UNODC
United Nations Office on Drugs and Crime

3
2023

CONSTRUCTIVE PRESENCE IN RELATION TO HOT PURSUIT IN THE LAW OF THE SEA

ISSUE PAPER

From the People of Japan

GLOBAL MARITIME CRIME PROGRAMME

UNITED NATIONS OFFICE ON DRUGS AND CRIME
VIENNA

CONSTRUCTIVE PRESENCE IN RELATION TO HOT PURSUIT IN THE LAW OF THE SEA

NOVEMBER 2023

ISSUE PAPER

ROB MCLAUGHLIN

THIS PROJECT WAS FUNDED BY THE GOVERNMENT OF JAPAN.

GLOBAL MARITIME CRIME PROGRAMME
UNODC

UNITED NATIONS

I. INTRODUCTION

The doctrine of 'constructive presence' is a significant maritime law enforcement (MLE) enabler.[1] It is expressly recognised in Articles 111(1) and (4) of the LOSC 1982 as an adjunct of the right of hot pursuit.[2] It is available in relation to coastal State jurisdictions in Internal Waters[3], Archipelagic Waters and Territorial Seas[4], the Contiguous Zone[5], Exclusive Economic Zone (EEZ)[6], and Continental Shelf – including for the enforcement of safety zones[7] around 'continental shelf installations'.[8] The doctrine applies over any matter that the right of hot pursuit can apply to, including revenue, customs, immigration, sanitary, fisheries, and drug trafficking offences, as well as to certain situations of civilian protest at sea.[9] However, the precise scope and parameters of the doctrine remain subject to some uncertainty, and it is the path to, and identification of, these points of uncertainty that is the focus of this report.

1.1 OUTLINE

This report is comprised of seven sections. Following this introductory section, section 2 describes the nature of, and background to, the doctrine of constructive presence. Section 3 then deals with important preliminary distinctions between the concepts of constructive presence and a number of similar but distinct law of the sea 'adjacency' provisions. With these distinctions made, section 4 describes the two well-established approaches to defining the scope of the constructive presence doctrine. The first is the customarily-attested '*simple*' approach, which asserted that constructive presence was available only between a *principal* vessel outside the relevant zone, and *boats* that are launched from that vessel, and which are inside the relevant zone at the time of commencing the hot pursuit of the *principal* vessel. The second approach is the more textually-based '*extensive*' approach, which asserts that the doctrine applies as between the *principal* vessel and any separate ('*link*') vessel, so long as that link vessel both started from a port / coast of the relevant state, and is in the relevant zone at the time of the commencement of the hot pursuit. However, this first element - which is labelled as the 'origins' element in this report - is contested, and there is case law which clearly asserts that the extensive approach also covers the situation

1 As Reuland has observed, 'Because the authority to take action against a suspect ship depends upon the zone in which the suspect ship is located - the nature of actionable offenses being a function of the purpose for which the zone is established - it is important for the ship of the littoral state to ascertain accurately the location of the suspect ship…' – R Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33:3 *Virginia Journal of International Law* 557, 582.

2 United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 ('LOSC 1982'), Art 111(4).

3 LOSC 1982, Art 111(1), (4).

4 LOSC 1982, Art 111(1), (4).

5 LOSC 1982, Art 111(1), (4).

6 LOSC 1982, Art 111(2), (4).

7 LOSC 1982, Art 60(5).

8 LOSC 1982, Art 111(2), (4).

9 G Plant, 'Civilian Protest Vessels and the Law of the Sea' (1983) 14 *Netherlands Yearbook of International Law* 133; see also the *Arctic Sunrise* case discussed in section 5.

where the link vessel is engaged in a common purpose with the principal vessel, but does not require that link vessel to have commenced its journey to engage in the common purpose from within the enforcing state's jurisdiction. Section 5 then examines a potentially even broader approach to constructive presence – one that prioritises the common purpose element above either any requirement for an 'origins' element, or any requirement that the link vessel be of the enforcing State's nationality (as well as within the enforcing State's jurisdiction). The focus in this section is upon whether this approach is indeed a separate and distinct, broader, approach, or merely an interpretive gloss upon the 'extensive' approach. Section 6 then summarises the conclusions to be drawn and notes the interpretive uncertainties that arise from this analysis of the doctrine. Section 7 briefly concludes.

II.

CONSTRUCTIVE PRESENCE IN THE LOSC 1982

In 1895, William Hall - in the fourth edition of his *A Treatise on International Law* - observed of the right of hot pursuit that:

The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.[10]

Craig Allen has more recently described how:

> Conventional and customary law recognize that a vessel on the high seas may be constructively present in waters over which a coastal state has jurisdiction. A vessel is constructively present if one of the vessel's boats violates coastal state law while located within coastal state waters, or if the vessel is a mothership, working as a team with other craft that violated coastal state law while located within coastal state waters. Such vessels are subject to hot pursuit, just as if they were physically present. The convention's choice of the term 'craft' when referring to the other team members in a mothership operation extends the constructive presence doctrine to cases where a mothership works with contact aircraft, as well as contact boats.[11]

As Gilmore similarly noted in the context of the 1958 *Geneva Convention on the Law of the Sea*, the doctrine of constructive presence cannot therefore be divorced from its central object and purpose – maritime law enforcement – in that 'for the lawful interdiction of narcotics traffickers at sea under the 1958 conventions, States must rely on general criminal law enforcement concepts such as hot pursuit and constructive presence.'[12] The consequences of this important preliminary clarification are two: (1) That constructive presence is only a relevant doctrine when the right of hot pursuit is correctly employed; and (2) that the doctrine of constructive presence must be interpreted in line with the overall object and purpose of hot pursuit – expressed by Colombos as follows:

> The reason for allowing this violation of the general rule of immunity of ships on the high seas appears to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has begun, or which, but for the accident of escape, would have begun, within the territory itself, and that it is necessary to permit it in order to enable the jurisdiction to be efficiently exercised.[13]

The incident often cited as the '*locus classicus* of the doctrine of constructive presence'[14] is *The Araunah* (1888). In short, the details of that incident are as follows:

> [The] British Columbian schooner *Araunah*... was seized off Copper Island, by the Russian authorities in 1888, because it appeared that members of the crew of the schooner were illegally taking seals in Bering Sea by means of canoes operated between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of the shore. Lord Salisbury stated that Her Majesty's Government were 'of opinion that, even if the *Araunah* at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license

10 W Hall, *A Treatise on International Law* (Fourth Edition), (Clarendon, 1895) 267.

11 C Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20:4 *Ocean Development and International Law* 309, 314-315.

12 W Gilmore, 'Drug trafficking by sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (May 1991) *Marine Policy* 184; see also EJ Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi' (2004) 19:1 *International Journal of Marine and Coastal Law* 19.

13 CJ Colombos, *The International Law of the Sea* (Fifth Edition) (Longmans, 1962) 152.

14 R Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33:3 *Virginia Journal of International Law* 557, 587.

warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters.'[15]

A series of – in particular US – cases subsequently reaffirmed this principle in the early Twentieth Century[16], and the concept was ultimately included in Article 23 of the 1958 *Geneva Conventions on the High Seas*[17] in terms almost identical to those employed in Article 111 of LOSC 1982. This authority, as Reuland points out, thus 'ensures that a state may effectively enforce its laws and regulations against non-national ships that flee onto the high seas where, but for the right of hot pursuit, the state would be legally powerless to exercise its enforcement jurisdiction.'[18]

2.1 LOSC 1982 ARTICLE 111 RIGHT OF HOT PURSUIT AND CONSTRUCTIVE PRESENCE

As noted, the key LOSC 1982 provision on constructive presence is Articles 111(1) and (4) in relation to hot pursuit:

Article 111 - Right of hot pursuit

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. *Such pursuit must be commenced when the foreign ship or one of its boats is within* the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted...

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that *the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within* the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf...

Consequently, the first key attribute of the concept of constructive presence – linked intricately as it is with the right of hot pursuit - is that the availability of this jurisdictional extension is preconditioned upon a valid operation of the customary / 1958 Convention Article 23 / 1982 Convention Article 111 right of hot pursuit. As Poulantzas has opined, constructive presence 'is not an independent theory but a part of the doctrine of hot pursuit which renders it more extensive and effective'.[19] That is, the doctrine of constructive presence does not operate unless and until a hot pursuit has been properly commenced. If a hot pursuit is for any reason invalid (as was the situation

15 The Secretary of State to the British Ambassador (Geddes), Washington, January 18, 1923, *Papers Relating to the Foreign Relations of the United States, 1922, Volume I* <https://history.state.gov/historicaldocuments/frus1922v01/d329>. The quote is from *British and Foreign State Papers*, Vol 82, 1058.

16 See, inter alia, Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention', 588 note 169.

17 Geneva Convention for the High Seas (1958) 450 UNTS 11, Articles 23(1), (3).

18 Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention', 559.

19 Nichols Poulantzas, *The Right of Hot Pursuit in International Law* (Second Edition), (Martinus Nijhof, 2002) 243.

in the *MV Saiga No.2* case, for example[20]), or was not properly commenced (eg through a failure to give the necessary 'visual or auditory signal to stop … at a distance which enables it to be seen or heard by the foreign ship'[21] – as with the *Arctic Sunrise* case dealt with later in this report), then constructive presence is not relevant. However, the doctrine also acts to provide an extension in time for commencing the hot pursuit against the 'mothership' - as Allen has noted, 'In constructive presence cases, the violation by the mothership is derivative: the mothership's offense is complete only when the contact vessel consummates its violation of coastal state law. This may require that hot pursuit be delayed a day or more. As long as the contact vessel remains within the coastal state's waters, however, pursuit of the mothership may be delayed until the contact vessel's violation is complete.'[22]

The second key attribute of constructive presence is that it (in essence) creates an actionable 'legal fiction' as to the location of a suspect vessel. The doctrine achieves this by rendering that suspect vessel liable to MLE action for an offence subject to the jurisdiction of the enforcing coastal state, even though - on the face of the situation - that vessel is physically located beyond the outer limits of the relevant maritime zone where that coastal state's MLE powers over the particular issue at hand exist. That is, the doctrine deems the suspect *principal* vessel to be within the relevant maritime zone for the purposes of the exercise of coastal state jurisdiction attached to that maritime zone, even though the vessel is physically outside the maritime zone in question.

The third key attribute of the doctrine of constructive presence (and its parent right of hot pursuit) which must inform interpretation is that the doctrine is – at core – an exception to the fundamental right of freedom of navigation in the High Seas[23], and in the EEZ beyond the outer limits of the Territorial Sea.[24] As such, limitations upon this right, and also consequently upon the primacy of flag State jurisdiction on the High Seas and (in respect of freedom of navigation) in the EEZ, are to be read judiciously and interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[25] In this regard, Papastavridis – whilst not speaking directly to the issue of constructive presence – usefully recalls the *Wanderer* arbitration (decided in 1921 but relating to an incident in 1894)[26] as an example of the long authority attaching to the general proposition that, at sea, 'any agreement containing an exception to the general international law rules prohibiting visitation and search of foreign vessels "must

20 ITLOS, *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* (1999) ITLOS Reps. 10, at paras 139-152: '148. As far as the pursuit alleged to have commenced on 28 October 1998 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the Saiga prior to the commencement of the alleged pursuit, as required by article 111, paragraph 4, of the Convention…

149. The Tribunal has already concluded that no laws or regulations of Guinea applicable in accordance with the Convention were violated by the Saiga. It follows that there was no legal basis for the exercise of the right of hot pursuit by Guinea in this case.

150. For these reasons, the Tribunal finds that Guinea stopped and arrested the Saiga on 28 October 1997 in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention.'

21 LOSC 1982, Art 111(4).

22 Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices', 318.

23 1982 LOSC, Art 87(1)(a).

24 1982 LOSC, Art 58(1).

25 Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Art 31(1).

26 *Owners, Officers and Men of the Wanderer (Great Britain) v United States* (1955) 6 RIAA 68. The key issues in this case were not related to the presence of the vessel or any of its boats within a particular zone, but rather as to the presence of arms on board and the specific provisions of the US-UK agreement on fur sealing in the Bering Sea. The Wanderer was 'seized [by a US Revenue Cutter] for act—mere possession, not use of arms and ammunition—which under British law did not justify seizure, and who thus did not exercise delegated authority. Illegality of seizure and, therefore, United States liability, not conditional upon British Court decision: British naval authorities may release illegally seized vessel by merely administrative decision…'. See also H Fromageot, 'American and British Claims Arbitration Tribunal: In the Matter of the Wanderer' (1922) 16:2 *American Journal of International Law* 305.

be constructed stricto jure".'[27] Or, as succinctly stated by the Court in the US case of the Marjorie E Bachman (1925)[28], 'The doctrine of constructive presence, being a mere fiction of the law, should be applied with caution. In extending the rights of this country we are invading those of other nations.'

In this regard, it is important to note that there have been attempts to characterise constructive presence as an incident of 'objective territorial jurisdiction' rather than an express and limited caveat to the general principle regarding flag State jurisdiction and non-interference with freedom of navigation. However, Poulantzas has – arguably correctly – asserted (using the analogy of offshore 'pirate' radio and television stations) that this is not correct:

One may wonder whether the principle of objective territorial jurisdiction could be invoked in justifying direct action against foreign vessels which, while staying outside territorial waters [takes part in the relevant offence]... the principle of objective territorial jurisdiction does not imply that direct action may be taken against foreign vessels or mobile stations lying – for the purpose of 'pirate' transmissions – outside the jurisdiction of the coastal State. Therefore, municipal laws provided, inter alia, for the punishment of foreigners involved in such activities only when found within the jurisdiction of the coastal State.[29]

It is difficult to disagree with this proposition. Similarly, the situation in the *Enrica Lexie* case[30] – involving prima facie Indian jurisdiction over the entirety of an offence which commenced on an Italian flagged vessel but was completed on an Indian flagged vessel – must also be distinguished, as it is not an incident of jurisdiction enabled via the constructive presence doctrine.

2.2 INTERPRETIVE GUIDANCE TO BE DRAWN FROM IMPLEMENTING LEGISLATION?

Leveraging the detailed research conducted by Goodman[31], a hot pursuit-focussed survey of accessible EEZ and fisheries related legislation as available on the DOALOS website[32], and in the FAOLEX website[33], discloses that of the 52 states[34] examined, none specifically addresses the issue of constructive presence in legislation. Commonly, states refer at most to the right of hot pursuit being exercised either 'in accordance with international law' generally[35], or by reference to text or phrases drawn from Article 111 LOSC 1982 more specifically.[36] Pinpointing legislation that might deal with hot pursuit and constructive presence in other MLE contexts – most particularly in relation to drug trafficking – has proven much more challenging. Of the three states[37] where relevant legislation has been identified, none refers explicitly to constructive presence. In the absence of state practice in the form of legislative provisions, it is therefore to the very few cases and commentaries concerning constructive presence that we

27 E Papastavridis, *The Interception of Vessels on the High Seas*, (Hart, 2014) 226.

28 *United States v 600 Cases, more or less, of Assorted Liquor (The Marjorie E Bachman)* 4 F.2d 405 (D. Mass. 1925) at p408.

29 Poulantzas, *The Right of Hot Pursuit in International Law* (Second Edition), 244-245, n9.

30 *The 'Enrica Lexie' Incident (Italy v India)*, award, 21 May 2020 (Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea - PCA Case No. 2015-28) <https://pcacases.com/web/sendAttach/16500>.

31 Camille Goodman, *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone*, (OUP, 2021).

32 <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm>.

33 <http://www.fao.org/faolex/country-profiles/en/>.

34 Algeria, Angola Antigua and Barbuda, Australia, Bangladesh, Barbados, Canada, Comoros, Cook Islands, Dominica, Eritrea, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, India, Kenya, Kiribati, Korea, Liberia, Malaysia, Mauritania, Mauritius, Montenegro, Mozambique, Myanmar, Namibia, Nauru, New Zealand, Niue, PNG, Russia, St Christopher and Nevis, St Lucia, St Vincent and The Grenadines, Samoa, Senegal, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Tanzania, Timor-Leste, Tonga, Tuvalu,, Vanuatu, Vietnam.

35 Eg, Ghana, *Fisheries Act* 2022, s96(3)(c); Papua New Guinea, *Fisheries Management Act* 1998, s3(1)(ii)(A).

36 Eg, Tonga, *Fisheries Management Act* 2002, s73(1).

37 Australia, Guyana, Sri Lanka.

must primarily turn. Before doing so, however, it is first necessary to distinguish constructive presence from a range of similar concepts and authorities.

III.

DIFFERENTIATING BETWEEN CONSTRUCTIVE PRESENCE, CONTIGUOUS ZONES, AND OTHER SIMILAR AUTHORISATIONS IN LOSC 1982

With this background to the general juridical nature of the doctrine of constructive presence outlined, before embarking upon a more detailed assessment of the scope of the doctrine as disclosed in cases and commentary, it is essential that the doctrine as a whole be distinguished from other similar law of the sea doctrines and authorisations. To this end, three similar – but jurisprudentially distinct – matters are particularly relevant: The Contiguous Zone; the authorisations provided by 1982 LOSC Articles 221 and 303; and the form of 'reverse' constructive presence temporarily authorised by the UN Security Council in response to piracy off the coast of Somalia.

3.1 THE LOSC 1982 'CONTIGUOUS ZONE'

Adjacency has long provided a basis for extended jurisdiction in the law of the sea.[38] An early example of adjacency claims was the concept of 'contiguous fishing zones' as claimed by many states and discussed during the negotiations for the 1958 *Geneva Conventions on the Law of the Sea* (within the context of an indeterminate maximum breadth for the Territorial Sea).[39] However, although both constructive presence and contiguity concepts invoke jurisdictional relationships based on locational adjacency, it is essential that the doctrine of constructive presence be differentiated from the Contiguous Zone.[40] To this end, it will be recalled that the Contiguous Zone is concerned with adjacency only in relation to fiscal, immigration, sanitary, and customs ('FISC') jurisdiction. The zone also supports two forms of authority. The first is a 'punish' power, where the outbound delinquent vessel has already breached a relevant FISC law in the pursuing coastal state's Internal Waters, Territorial Sea, or Archipelagic Waters, and that outbound delinquent vessel has not yet sailed beyond the outer limit of the Contiguous Zone (a maximum of 24nm from the coastal state's Territorial Sea or Archipelagic baselines). The second authority is a 'prevent' power, where the inbound suspect vessel – which cannot yet have breached any relevant coastal state FISC law as those laws are not generally applicable beyond the Territorial Sea – is reasonably suspected of intending to breach a FISC law once it does enter the Territorial Sea, Archipelagic Waters, or Internal Waters as relevant, and that inbound suspect vessel has crossed into the Contiguous Zone of the concerned coastal state.

38 For an account of the historical development of the concept of adjacency – particularly in the fisheries context – see T.W Fulton, *The Sovereignty of the Sea*, (Blackwood and Sons, 1911), Section I, Ch VI; Section II, Chs III and V.

39 A Dean, 'The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas' (1960) 54:4 *American Journal of International Law* 751, 754-755.

40 'Article 33 - *Contiguous zone*. 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.'

The Contiguous Zone is thus an expression of the long-standing desire of states to assert adjacent waters jurisdictions primarily for fishing and trade related revenue measures.[41] As an expression of the 'rule of reason or a theory of interests'[42], its essence resides in the extension of coastal state jurisdiction outside a relevant zone by asserting authority over a limited suite of key 'proximity' concerns.

However, whilst both the doctrine of constructive presence, and the Contiguous Zone, separately permit action in relation to vessels, the juridical basis for the Contiguous Zone is fundamentally different to that for constructive presence. The Contiguous Zone is designed to extend a seize (outbound), or prevent (inbound), jurisdiction over adjacent oceanspace in relation to select issues – the FISC matters. That is, the Contiguous Zone approach to adjacency is to extend limited prevent or punish jurisdiction beyond the relevant maritime zone, over a matter that would not normally be subject to that coastal state's jurisdiction beyond that relevant zone.

By contrast, constructive presence concerns asserting authority over a vessel, not an issue. Constructive presence seeks to extend jurisdiction over a vessel by deeming the vessel to be within the relevant zone for the purposes of asserting jurisdiction over that vessel, in relation to conduct over which the coastal state has enforcement authority in that zone. This is achieved by deeming the target ('principal') vessel to be within the relevant zone (which, as a matter of fact, it physically is not) because it is connected through some common purpose to another ('link') vessel that is within the relevant jurisdiction-supporting zone. Constructive presence thus requires that a 'physical link' to the principal / deemed vessel - in the form of the subsidiary / link vessel - still be in the relevant offence-linked zone, and thus within the coastal state's jurisdiction, because the principal vessel is therefore 'within' – in a deemed sense – the relevant zone. Furthermore, the doctrine of constructive presence is manifestly a 'punish' doctrine; there is no 'preventive' aspect to constructive presence, in the way that there is with the Contiguous Zone.

3.2 OTHER LOSC 1982 EXTENSIONS OF JURISDICTION THAT ARE SIMILAR TO, BUT ARE NOT BASED IN, CONSTRUCTIVE PRESENCE

Constructive presence in the context of the LOSC 1982 Article 111 right of hot pursuit must also be differentiated from other LOSC 1982 adjacency authorisations. One such example is LOSC 1982 Article 303(2)[43] in relation to 'archaeological and historical objects found at sea', which deems interference with such objects within a coastal state's Contiguous Zone to be a breach of relevant laws and regulations applicable over such objects as if they were located within that coastal state's Territorial

41 See, for example, H Kent, 'The Historical Origins of the Three-Mile Limit' (1954) 48:4 *American Journal of International Law* 537; in relation to smuggling, see W Masterson, *Jurisdiction in Marginal Seas with Special Reference to Smuggling*, (MacMillan, 1929), Part I, Chs II – IX, dealing with, inter alia, 'the King's Chambers', the Hovering Acts and successor Acts, and the evolution from an unspecified jurisdictional limit, to various limits for separate purposes. For example, in relation to the Act of 1826: 'The new Act extended jurisdiction *over foreign smuggling vessels when found at various distances from the shore ranging from one league to one hundred leagues*. They were subjected to forfeiture when found within four and eight leagues, depending upon the part of the coast, in some cases when one half the persons on board were British subjects, and in other cases when only one such subject was on board, or when the vessel was owned in whole or in part by such subjects. Forfeiture was incurred when the vessel was found within one hundred leagues, only when one -half the persons on board were such subjects, or when the vessel was owned wholly or in part by such subjects. When the vessel was owned wholly by foreigners, and if no English subject was on board, the foreign vessel was not forfeitable unless it was found within one league of the coast…': 104-105.

42 L Fell, 'Maritime Contiguous Zones' (1964) 62:5 *Michigan Law Review* 848, 849, 856-857, 861-862.

43 LOSC 1982, Art 303: 'Archaeological and historical objects found at sea… 2. In order to control traffic in such objects, the coastal State may, in applying article 33 [Contiguous Zone], presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article…'.

Sea.[44] A second example is the authority given to the coastal State to deal with maritime casualty and pollution events – using both LOSC 1982 authorisations and more general international law powers – that take place beyond but adjacent to their Territorial Sea[45]:

Article 221 Measures to avoid pollution arising from maritime casualties

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, *to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests*, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, 'maritime casualty' means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

This form of adjacency jurisdiction is neither one of contiguity nor construction; rather, it is a power drawing authority from permissions to take response action in mitigation of an evolving disaster, founded in doctrines of necessity and emergency rather than primarily in assertions of enforcement jurisdiction. Whilst such laws have some application to situations and vessels at sea, they are not relevant to the LOSC 1982 doctrine of constructive presence as related to maritime law enforcement authorisations over delinquent vessels as per the Article 111 right of hot pursuit.

UNSC authorised 'reverse' constructive presence is not linked to the Article 111 right of hot pursuit

One additional example of a facsimile of the doctrine of constructive presence in a law of the sea context, but unrelated to Article 111 of LOSC 1982 (and thus outside the scope of this report), is evident in UNSC Resolution 1846 (and successor resolutions) in respect of piracy off the coast of Somalia. This resolution in effect authorised foreign warships to enter the Somali Territorial Sea to deal with pirates and pirate vessels in that Somali Territorial Sea as if those pirate vessels and those enforcing warships were in fact on the High Seas:

> 10. [The UNSC] Decides that for a period of 12 months from the date of this resolution States and regional organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:
>
> (a) Enter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
>
> (b) Use, within the territorial waters of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea...[46]

This is a form of 'reverse' constructive presence, whereby the delinquent vessel was deemed to be outside the actual maritime zone it is physically located in, in order to take advantage of enforcement authorisations in the deemed zone. That is, where Article 111(4) constructive presence deems a vessel to be

44 For commentary on some 'in rem' jurisdiction issues associated with the law of salvage in relation to treasure, see B Alexander, 'Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations' (1989) 20:1 *Journal of Maritime Law and Commerce* 1.

45 See generally: I Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35:2 *International and Comparative Law Quarterly* 320, 339-341.

46 UNSC Resolution 1846, 02 December 2008, operative paragraph 10.

inside a maritime zone nearer to the enforcing state so as to take advantage of the (stronger and/or relevant) MLE authorisations available in that nearer zone, this bespoke authorisation in relation to piracy off the coast of Somalia in effect deemed the suspected pirate vessel to be in the High Seas rather than in the Somali Territorial Sea. This was done so that third states could access powers associated with the High Seas right of visit under LOSC 1982 Article 110(1(a) – powers not available to third state warships within other states' Territorial Seas.

IV.

THE TWO DOCTRINAL APPROACHES TO CONSTRUCTIVE PRESENCE

As has been indicated, the key issue in interpreting the doctrine of constructive presence is the nature of the relationship between the target – 'principal' - vessel (which is physically located outside the relevant zone, but which is deemed to be within the zone) and the 'link' vessel(s) (that is, the vessel actually within the relevant zone) that connects the principal vessel to the offence. The labels used in this report for these two approaches to interpreting the doctrine of constructive presence are as employed by Poulantzas ('simple') and O'Connell ('extensive') respectively.[47]

4.1 *THE 'SIMPLE' APPROACH*

One understanding of the linkage requirements between the target principal vessel (which is outside the zone), and the secondary link vessel(s) (which is within the zone), is expressed by Reuland (and others) thus:

> Under the doctrine of constructive presence, a ship may be pursued onto the high seas if *any of her boats* are reasonably suspected of having committed a delict within the marginal seas of the littoral state, even if the ship herself is not actually within such marginal seas. The ship in this case is deemed constructively present in the marginal seas within which her ships are operating.[48]

The essence of this 'simple' approach is that constructive presence is only available where the linkage is between the principal vessel and subsidiary boats that are launched from that principal vessel, where the principal vessel remains outside the relevant zone, and those subsidiary boats are engaged in the offence within the relevant zone. This is sometimes described as the 'singularity' principle – the principal vessel and her boat(s) are considered to be a single vessel for the purposes of jurisdiction.[49]

In terms of expert support for this view, Colombos asserts that 'the "constructive presence" within territorial waters of a vessel on the high seas cannot be presumed when neither the crew nor her boats are participating in the unloading of her cargo'.[50] O'Connell states that Article 23(1) of the 1958 *Geneva Convention on the High Seas* – which references 'the foreign ship or one of its boats' - is 'operative to establish the rule', while Article 23(3) – which references the 'other craft' and 'working as a team' – is merely 'circumstantial as to its application' and at any rate 'not conditions usual in transhipment'.[51] On this point, however, Poulantzas is of the view that the language of simple constructive presence found in Article 23(1) of the 1958 *Geneva Convention on the High Seas*, whilst Article 23(3) clearly incorporates what will shortly be described as extensive constructive presence, 'was obviously an oversight of the Conference without any further legal consequences'.[52] Klein refers to 'motherships' and to a vessel 'or one of its boats'[53], but this is in the nature of a contextual reference to the text of LOSC 1982 rather than an assertion of the enduring limitation of the scope of the doctrine to the narrow 'simple' approach.

47 Poulantzas, *The Right of Hot Pursuit in International Law* (Second Edition), 71-78, 243-251; DP O'Connell, *The International Law of the Sea* (IA Shearer, Editor), (Clarendon, 1982) 1092-1093. The potential additional approach assessed in section 5 is not specifically labelled (beyond noting that it is a broader approach), although a label ('extended extensive') has been proposed by Reece Lewis: R Lewis, 'The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory"' (2020) 51:1 *Ocean Development & International Law* 19.

48 Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention', 587.

49 A Kanehara, 'Challenging the Fundamental Principle of the Freedom of the High Seas and the Flag State Principle Expressed by Recent Non-Flag State Measures on the High Seas' (2008) 51 *Japanese Journal of International Law* 21.

50 CJ Colombos, *The International Law of the Sea* (Fifth Edition), 157.

51 DP O'Connell, *The International Law of the Sea*, 1093.

52 Poulantzas, *The Right of Hot Pursuit in International Law* (Second Edition), 251.

53 N Klein, *Maritime Security and the Law of the Sea*, (Oxford University Press, 2011), 110, 112-113.

4.1.1 ORIGINS OF THE 'SIMPLE' APPROACH

The *Catalpa* incident (1876) involved the 16 April 1876 escape of six Irish nationalists serving life sentences in prison in Fremantle (having been transported to Western Australia for that purpose). The escaped men linked up with a group who had put together a plan to transport the men by wagon to a point further up the coast where they met a rowboat from the US flagged *Catalpa*, which was waiting about 20nm offshore. The rowboat then ferried them out to the waiting vessel (although it took until the following day, being interrupted by weather, night, and pursuit) in order to make good their escape. In a series of interactions, British vessels sought permission from *Catalpa*'s master to board, and then indicated that they would do so by force, until wind saved the becalmed *Catalpa* and she was able to flee. In subsequent legal correspondence, the UK Law Officers asserted that the *Catalpa* had violated British territory via its ship's boat, and therefore was itself liable to boarding and seizure on that grounds, even though the *Catalpa* had herself never entered British waters around the colony of Western Australia.[54] The previously noted case of the *Araunah* (1888) involved the Russian seizure of a British vessel that had similarly sent its 'canoes' into Russian territorial waters near Cooper Island. The principal vessel – *Araunah* – was located approximately six miles offshore, but several of her boats had closed to within half-a-mile of the shore to conduct sealing operations. The boats were thus within the Russian three-mile Territorial Sea, and Britain agreed that Russian jurisdiction thus also extended to the principal vessel, *Araunah*, even though she was well outside the three-mile limit.[55]

One often-cited expression of the broad consensus as to the restricted – 'simple' - scope of constructive presence prior to the 1958 *Geneva Convention on the High Seas*, is the limited reference to indicia of simple constructive presence in Article 11 of the 1930 *Hague Codification Conference Report on the Territorial Sea*:

> Article 11: The pursuit of a foreign vessel for an infringement of the laws and regulations of a Coastal State begun when the foreign vessel is within the inland waters or territorial sea of the State may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.
>
> The pursuit shall only be deemed to have begun when the pursuing vessel has satisfied itself by bearings, sextant angles, or other like means *that the pursued vessel or one of its boats is within the limits of the territorial sea*, and has begun the pursuit by giving the signal to stop. The order to stop shall be given at a distance which enables it to be seen or heard by the other vessel... [56]

54 See, inter alia: G King, 'The Most Audacious Australian Prison Break of 1876', *The Smithsonian Magazine*, 12 March 2013 <https://www.smithsonianmag.com/history/the-most-audacious-australian-prison-break-of-1876-1804085/A>. V. Lowe, 'The Development of the Concept of the Contiguous Zone' (1981) 52 *British Yearbook of International Law* 109, 117; P Fennell, 'History into Myth: The "Catalpa's" Long Voyage' (2005) 9:1 *New Hibernia Review* 77.

55 J.B Moore. 'Fur Seal Arbitration' in *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, (Government Printing Office, Washington, 1898), 755-961 at 824-825. On other similar cases, see inter alia Lewis 'The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory"', 21-22.

56 'Conference for the Codification of International Law, Held at the Hague in March-April, 1930: Report of the Second Committee (Territorial Sea)' (1930) 24:3 Supplement *American Journal of International Law* 234, 245-246 (italics added); Note also the absence of any reference to constructive presence in relation to hot pursuit in Article 21 of the 1929 *Draft on Territorial Waters*, in the previous year's 'Draft Conventions and Comments on Nationality, Responsibility of States for Injuries to Aliens, and Territorial Waters, Prepared by the Research in International Law of The Harvard Law School: Territorial Waters' (1929) 23 Supplement *American Journal of International Law* 242, with commentary 358-362: 'Article 21: A state may continue on the high sea the pursuit of a vessel of another state and may effect its arrest for a violation of its law, if such pursuit was begun while the vessel was in the territorial waters of that state.'

The outer limits of the 'simple' approach – as assessed by Churchill and Lowe, for example – appear to have been well expressed by this draft article, as informed by the *Henry L Marshall* case (1922)[57], and later reflected in the *Sito* case (1957) (which were actually both problematic for the 'simple' approach because they involved a vessel from shore as the link to the principal vessel outside the relevant maritime zone). In these situations, it was asserted that the doctrine of constructive presence 'had no application where a foreign ship communicated with the shore not by means of its own boats but by means of boats sent out from shore. In such cases the exclusive jurisdiction of the flag State over its ships on the high seas was said to remain intact'.[58] However, as noted just above, it is not absolutely clear that the *Henry L Marshall* case is ironclad authority for this point.

In the *Henry L Marshall* case, the infamous 'rum runner' William McCoy had transferred the US flagged *Henry L Marshall* to a British flag (via the harbour-master in Nassau, Bahamas) specifically to avoid US enforcement action so long as the vessel stayed outside the relevant US maritime zone. The seizure of the vessel took place after the drunk captain (not McCoy himself) had boasted ashore (to an undercover agent) of the vessel's engagement in rum running. The US authorities exploited this admission to proceed into international waters and seize the vessel on the basis of its contact with the intermediate vessels that had actually brought the illicit cargo ashore.[59] At first instance, the trial Court ultimately found that 'The evidence shows conclusively that the master intended to introduce and did introduce the liquors into the United States by the participation of small boats which came to the Vessel for transference.'[60] On appeal, however, the Court observed that

> We are entirely in accord with the decision in *The Grace and Ruby*... The difference between the facts there presented and those at bar is that, instead of arranging to unload and deliver the cargo of the schooner by, through, or with some assistance from the schooner's crew or equipment (as in the case cited), the whole matter was performed by previous arrangement with those controlling the *Marshall*, but with small boats that did not belong to the schooner, and were not even partially manned by men from her crew.[61]

Nevertheless, despite this factual divergence, the Court ultimately affirmed the decrees issued by the trial Court and agreed that 'there were willful acts (ie, "rum-running") by means whereof the United States was deprived of duties upon the merchandise (ie, whisky) affected by said acts. The government may, and in instances like this does, tax unlawful liquor as it did lawful product or importation.'[62] Consequently, the forfeiture of the cargo was upheld.

57 'Schooner *Henry L Marshall* seized, outside three-mile limit, by American authorities under the misapprehension that the vessel was of American registry', 26 August 1921, UK National Archives: CO 23/289/63; D Canney, *Rum War: The US Coast Guard and Prohibition* <https://media.defense.gov/2017/Jul/01/2001772272/-1/-1/0/RUMWAR.PDF>.

58 R Churchill and V Lowe, *The Law of the Sea* (Third Edition), (Manchester University Press, 1999), 133 – however, they note that in recent State practice in respect of drug trafficking in particular (including by Canada - see below), 'it is not surprising that some States have begun to take a more liberal view...'.

59 See, inter alia: D Laliberte, 'The Real McCoy', *Naval History*, February 2020; R Canty, 'Limits of Coast Guard authority to board foreign flag vessels on the high seas' (1998) 23:1 *Tulane Maritime Law Journal* 123, 128-129.

60 *United States v 1,250 Cases of Liquor, The Henry L Marshall* 286 F. 260 (1922) Oct. 14, 1922, United States District Court for the Southern District of New York 286 F. 260, 264.

61 *United States v 1,250 Cases of Intoxicating Liquors, The Henry L Marshall*, 292 F. 486 (1923)

June 19, 1923, United States Court of Appeals for the Second Circuit, Nos. 241-243 292 F. 486, 488.

62 Ibid.

The reference to *The Grace and Ruby*[63] in this case is in relation to the following facts:

> At that time the schooner was about ten miles from the nearest land. About 8,000 bottles of whisky and some other liquors were there transferred from the *Grace and Ruby* into the motorboat and taken to shore at night. Three members of the crew of the schooner, as well as Sullivan, went in the *Wilkin II*, and a dory belonging to the schooner was towed along, presumably for use in landing the liquor, or to enable the men to return to the schooner after the liquor was landed. The attempt to land the liquor was discovered by revenue officers, and *Wilkin II* and her cargo were seized...There is nothing to suggest any intent on his part, if that be material, that the *Grace and Ruby* herself should go within the territorial jurisdiction of this country, and so far as appears she never did. She was hovering on the coast for the purpose of landing contraband goods, and had actually sent, at night, a part of her cargo ashore, with her boat and three of her men to assist in landing it.[64]

The Court in *The Grace and Ruby* concluded that 'It was none the less an unlawful unlading, within the section referred to, because by the transfer to the motorboat an offense was committed under section 2867, which rendered the motorboat and liquor liable to seizure and forfeiture, and the persons who aided and assisted liable to a penalty for so doing.'[65]

It would appear, consequently, that a combined reading of the iconic cases of *The Grace and Ruby*, and the *Henry L Marshall*, does point out the distinction between a situation where some of the principal vessel's equipment and crew are employed in the transhipment to shore, and the different situation where none of that principal vessel's equipment and crew is employed in the transhipment to shore. Ultimately, this differentiation did not, however, alter the reach of the relevant US statute onto the principal vessel. It is therefore far from clear that the *Henry L Marshall* case endorses the 'simple' approach to constructive presence by setting an outer limit to its application in terms of the relationship between a 'shore' transhipment boat and the principal vessel. However, this case did prompt subsequent specific reference to the limitations of the simple approach. As noted by the International Law Commission (ILC) in 1951,

> The British Government protested against this extension of the notion of 'constructive presence'. On November 9, 1922, an ordinance of the Ministry of Finance of the United States declared that 'all foreign vessels captured for unloading cargo in excess of the 3-mile limit had to be relaxed if it was not proven that these vessels "communicated with the coast by means of their boats or their equipment".'[66]

This is a reference to a US Treasury Order issued on 09 November 1922 – subsequent to the *Henry L Marshall* case – 'to the effect that "all foreign vessels seized for unloading cargoes beyond the three-mile limit" should be released where there was no evidence that the vessels "were communicating with the shore by means of their boats or equipment".'[67] This US order then influenced a number of subsequent cases often cited in support of the

63 *The Grace & Ruby*, 283 F. 475 (1922) Sept. 18, 1922, United States District Court for the District of Massachusetts, Nos. 2182, 2183 283 F. 475.

64 Ibid, 476.

65 Ibid, 477.

66 'Regime of the High Seas' (Document A/Cn.4/42), 10 April 1951 (Report of Special Rapporteur JP Francois) (1951) *Yearbook of the International Law Commission*, Volume II, 91-91, para 98; See also W Gilmore, 'Hot pursuit and constructive presence in Canadian law enforcement: A case note' (April 1988) *Marine Policy* 105, 109-110. However, the protest was withdrawn once it became apparent that the vessel's change from US to British registration had been fraudulent: 'It should be added that while the British Government originally made a protest in this case, it was finally withdrawn upon the ground that the vessel was not of bona fide British registry, and it should be said that in this withdrawal the British Government did not acquiesce in the principle of the ruling...' - CE Hughes (US Secretary of State), 'Recent Questions and Negotiations' (1924) 18:1 *American Journal of International Law* 229, 233.

67 Colombos, *The International Law of the Sea* (Fifth Edition), 158.

simple approach.[68] Perhaps the best that can be said of these early US cases is, as Noyes notes, that the US approach to constructive presence was at that time binary, requiring *either* (1) application of the 'singularity' approach, *or* (2) allowing a statutory link to be made out 'where a treaty authorised the coastal state to enforce specified laws outside the territorial sea' regardless of a singularity link.[69] Noyes cites the 1924 *US-UK Liquor Convention* as an example of such a treaty arrangement. That treaty (which also forms the legal backdrop to the *I'm Alone* incident) provided that where the suspected British-flagged smuggling vessel was outside the US three mile Territorial Sea, it could be boarded, and – if there was 'reasonable cause for belief that the vessel has committed or is committing or attempting to commit [a relevant liquor importation] offense' – seized (as per Article II(1)-(2)). However, these rights were not to be 'exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense' (as per Article II(3)). But Article II(3) then continued, adding that

> In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions *by a vessel other than the one boarded and searched*, it shall be the *speed of such other vessel* and not the speed of the vessel boarded, which *shall determine the distance from the coast* at which the right under this article can be exercised.[70]

This provision clearly anticipates the jurisdictional use of the physical location and characteristics of the second – shore destined – transhipment or link vessel in order to deem the principal vessel as being within the relevant zone for enforcement purposes.

4.1.2 THE INTERNATIONAL LAW COMMISSION AND PREPARATIONS FOR THE 1958 CONFERENCE ON THE LAW OF THE SEA

The ILC specifically addressed the simple approach to constructive presence during discussions preceding the Conference on the Law of the Sea which resulted in the four 1958 *Geneva Conventions on the Law of the Sea*. There was some debate within the ILC as to adopting the narrow simple approach or a broader approach, although the conclusion appears to have been that the Special Rapporteur's (Francois) preference for the doctrine of constructive presence to remain narrowly cast was ultimately left undisturbed.[71] One of the Special Rapporteur's early reports specifically noted that other commentators had argued that constructive presence was also established where the principal vessel uses, for the criminal act, 'not his own boats, but other craft'. However, the report concluded that 'The Rapporteur [was] of the view that this opinion did not find the necessary support' for it to be reflected in the text to be adopted by the Commission.[72] This view was repeated in the 1952 report[73], and Article 47(3) of the ILC Draft Articles (1956) proposed the following text to States:

> 3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by bearings, sextant angles or other like

68 See, inter alia, the case notes in: Colombos, *The International Law of the Sea* (Fifth Edition), 157-158; Poulantzas, *The Right of Hot Pursuit in International Law* (Second Edition), 71-78.

69 J Noyes, 'The Territorial Sea and Contiguous Zone', in D Rothwell et al eds, *The Oxford Handbook of the Law of the Sea*, (Oxford University Press, 2015), 108 n119.

70 Convention between the United States of America and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States (1924), signed at Washington 23 January 1924, 27 LNTS 182, US Treaty Series No. 685 (italics added).

71 Summary Record 125th Meeting, Monday, 16 July 1951, at 3 pm (A/CN.4/SR.125) (1951) *Yearbook of the International Law Commission*, Volume I, 365, paras 60-69; see also W Gilmore, 'Hot pursuit and constructive presence in Canadian law enforcement: A case note', 109-110.

72 'Regime of the High Seas' (Document A/CN.4/42) (Third Report of JP François, Special Rapporteur) (1951) *Yearbook of the International Law Commission*, Volume II, 91, para 99.

73 'Regime of the High Seas' (Document A/CN.4/51) (Third Report of JP François, Special Rapporteur) (1952) *Yearbook of the International Law Commission*, Volume II, 49.

> means, *that the ship pursued or one of its boats* is within the limits of the territorial sea or, as the case may be, within the contiguous zone.[74]

The ILC's commentary to the draft article did not deal with the debate as to a simple or broader approach to this proposed codification of constructive presence.[75]

4.1.3 THE 1958 UN CONFERENCE ON THE LAW OF THE SEA

Discussion of Article 47 of the Draft Articles at the UN Conference on the Law of the Sea included regular reference to 'the foreign ship or one of its boats' formulation.[76] However, Mexico specifically identified the unresolved issue of a simple versus a more expansive approach to constructive presence, asserting that:

> When drafting its text for article 47, the Commission had been in agreement that a ship was liable for the actions of its boats. But it had left a gap in its text by failing to include a clause conferring on the coastal State the right of hot pursuit in respect of ships which, though not themselves actually within the State's territorial sea or contiguous zone, or sending any of their boats into those areas, were none the less engaging in illicit acts therein for which boats other than their own were being used. The second part of his delegation's proposal provided a suitable means of filling the gap.[77]

This proposal (A/CONF.13/C.2/L.4) to adjust the text of Article 47 included the following:

> PARAGRAPH 3. After the words 'within the contiguous zone' at the end of the first sentence, add the following: 'or within a conservation zone for the living resources of the sea unilaterally adopted by the coastal State in accordance with article 55'. *Insert between the words 'or one of its boats' and 'is within the limits', the following words: 'or other craft working as a team and using the ship pursued as a mother ship'. Replace the words 'is within' by the words 'are within'*.[78]

As the meeting records ultimately note of the second (italicised) part of the proposed amendment to Article 47(3)[79], 'The amendment was adopted by 35 votes to 13, with 16 abstentions'.[80] Article 23(3) of the finalised 1958 *Geneva Convention on the High Seas* therefore included this 'or other craft working as a team and using the ship pursued as a mother ship' formulation.

Given the context and negotiating history to this language, this development clearly presents as a supersession of the simple approach. Consequently, there can be little doubt that by 1958 at the latest, there was general acceptance – as expressed in the 1958 *Geneva Convention on the High Seas*, and explicitly acknowledged in the preparatory materials - that the simple approach to constructive presence had been overtaken by a broader approach. This broader approach did not require that the link boats be those of the principal vessel itself. Douglas Guilfoyle perhaps best sums up the supersession of the simple approach by (as a minimum) the extensive approach thus:

> In 1958 [referencing Article 2 of the Geneva High Seas Convention] this [turn away from the simple to a more extensive approach] may have been more of a progressive

74 'Articles concerning the Law of the Sea with commentaries' (1956) *Yearbook of the International Law Commission*, Volume II, 284.

75 Ibid, 285.

76 Eg, Records, 28th Meeting, Wednesday, 9 April 1958, at 8.15 pm, 79, para 3 (UK); 81 para 16 (Germany).

77 Ibid, 81, para 21 (Mexico).

78 *United Nations Conference on the Law of the Sea*, Geneva, Switzerland 24 February to 27 April 1958 Documents: A/CONF.13/C.2/L.3-35, 116 (italics added).

79 The first part of the proposal in relation to para 3 – on the contiguous zone - was ultimately withdrawn by the Mexican delegation prior to vote.

80 *United Nations Conference on the Law of the Sea*, Geneva, Switzerland 24 February to 27 April 1958 Document: A/CONF.13/C.2/SR.31-37 Summary Records of the 31st to 37th Meetings of the Second Committee, 91, para 16.

> development of the law than codification of custom and was contrary to much of the case law. However, its re-enactment in UNCLOS and subsequent state practice suggest that it is now the generally applicable rule.[81]

It is to the extensive approach that the analysis next turns.

4.2 THE 'EXTENSIVE' APPROACH

The 'extensive' approach to constructive presence is thought to encompass the situation where: (1) A *principal* (that is, the target) vessel is operating with a *link* vessel that is not a 'boat' from that principal vessel, but rather is an entirely separate vessel; (2) so long as that *link* vessel both: (i) originally commenced its journey to the rendezvous with the principal vessel from a port within the relevant coastal (enforcing) state's jurisdiction, and (ii) is still within a relevant offence-creating zone (eg the relevant coastal state's Territorial Sea, or Internal Waters) at the time of the commencement of the hot pursuit of the principal vessel which is still located outside that zone. This is the situation that existed in the previously noted *Henry L Marshall* case, in that the transhipment vessel that was actually ferrying the illicit cargo from the principal vessel (which was outside the relevant zone) to the shore, was an independent vessel which had set out from that shore to rendezvous with the principal vessel in order to take on, and then land, that illicit cargo. Poulantzas has argued that regardless of the (contested[82]) apparent preference for the simple approach to constructive presence prior to the 1958 *Geneva Convention on the High Seas*,

> Today the doctrine of constructive presence is applied to the fullest extent, and rightly so, because of the doctrine's *raison d'erte*, which is the effective protection of the coastal State. Had this extension of the doctrine not been adopted by the Conference, evasion of the laws of the coastal State would have been rendered easy.[83]

4.2.1 INDICATIVE CASES

In the Italian case of *Re Pulos and Others* (1976)[84], the Greek flagged *Olimpios Hermes* – loaded with 25,000 cartons of cigarettes - was engaged in transhipment of part of this cargo to a small fleet of boats (20 in the immediate vicinity, plus a further 12 boats standing off about 15 miles from the Italian island of Ischia off the northern tip of the Gulf of Naples). On 29 November 1976, in a position approximately 27 miles off the coast of Ishcia, one of the link boats (of Italian registration) was pursued by Italian MLE vessels into the Italian Territorial Sea, to a point about 10 miles off the coast, and apprehended. Once this seizure had been effected (the boat had on board 80 cartons of cigarettes it was intending to smuggle into Italy), other Italian MLE vessels commenced pursuit of *Olimpios Hermes* and boarded the vessel at a range of about 28 miles from the Italian coast. The vessel and crew were taken to an Italian port, and a number of the crew were subsequently prosecuted for cigarette smuggling offences.[85]

At the trial, the Italian Court specifically addressed the issue of constructive presence, concluding that Article 23 of the 1958 *Geneva Convention on the High Seas*,

> whilst going beyond the scope of the Codification Conference of 1930, is nevertheless narrower than the relevant

81 D Guilfoyle, *Shipping Interdiction ad the Law of the Sea*, (Cambridge University Press, 2009), 13-14.

82 Hughes, 'Recent Questions and Negotiations', 232: 'It may be urged with force that this principle [constructive presence] should not be limited to the case of the use by the vessel of her own boats, where she is none the less effectively engaged, although using other boats, in the illegal introduction of her cargo into the commerce of the territory...'.

83 Poulantzas, *The Right of Hot Pursuit in International Law* (Second Edition), 249, 250: 'This paragraph [Art23(3)] covers, as is clear, not only the case of "simple constructive presence" but also that of "extensive constructive presence".'

84 *Re Pulos* (1977) 77 ILR 587.

85 Ibid, 587-589.

> rules of customary international law where no specific limits are laid down, which indicates that States are tending to return to a broad conception of the right in order to provide better protection for their national interests, which are increasingly threatened by well-trained and highly organised groups of criminals.[86]

However, having made this observation, the Court nevertheless appeared to rely upon the text of Article 23 – focussing on 'boats operated as a team with the [principal] vessel', and concluded that the arrest and seizure of *Olimpios Hermes* was lawful.[87] Of interest -considering the possibility of a yet broader approach to constructive presence as assessed in section 5 below - the Court also noted that:

> It is quite clear that no relevance in the present case can attach to the fact that pursuit of the motor boat began on the high seas (it nevertheless continued int the territorial waters where it also terminated) in that, *since the boat in question was Italian*, pursuit and any capture which took place on the high seas was entirely lawful.[88]

In the Canadian case of *R v Sunila and Soleyman* (1986 - Nova Scotia Supreme Court)[89], a Canadian fishing vessel (the *Lady Sharell*) sailed from Liverpool, Nova Scotia, to rendezvous with the Honduran flagged *Ernestina* within the Canadian Territorial Sea. At that rendezvous (on 22-23 May 1985), the Canadian fishing vessel took on 13.4 tons of cannabis resin and then took that cargo into Lockeport, Nova Scotia, where the vessel, crew, and cargo were seized. *Ernestina* had meanwhile sailed back into the High Seas and on 24 May 1985 was ultimately boarded and detained by the Royal Canadian Mounted Police (RCMP) and Royal Canadian Navy (RCN) approximately 400nm from the Canadian coast – after the *Lady Sharall* had been seized in port. *Ernestina* was sailed to Halifax, Nova Scotia, and two of the crew - Sunila and Soleyman – were ultimately charged with narcotics offences.[90] At trial, the accused specifically argued that their arrest had been unlawful as the *Ernestina* was arrested in international waters; however, the Trial Judge ruled that the search and seizure was lawful. In doing so, the trial Court had relied upon advice (a 'Factum') from the Attorney-General of Canada that the doctrine of constructive presence covered the situation where the principal vessel was 'engaged in a common venture' and 'acting as a team' with the shore-bound transhipment vessel (*Lady Sharell*), even where that link vessel was a separate vessel and was not simply a boat from the principal vessel (the *Ernestina*). In this case, the *Ernestina* had been seized at a time when the *Lady Sharell* – by then detained in a Canadian port – was within the Canadian Territorial Sea.

On appeal, the matter arose for further consideration. The Appeal Court confirmed that the doctrine of constructive presence applied (which the Court held to be customary and as described in Article 23 of 1958 *Geneva Convention on the High Seas*, which Canada had signed but not yet ratified[91]), and that the arrest had been valid. One issue of interest, however, is when the hot pursuit commenced. The Appeal Court appeared to say that the pursuit had been 'continuous' from the time that the transhipment from *Ernestina* to *Lady Sharell* had taken place, and at any rate was satisfied that 'the *Ernestina* was a mother ship of the *Lady Sharell* and that the *Lady Sharell* was within Canadian waters when the pursuit of the *Ernestina* took place by HMCS *Iroquois*.' [92] But at that initial point of transhipment, no visual or auditory signal had been given; this

86 Ibid, 591.

87 Ibid, 592.

88 Ibid (italics added).

89 *R v Sunila and Soleyman*, 1986 CarswellNS 36 (Nova Scotia Supreme Court, Appeal Division), (1986) 28 DLR 4th 453.

90 See: *R v Sunila and Soleyman*, paras 5-13; W Gilmore, 'Hot pursuit and constructive presence in Canadian law enforcement: A case note', 105; R Lewis, 'The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory"', 23-24.

91 *R v Sunila and Soleyman*, para 30.

92 Ibid, para 32.

was only done at the start of the actual boarding operation that ultimately led to the seizure of the Ernestina about 400nm offshore. However, this is of little jurisdictional relevance as the fact remained that even at this later time when the hot pursuit commenced and the signal was given, the link vessel – Lady Sharell – was still within the relevant zone (in port and thus within Canadian territorial waters, it was said).

In the subsequent Canadian (New Brunswick) case of R v Rumbaut (1998)[93], the Canadian vessel Lady Teri-Anne sailed from Shelburne port to rendezvous with the Cyprus registered Pacifico 12.2 nm from the Canadian coast – outside the Canadian Territorial Sea – on 22 February 1994. A large quantity of cocaine was transferred from *Pacifico* to *Lady Teri-Anne*. *The Lady Teri-Anne* then proceeded back to Shelburne port and the *Pacifico* sailed further out into the High Seas. The *Lady Teri-Anne* was subsequently arrested in port, and the Pacifico – after a short hot pursuit - was boarded approximately 100nm from the Canadian coast and sailed to Halifax, arriving on 23 February 1994.[94] In a 'Decision on voir dire held to determine admissibility of evidence seized on board the Cypriot vessel "*M V Pacifico*" on February 22, 1994' the Court observed how,

> As it did in *Kirchhoff* [a similar 1996 case[95]], the Crown submits that the arrest and subsequent boarding of the Pacifico in international waters was fully justified by customary international law of the sea as reflected by the 1958 Geneva Convention on High Seas and particularly Article 23 thereof, on the basis of the doctrine of 'extended or extensive constructive presence', a doctrine which was carried forward into the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and more particularly article 111 thereof.[96]

Also citing the British case of *R v Mills and Others* (1995 – see below), the Court extensively reviewed the degree to which Article 23 of the *Geneva Convention on the High Seas* – with its endorsement of the 'extensive' approach to constructive presence – and more recently, Article 111 LOSC 1982, could be said to be declaratory of customary international law, concluding that this was the case.[97] The evidence seized onboard *Pacifico* was thus admitted.[98]

In the British case of *R v Mills and Others* (1995)[99], the *Poseidon*, registered in St Vincent and the Grenadines, was to be used to transport 6.25 tons of cannabis from Morocco to a point off the British coast where it would be transhipped into a second vessel – the British registered trawler *Delvin* - which would then land the illicit cargo in Britain. *Delvin* was in fact crewed by undercover officers. *Delvin* departed from the Irish port of Cork and on 10 November 1993 *Poseidon* and *Delvin* rendezvoused at 'a position some 100 miles west of the Scillies and 100 miles south of Ireland in International Waters'. Only 3.25 tons of the cannabis were ultimately transhipped due to weather, and then 'the offload vessel set a course for the south coast of England while the *Poseidon* headed in a south-westerly direction back into the Atlantic'. The *Delvin* was not immediately arrested upon entering the British Territorial Sea as the intention was to allow the vessel to berth and then to seize both the cargo and the shore party intending to take possession of that cargo. *Delvin* eventually arrived at Littlehampton on 12 November and the shore party was arrested after the offload of the cargo. Early on 13 November – some 65 hours after the transfer at sea, and 54 hours after *Delvin* had re-entered the British Territorial Sea - *Poseidon* was boarded and brought to

93 *R v Rumbaut*, Court of Queen's Bench of New Brunswick – Trial Division (B/M/118/97, 2 July 1998).

94 Ibid, 2-8.

95 *R v Kirchoff* (1996) 172 N.B.R. (2d) 257; 439 A.P.R., 257.

96 *R v Rumbaut*, 11.

97 Ibid, 12-28.

98 Ibid, 32.

99 W Gilmore, 'Hot Pursuit: The Case of R v Mills and Others' (1995) 44:4 *International and Comparative Law Quarterly* 949.

Portsmouth, and the crew arrested.[100]

During this hearing (which was not the criminal trial itself, but rather was related to the Court's 'supervisory jurisdiction' in respect of an application to 'stay the proceedings on the ground of abuse of process' (prompted by the defendants' argument that the hot pursuit and thus arrest had been illegal), the Judge affirmed that the doctrine of constructive presence as elaborated in Article 23 of the 1958 *Geneva Convention on the High Seas* (to which St Vincent and the Grenadines was not a party) was a codification of, and declaratory of, customary international law.[101] Further, the Judge asserted that whilst most cases involving a separate link vessel that was not a boat of the principal vessel had in fact involved that link vessel departing from and returning to a port in the relevant (enforcing) coastal State, this was not a limitation within the doctrine:

> It is clear to me that the policy consideration behind [the] doctrine is the prevention of the commission of crimes in the territorial waters of the state which exercises the right to hot pursuit. That consideration would be defeated if the point of departure was relevant, mother ships hovering outside territorial waters could never be arrested if the daughter ship departed from a different jurisdiction to her ultimate destination.[102]

This issue will arise once again in section 5 in relation to the potential or otherwise that an even broader approach has more recently manifested. Also of note, the Judge found that the issue of 'immediacy' was not central to the doctrine of constructive presence. The fact that the boarding of *Poseidon* occurred sometime after the ultimate completion of the offense through the *Delvin's* landing of the drugs in Littlehampton was explicable by reference to operational and environmental conditions (such as method of boarding, weather, waiting for daylight) and was not fatal to the validity of the hot pursuit.[103] This issue is also relevant in terms of commencement of hot pursuit, and thus the availability of constructive presence, in relation to the *Artic Sunrise* case (2015), as discussed below.

4.2.3 CONCLUSION AS TO THE EXTENSIVE APPROACH

It is clear that the 'extensive' approach to constructive presence is now the generally cited position on constructive presence and has displaced the older pre-1958 'simple' approach. This means that the link vessel need not be one of the principal vessel's own boats; however, this link vessel may be subject to the requirement that it must have commenced its passage to the transhipment point from a port or place within the relevant coastal state's Territorial Sea (the 'origins' condition - further assessed below). It is also clear from these cases that there is significant leeway given to the on-scene commander to determine the point at which they will formally commence the hot pursuit (via visual or auditory signal) of the principal vessel. However, the cases also clearly demonstrate that hot pursuit is not to be commenced – regardless of prior shadowing and tracking – until after the crime is 'completed' by the link vessel. This is generally indicated by the link vessel - depending upon how the offence is set out in the relevant coastal state law - either committing a relevant offence by entering the coastal State's Territorial Sea or Internal Waters, or committing a relevant offence by unloading the illicit cargo.

Nor does the extensive approach indicate much dispute with respect to the issue of 'immediacy' or timeliness in terms of the commencement of the hot pursuit of the principal vessel. It is logical that this matter is rightly left – as the cases seem to indicate – to the judgment of the

100 Ibid, 951-953.

101 Ibid, 953-956.

102 Quoted in ibid, 955.

103 Ibid, 955-956.

relevant MLE authorities, taking into account the capabilities available, the environment, weather, sea state, time of day, and so on. Noting that a number of seizures based on constructive presence have been effected at a range of 100nm or more from the relevant coastal state maritime zone, and have taken place one or even several days after the arrest of the link vessel, the time limit for the commencement of the hot pursuit appears to – appropriately – be determined simply by reference to the proper commencement, and continuity, of the hot pursuit of the principal vessel.

However, the nature and context of the cases are not at all clear as to the juridical nature of the coastal State port 'origins' requirement for the link vessel. This requirement is not evident on the face of the text of either 1958 Convention Article 23, or LOSC 1982 Article 111, but rather appears to have been implied from the fact situations relevant in the cases where this extensive approach to constructive presence was employed. This raises the question – as noted by the Judge in *R v Mills and Others* – as to whether this 'origins' of the link vessel aspect is elemental to the doctrine, or merely a circumstance common across most (but not all) of the cases where it has been elaborated. The *Artic Sunrise* arbitration award (2015) has recently raised this issue afresh, and it is to this matter that the analysis now turns.

V.

A BROADER APPROACH?

An interpretive approach to constructive presence that might be broader than the existing 'extensive' approach could propose that the doctrine is available whenever the two or more separate vessels involved – being the targeted principal vessel outside the relevant zone, and the 'other' or link vessel that is within the relevant zone - are engaged in a common purpose.[104] This approach would not require that the link vessel - that is, the vessel within the relevant zone – must have commenced its part in the common enterprise by sailing from one of the relevant coastal state's ports. Nor would it require that the link vessel be of the enforcing port/coastal state's own nationality (as seems to have been an implicit factor in the *R v Mills* and *Re Pulos* cases). That is, the explicit 'origins' element observed in most (but not all) cases on the extensive approach to constructive presence, and the implicit 'nationality' situation evident in these same cases, would both be read down as merely a function of factual circumstances, rather than operating as constitutive (and limiting) elements of the doctrine. Reece has labelled this broader common purpose-focussed approach as the 'extended extensive' approach, and describes it as follows:

> It is now argued that constructive presence occurs when vessels that are independent of one another rendezvous on the high seas, both having not come from the pursuing state's shore. In these cases, the craft are essentially autonomous, but for their brief association with each other.[105]

This approach, if it exists, would thus privilege the 'teamwork' and 'common purpose' aspects of constructive presence, with no explicit limitation as to the origins or nationality of the link vessel. If it exists, this approach would reflect the policy emphasis noted above in *R v Mills* – that 'the prevention of the commission of crimes in the territorial waters of the state which exercises the right to hot pursuit… would be defeated if the point of departure was relevant'. However, as noted above, although the Court in that case asserted the irrelevance of the port of departure, it must also be recalled that the link vessel in that case, although having set out from Ireland for the rendezvous, was nevertheless British registered and the ultimate enforcing state was Britain. Similarly, in *Re Pulos*, although the Italian Court did not appear concerned with where the apprehended link boat had commenced its journey from, but rather only where the journey (and offence) was completed (being in the Italian Territorial Sea), that Court nevertheless took pains to note that the apprehended link vessel was of Italian registry. The question, consequently, is whether there is juridically endorsed broader approach to constructive presence that is not subject to a limitation hinging upon either the nationality of the link vessel, or the jurisdiction from which it commenced its role in the common purpose. It has been argued that this is indeed the outcome of the *Arctic Sunrise* award, and it is to this issue that the analysis now turns.

104 The phrase 'common purpose' is used so as to avoid a level of confusion that attends the specific concept of 'joint criminal enterprise' as operative within some international, and internationally-influenced, criminal law instruments and jurisdictions – see, inter alia, Ian Ralby, 'Joint Criminal Enterprise Liability in the Iraqi High Tribunal' (2010) 28 *Boston University International Law Journal* 282.

105 Lewis, 'The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory"', 24.

5.1 THE ARCTIC SUNRISE ARBITRATION AWARD (2015) AND THE PRIMACY OF THE COMMON PURPOSE?

The *Arctic Sunrise* arbitration (2015)[106] concerned the hot pursuit, arrest, and detention of the Netherlands registered Greenpeace vessel *Arctic Sunrise* by Russian MLE forces in the vicinity of the Prirazlomnaya oil platform in the Russian EEZ (in the south-eastern part of the Barents Sea). The facts relevant to the issue of constructive presence are as follows. On 18 September 2013, five boats from *Arctic Sunrise* entered the 500-metre safety zone (as permissible via LOSC 1982 Article 60(5)) around the Prirazlomnaya platform, despite warnings against doing so by the Russian Coast Guard vessel *Ladoga*. Some of the people in the five *Arctic Sunrise* boats temporarily landed on the platform, but eventually the five boats departed and returned to *Arctic Sunrise*, although two of the people who had landed on the platform were apprehended and taken by one of *Ladoga's* ship's boats to the *Ladoga*.[107] Radio calls to the nearby *Arctic Sunrise* to heave too for boarding were made but they appear to have commenced just after the *Arctic Sunrise* boats had exited the 500 metre safety zone. Apart for a short digression to recover a towed float which had parted from one of the boats, *Arctic Sunrise* had stayed outside a Russian three nm warning zone, which was ultimately found to have no basis in the LOSC 1982 and did not, at any rate, appear to have been clearly established even under the claimed Russian law.[108] This is significant in terms of the issue of when the hot pursuit commenced and whether the required 'visual or auditory signal' had been made whilst the boats were still within the relevant maritime jurisdictional zone – the 500 metre safety zone – such as to support the validity of the hot pursuit and thus the use of the constructive presence doctrine linking the boats to the principal vessel, *Arctic Sunrise*. The key is that calls to the boats during the chase and skirmish within the 500 metre safety zone were not relevant; when invoking constructive presence, it is the call to the *principal vessel* that is relevant:

> 255. The Tribunal considers that any order to stop given to the RHIBs [rigid hull inflatable boats] of the Arctic Sunrise during their scuffle with the RHIBs of the Ladoga within the 500-metre safety zone of the Prirazlomnaya would not have been valid under the Convention, as the Convention requires that stop orders be given to the main ship that is to be pursued.[109]

These calls to *Arctic Sunrise* were repeated for a period thereafter, and then reprised again the next day. Ultimately, both *Arctic Sunrise* and *Ladoga* stayed in the vicinity of the Prirazlomnaya platform until *Arctic Sunrise* was boarded by a team deployed from a helicopter at sunset on 19 September 2013.[110]

As noted above, for the hot pursuit to have been valid ab initio, via constructive presence, the essential question was 'whether, at the time of the first radio message [to *Arctic Sunrise*] to stop, at least one of the *Arctic Sunrise* boats was still within the 500-metre zone around the Prirazlomnaya'.[111] The Tribunal ultimately concluded that 'on all of the evidence before it... the first stop order was probably given (if only a minute or two) after the last of the *Arctic Sunrise* RHIBs exited the 500-metre zone around the Prirazlomnaya'.[112] However, it was only after the Tribunal added to this concern the fact that the boarding of *Arctic Sunrise* did not take place until 36 hours after that first call to heave to

106 *The Arctic Sunrise Case (Netherlands v. Russia)* (14 August 2015) Award on the Merits, Permanent Court of Arbitration (PCA) Case No 2014-02; see generally, O Elferink, 'The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 The International Journal of Marine and Coastal Law 244, at inter alia, 256, 258, 272, 275-276, 283.

107 *The Arctic Sunrise Case (Netherlands v. Russia)* (14 August 2015) Award on the Merits, paras 85-92.

108 Ibid, para 220.

109 Ibid, para 255.

110 Ibid, paras 100-102.

111 Ibid, para 261.

112 Ibid, para 266.

had been made[113], that the hot pursuit – if it was ever properly commenced - was nevertheless held to have been interrupted, and thus the boarding invalid.[114]

In relation to constructive presence, three aspects of the *Arctic Sunrise* case are thus relevant. First, the award reinforces that constructive presence only operates as a means of deeming a *principal* vessel to be present in the relevant zone when the underlying hot pursuit is itself valid – that is, if the hot pursuit is not valid, constructive presence cannot be claimed. In this regard, the award is reflective of existing customary and textual orthodoxy. Second, the award asserts that the fact that the boats were 'crewed' by Greenpeace activists and journalists rather than *Arctic Sunrise* crew was not fatal to the 'singularity' of the boats with their parent vessel.[115] Again, although this is a gloss on the factual circumstances that have informed both the simple and extensive approaches, it does not represent a new or different approach. Third – and most relevantly for this analysis - the award clearly takes the position that the interpretive emphasis must be upon 'the act itself':

> In other words, the central question is whether those involved can be said to be part of an operation that intends to violate or is violating the coastal state's law… the Tribunal laid emphasis on the necessity of a broader intention of those involved, a unified objective. It was not the unity of the crew and vessels that was examined, it was that all the protesters were members of Greenpeace or that they acted on behalf of a broader (and declared) objective to protest against oil exploration in the Arctic.[116]

The underlying policy argument employed in relation to constructive presence appeared, consequently, to be one of common purpose as between those boats and the principal vessel, and this does raise the prospect of privileging this policy objective above the general reticence of international law to interfere with freedom of navigation.

On one reading, this prioritising of the common purpose could simply be said to reflect the longstanding emphasis on 'singularity' evident in both the simple and extensive approaches. On another reading, this could represent a new prioritisation of the common purpose element above all other elements, such that those other often-cited elements – such as the link vessel origins and nationality factors – become contextual and non-determinative, rather than constitutive. The problem is, on its facts, the *Artic Sunrise* award does not clearly do this. This is for two reasons. First, as regards the nationality of the link vessels, the facts speak to the simple approach – the boats (the link vessels) were all ship's boats from *Arctic Sunrise* herself. Second, on its facts, the case does engage – and does not clarify - the function, relevance, or otherwise of the 'origins' element. This is because, again, the *Arctic Sunrise* case is factually an example of 'simple' constructive presence in that the link vessels were the principal vessel's own boats. That is, the argument for a broader common purpose approach that dispenses with the requirements for either or both of the link vessel's journey origins, or nationality, nexus with the enforcing state is neither explicit in, nor raised by the facts and thus implicit within, the award.

113 Ibid, para 269.

114 Ibid, para 275.

115 For commentary on this 'scheme theory' aspect see Lewis, 'The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory"', 28-29.

116 Ibid, 29.

VI.

CONCLUSIONS AS TO AN INTERPRETIVE APPROACH TO CONSTRUCTIVE PRESENCE THAT IS BROADER THAN THE 'EXTENSIVE' APPROACH?

From the foregoing analysis, it seems possible to draw seven key conclusions. The first three are as to the *availability* of the doctrine and the remaining four relate to the *scope* of the doctrine.

First, constructive presence is only available as a mechanism for extending jurisdiction over a principal vessel located outside the relevant coastal state maritime zone when a valid hot pursuit of that principal vessel (not of the link vessel inside the relevant zone) has been commenced. Second, the hot pursuit of the principal vessel cannot not be commenced until the link vessel has 'completed' the relevant offence in the relevant coastal state maritime zone. Depending upon the specific offence, this may be at the point of entry into the coastal state's Territorial Sea (or port) with the illicit cargo, or at the point of unloading the illicit cargo to shore. Third, in addition to the traditionally understood scheme of application (fisheries, drugs, and so on), the doctrine of constructive presence is also available for MLE action against a principal vessel engaged in a common purpose of unlawful entry into a LOSC 1982 Article 60 safety zone (500 metres) so long as the hot pursuit of the principal vessel is commenced by visual or auditory signal before the link vessel(s) depart from within that safety zone.

Turning to the scope of the doctrine more broadly, the fourth conclusion is that the narrower 'simple' approach had by 1958 been generally superseded by the broader 'extensive' approach. The fifth conclusion, however, is that the precise outer limits of the 'extensive' approach are not easily identifiable. As a minimum, the extensive approach includes all situations of 'simple' constructive presence plus all situations where the link vessel sailed from a coastal state port (or at any rate from a point in that coastal (enforcing) state's Territorial Sea), rendezvoused with the principal vessel, and then returned to that coastal state's Territorial Sea (or further, to a coastal state port, depending upon the specific offence), regardless of the link vessel's nationality. Yet despite this inclusion within scope, the sixth conclusion one can draw is that this link vessel 'origins' element is not actually evident on the face of the text of either Article 23 of the 1958 *Geneva Convention on the High Seas* or Article 111 of the LOSC 1982, but rather has been implied from the factual circumstances of a number of cases in which the assertion is made that constructive presence is available even where the link vessels are not the principal vessel's own boats. Further, a number of cases have nevertheless found the doctrine to apply where the link vessel did not commence its part in the common purpose from within the relevant coastal (enforcing) state's jurisdiction. This raises the prospect that the link vessel 'origins' element is not in fact a precondition for, or fundamental to, the application of the doctrine, but rather has been merely circumstantial.

The final conclusion, however, is that none of the key cases that might be said to support an even broader approach are necessarily clear as to their complete rejection of the link vessel nationality element. In the *Arctic Sunrise* award, the link vessels were boats of the principal vessel and thus - provided that the assertion that the 'crew' in those boats were 'crew' of the parent vessel for these purposes is accepted (which is a fair assertion, it must be said, as they are operating a piece of the principal vessel's equipment) – this would have actually been an incident of 'simple' constructive presence if the hot pursuit had been valid. In *R v Mills*, although the link vessel departed from an Irish port, it was of British nationality and it transhipped the illicit drugs into a British port. Similarly, in *Re Pulos*, the origins of the link vessel were not commented upon by the Court, whereas the nationality of the link vessel – an Italian vessel apprehended in the Italian Territorial Sea – was held to be material to the application of the doctrine in that case.

So where does this leave us in terms of scoping the outer limits of the doctrine of constructive presence? Taking as the start point the post-1958 orthodoxy of the extensive approach as opposed to the narrower simple approach,

the key uncertainty is arguably not about the existence or otherwise of a third – broader – approach having superseded the orthodox extensive approach, with that broader approach represented by the *Artic Sunrise* award. Indeed, while that case might be said to privilege the common purpose element of the doctrine, it is difficult to say that it explicitly (through decision), or implicitly (via the facts), stands for a new approach that is distinctly broader than or different to the extensive approach. The key issue requiring a degree of further inquiry is actually as to the limits of the extensive approach, and in particular whether the link vessel 'origins' and/or nationality element(s) is fundamental to, or merely circumstantial in, the application of the doctrine. As to the first, the policy statement in *R v Mills*, and the unimportance of the question in *Re Pulos*, would tend to suggest that a link vessel 'origins' requirement would constitute an unnecessary limitation of the doctrine of constructive presence, if refenced against the objectives the doctrine is designed to achieve. To countervail this view, one might assert that the journey origins of the link vessel should be relevant because it reflects the equally important principle that limitations on high seas freedoms ought to be read strictly. However, given that the ultimate endpoint is a routine assertion of coastal state jurisdiction based on that link vessel being within territorial jurisdiction, this counter-argument is perhaps less persuasive.

As to the second factor – link vessel nationality - the fact that the cases have involved link vessels that are either from the principal vessel (simple constructive presence), or of the nationality of the relevant coastal (enforcing) state, does tend to suggest that in non-simple constructive presence situations, a nationality connection may be an implicit requirement. However, once again, it is not at all certain that this is a pre-condition for, or essential element of, application of the extensive approach, or merely a circumstance evident in the cases to date. This is where the issue of whether common purpose is the primary factor, or merely a co-equal factor, in scoping the outer limits of the doctrine becomes most relevant – if it is the primary doctrine shaping factor, then the nationality of the link vessel would seem to be non-essential, whereas if it is merely a co-equal shaping factor, then the nationality of the link vessel may in fact be critical to the availability of the doctrine.

My own view is that neither the journey origins of the link vessel, nor the nationality of the link vessel, are fundamental to the doctrine. So long as the offence is perfected by the link vessel – regardless of where it commenced its journey, and regardless of its flag - coming within the coastal (enforcing) state's territorial jurisdiction, and the arrest of that link vessel does not take place until this point, then this should be sufficient to ground application of the doctrine of constructive presence in relation to the principal vessel.

VII.
CONCLUSIONS

While the general trajectory of international law relating to the freedom of the seas greatly privileges the primacy of flag state jurisdiction over that flag state's vessels, as Shearer reminds us, 'the doctrine of the freedom of the high seas… [is] by no means as absolute' as is often thought.[117] Constructive presence is, to apply Shearer's assessment, both a well-established customary exception to this general rule on the High Seas, as well as a more recently codified limitation imposed by the development of maritime zones contingent upon the 1958 and 1982 Conventions.[118] A conservative view of the sparse cases would thus seem to suggest caution in relation to asserting a new broad approach to constructive presence, but affirm that the post-1958 extensive approach is the orthodox approach.

However, this assessment nevertheless leaves unresolved the outer parameters of the extensive approach to constructive presence in one important situation: Can the doctrine be used to assert jurisdiction over the principal vessel outside the relevant maritime zone where the link vessel seized inside the relevant coastal state maritime zone had commenced its journey from outside that relevant coastal state's maritime zone, and also does not hold that coastal state's nationality? This is an essential question to ask in relation to the potential application of the doctrine of constructive presence to transhipment at sea, which remains a critical MLE issue - not only for fisheries and smuggling, but also more recently in UN sanctions avoidance operations concerning, amongst others, North Korea.[119] As the capacity of smaller vessels to range, navigate, and operate further from shore evolves, the likelihood that such vessels will be employed in ever more distant transhipment and illicit cargo landing operations, and that they will neither commence their illicit journey from, nor carry the flag of, the ultimate destination (and enforcing) state will only increase, making an definitive answer to this question all the more urgent.

117 Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', 320.

118 Eg, in relation to the High Seas, ibid, 336-339.

119 'North Korean Sanctions Evasion Techniques', *RAND*, 2021, 34-35 < https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1500/RRA1537-1/RAND_RRA1537-1.pdf>; Cameron Trainer, 'How North Korea Skirts Sanctions at Sea', *The Diplomat*, 01 September 2019 < https://thediplomat.com/2019/08/how-north-korea-skirts-sanctions-at-sea/>; Pete Pedrozo, 'DPRK Maritime Sanctions Enforcement' (2020) 96 *International Law Studies* 98, 101.

CONSTRUCTIVE PRESENCE IN RELATION TO HOT PURSUIT IN THE LAW OF THE SEA

UNODC
United Nations Office on Drugs and Crime

GLOBAL MARITIME
CRIME PROGRAMME