

THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW

Second edition

by

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SECTION III

CRAFT ENTITLED TO THE RIGHT OF HOT PURSUIT

The coastal State is entitled to pursue, arrest and pass judgment on foreign vessels²⁷¹ following a violation of its laws and regulations by these ships or by persons on board them. The authorities of a State which may carry out the pursuit and seizure of a foreign vessel on the high seas should be described precisely so that abuses are avoided.

The teachings of publicists relating to this question have not been unanimous. Thus, MÖLLER²⁷² believes that the exercise of the right of hot pursuit belongs in general to the authorities. Similarly, CALVO²⁷³

271. The question against which vessels the right of hot pursuit may be exercised is closely connected with the problem of immunity of vessels in international law. Cf. also the Brussels Convention of April 10, 1926, on the immunity of State ships. See also in general, T. K. THOMMEN, *Legal Status of Government Merchant Ships in International Law*, The Hague, 1962.

At the Geneva Codification Conference of 1958, the representative of Bulgaria proposed that government merchant vessels should be exempted from the application of visit and hot pursuit. The Conference rejected such a distinction, and Article 23 of the Geneva Convention on the High Seas provides generally for a "foreign ship" (cf. *United Nations Conference on the Law of the Sea, Official Records*, Vol. 4, 1958, p. 90). By combining this fact with Article 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, which reads: "the rules contained in subsections A and B shall also apply to government ships operated for commercial purposes", one may conclude that the right of hot pursuit is also applicable against government ships operated for commercial purposes. Indeed, this last Convention assimilates, so far as innocent passage is concerned, private merchant vessels with government merchant ships. One may also reach the same conclusion by referring to Article 9 of the Convention on the High Seas. However, see the reservations made to Article 21 of the Convention on the Territorial Sea and the Contiguous Zone (*U.N.Doc.No.ST/LEG/3, Rev. 1*) by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Roumania, the Ukrainian Soviet Socialist Republic and the U.S.S.R., to the following effect: "government ships in foreign waters have immunity and that the measures set forth in this article may therefore apply to such ships only with the consent of the flag State". Likewise, reservations were made by the governments of the above States, plus Poland, to Article 9 of the Convention on the High Seas to the effect that "the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships".

Regarding warships and government vessels operated for non-commercial purposes, one may conclude, by taking into account general provisions of international law on the immunity of certain categories of vessels, that hot pursuit is not allowed against these ships. One reaches the same conclusion when reading together Articles 22 and 23 of the Geneva Convention on the Territorial Sea and the Contiguous Zone as well as Articles 8 and 9 of the Geneva Convention on the High Seas. Only in self-defence would a vessel of the coastal State be entitled to pursue and arrest ships of this category.

272. *Op. cit.*, p. 208.

273. *Op. cit.*, p. 567.

delegates this right to the competent authorities, and ORTOLAN²⁷⁴ to the local police authorities. HYDE²⁷⁵ and BLUNTSCHLI²⁷⁶ also assign this right to the local jurisdiction. Other publicists like OPPENHEIM²⁷⁷ and LE MOINE²⁷⁸ think that warships of the coastal State are entitled to the right of hot pursuit of offending vessels. PIGGOTT²⁷⁹ and GIDEL²⁸⁰ require the pursuing ship to fulfil certain prerequisites or to have a special authorization. The view of RIVIER²⁸¹ that all vessels of the coastal State are entitled to a right of hot pursuit has been generally criticized. McDUGAL and BURKE²⁸² think that the pursuing vessel "must be acting on behalf of some political authority, presumably a State or an intergovernmental organization, in order that responsibility for unlawful conduct can be imposed and future transgressions prevented". They further consider it sufficient for this purpose that "the State or other entity designate the vessels authorized to enforce its laws and furnish documents evidencing this authorization". It is, however, submitted that vessels belonging to intergovernmental organizations have little significance for the exercise of the right of hot pursuit, since the other prerequisites of hot pursuit are also necessary for the lawful practice of this right. One of these prerequisites is the commencement of hot pursuit from within the territorial waters or the contiguous zone of a coastal State. However, an intergovernmental organization does not possess, at any rate up to the present a territorial sea or contiguous zone in which hot pursuit may commence.

The question, as to which organs should be employed by the coastal State for the exercise of the right of hot pursuit, had not been the subject of discussions during international codification efforts of the law of the sea, until the establishment of the I.L.C. All Drafts prepared by International Institutes and Associations since 1888 which, *inter alia*, provided for the right of hot pursuit, simply read that the coastal State has the right to start and continue the pursuit of a foreign offending vessel on the high seas.²⁸³ No special mention was made of the organs of the coastal State entitled to exercise the right of hot pursuit.

Article 10, para. 2, of the Draft Convention prepared by a Sub-Committee for the Hague Conference of 1930 contained simply the general wording, "the coastal State has the right to continue on the high seas

274. *Règles internationales et diplomatie de la mer*, Paris, 1845, p. 251.

275. *Op. cit.*, p. 794.

276. *Op. cit.*, p. 201.

277. *Op. cit.*, p. 604.

278. *Op. cit.*, p. 36.

279. *Op. cit.*, p. 37.

280. *Op. cit.*, Vol. III, pp. 339-340.

281. *Op. cit.*, p. 151.

282. *Op. cit.*, p. 894.

283. See *supra*, Chapter II, Section I.

the pursuit ...". The Base of Discussion No. 26 which was prepared by a Preparatory Committee and was submitted to the Hague Codification Conference, likewise referred to "the pursuit of a foreign vessel, regularly commenced by the coastal State ...". Also Article 11 of the Annex to the Resolution as drafted by the Second Commission contained no special mention of the vessels of the coastal State which are entitled to hot pursuit. The same is noticed in some other multipartite and bipartite treaties. Thus, Article 9 of the Convention for the Suppression of Contraband Traffic in Alcoholic Liquors of 1925 referred in general to "the authorities of the country exercising control over the zone in question ...". However, a group of bipartite treaties, concluded between Egypt and various other States, read that the Egyptian customs officers are entrusted with the carrying out of hot pursuit against foreign offending vessels. Still more precise was the 1929 Convention between the Finnish Republic and the U.S.S.R., which said that the right of hot pursuit may be exercised by coast-guard vessels of the two countries. A similar wording is contained in some national laws.²⁸⁴

Article 23, para. 4, of the Geneva Convention on the High Seas provides expressly: "The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect".²⁸⁵ The meaning of this paragraph is quite clear. The right of hot pursuit may be exercised only by warships and military aircraft, or by other ships and aircraft in Government service, on the condition that they are specially authorized to that effect. Hence, government ships in commercial service are incompetent to exercise this right.

Warships and military aircraft irrespective of their size, type and whether they belong to the naval, aerial or land forces of the coastal State, are entitled to the exercise of the right of hot pursuit. Accordingly, small fast surface craft belonging to the aerial forces and used for the rescue of aircraft and crew in case of an accident may be employed to this end. Every kind of craft belonging to the land forces and used, *e.g.*, for landing of troops on the coast, may also be used for hot pursuit. So may aircraft, seaplanes and helicopters of the air, naval or ground forces of the coastal State. However, "fleet auxiliaries" must be specially commissioned in order to be entitled to act as warships.²⁸⁶

284. See *supra*, Chapter II, Section III. For relevant case-law, see *supra*, p. 62 ff.

285. In other passages of Article 23 of the Convention on the High Seas, reference is made to "the competent authorities of the coastal State", to "the ship giving the order" as well as to "the pursuing ship".

286. *Cf.* as to "fleet auxiliaries" the opinion of COLOMBOS (*op. cit.*, p. 465). He also thinks that they must be specially commissioned in order to act as warships. Nevertheless, in a later passage (*ibid.*, p. 778 ff.), under the term "armed ship", the learned author includes fleet auxiliaries as well.

It is submitted that the interpretation of the terms "warship"²⁸⁷ and "military aircraft"²⁸⁸ has broad scope under the article on hot pursuit. Thus, under the term "warships" are included not only surface vessels,

287. For a definition of "warships", Article 8, para. 2, of the Geneva Convention on the High Seas provides: "For the purposes of these articles, the term 'warship' means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline". Cf. also the Hague Convention VII of 1907, regarding the conversion of merchant ships into warships. Thus, a merchant vessel converted into a warship must bear the naval ensign and have the outward appearance of a warship. It must further be under the command of a commissioned officer and the crew must be subject to naval discipline. Finally, the conversion must be notified and the vessel should conform to the laws of war. (See also, H. A. SMITH, *op. cit.*, p. 103). These provisions, although intended only for wartime, have also great importance for peace time (cf. OPPENHEIM-LAUTERPACHT, *op. cit.*, p. 852). Ships chartered by a State for certain public purposes have, by virtue of their commissions, the character of warships. Privateers also by virtue of their commission (*letters of marque*) used to enjoy the same character as warships (cf. *ibid.*, p. 852; C. J. COLOMBOS, *op. cit.*, pp. 422, 471-473, 713). For a definition of "warships" in English law, contained in the Naval Discipline Act of 1957, as well as for such a definition in the United States Law, contained in the Proclamation of the President of the United States of May 23, 1917, see C. J. COLOMBOS, *op. cit.*, p. 236; G. GIDEL, *op. cit.*, Vol. I, pp. 96-102. See further Article 2 of the *Oxford Manual on the Laws of Naval Warfare*, the definition of the Institute of International Law, in *Annuaire of the Institute*, 1913, p. 643, as well as the French Decrees of September 29, 1929, and October 1, 1934. Cf., finally, Article 133 of the Italian Decree of July 8, 1938.

288. Military aircraft was defined by Article 31 of the Paris Convention of 1919 as that under military command. The Chicago Convention on International Civil Aviation of December 7, 1944, without giving a definition of military aircraft, states in Article 3 (b): "Aircraft used in military, customs and police services shall be deemed to be State aircraft".

It has been, however, proposed that since the Chicago Convention does not give an explicit definition of military aircraft, it is the use of the aircraft in each specific case which qualifies it (cf. MING MIN PENG, "La définition de l'aéronef militaire", in *R.F.D.A.*, 1956, p. 121 ff.; the same, *Le statut juridique de l'aéronef militaire*, The Hague, 1957, pp. 20-49; J. VERPLAETSE, *International Law in Vertical Space*, South Hackensack N.J., 1960, p. 76; A. MEYER, "Zum Begriff Militärluftfahrzeug", in *Zeitschrift für Luftrecht und Weltraumrechtsfragen*, 1963, pp. 133-147). Thus, military aircraft, according to this functional criterion, would include all aircraft used directly or indirectly by a State for military or auxiliary purposes. Registration of the aircraft, as criterion for its definition, is not useful because State aircraft are not obliged to be registered. Nevertheless, military aircraft bear, at least in peace time, national emblems and external marks such as those, e.g., provided for in Article 36 of the Geneva Sanitary Convention of 1949 which deals with medical aircraft (see *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne. Commentaire publié sous la direction de JEAN PICTET*, Vol. I, Geneva, 1952, pp. 316-327).

For a discussion of State aircraft in comparison with State ship, see: BIN CHENG,

but also submarines, as under the term "military aircraft" are included not only airplanes but also seaplanes and helicopters.

According to this article, warships and military aircraft need no special authorization. Nevertheless, military aircraft or warships will usually intervene after a special order is given to them, or are summoned by State authorities, in case of infringement of laws whose enforcement is left to some other authority of the coastal State like, *e.g.*, the coastal police or fishery protection vessels, when such special vessels do not happen to be on the spot of an infringement. This order bears no relation to the special authorization required by the article on hot pursuit. At any rate, many of these questions of competence concern only the internal legislation of States.

The other group of pursuing craft of the coastal States is represented by ships²⁸⁹ or aircraft in government service.²⁹⁰ In this group are included

"State Ships and State Aircraft", in *Current Legal Problems*, 1959, pp. 225, 233 ff.; I. H. PH. DE RODE-VERSCHOOR, *Inleiding tot het Luchtrecht*, Haarlem, 1960, p. 30 ff.; the same, "The Legal Status of State Aircraft", in *Il diritto aereo*, 1963, p. 115 ff. The Rules of Air Warfare drafted by a Commission of Jurists at the Hague, between December 1922 and February 1923, in Article 2 provided that, "The following shall be deemed to be public aircraft:

(a) Military aircraft.

(b) Non-military aircraft exclusively employed in the public service. All other aircraft shall be deemed private aircraft".

Further Article 3 provided: "A military aircraft shall bear an external mark indicating its nationality and military character".

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokio, on September 14, 1963, in Article 1, para. 4, provides: "This Convention shall not apply to aircraft used in military, customs or police services". Moreover, reference to military and State aircraft is made in Article 1 of the International Sanitary Convention for Aerial Navigation of 1933 as well as in Article 3, para. 1, of the Convention Concerning Precautionary Arrest, signed at Rome on May 29, 1933. Finally, the Air Navigation General Regulations, made on March 5, 1949, which came into operation on April 1, 1949, in section 1(2) provide: "Military aircraft includes naval, military and air force aircraft, and every aircraft commanded by a person in naval, military or air force service detailed for the purpose shall be deemed to be a military aircraft".

289. For qualifying the term "ships on government service", reference may be made to Article 9 of the Geneva Convention on the High Seas: "Ships owned or operated by a State and used only on government non-commercial service ...". Reference also to government ships other than warships is made in Article 22, para. 1, of the Geneva Convention on the Territorial Sea and Contiguous Zone: "The rules contained in subsection A and in Article 18 shall apply to government ships operated for non-commercial purposes". For the legal status of such government ships or public ships, *cf.* COLOMBOS, *op. cit.*, pp. 243-247; OPPENHEIM, *op. cit.*, p. 856 ff. For an interesting classification and enumeration of public vessels used by the Italian customs authorities, see L. BURATTI, *op. cit.*, pp. 31-32. Italian laws attribute the character of warships to such vessels.

290. The term "aircraft on government service", as opposed to private and military aircraft, may be made clear by referring to Article 2 (b) of the Hague Rules of Air Warfare of December 1922 and February 1923: "(b) Non-military

coast-guard ships, fishery protection vessels, police vessels, etc., or aircraft, seaplanes and helicopters assigned to similar services. The difference between the second group of craft and the first one is that, according to Article 23, para. 4, of the Geneva Convention on the High Seas, the ships or aircraft on government service should be specially authorized²⁹¹ to exercise the right of hot pursuit against foreign infringing vessels. Should vessels in government service exercise a right of hot pursuit without special authorization, the international responsibility of the state may be incurred.²⁹²

The prerequisite of a special authorization, which is indispensable to ships or aircraft in government service, to start and continue a pursuit on the high seas serves to keep the exercise of the right within limits of moderation and to avoid breaches of international law which might occur through action taken by unauthorized and irresponsible craft. This special authorization required by the Convention does not apply in every special case, but is a general authorization to special classes of vessels, like coast-guard ships, fishery protection vessels, to exercise their special duties for the enforcement of which the right of hot pursuit will be also permitted.

The remarkable innovation introduced by Article 23 of the Geneva Convention on the High Seas, *i.e.*,²⁹³ that the right of hot pursuit is also granted to aircraft, had been proposed by the Governments of Norway, Iceland and the United Kingdom. The most keen supporter of this proposal was the representative of the United Kingdom FITZMAURICE,

aircraft exclusively employed in the public service". Moreover, this term may well include not only customs and police aircraft, mentioned in Article 3(b) of the Chicago Convention, but also other categories of State aircraft if they are specially authorized to that effect. For a useful discussion of the use of aircraft against contraband traffic, see P. MECCARIELLO, "L'esplorazione aerea nella difesa anticontrabbando", in *Rivista della Guardia di Finanza*, 1958, p. 45 ff.

291. The requirement of "authorization" is also met in section 581 of the United States Tariff Act of 1922 which reads: "Boarding Vessels—Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury ...". In the second paragraph it reads: "Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States ...".

292. See in general on international responsibility CH. DE VISSCHER, *Théories et réalités en droit international public*, Paris, 1953, pp. 335-346; C. TH. EUSTATHIADÈS, "Nouvelles tendances du droit international (Responsabilité et sujets du droit international)", in *The Hague Academy, Recueil des Cours*, Vol. 84, 1953, pp. 401-614; SEIDL-HOHENVELDERN, *Völkerrecht*, Berlin, 1965, pp. 263-267; S. STRATIS-CALOGEROPOULOS, *Public International Law*, (in Greek), Athens, 1946; N. M. POULANTZAS, "The Individual Before International Jurisdictions", in *R.H.D.I.*, 1962, pp. 375-390. See also *infra*, pp. 252-268.

293. For an interesting general discussion of the work of the I.L.C. and of the Geneva Conference on the International Law of the Sea, see M. Bos, *Rondom de Codificatie van het Volkenrecht*, Leyden, 1959, p. 16 ff.

who proposed during the work of the I.L.C. the additional paragraphs 5-7 to the article on hot pursuit. Para. 5 reads: "Subject to the following rules, pursuit may legitimately be affected by means of aircraft. The provisions of para. 1 to 4 of the present article shall apply *mutatis mutandis* to any such pursuit".²⁹⁴ However, during the discussion of the proposal in the I.L.C. there was rather strong opposition on the part of some of its members, among whom were FRANÇOIS, KRYLOV and AMADO.

After long discussions, para. 4 of Article 47 of the Draft of the I.L.C. dealing with the right of hot pursuit came to provide that this right "may be exercised only by warships or military aircraft or other ships or aircraft on government service specially authorized to that effect". It was this wording that finally became paragraph 4 of Article 23 of the Geneva Convention on the High Seas.

SECTION IV

POSITION OF THE VESSELS AND OTHER PREREQUISITES FOR THE COMMENCEMENT OF HOT PURSUIT

1) *Simultaneous Presence of the Vessels in the Same Zone*

The question of the position of the vessel of the coastal State when giving the order to stop to the foreign suspected vessel caused some controversy in the past. The problem was: when the suspected vessel is in the territorial waters or the contiguous zone of the coastal State, should the ship giving the order to stop likewise be in the same zone? The problem of the simultaneous presence of the two vessels in the same zone was connected with the effectiveness of hot pursuit, because if this presence was required the offending vessel could more easily escape and avoid arrest.

Article 8 of the Draft prepared by the Institute of International Law at its Paris session in 1894 required that both vessels be within the limits of the territorial sea. The question arose again during the Hague Codification Conference of 1930, when the Danish delegation proposed that for the lawful commencement of the pursuit it was necessary that only the suspected vessel was at the moment of the beginning of the pursuit in the territorial waters of the coastal State. RAESTAD, GWYER, BADAWI and SCHÜCKING²⁹⁵ expressed agreement with this proposal, whereas the Italian representative GIANNINI considered it necessary that the appre-

294. *Yearbook of the I.L.C.*, Vol. I, 1956, p. 52, para. 35. See for an extensive discussion of this question, *infra*, p. 215 ff.

295. See *Kodifikationsversuch* etc., p. 43.