

## *International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century*

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### I INTRODUCTION

The doctrine of maritime hot pursuit, codified in art 111 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>1</sup> recognises that a vessel, if it has committed a violation of the laws of a foreign state while in that state's sovereign or territorial waters, may be pursued onto the high seas and seized.<sup>2</sup>

The essential thesis of this article is that the doctrine of hot pursuit is increasingly being left behind by technological advancements, as well as by the shifting priorities and policy interests that underpin the modern law of the sea. As such, without a liberal and purposive judicial interpretation, art 111 is likely to prohibit, rather than promote, more effective law enforcement procedures.

The right to pursue a vessel and seize it on the high seas is an exception to two fundamental principles of international law: first, the freedom of navigation upon the high seas, and secondly, the principle that a ship is subject to the exclusive sovereignty of the state whose flag it flies. As a result, there has been only a limited expansion of the right since its initial formulation well over a century ago when the principles of freedom of navigation and exclusive flag state jurisdiction were of paramount importance.

Since then, however, the operational maritime environment, which the law of the sea purports to regulate, has undergone a series of dramatic changes. These changes have resulted from the development of several new issues and challenges that now face the global community. For example, it is now generally recognised that illegal fishing is plundering the world's fish stocks (once thought of as being limitless) and coastal states are fighting an increasingly difficult battle to protect effectively their marine resources against exploitation.<sup>3</sup> Additionally, concerns over maritime security are far

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1 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS].

2 C J Colombos *The International Law of the Sea* (6th ed, Longmans, London, 1967) at 168.

3 See generally Rachel Baird "Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence" (2004) 5 *Melbourne Journal of International Law* 299 ["IUU Fishing"]; Food and Agriculture Organization of the United Nations "International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" (2001) <[www.fao.org](http://www.fao.org)> [FAO "IPOA-IUU"].

more prevalent in today's global climate than they were a century ago. Technological advancements have only served to accelerate this trend. Yet, at the same time, the current law is potentially preventing coastal states from benefiting maximally from these new and innovative technologies when enforcing their sovereign rights.

This article will analyse the right of hot pursuit as it has been codified in UNCLOS and attempt to apply it to maritime law enforcement operations in a 21st century environment. While a new formulation of art 111 would be supported by this author, and a mechanism for the UNCLOS to be amended does exist,<sup>4</sup> such a proposal would likely be controversial and therefore difficult to realise. Thus, a reformulation is outside of the scope of this article. Instead, the intention is to analyse and interpret the doctrine in its current form.

Part II of the article will discuss the rationale and policy interests behind the rule, and the development of the doctrine to its current formulation in art 111. Part III will provide an outline of the current maritime operational environment and the challenges that coastal states face in enforcing their sovereign rights and discharging their obligations. Part IV will then analyse the rule and assess how the doctrine can remain effective in light of the challenges highlighted in Part III.

The international community recognises the importance of, and now places an emphasis on, conserving the scarce resources of the marine environment as well as maintaining and enforcing maritime security effectively. Therefore, it will be argued that the doctrine of hot pursuit must be interpreted in the context of these new priorities. It will only be through interpreting the doctrine in this way that law enforcement agencies will be able to use the full range of new and developing technologies available to them.

## II THE DOCTRINE OF HOT PURSUIT

### The Rationale for the Doctrine of Hot Pursuit

Maritime hot pursuit evolved as a customary international law doctrine<sup>5</sup> before being first codified into an international treaty by art 23 of the 1958 Geneva Convention on the High Seas (the High Seas Convention).<sup>6</sup> The

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4 UNCLOS, above n 1, arts 311–316.

5 Nicholas M Poulantzas *The Right of Hot Pursuit in International Law* (2nd ed, Martinus Nijhoff, The Hague, 2002) at 39; D P O'Connell *The International Law of the Sea* (Oxford University Press, Oxford, 1982–1984) vol 2 at 1076.

6 Geneva Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) [High Seas Convention].

doctrine was reproduced, in essence unchanged, in art 111 of UNCLOS.<sup>7</sup> Thus, as one author notes, the doctrine enjoys “all the sanction of modern state practice and opinion”.<sup>8</sup>

UNCLOS provides the primary constitution for the oceans. On the one hand, it regulates the rights and duties of coastal states in the various maritime zones under their sovereignty. On the other, it codifies the freedom of navigation within coastal waters — such as the rights of innocent, transit and archipelagic sea lanes passage — and the freedom of navigation through the exclusive economic zone (EEZ). Thus, UNCLOS continues to seek a balance between the rights of coastal states to control their maritime areas and the rights of maritime states to enjoy the freedom of navigation over the ocean.<sup>9</sup>

Conflict between coastal and maritime states — including disputes over the distinction between maritime zones and the high seas — has been a dominant theme throughout the history of the law of the sea.<sup>10</sup> While one of the most important freedoms of the high seas is the freedom of navigation,<sup>11</sup> equally paramount is the principle that ships on the high seas are subject exclusively to the jurisdiction of their flag state.<sup>12</sup> Exceptions to this exclusivity rule may only be invoked in exceptional circumstances.<sup>13</sup>

The right of hot pursuit is one such exception to exclusive flag state jurisdiction, with the predominant rationale being that the high seas should not be a safe haven for those who attempt to escape the lawful jurisdiction of another state.<sup>14</sup> Reuland argues that:<sup>15</sup>

Limiting a state's enforcement jurisdiction to its marginal seas would needlessly foil the state's interest in the enforcement of its laws. There is simply no good reason to throw up a barrier to pursuit at the line dividing the state's territorial waters from the high seas. Pursuit onto the high seas offends the territorial sovereignty of no state. Nor does hot pursuit unduly offend the principle that ships on the high seas are subject to the exclusive jurisdiction of their flag state. Only escaping ships that at one time properly fell within a

7 Article 111 contains both stylistic changes as well as more substantial additions rendered necessary by developments in the law of the sea. For present purposes, however, it is enough to say that the main additions to art 111 allow the right of hot pursuit to be further exercised from the Exclusive Economic Zone (EEZ) and the Continental Shelf. For a more detailed discussion of the precise changes, see Poulantzas, above n 5, at XII–XIII.

8 Robert C Reuland “The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention” (1993) 33 Va J Intl L 557 at 557.

9 Donald R Rothwell “Navigational Rights and Freedoms in the Asia Pacific Following Entry Into Force of the Law of the Sea Convention” (1995) 35 Va J Intl L 587 at 588.

10 Erik Jaap Molenaar “Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*” (2004) 19 IJML 19 at 26.

11 UNCLOS, above n 1, art 87(1)(a).

12 *Ibid*, arts 89 and 92(1).

13 *Ibid*, arts 110 and 111. Article 110 provides that a warship may board foreign vessels on the high seas if it has reasonable grounds to suspect that the vessel is: engaged in piracy, slave trading or unauthorised broadcasting; is stateless; or is of the same nationality as the warship, although flying the flag of another state.

14 O’Connell, above n 5, at 1076–1077; Colombos, above n 2, at 168; Reuland, above n 8, at 559.

15 Reuland, above n 8, at 559–560.

state's territorial jurisdiction are exempted from the exclusivity rule (citation omitted).

However, the right of hot pursuit ceases when the fleeing vessel enters the territorial waters of its flag state or those of a third state.<sup>16</sup> In these circumstances, pursuing a vessel into another state's territorial waters has traditionally been considered an unacceptable violation of that state's sovereignty.<sup>17</sup> Thus, the right of hot pursuit is seen as a pragmatic balance between the coastal state's interest in enforcing its laws and the interests of the international community in the freedom of the oceans and the integrity of territorial jurisdiction.<sup>18</sup>

### The Development of the Doctrine in International Law

As noted, the doctrine of hot pursuit finds its origins and legitimacy in more than 100 years of state practice and can be described as a reflection of customary international law.<sup>19</sup>

Early jurisprudence helped formulate the doctrine, with the case of the *I'm Alone* being one of the most cited.<sup>20</sup> The doctrine was also codified in various formulations by a number of early private academic institutions, such as the *Institut de Droit International* in 1894 and 1924, the International Law Association in 1894 and 1926, the American Institute of International Law in 1926 and the Harvard Research in International Law of 1929.<sup>21</sup> The *Institut de Droit International* was of the opinion that while the pursuit was interrupted when the pursued vessel entered the territorial waters of another state, it did not actually cease until the vessel entered the port of that state.<sup>22</sup> This distinction between a state's territorial sea and its port with regard to the exercise of the right of hot pursuit was criticised by Colombos,<sup>23</sup> and has not been carried through into further developments of the law.

By 1930, while there was some difference of opinion on the issue of which zone the pursuit could be commenced from, the Preparatory Committee of The Hague Codification Conference reported that there was overwhelming agreement that a state was entitled to continue a pursuit

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16 UNCLOS, above n 1, art 111(3).

17 O'Connell, above n 5, at 1077. O'Connell argues that if the pursuit enters only the high seas, it is simply the sovereignty of the flag state that is affronted. In these circumstances, "it is inappropriate that the [flag state] should oppose the effective administration of justice".

18 Reuland, above n 8, at 560.

19 Ibid, at 561; Molenaar, above n 10, at 27. See generally Poulantzas, above n 5, at 118–128.

20 *I'm Alone* (1935) 29 AJIL 326.

21 O'Connell, above n 5, at 1078.

22 Colombos, above n 2, at 169.

23 Ibid, at 169–170. Colombos' reasoning was that the right of hot pursuit was exceptional and should be interpreted in a narrow sense. However, as will be demonstrated in Part IV, this author disagrees with Colombos' approach to the interpretation of the right.

onto the high seas.<sup>24</sup> By the time that the International Law Commission (ILC)<sup>25</sup> produced its reports on the law of the sea in 1956, it also had little difficulty in securing an agreement on a draft article, which was included as art 23 of the High Seas Convention in 1958.<sup>26</sup>

The right of hot pursuit had therefore become universally accepted by the middle of the 20th century. So much so that Poulantzas, writing in 1969, described the right as being indispensable for coastal states. He submitted:<sup>27</sup>

[U]nder the specific conditions of Article 23 of the Convention on the High Seas (1958), which were laid down in order to secure, as far as possible, a just and proper implementation of the right of hot pursuit, this right became an indispensable accompaniment to the rights of the coastal States over the waters under their sovereignty or jurisdiction.

Article 23 of the High Seas Convention was carried forward to art 111 of UNCLOS in 1982, and contains a number of procedural requirements for the pursuit to be considered legitimate. The International Tribunal for the Law of the Sea (ITLOS) held in the *M/V Saiga (No 2)* case that these procedural requirements are cumulative and that “each of them has to be satisfied for the pursuit to be legitimate under the Convention”.<sup>28</sup>

However, Reuland argues that there are inadequacies and ambiguities on the margins of art 111 and that the result is uncertainty:<sup>29</sup>

Although the general parameters of the right of hot pursuit are not controversial, the proper exercise of the right is less clear in circumstances that do not fall neatly within the black letter rule.

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24 See O’Connell, above n 5, at 1078; Colombos, above n 2, at 170. While the Hague Conference did not succeed in adopting a convention on the territorial seas, its draft articles have nevertheless proved to be influential with later conferences and codification attempts, especially with respect to the doctrine of hot pursuit.

25 The International Law Commission (ILC) was a body of 34 eminent lawyers — nominated by their respective governments but serving in their individual capacities — appointed in 1948 and charged with the progressive codification of international law. See generally RR Churchill and AV Lowe *The Law of the Sea* (3rd ed, Manchester University Press, Manchester, 1999) at 15.

26 O’Connell, above n 5, at 1079. Again, note that the only controversy was over in what zone the pursuit could begin.

27 Poulantzas, above n 5, at 127. For a discussion on the opinions of the various writers up to the High Seas Convention, see generally Poulantzas, above n 5, at 118–128.

28 *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) ITLOS No 2, 1 July 1999 at [146] [*M/V Saiga*].

29 Reuland, above n 8, at 557.

Other writers have also argued that the doctrine is outdated and in need of modernising. Allen states that:<sup>30</sup>

Unfortunately, aspects of the traditional doctrine of hot pursuit are largely founded on assumptions better suited to the era of local fisheries, three-mile territorial seas, and observation by long glass than to the current era characterized by distant-water fleets of factory trawlers, 200-mile exclusive economic zones, and observation by radar, aerial photography, underwater sensors, and satellites. The traditional doctrine contains procedural requirements that might be invoked to limit or preclude the use of these essential technologies.

The aim of Part IV of this article is to examine each of the conditions set out in art 111 of UNCLOS and to apply the doctrine to the maritime environment of the 21st century. It will be argued that the art 111 requirements are too restrictive if they are not given a liberal interpretation or allowed to develop and evolve for the modern context. It is suggested that such an interpretation is possible in light of emerging state practice and the shifting balance of today's maritime environment.

### III THE MARITIME ENVIRONMENT IN THE 21ST CENTURY

While the importance of UNCLOS cannot be underestimated,<sup>31</sup> it is essentially a reflection of various political interests existing at the time of its creation.<sup>32</sup> Difficulties were encountered over a number of issues and the balance between the rights of coastal and maritime states that was achieved during the debates of 1973–1982 no longer accurately represents the state of affairs in today's maritime environment. Indeed, one author has observed that:<sup>33</sup>

[D]isorder on the oceans appears resurgent. This breakdown takes a variety of forms, including piracy, trafficking in drugs or people,

30 Craig H Allen "The Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices" (1989) 20 ODIL 309 at 310. See also Rachel Baird "Arrests in a Cold Climate (Part 2) — Shaping Hot Pursuit through State Practice" (2009) 13 Antarctic and Southern Ocean Law and Policy Occasional Papers 1, available at <eprints.usq.edu.au/5604/> at 3 ["Hot Pursuit"]; William C Gilmore "Hot pursuit: the case of *R v Mills and others*" (1995) 44 ICLQ 949 at 949 ["*R v Mills and others*"]. Gilmore, although referring to international waters and not those waters under the sovereign jurisdiction of a coastal state, notes that "[t]he traditional international law of the sea has widely been regarded as providing insufficient flexibility to accommodate the needs of the law enforcement community".

31 Michael A Becker "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea" (2005) 46 Harvard Intl LJ 131 at 133. Becker states that UNCLOS is widely considered to be "one of the most comprehensive and well-established bodies of international regulatory norms in existence ... buttressed by longstanding international norms, and formal legal agreements, critical to creating a more secure international environment".

32 Churchill and Lowe, above n 25, at 16–18.

33 Becker, above n 31, at 132–133 (emphasis added).

illicit fishing, and degradation of the marine environment. The system of open registries, or flags of convenience, permits the facile concealment of ship ownership behind the corporate form. Lax flag state enforcement of shipping regulations leads to sub-standard vessels that pose hazards to crew and coast, as well as to the marine environment.

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[T]he persistence of maritime disorder indicates a critical gap between the prescription of law and the capacity or will to make that prescription effective. Alternatively, in some instances, the prescription itself may be lacking, either in specificity, scope, or *adaptability to evolving circumstances*. UNCLOS is undoubtedly an historic achievement, but its successful translation into an effective regime of international law is a process in need of frequent reassessment and adjustment.

Issues such as piracy, terrorism, maritime security and the proliferation of weapons of mass destruction are important issues that need consideration today. However, these are often issues that involve the interdiction of a ship on the high seas without an offence having been committed in the coastal state's jurisdiction. Consequently, the right of hot pursuit under art 111 is not engaged. International efforts attempting to permit non-flag state interdiction of ships on the high seas and the pursuit of them — often into territorial waters of a third state — are therefore outside the scope of this article.<sup>34</sup>

As already mentioned, hot pursuit justifies the interference with a foreign vessel on the high seas after a pursuit that was commenced lawfully within the sovereignty or jurisdiction of the coastal state. The types of offending giving rise to the right of hot pursuit depend on the competence of the coastal state to enact laws and regulations in the various maritime zones. This topic will be discussed in more depth in Part IV of this article. While drug and people smuggling are global problems, the enforcement of regulations pertaining to the preservation of the world's ocean resources is undoubtedly the predominant issue in the modern marine environment that results in the exercise of hot pursuit. Consequently, it is useful to provide a broad outline of the problems faced by coastal states in this context.

When agreement on UNCLOS was finally reached in 1982, it reflected an enormous amount of change and progress in the law of the sea. The acceptance of the EEZ and the continental shelf regime resulted in coastal states gaining the capacity to claim jurisdiction over vast areas of ocean that had previously been regarded as the high seas.<sup>35</sup> However, the result of this expansion, and the associated increase in regulation, has had

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34 For a comprehensive study on the action of states in stopping, searching and arresting foreign flagged vessels and crew on the high seas in cases such as piracy, slavery, proliferation of weapons of mass destruction, drug smuggling, and maritime terrorism see Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009).

35 See generally UNCLOS, above n 1, Parts V and VI.

a dramatic effect on the international fishing regime by displacing fishing fleets from these waters.<sup>36</sup>

At the same time, rising populations that depend on fish for their food supply, coupled with growing demands on commercial fishing vessels to increase their productivity, have had a significant impact on the rapid depletion of the world's ocean resources. Technological advancements and significant capital investment in the fishing industry have further exacerbated the problem.<sup>37</sup> The result has been the emergence of a practice commonly referred to as illegal, unreported and unregulated (IUU) fishing, which has become a severe threat to ocean sustainability.<sup>38</sup>

It is in the context of IUU fishing that much of the debate concerning the ability of coastal states to enforce their fisheries regulations has arisen in recent years.<sup>39</sup> It has been recognised that coastal states share responsibility for preventing IUU fishing in their economic zones,<sup>40</sup> and that developments in technology are playing an important role in this regard. Such technology includes using radars, satellites and other remote sensing equipment, high-altitude aircraft, and potentially unmanned aerial vehicles (UAVs) as part of an effective surveillance and vessel monitoring system.

But effective surveillance is one thing; effective enforcement is another. Once a vessel has been detected violating the laws of the coastal state, it must be subject to enforcement action. A significant tool in a coastal state's enforcement armoury is the ability to carry out an effective hot pursuit. As the international community already recognises the utility of modern technology in a number of areas within the law of the sea, there is no reason why the international community should not also recognise the utility of modern technology in making the right of hot pursuit an effective one.

#### IV ANALYSIS OF THE ELEMENTS OF HOT PURSUIT

This article argues that the doctrine of hot pursuit as set out in art 111 of UNCLOS needs to be interpreted broadly — or, as Allen prefers, “functionally”<sup>41</sup> — when applied in the modern context. It is submitted that

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36 Baird “IUU Fishing”, above n 3, at 300 and generally.

37 *Ibid.*, at 300.

38 The issue of IUU fishing is outside the scope of this article. It is sufficient to say that estimates by the Food and Agriculture Organisation of the United Nations have indicated that half of the world's most valuable food stocks are over exploited, with IUU fishing accounting for over 30 per cent of this. An area in which IUU fishing is most keenly felt is in the vast expanse of the Southern Ocean — specifically within the EEZs adjacent to a number of sub-Antarctic Islands — where the high value of the Patagonian toothfish is proving an irresistible target for IUU fishermen. However, areas around China and Canada are also over-fished. See generally Food and Agriculture Organization of the United Nations “The State of World Affairs and Aquaculture” (2008) <[www.fao.org](http://www.fao.org)>.

39 See generally Baird “IUU Fishing”, above n 3.

40 See generally FAO “IPOA-IUU”, above n 3, at Part III.

41 See generally Allen, above n 30.



not only is such an interpretation possible but also that it reflects current state practice.<sup>42</sup>

## Offences Justifying the Exercise of Hot Pursuit

### 1 Breach of Coastal State Law

Article 111(1) of UNCLOS provides, in part, that the coastal state must have “good reason to believe that the ship has violated the laws and regulations of that State”.<sup>43</sup>

It is therefore apparent from the wording of art 111(1) that violations of any law or regulation could potentially justify hot pursuit. O’Connell considers that in the territorial sea, the coastal state’s competence is “plenary, and limited only by the right of innocent passage”.<sup>44</sup> However, that competence is restricted in the other maritime zones, which confer only limited jurisdictional rights on the coastal state. It is for this reason that art 111(2) states:

The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including safety zones.

Nevertheless, it has generally been accepted that a coastal state should only exercise the right of hot pursuit where the offence involved is serious.<sup>45</sup>

### 2 Good Reason to Believe

Article 111(1) requires the coastal state to have “good reason to believe” that its laws or regulations have been violated by a ship before hot pursuit will be justified. Briefly stated, it is generally considered that “good reason to believe” requires more than mere suspicion but that it need not amount to actual knowledge.<sup>46</sup>

What constitutes “good reason to believe” was an issue in the *M/V Saiga* case. On the evidence presented to it, the Tribunal found that the Guinean authorities could have had no more than a mere suspicion that the

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42 Baird “Hot Pursuit”, above n 30, at 16.

43 UNCLOS, above n 1, art 111(1).

44 O’Connell, above n 5, at 1081. The territorial sea extends not more than 12 nautical miles from the coastal baselines established under the Convention: UNCLOS, above n 1, art 3.

45 Allen, above n 30, at 315; O’Connell, above n 5, at 1080; Reuland, above n 8, at 556–568.

46 Baird “Hot Pursuit”, above n 30, at 6; O’Connell, above n 5, at 1088; Reuland, above n 8, at 569; Poulantzas, above n 5, at 156–157 (Poulantzas describes the standard as a “reasonable suspicion”).

*Saiga* had breached Guinean law. This was less than the “good reason to believe” standard required.<sup>47</sup>

Further evidence of state practice may be found in a treaty between Australia and France, signed on 8 January 2007, which provides that both states will cooperate in the surveillance and enforcement of fisheries laws in their respective territories in the Southern Ocean.<sup>48</sup> In art 4, the Australia-France Treaty provides, among other things, that a “good reason to believe” may include:<sup>49</sup>

- i. direct visual contact with the fishing vessel or one of its boats by the authorised vessel; or
- ii. evidence obtained by or on behalf of the authorised vessel by technical means.

Such “technical means” might include radar or satellite imagery and aerial photography that could not only show the vessel’s location but also track movements consistent with fishing techniques.<sup>50</sup> By providing specifically that evidence may be obtained through “technical means”, the Australia-France Treaty recognises the growing importance that coastal states are placing on technology in the surveillance and enforcement of their maritime zones.

### Maritime Zones in which Pursuit Must Commence

Article 111(1) of UNCLOS provides:

[The] 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 ... .

Article 111(2) extends the right *mutatis mutandis* to violations occurring in the exclusive economic zone or on the continental shelf. The right may only be invoked for offences that occur within these zones.

The proposition that pursuit may be commenced for certain offences committed within the contiguous zone, although codified in art 111 of UNCLOS, has created a degree of controversy and is not without

47 *M/V Saiga*, above n 28, at [147] and the separate judgment of Judge Anderson.

48 Agreement on the Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories and Heard and McDonald Islands (8 January 2007) [Australia-France Treaty].

49 *Ibid*, art 4.

50 Baird “Hot Pursuit”, above n 30, at 8; see also Warwick Gullet and Clive Schofield “Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean” (2007) 22 *IJML* 545 at 566 and generally for the lawfulness of the Australia-France Treaty under UNCLOS.

difficulty.<sup>51</sup> Article 111(1) of UNCLOS provides that a pursuit from the contiguous zone, as defined in art 33,<sup>52</sup> “may only be undertaken if there has been a violation of the rights for the protection of which the zone was established”.

Article 33 provides that the coastal state may, in its contiguous zone, exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory or territorial sea, and punish infringement of those laws and regulations committed within its territory or territorial sea.<sup>53</sup> O’Connell argues, therefore, that hot pursuit can begin in the contiguous zone only for offences relating to the coastal state’s customs, fiscal, immigration or sanitary laws that have occurred within the coastal state’s internal waters or territorial sea.<sup>54</sup> As such, an incoming vessel that is yet to reach the territorial sea is also yet to commit an offence. While the coastal state may take measures to prevent infringements relating to these four areas — including visiting and searching — it is arguable that an infringing vessel could not be pursued if it fled to the high seas.<sup>55</sup>

O’Connell goes on to state that this narrow interpretation of the scope of art 111 of UNCLOS is against “the current of opinion and practice”.<sup>56</sup> It is certainly true that the ILC debated the issue in 1955 and rejected this narrow interpretation.<sup>57</sup> Poulantzas also states that it is “clear that hot pursuit may commence from the contiguous zone also for acts committed there infringing upon the specific interests protected in this zone”.<sup>58</sup> Nevertheless, this author is of the opinion that the particular drafting of art 33 of UNCLOS is unfortunate when compared to art 111(1) and that, until the inconsistency is resolved, arguments in favour of the narrow interpretation are likely to linger.

Hot pursuit may also be lawfully commenced from the EEZ, again for violations of the laws and regulations applicable to this zone. Article 56(1) of UNCLOS provides:

In the exclusive economic zone, the coastal State has ... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone ... .

51 See generally O’Connell, above n 5, at 1081–1085; Poulantzas, above n 5, at 158–167; Reuland, above n 8, at 573–575.

52 See UNCLOS, above n 1, art 33(2): “The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

53 *Ibid*, art 33(1).

54 O’Connell, above n 5, at 1083.

55 *Ibid*, at 1083.

56 *Ibid*, at 1084.

57 International Law Commission “Summary record of the 291st meeting” at [31]–[50] <[www.un.org/law/ilc](http://www.un.org/law/ilc)>.

58 Poulantzas, above n 5, at 164.

The coastal state is permitted to enact legislation that is consistent with these rights. Thus, the right of hot pursuit from the EEZ is correspondingly limited to breaches of these laws.<sup>59</sup>

Article 111(2) also recognises the coastal state's right to pursue a vessel suspected of infringing laws and regulations that relate to the continental shelf, including the safety zones around installations over the continental shelf. Article 77(1) of UNCLOS provides that the coastal state "exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources". Thus, as with the EEZ, if a vessel is infringing these sovereign rights, the coastal state has enforcement jurisdiction and may exercise the right of hot pursuit over such a vessel if it flees. The recognition in art 111(2) that hot pursuit applies to the 500 metre safety zones around installations, artificial islands or structures in the EEZ or over the continental shelf is also an important one: such a right may become relevant in the event of, for example, a terrorist attack or an act of piracy against an oil rig, or perhaps navigational incidents that result in some harm or danger to the installation, artificial island or structure.

However, while the right of hot pursuit may exist in the event of such an attack or incident, given that the conditions for the lawful exercise of hot pursuit are cumulative, actually exercising the right in such circumstances is problematic from a practical perspective. The coastal state would need to have an enforcement vessel or aircraft in the vicinity at the time of the incident and that vessel would be obliged to carry out the remaining procedural requirements of art 111 — such as giving a visual or auditory signal to stop while the offending craft was still within the relevant area — for any pursuit to be lawful. As the safety area around such installations is only 500 metres, it is submitted that the majority of the world's coastal states are unlikely to have sufficient resources to be able to monitor every installation, artificial island or other structure in its jurisdiction in this manner.

### *1 The Doctrine of "Constructive Presence"*

The doctrine of constructive presence has long been recognised by customary and conventional law.<sup>60</sup> Article 111(4) of UNCLOS provides, among other things:

Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself ... 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,

<sup>59</sup> Reuland, above n 8, at 575.

<sup>60</sup> Allen, above n 30, at 314; William C Gilmore "Hot pursuit and constructive presence in Canadian law enforcement" (1988) 12 *Marine Policy* 105 at 109 ["Hot pursuit"]; Gilmore "*R v Mills and others*", above n 30, at 954: "It is beyond controversy that the rules relating to hot pursuit in international law, conventional or customary, have developed in a manner which encompasses the concept of constructive presence."

within the contiguous zone or the exclusive economic zone or above the continental shelf.

Nevertheless, the scope and parameters of the doctrine are yet to be fully explored. Initially, it was limited to situations involving the mother ship's own boats (referred to as simple constructive presence) rather than those situations where other boats are acting together (extensive constructive presence).<sup>61</sup> While the ILC lent its weight to the simple version of the doctrine in 1956, this position was rejected with the inclusion in art 23 of the High Seas Convention of the reference to other craft working as a team.<sup>62</sup> Article 23 has simply been carried into art 111(4) of UNCLOS.<sup>63</sup>

The extensive doctrine of constructive presence is important in modern day law enforcement, especially with regard to the transshipment of contraband and IUU fishing carried out by fleets with bunkering vessels, factory ships and catchers. Nevertheless, there remains some ambiguity here as well, as there are no accepted legal definitions of "team work" or "mother ship".<sup>64</sup> Gilmore, like O'Connell, argues as follows:<sup>65</sup>

[The wording of art 111(4)] does not encompass one-off cases of unloading contraband by prearrangement but rather implies some measure of frequency of association and continuity of a dependent relationship. Such a restrictive approach, it might be noted, is consistent with the view that "the right of hot pursuit, being a derogation from the general rule prohibiting any interference by a State with foreign vessels on the high seas, ought to be interpreted in a narrow sense".

Given that the trend among Western states is, as Gilmore notes, "to broadly construe powers to interfere with foreign shipping on the high seas in the interests of coastal state law enforcement",<sup>66</sup> such a narrow interpretation would be a blow to modern law enforcement practices. The doctrine of hot pursuit needs to be interpreted broadly if it is to have continued relevance for the effective enforcement of the law in the 21st century.

The rationale behind the doctrine of constructive presence is that while an act may have physically occurred outside a state's jurisdiction, the act is considered to have occurred within that state's jurisdiction if its

61 O'Connell, above n 5, at 1093.

62 Gilmore "*R v Mills and others*", above n 30, at 954-955.

63 Ibid, at 958.

64 Gilmore "Hot pursuit", above n 60, at 111.

65 Ibid, at 111 (citations omitted). O'Connell also notes that the wording of art 111(4) "makes pursuit conditional on team work and use of the vessel as a mother ship, which are not conditions usual in transshipment": O'Connell, above n 5, at 1093.

66 Ibid. See Churchill and Lowe's discussion of *R v Mills* where they note that Devonshire J, in adopting a liberal interpretation of the doctrine of constructive presence, "was not troubled by the fact that the second ship was not one of the boats of the ships pursued, nor even a boat that had put out from and returned from British shores": Churchill and Lowe, above n 25, at 216. See also *R v Mills* (unreported judgment of Devonshire J, Croydon Crown Court, 1995), cited in Gilmore "*R v Mills and others*", above n 30.

effects are felt within that state.<sup>67</sup> This policy, therefore, would be defeated if issues such as the frequency of association of the vessels and dependency on the “mother ship” were considered to be relevant.

## *2 Ascertaining the Vessel’s Location Within the Coastal State’s Sovereign Waters*

Article 111(4) of UNCLOS also requires that the pursuing ship satisfy itself “by such practicable means as may be available that the ship pursued or one of its boats or other craft” is within the relevant coastal state maritime zone when the pursuit is commenced. In not prescribing an exact method of determining the vessel’s location, the wording of art 111(4) has been interpreted as providing the pursuing vessel with the flexibility to use any reasonable means that may be available to it to ascertain the position of the offending ship.<sup>68</sup>

Poulantzas argued strongly in 1969 that the offending vessel’s position should be determined by the same vessel that initiated the pursuit.<sup>69</sup> This view was criticised by Allen, who pointed out that there was no justification apparent in the wording of art 111(4), nor any policy reason, that warranted such a position.<sup>70</sup> Allen went on to outline the reality of modern maritime enforcement practice:<sup>71</sup>

Modern surface vessels located beyond visual or radar range of a suspect vessel may satisfy themselves of the suspect vessel’s position by accepting the position given by an aircraft with which it is working, whose navigational methods are known by the enforcing vessel to be reliable. This practice meets the literal requirements of Article 111(4). This option may become important where, for example, a high-altitude aircraft or satellite has detected and identified a vessel violating coastal state laws, but cannot itself signal the violator and initiate the pursuit. The aircraft can report the offender’s identity and position to a surface vessel, which can then signal the offender to stop and initiate pursuit.

This author considers that Allen’s interpretation is the correct one. Coastal states are becoming more and more reliant on developing technology — such as over-the-horizon radar, military satellites or UAVs that have the ability to provide real time visual footage and accurate positional

<sup>67</sup> O’Connell, above n 5, at 1092.

<sup>68</sup> Allen, above n 30, at 318; Baird “IUU Fishing” above n 3, at 327–328; Reuland, above n 8, at 582; Poulantzas, above n 5, at 202.

<sup>69</sup> Poulantzas, above n 5, at 200–201: “It goes without saying that the finding of the position of the infringing vessel must be made by the same authorised ship which gives it the order to stop. ... Thus, a coast-guard ship which was radioed that an infringement has taken place is not considered to have commenced the pursuit of the foreign vessel, which is yet out of view, unless it has itself determined the exact position of this ship and has given it the order to stop.”

<sup>70</sup> Allen, above n 30, at 318.

<sup>71</sup> *Ibid.*, at 318–319 (citations omitted).

information — for their surveillance, detection and enforcement practices as they come to terms with the vast areas of oceans for which they are now responsible and over which they have enforcement jurisdiction. Allen’s argument is even more compelling given developments in technology during the 20 years since he was writing, and the fact that reliance on such technology is likely to increase.

## **The Character of the Pursuit**

### *1 Craft that May Be Employed in the Pursuit*

Article 111(5) of UNCLOS prescribes what types of craft may be employed in hot pursuit: “The right of hot pursuit may be exercised only by warships or military aircraft”. Article 29 defines a warship in the following terms:

For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

It has been argued that these terms should logically be read broadly to include all craft that belong to the naval, aerial or land forces of the coastal state.<sup>72</sup>

Article 111(5) further provides that “other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect” may also exercise the right of hot pursuit. This additional category of authorised vessel would seemingly be intended to cover the vessels of other governmental agencies — such as coast guard, customs, fisheries or police — that may feasibly be involved in the protection of a coastal state’s maritime zone.<sup>73</sup> It is important that the vessels of this additional category be authorised specifically to conduct enforcement action and therefore authorised to act on behalf of the coastal state.<sup>74</sup>

### *2 Pursuit Must Be Immediate*

While the very term “hot pursuit” implies that the pursuit must follow closely a violation of the coastal state’s laws or regulations, the immediacy

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72 Poulantzas, above n 5, at 194–195.

73 See *ibid.*, at 193 where Poulantzas observes that there is no discussion in the preparatory materials on the issue.

74 Reuland, above n 8, at 562.

of the pursuit is not an inflexible requirement.<sup>75</sup> It should be interpreted in “a broader sense”.<sup>76</sup>

A key consideration is the action taken by the coastal state in initiating the pursuit. A vessel may have to seek authorisation from superiors or a land based headquarters before being authorised to commence a pursuit, or alternatively a vessel that is more appropriately equipped and crewed to conduct an arrest at sea may need to be summoned. These delays should not affect the legitimacy of any pursuit. Outside these general guidelines, however, whether the pursuit was immediate or not should depend entirely on an assessment of what is “reasonable” in the particular circumstances.

### 3 *The Pursued Vessel Must Be Given a Signal to Stop*

UNCLOS art 111(4) provides:

The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

Thus, strictly interpreted, the signal to stop is of paramount importance as hot pursuit does not commence until after the direction has been given.<sup>77</sup> It follows logically that the signal to stop must be given when the offending vessel is within the coastal state’s jurisdiction.

Nevertheless, it has been held that in circumstances where it is obvious that the offending vessel is aware it is being pursued, the requirement to signal may be foregone.<sup>78</sup> Reuland cites the example of *The Newton Bay*<sup>79</sup> as illustrative of this point, and notes:<sup>80</sup>

The reasoning of the court in *The Newton Bay*, and the exceptions to the signal requirement drawn in that case, make good sense. The signal requirement is intended to afford the suspect ship opportunity to heave to and await the inspection of the warship. When it is clear that the suspect ship has no intention to await inspection, the imposition of a signal requirement becomes a useless formality.

The requirement to signal to the offending vessel that it has been detected, identified and is ordered to stop has been justified as necessary to prevent abuse<sup>81</sup> and to ensure that there is no surprise when the enforcement vessel closes in.<sup>82</sup>

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75 Allen, above n 30, at 318.

76 Poulantzas, above n 5, at 210.

77 Ibid, at 204.

78 Allen, above n 30, at 319; Reuland, above n 8, at 583–584.

79 *The Newton Bay* 36 F 2d 729 (2d Cir 1929), cited in Reuland, above n 8, at 584.

80 Reuland, above n 8, at 584.

81 Poulantzas, above n 5, at 204.

82 Baird “Hot Pursuit”, above n 30, at 11.



Traditionally, it has been understood that the requirement for the signal to be visual or auditory has excluded the use of radio.<sup>83</sup> Again, this was primarily intended to avoid the possibility of abuse.<sup>84</sup> The signals to be used, therefore, included sirens, loudhailer, those prescribed in the *International Code of Signals* and even cannon shot.<sup>85</sup>

However, some commentators have criticised the rejection of radio broadcasts as being a sufficient signal. Baird argues that when the ILC was debating in 1956, and to a lesser degree, when UNCLOS was completed in 1982, means of communication were “more limited and less reliable” than they are today.<sup>86</sup> She further notes that the ILC itself commented that “the important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which the right was exercised”.<sup>87</sup> Allen also argues that radio broadcasts should be permitted, stating:<sup>88</sup>

Marine communications advances have rendered the requirement that signals can be given only by visual or auditory means antithetical to the doctrine’s underlying policy goals. There is no question that vessel operators now universally communicate by radio, many by satellite communications. Mariners have become so accustomed to communicating by radio that few can any longer understand flag hoist or flashing light signals. Vessels routinely maintain a full-time listening watch on at least one of the maritime distress and calling frequencies.

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Indeed, the doctrine’s demand for positively alerting a violator to the fact that it is to heave to for boarding may actually *require* that signals be given by radio, the best and most commonly used method of communication (citations omitted).

In contrast, Reuland posits that the requirement for a visual or auditory signal that does not include radio broadcasts “ensures that the signal to stop is given when the warship and the suspect vessel are in close quarters”.<sup>89</sup> However, this narrow interpretation is based on the premise that radio signals are prohibited, a premise that cannot be recognised if the right of hot pursuit is to assume any relevance today.

There is no definitive prohibition in art 111(4) of radio signals or other modern forms of communication — such as satellite phone or even fax or email — when giving a signal to stop. Such forms of communication

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83 Colombos, above n 2, at 170.

84 Poulantzas, above n 5, at 204–205; Baird “Hot Pursuit”, above n 30, at 10.

85 Poulantzas, above n 5, at 206–207.

86 Baird “Hot Pursuit”, above n 30, at 11.

87 Ibid, at 10.

88 Allen, above n 30, at 323 (emphasis in the original).

89 Reuland, above n 8, at 583. Reuland does, however, note that this limitation is curious.

are commonplace among modern fishing vessels as they communicate with their home bases or other ships in their fleet.

Furthermore, the fact that art 111(1) states that there is no requirement for the enforcement vessel to be in the same maritime zone as the suspect vessel, when the signal to stop is given, adds weight to the argument that the enforcement vessel does not have to be within visual range. As surveillance of maritime zones by satellite, high-altitude aircraft, over-the-horizon radar or UAV<sup>90</sup> becomes more common, it is entirely possible that the suspect vessel will have been detected long before an enforcement craft is within sufficient range to be able to give a visual or auditory signal that does not include a radio broadcast of some description. It follows therefore that in the modern maritime environment, radio and other broadcasts must be used as a practical reality.

The ILC was particularly concerned that if radio signals were permitted, there would be no limit on the distance from which the signal could be given.<sup>91</sup> However, technology in 1956 was far less reliable than it is today and the ILC was considering the doctrine long before UNCLOS had extended the maritime areas under coastal state jurisdiction to 200 miles. Thus, it is argued that the comments of the ILC need to be viewed in this context and with due regard to contemporary norms.

This article further argues that too much importance has been placed on providing notice to the suspect ship that it has been detected, especially when there is no express requirement in art 111 for the coastal state to prove that the pursued vessel received the signal.<sup>92</sup> It should be remembered that the very reason the vessel is being pursued is because the coastal state has good reason to believe that the vessel has violated its laws or regulations. While that does not give the coastal state *carte blanche* to act in a manner of its choosing, the fact that a vessel is caught unaware that it has been detected should not negate the coastal state's rights to enforce its laws. Furthermore, the rights of the suspect vessel are protected adequately from abuse by UNCLOS art 111(8), which provides that in the event of an unjustified hot pursuit the ship shall be compensated for any loss or damage that was sustained. This will be addressed in more detail below.

In this author's opinion, the signal is important as it provides evidence of when the coastal state detected the offending ship and began the pursuit. Consequently, the pivotal consideration should be merely whether a signal is given. This is of particular relevance when the offending vessel has been detected by satellite or similar means and the coastal state's enforcement craft is not yet in visual range.

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90 See generally Vasilios Tasikas "Unmanned Aerial Vehicles and the Doctrine of Hot Pursuit: A New Era of Coast Guard Maritime Law Enforcement Operations" (2004) 29 Tul Mar LJ 59.

91 Baird "Hot Pursuit", above n 30, at 10; Allen, above n 30, at 319 note 148.

92 Allen, above n 30, at 319.

#### 4 Pursuit Must Be Continuous

Another problematic area in applying the doctrine of hot pursuit in a modern day context is the requirement that the pursuit be continuous. UNCLOS art 111(1) provides that the pursuit “may only be continued ... if [it] has not been interrupted”. This continuity of pursuit provides the jurisdictional link to the fleeing vessel that permits the non-flag state to interfere on the high seas.<sup>93</sup> The requirement also ensures that the pursued vessel is identified positively at all times and that enforcement action is not taken against the wrong vessel due to misidentification. Once the pursuit is interrupted, the right to pursue is lost and cannot be resumed.<sup>94</sup>

But what constitutes an interruption is not defined in UNCLOS. It is generally considered that the interruption must be significant,<sup>95</sup> and that short gaps in the pursuit — such as when the pursuing vessel stops to pick up evidence,<sup>96</sup> when the pursuing vessel suffers a mechanical fault,<sup>97</sup> or when observation is lost due to inclement weather conditions<sup>98</sup> — are acceptable. Indeed, a broad or purposive interpretation of art 111(1) would allow a substantial rather than merely transitory interruption of the pursuit, recognising the practical difficulties of a protracted pursuit across the high seas in challenging weather conditions.<sup>99</sup> Whether an interruption is considered significant or not will depend on the particular circumstances and the time taken to resume the pursuit.

The requirement for continuity raises questions as to whether observation and pursuit utilising radar or other electronic means are acceptable. Baird argues that a loss of visual, but not radar, contact should not constitute an interruption of the pursuit.<sup>100</sup> In the modern maritime environment, this must be the correct position if the doctrine of hot pursuit is to have any significant utility.

When considering the rationale underpinning the requirement that the pursuit be continuous — that is, to maintain the jurisdictional link with the suspect ship and to prevent enforcement action being wrongly taken against an incorrectly identified vessel — there is no sound policy reason for denying that contact may be maintained by radar or other surveillance. Indeed, as Allen argues, “[t]he traditional notion that continuous *visual* observation is the only reliable means to maintain contact with a fleeing vessel during pursuit is obsolete”.<sup>101</sup> Modern technological advances have meant that the identification of a vessel can be maintained accurately

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93 Poulantzas, above n 5, at 210.

94 Reuland, above n 8, at 584.

95 Ibid, at 584; Baird “Hot Pursuit”, above n 30, at 12.

96 Allen, above n 30, at 320.

97 Poulantzas, above n 5, at 212 (see, in particular, note 20).

98 Baird “Hot Pursuit” above n 30, at 12; Reuland, above n 8, at 584; Allen, above n 30, at 320.

99 Tim Stephens “Enforcing Australian fisheries laws: testing the limits of hot pursuit in domestic and international law” (2004) 15 PLR 12 at 15.

100 Baird “Hot Pursuit”, above n 30, at 16.

101 Allen, above n 30, at 324 (emphasis in the original).

without resorting to visual observation. Furthermore, the utility of electronic surveillance has been recognised with the growth of vessel management systems in maritime law enforcement operations.<sup>102</sup> To then “deny radar surveillance an equally legitimate role [in maintaining pursuit] is contradictory”.<sup>103</sup>

The key consideration in determining whether pursuit is continuous should simply be whether the suspect vessel was positively identified and tracked throughout the pursuit, regardless of the method used to achieve this outcome. This interpretation does not offend art 111 in any way and is instead a reflection of the law evolving to remain effective in a modern context.

### 5 Pursuit in Relay and Multilateral Hot Pursuit

A pursuit may be carried out in relay. Article 111(6)(b) provides specifically for the situation where a ship takes over the pursuit from an aircraft, and it is an uncontroversial extension to allow one ship to take over from another.<sup>104</sup>

However, an issue that has arisen in recent years is whether UNCLOS permits multilateral hot pursuits; in other words, does art 111 permit the enforcement craft of a third state to join the enforcement vessel of the injured coastal state? This was the situation when, on two separate occasions, an Australian enforcement vessel, the *Southern Supporter*, joined in the pursuit of two vessels fishing illegally in Australia’s EEZ, the *South Tomi* and the *Viarsa I*. While the *Southern Supporter* remained in close contact with the pursued vessels at all times, the actual arrest was carried out with South African and, in the case of the *Viarsa I*, British assistance.<sup>105</sup>

The concept of so-called cooperative hot pursuit is a novel one.<sup>106</sup> Article 111(6)(b) refers explicitly to the situation where a ship or aircraft “of the coastal State” takes over the pursuit. Therefore, hot pursuits involving third party states would, at first glance, seem inconsistent with UNCLOS. Molenaar argues, however, that the pursuits of the *South Tomi* and the *Viarsa I* did satisfy the procedural requirements of art 111. There was, first, a legitimate basis for the pursuits and, secondly, all the procedural requirements were met: the pursuits remained continuous and the *Southern Supporter* remained in close contact with both vessels throughout the pursuits. As such, “the hot pursuit did not constitute an interception and there was no risk of abuse or pursuing the wrong vessel”.<sup>107</sup>

102 See generally Rachel Baird “Coastal State Fisheries Management: A Review of Australian Enforcement Action in the Heard and McDonald Islands Australian Fishing Zone” (2004) 9 Deakin Law Review 91; Baird “IUU Fishing”, above n 3; Allen, above n 30, at 324.

103 Baird “Hot Pursuit”, above n 30, at 16.

104 Ibid, at 14; Molenaar, above n 10, at 30; Churchill and Lowe, above n 25, at 215; Reuland, above n 8, at 584.

105 See generally Molenaar, above n 10, for a good account of the pursuits.

106 Ibid, at 31.

107 Ibid, at 32.

Provided the pursuit is carried out in accordance with the procedural requirements of art 111 and the enforcement craft of the coastal state whose laws or regulations were breached remains part of the pursuit, it is arguable that there is no policy reason why these multinational or cooperative hot pursuits should be unlawful.<sup>108</sup> Indeed, as Baird puts it, such cooperation illustrates the “adaptation of state practice to an evolving environment and in recognising their validity, hot pursuit remains a cogent right in the 21st century”.<sup>109</sup>

### **When the Right of Hot Pursuit Terminates**

As has already been indicated, the pursuit ceases when interrupted substantially. UNCLOS art 111(3) further provides that the right of hot pursuit also ceases as soon as the ship pursued enters the territorial sea of either its own or a third state. However, there is no limitation in UNCLOS specifying that the pursuit likewise ceases as soon as the ship enters the EEZ or even contiguous zone of its own or a third state.<sup>110</sup>

The rationale for the rule that the right of pursuit ceases as soon as the pursued vessel enters the territorial sea of another state is that “to continue it therein would be to violate the sovereignty of the other state”.<sup>111</sup> Furthermore, while all ships enjoy the right of innocent passage through the territorial sea of a foreign state,<sup>112</sup> pursuing a vessel through, or taking direct enforcement action in, the territorial sea would not fall within this right.<sup>113</sup>

It has been suggested that the pursuit may be resumed if the vessel returns to the high seas,<sup>114</sup> although opinion is divided on this point.<sup>115</sup> Reuland believes that there are two competing policy considerations to be balanced. On the one hand, he notes that “[i]f international law does not permit resumption of pursuit, the pursued vessel is seemingly washed clean of its sins by the territorial waters of a third state”.<sup>116</sup> On the other hand, he argues that there are “other equally important considerations in play

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108 Ibid. Gullet and Schofield argue that Molenaar’s argument is “persuasive, although untested”: Gullet and Schofield, above n 50, at 569. Baird argues that “although novel, these two instances of multi-lateral hot pursuit do not undermine the principle of hot pursuit”: Baird “Hot Pursuit”, above n 30, at 15.

109 Baird “Hot Pursuit”, above n 30, at 15.

110 Allen, above n 30, at 320; Reuland, above n 8, at 577.

111 Churchill and Lowe, above n 25, at 215.

112 UNCLOS, above n 1, art 17.

113 Ibid, art 19. Baird also argues that passage of the pursued vessel through the territorial sea is not innocent. It is certainly not innocent if the vessel lingers in the territorial sea to outwait the pursuing vessel because a requirement of innocent passage is that it is continuous and expeditious: Baird “Hot Pursuit”, above n 30, at 13.

114 Baird “Hot Pursuit”, above n 30, at 13; Allen, above n 30, at 320. Poulantzas argues that “a short stay or passage of the pursued vessel through the territorial waters of a State, obviously undertaken with the intention of evading the law, does not preclude the resumption of hot pursuit”: Poulantzas, above n 5, at 231.

115 O’Connell, above n 5, at 1091.

116 Reuland, above n 8, at 581.

— namely state sovereignty, as expressed in the general rule disallowing interference with the ships of another state”.<sup>117</sup>

But Reuland’s analysis does not provide the correct policy considerations for the rule that the pursuit ceases when the pursued ship enters the territorial sea of its own or a third state. Instead, the correct rationale behind art 111(3) is that the continuation of such a pursuit would offend the territorial sovereignty of that third state, not that it would offend the general principle of a state’s exclusive jurisdiction over a ship that flies its flag. The exclusivity of the flag state’s jurisdiction is already lost at the time the hot pursuit lawfully commences, and the jurisdictional link between the coastal state and the pursued vessel should not be extinguished simply because the ship enters the territorial sea of another state. As Baird argues, the fleeing vessel “should be denied the protection afforded by Article 111 where entry into a third state’s territorial sea has been a deliberate act to avoid apprehension”.<sup>118</sup>

A coastal state may, of course, permit the pursuit through its territorial sea and there are numerous instances where this has been done.<sup>119</sup> Nevertheless, the apprehended vessel’s flag state could challenge the legality of the arrest and the arresting state would be required to argue that art 111(3) should be given a broad and purposive interpretation rather than a strict and narrow one.<sup>120</sup>

### Use of Force in Hot Pursuit

It is accepted in international law that a coastal state may resort to the use of force in order to arrest of a suspect vessel.<sup>121</sup> Indeed, the right of hot pursuit without a corresponding right to use force to effect it “would be a nullity”.<sup>122</sup> The force used, however, must be reasonable in the circumstances and the coastal state will be held responsible for any excesses.<sup>123</sup> In the case of *I’m Alone*, the Commission held:<sup>124</sup>

[The United States was permitted to] use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purposes, the pursuing vessel might be entirely blameless.

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117 Ibid, at 581.

118 Baird “Hot Pursuit”, above n 30, at 13.

119 Australia–France Treaty, above n 48; Niue Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (opened for signature 9 July 1992, entered into force 20 May 1993), art VI.

120 Gullet and Schofield, above n 50, at 567.

121 O’Connell, above n 5, at 1073; Reuland, above n 8, at 585; Churchill and Lowe, above n 25, at 215.

122 Reuland, above n 8, at 585.

123 Churchill and Lowe, above n 25, at 215.

124 Poulantzas, above n 5, at 65; O’Connell, above n 5, at 1073. In this case, however, the intentional sinking of the *I’m Alone* was not justified.

The coastal state should, however, use all practical means available to it to effect the arrest without using force, and any use of force should be graduated, commencing with, for example, a warning shot.

### **Unjustified Hot Pursuit**

UNCLOS art 111(8) provides that if a ship has been stopped in circumstances where the right of hot pursuit was not justified then “it shall be compensated for any loss or damage that may have been thereby sustained”. There is also the possibility of further recourse through arts 110(3)<sup>125</sup> and 304.<sup>126</sup> It has been suggested that, because of these provisions, coastal states are unlikely to abuse the right of hot pursuit.<sup>127</sup>

Nevertheless, these recourses are only available for states, not natural persons,<sup>128</sup> and so the owners of the vessel would first, have to convince their flag state to instigate proceedings. They would also need to exhaust local procedures. The whole process, therefore, is likely to be expensive and time consuming. Furthermore, the unlawful exercise of the right of hot pursuit has not prevented some coastal states from commencing criminal prosecutions against the offenders, nor has it affected the admissibility of any evidence obtained as a result of the hot pursuit.<sup>129</sup>

## **V CONCLUSION**

The doctrine of hot pursuit has entered the 21st century essentially unchanged from its original formulations. However, this traditional notion of hot pursuit, as reflected in art 111 of UNCLOS, “was better suited to a time where the seas were largely subject to a laissez-faire regime, most states asserted only a three-mile territorial sea, and fisheries were confined to local waters”.<sup>130</sup> The operational maritime environment that the doctrine regulates — and, consequently, the uneasy balance that exists between the rights of coastal and maritime states — has changed dramatically since the time when UNCLOS was negotiated. This change is probably far greater than the initial scholars and professionals who were charged

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<sup>125</sup> Allen, above n 30, at 321 note 184. UNCLOS, above n 1, art 110(3) provides: “If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”

<sup>126</sup> Molenaar, above n 10, at 36; UNCLOS, above n 1, art 304 provides: “The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.”

<sup>127</sup> Molenaar, above n 10, at 36.

<sup>128</sup> *Ibid.*, at 36; UNCLOS, above n 1, art 291(1).

<sup>129</sup> Allen, above n 30, at 321; Gilmore “Hot pursuit”, above n 60, at 111.

<sup>130</sup> Tasikas, above n 90, at 80.

with its codification ever imagined. As Judge ad hoc Shearer stated in his dissenting opinion in the *Volga* case:<sup>131</sup>

The Tribunal itself has referred to [the] balance [between the interests of flag and coastal states] in its Judgment in the “*Monte Confurco*” Case, at paragraphs 70–72. It is still thought by some that this balance should be preserved exactly as it was conceived at the time of the Third United Nations Conference on the Law of the Sea, 1973–1982. But it should be recognised that circumstances have now changed. Few fishing vessels are state-owned. The problems today arise from privately owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalised and efficient, and some of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel’s owners. A new “balance” has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.

Technological developments are also changing the face of maritime law enforcement operations and it is now possible to detect and track offending vessels using a variety of new technologies. The ability to utilise such technologies is vital if a coastal state is to enforce its laws and regulations adequately and effectively as well as protect its vital marine resources. In this respect, the right of hot pursuit is an important tool in a coastal state’s enforcement armoury.

But it is not entirely clear whether art 111 of UNCLOS will prove to be robust enough to meet the demands of modern day maritime law enforcement procedures. For example, there are doubts as to whether art 111 will permit a coastal state to detect an offending vessel using satellite or other imagery while an enforcement craft is not yet within visual range, or to track a vessel using this technology when the enforcement vessel has lost visual sight of the fleeing ship. Nor is it clear whether art 111 will permit the coastal state to use radio or other modern satellite communications to provide the offending vessel with the requisite signal to stop. Only time will tell whether the law will prove flexible enough to prevent an offending vessel from exploiting the rigid requirements of art 111 and thereby avoiding arrest by entering a third state’s territorial sea.

This article has argued that it is possible for art 111, in its current

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131 *Volga* (*Russian Federation v Australia*) (*Dissenting Opinion of Judge ad hoc Shearer*) (2003) 42 ILM 159 at [19].



formulation, to be given a liberal and purposive interpretation, enabling it to remain effective and relevant in the modern era. Such an interpretation should not be seen as further evidence of “creeping” coastal state jurisdiction at the expense of the freedom of the high seas, but should be viewed as a reflection of the law adapting to remain effective in a modern context and in light of developing state practice.<sup>132</sup> Much will depend, however, upon the resolve and foresight of the ITLOS judges who will be required to adjudicate on such questions. It is hoped that they will allow the law to evolve in order to permit the effective exercise of the right of hot pursuit in the 21st century.

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<sup>132</sup> Baird “IUU Fishing”, above n 3, at 334; Baird “Hot Pursuit”, above n 30, at 16.