign fishers brandishing knives, a machete and a hatchet. The crew also threw lead weights, extended long timber poles from their vessel and attached burning Hessian bags to the poles, all to deter boarding. Yet, nine of the crew were charged under s 108(1) of the *Fisheries Management Act.* The eight accused who pleaded guilty were sentenced to imprisonment for nine months. Time was taken into account for the four months spent in pre-trial detention.

The matter of pre-trial detention raises another issue which is discussed under the heading immediately below. Two observations about the *Sepakat Jaya* case are made at this juncture. First, the imprisonment is contrary to article 73(3) of the *LOSC*. Second, the conduct of the crew on the *Sepakat Jaya* is similar to that of Aceng and his crew. Why were the *Sepakat Jaya* crew charged with a regulatory offence under the *Fisheries Management Act* whilst Aceng was charged with a criminal offence? Just nine months separated the trials of the two crews. Is the difference to be explained by a change in government policy? If so, the desire to adopt a tough stance with illegal foreign fishers is understandable yet must be tempered by the need to consider international law obligations. As with default imprisonment, the Australian Government runs the risk of an abuse of rights claim in its vigorous pursuit of foreign fishers both on and off the water.

It is suggested that the six month sentence imposed upon Lan Delin was unlawful under international law, as are any other similar sentences imposed in recent years. This is a matter of some importance for the Australian government,

41 *Fisheries Management Act* s 84(1)(aa). It is noted that Customs Officers are authorised to conduct boardings under the *Customs Act 1901* (Cth) ss 184-85.

which seeks to employ international law as a foil in its battle against illegal fishers and the wider problem of illegal, unregulated and unreported fishing. It would be unwise to provide states with a basis for initiating international action in relation to the jailing of one of its nationals consequent upon conviction for a fisheries related offence. It is noted that most of the crew onboard FFVs arrested in the northern AFZ are Indonesian or Chinese nationals. The fact that neither of these states has taken action to call Australia to account should not lull Australian authorities into a false sense of legitimacy.[42] That Indonesian fishers have not sought appeals in superior domestic courts should not be taken as acceptance that imprisonment is in accordance with international law.

Before proceeding it is useful to consider whether there would be any circumstances in which the conduct of FFV crews might constitute a criminal offence, as opposed to a regulatory fisheries offence. That is, where the FFV crew behave in such a manner as to constitute an assault upon the boarding party. Such conduct would be an interference with the coastal States' exercise of sovereign rights rather than a fisheries offence. In the case of Aceng, mentioned above, the throwing of cement-filled bottles and brandishing of the long sword may support the formulation of a charge of assaulting a public official. That is, the assault on the officer is a matter relating to the exercise by the coastal state of its sovereign rights over the EEZ rather than a matter relating to a fisheries violation.

As with most matters of legal interpretation, the distinction between when conduct constitutes a violation of a fisheries law and when it amounts to an interference with the exercise of sovereign rights is grey. This is a matter for the prosecutor to determine and should be determined balancing the need to vigorously prosecute illegal fishers with the obligation, as a State party to the *LOSC*, to observe the rules of international law.

D Pre-trial Detention

The final issue to be addressed in this paper is the length of time FFV crews spend in pre-trial detention. In the case of the *De Yaun Yu 01*, the accused was in pre-trial custody for five months. The defence counsel for Lan Delin, the master of the *De Yaun Yu 01*, made a point of stressing the accused's separation from his family in China. The master of the sister ship, the *De Yuan Yu 02*, was in pre-trial custody for a similar period. Aceng was arrested in July 2006 and sentenced in November 2006. The master and fishing master of the *FV Taruman*, a Cambodian-flagged vessel, were arrested in September 2005 and found guilty of fishing illegally within the AFZ by a New South Wales jury one year later. There were six other iceboats arrested along with Aceng's vessel; the crews are still awaiting court appearances.[43]

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42 Neither state recognises the compulsory jurisdiction of the ICJ. China has not ratified the *LOSC*.

43 See Eric Abtez, Australian Minister for Fisheries, Forestry and Conservation and Brendan Nelson, Australian Minister for Defence, 'Ice Boat crews feel the heat' (Press Release, 22 October 2006).

Under article 73 of the *LOSC*, the coastal State has an obligation to promptly release the vessel and crew. Article 73(2) states that vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

This obligation has been interpreted to mean that the coastal state has an obligation to either release the crew,[44] or charge them and then proceed with the hearing without undue haste yet without undue delay. The question posed is whether a delay of four to five months constitutes undue delay. The issue has been the subject of judicial comment in *Juno Trader*,[45] where the Tribunal observed that:

> The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.[46]

Whether lengthy pre-trial detention away from the fisherperson's home, family and friends, is in accordance with general human rights principles is questionable. The accused has a right to be charged and tried in a reasonable amount of time. This right has been recognised by the judiciary. In *Ribot-Cabrera v The Queen,*[47] a case involving an appeal by crew of the *Viarsa* in relation to their bail conditions, the court commented that:

> It is open to a judicial authority to take into account as a discretionary consideration the evident purposes of Articles 73 and 292 in considering whether there should be a grant of bail.[48]

The length of time it takes to lay charges and bring fishers to trial has been commented on by the courts.[49] Illegal fishers may be detained for the purposes of determining whether to charge them but must be released from detention at the end of seven days.[50] However, fishers may then be placed under 'immigration detention' under s 250(3) of the *Migration Act 1958* (Cth). This immigration detention is for such period as required for the making of a decision whether to prosecute or institute such prosecution. Detained fishers may remain in immigration detention from the time of boarding until conviction and deportation. Quite apart from the obligation to promptly release the fishers under international law, there is an obligation under Australian criminal law to charge detained persons. The potential for abuse of the system was noted in 2005 by Mildren J in *R v Zainudin and Ho*,[51] where he observed that '[n]ot even a person arrested for a terrorism offence can be held indefinitely as this defendant could be'.[52]

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44 It is noted that the great majority of the crew are repatriated at Australia's expense.

45 *Juno Trader (Saint Vincent and the Grenadines v Guinea Bissau)* (Unreported, International Tribunal for the Law of the Sea, 23 November 2005).

46 Ibid [77].

47 [2004] WASCA 101 (Unreported, Steytler, Em Heenan and Le Miere JJ, 18 April 2004).

48 Ibid [16].

49 See, eg, *Yusup v The Queen* [2005] NTCCA 19 (Unreported, Mildren, Riley and Southwood JJ, 22 December 2005).

50 *Fisheries Management Act* sch 1A, clauses 8 and 13.

51 [2005] NTSC 14 (Unreported, Mildren J, 24 January 2005).

52 Ibid [27].

Justice Mildren addressed the issue again in 2005 in *Yusup v The Queen*.[53] He observed that, notwithstanding the need to deter illegal fishing in the AFZ, 'judges and magistrates should closely monitor the time taken to lay charges for fisheries offences which, in [his] opinion, should always be laid with the time fixed' by the Act.[54]

IV CONCLUDING REMARKS

There are serious issues raised by the presence of FFVs within the AFZ including matters of quarantine and resource protection. The Australian government is within its rights to pursue varying means of targeting FFVs operating within the AFZ. That said, Australian law and policy must be in accordance with the rules of international law. The practice of imposing periods of default imprisonment, whilst valid under domestic law, is questionable under international law. The practice of imprisonment for what are, in substance, fisheries offences is arguably contrary to international law. Furthermore, the delay in dealing with fishers, whether prior to the laying of charges or in convening a hearing, is also of concern. These issues are not insurmountable. For example, improvements in expediting hearings and repatriating those fishers not charged are administratively straightforward, though possibly logistically more challenging.

The desire to apprehend FFVs and prosecute crew members to ensure that significant disincentives are applied must not overshadow Australia's obligations under the *LOSC*. Further the international good will that flows from Australia's role in the global campaign against the wider problem of illegal, unregulated and unreported fishing would be put at risk by any non-compliance with international law.

53 *Yusup v The Queen* [2005] NTCCA 19 (Unreported, Mildren, Riley and Southwood JJ, 22 December 2005).

54 Ibid [4].