The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention

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I. INTRODUCTION

The right of hot pursuit is today firmly established in the law of nations. A state may, as a general proposition, pursue and seize a non-national vessel suspected of having committed a delict within the state's maritime jurisdictional zones where the vessel flees to the high seas to avoid arrest. The right of hot pursuit is an exception to the general rule that a ship on the high seas is subject only to the jurisdiction of the state whose flag she flies. The right of hot pursuit is codified in the two comprehensive conventions on the law of the sea and enjoys all the sanction of modern state practice and opinion.

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. The inadequacies and ambiguities on the margins result mainly from a lack of considered state practice and relevant case law. Simply put, the right of hot pursuit is rarely exercised. The dearth of practical application and judicial consideration of the right stifles its development at the outer edges, leaving a core of general axioms—and not much else.

In this Article, I shall address the right of hot pursuit as codified in the recent sea conventions and as practiced by states. In doing so, I shall point out several important ambiguities of the black letter law and suggest some possible approaches to resolving them.

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II. THE REASON FOR HOT PURSUIT

The right of hot pursuit is an extraordinary right that at first blush appears offensive to the right of private ships to navigate freely upon the high seas. Absent extraordinary circumstances, private ships sailing the high seas are subject to the exclusive jurisdiction of the state whose flag they fly.[1] This principle—known as the exclusivity rule of flag-state jurisdiction—is a pillar of the international law of the sea,[2] and exceptions to it are drawn only in circumstances of extreme necessity.[3] The assertion of jurisdiction over a foreign ship on the high seas is tolerated under international law only when respect for exclusive flag-state jurisdiction would not unduly suffer from a momentary suspension of the general rule.[4] Exceptions to the exclu-

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1. The Permanent Court of International Justice held in the *Lotus* case that
> vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.

Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7); see also The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826); Le Louis, 2 Dods. 210, 243, 165 Eng. Rep. 1464, 1475 (1817).

2. The notion of exclusivity of flag-state jurisdiction is codified in the Geneva Convention on the High Seas, opened for signature Apr. 29, 1958, art. 6(1), 13 U.S.T. 2312, 2315, 450 U.N.T.S. 82, 86 (entered into force Sept. 30, 1962) [hereinafter HSC]; and in the United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 92(1), U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1261-87 (1982) [hereinafter LOSC].

On the principle of exclusivity of flag-state jurisdiction, see generally J.L. Brierly, The Law of Nations 304-10 (Sir Humphrey Waldock ed., 6th ed. 1963); Ian Brownlie, Principles of Public International Law 238-42 (3d ed. 1979); 2 D.P. O'Connell, International Law 645-47 (2d ed. 1970) [hereinafter O'Connell, International Law]; 2 D.P. O'Connell, The International Law of the Sea 735-37, 799-801 (I.A. Shearer ed., 1984) [hereinafter O'Connell, Law of the Sea]; 1 L. Oppenheim, International Law 582-94 (H. Lauterpacht ed., 8th ed. 1955).

3. The Law of the Sea Convention provides that the exclusivity rule of flag-state jurisdiction may be suspended where there is a reasonable basis for suspecting that a ship encountered on the high seas is engaged in one of a number of proscribed activities or is of a particular condition. LOSC, supra note 2, art. 110. In particular, a duly authorized vessel of any state may approach and visit a ship reasonably suspected of (i) piracy, (ii) trading in slaves, (iii) unauthorized broadcasting, (iv) being stateless, or (v) being in reality the same nationality of the approaching vessel, although flying the flag of another state. Id. art. 111(1). For an extended analysis of this issue, see Robert C. Reuland, Note, Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction, 22 Vand. J. Transnat'l L. 1161 (1990).

4. As a practical matter, the danger of interference with the freedom of the high seas remains mostly conjectural. McDougal and Burke write that hot pursuit on the high seas "is needed but seldom, and it is doubtful that the recognition of such a competence in the coastal state offers any serious threat to unhindered navigation upon the high seas." Myres S. McDougal & William T. Burke, The Public Order of the Oceans 894 (1962).

In any event, it is absurd to claim that a vessel fleeing desperately onto the high seas is merely enjoying the right of free navigation. Such a vessel has no reasonable expectation to enjoy the freedom of navigation, for that is not the purpose for which she takes to the high

sivity rule permit states to seize, for example, pirate ships, traders in slaves, and stateless vessels.[5] The right of hot pursuit is similarly exceptional.[6]

International practice and opinion sanction such exceptions to the exclusivity rule so that the high seas may not provide safe haven for those who act contrary to international order. The extraordinary measure of hot pursuit is indeed contrary to the exclusivity rule of flag-state jurisdiction, but it is in accord with the overarching objective of order on the high seas—a fundamental principle that supports both the rule of exclusive flag-state jurisdiction and the rule forbidding interference with non-national ships.[7]

Apart from the undoubted benefits that inure to the international community of states by operation of the right of hot pursuit, the right remains of primary interest to coastal states in the enforcement of local law. The right ensures that a state may effectively enforce its laws and regulations against non-national ships that flee onto the high seas where, but for the right of hot pursuit, the state would be legally powerless to exercise its enforcement jurisdiction. Hall writes that hot pursuit "is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that *it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.*"[8]

The right to pursue ships onto the high seas is therefore a right of necessity,[9] for without the right of hot pursuit, the laws and regulations of the littoral state are largely unenforceable against fleeing ships.[10] Limiting a state's enforcement jurisdiction to its marginal

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seas. A fleeing vessel seeks to escape capture and punishment, nothing more. The freedom of the high seas is a right; it ought not be used to cloak wrongdoers from the just execution of the law.

5. See generally Reuland, supra note 3 (analyzing exceptions to the exclusivity rule of flag state jurisdiction).

6. O'Connell, International Law, supra note 2, at 646; see Brownlie, supra note 2, at 254-55.

7. McDougal & Burke, supra note 4, at 895. See generally Reuland, supra note 3 (discussing exceptions to the exclusivity rule).

8. William E. Hall, A Treatise on International Law 252 (J.B. Atlay ed., 6th ed. 1909) (emphasis added).

9. See 1 John Westlake, International Law 177 (2d ed. 1910) (arguing that the right of hot pursuit is "necessary to the effective administration of justice"). Brownlie observes that the right of hot pursuit "exists in order that the exercise of jurisdiction within territorial waters should be effective." Ian Brownlie, International Law and the Use of Force by States 302 (1963) [hereinafter Brownlie, Use of Force].

10. Professor Sir Hersch Lauterpacht explains that without the right of hot pursuit, "the enforcement by the State of its protective jurisdiction within its territorial waters tends to become nugatory." 3 Hersch Lauterpacht, International Law 173 (E. Lauterpacht ed., 1977).

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 state's territorial jurisdiction are exempted from the exclusivity rule.[11]

But a state's interest in the enforcement of its laws is not unqualified, and pursuit must terminate in the territorial waters of the flag state of the pursued vessel or in the territorial waters of a third state.[12] In other words, international law recognizes a state's right to administer its laws and regulations effectively, except insofar as there exist countervailing interests of greater weight. Such an interest arises when a pursuing vessel violates the territory of another sovereign. A state's right to administer its laws in the course of hot pursuit therefore ends at the territorial sea of another state.[13] The right of hot pursuit, then, reflects a pragmatic balance of the littoral state's interest in the enforcement of its laws against the interest of the international community of states in the free use of the oceans and in the integrity of territorial jurisdiction.[14]

Although modern international practice and opinion support the notional existence of hot pursuit, there remains some difficulty in pigeonholing the concept—which is variably referred to as a right,[15] a

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11. O'Connell writes:

> where jurisdiction would be properly exercisable intraterritorially, it is unreasonable that it should abruptly terminate the moment the line of demarcation between territory and high seas is reached. Where an offender escapes into neighboring territory the situation is different, because to follow him involves intrusion into foreign territory. But when the pursuit enters the high seas, there is no sovereign to be affronted, other than the State of the flag, and it is inappropriate that the latter should oppose the effective administration of justice.

O'Connell, Law of the Sea, supra note 2, at 1077 (citation omitted).

12. See infra part III.D.

13. Nicholas M. Poulantzas, The Right of Hot Pursuit in International Law 187-91 (1969); HSC, supra note 2, art. 23.

14. See generally Poulantzas, supra note 13, at 39-41 (discussing the right of hot pursuit before the Law of the Sea Convention).

15. The hot pursuit provisions of the 1982 Convention on the Law of the Sea appear under the heading of the "Right of Hot Pursuit." LOSC, supra note 2, art. 111. The Judge Advocate General of the United States Navy refers to hot pursuit as "a law enforcement action." Department of the Navy, Office of the Chief of Naval Operations, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations NWP 9 (Rev. A)/FMFM 1-10, at 3-15 (1989) [hereinafter Commander's Handbook].

doctrine,[16] a privilege,[17] and as "not a strict right by International law, but . . . something which nations will stand by and see done."[18] Although the distinction may be purely semantic—for states recognize hot pursuit regardless of its classification—this uncertainty points up an underlying ambivalence that merits further attention. Any unwillingness on the part of states to refer to hot pursuit as a proper right undoubtedly stems from states' historic concern for the exercise of jurisdiction over their merchant fleets by other states.[19] States only grudgingly make exceptions to the exclusivity principle of flag-state jurisdiction. And the few such exceptions that do exist obtain only in extreme circumstances.[20] The right to pursue the ship of another state onto the high seas and seize her is an extreme act and one that states will not readily applaud, even if the need for such pursuit is obvious. But despite the historic distaste for such exceptions to the exclusivity rule, there can be little doubt that today hot pursuit exists as a proper customary right. The public and private codifications of international law over the past century, as well as the writings of the best known publicists, evince a solid customary basis for the assertion of the right of hot pursuit.[21]

III. ANALYSIS OF THE RIGHT OF HOT PURSUIT

A. *Participants in Hot Pursuit*

1. Pursuing Vessels

The instrumentalities through which a littoral state may lawfully exercise the right of hot pursuit are limited to certain ships and aircraft having a unique connection to the governmental authority of the state. The 1958 Convention on the High Seas provides in article 23(4)

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16. Colombos labels hot pursuit interchangeably as a "doctrine" and as a "right," although he appears to prefer the former term. C. John Colombos, The International Law of the Sea §§ 171-79 (6th rev. ed. 1967).

17. O'Connell observes:

> *The "right" of hot pursuit is really a privilege* founded on the breach of a double duty on the part of the offending vessel. The first breach is that of the local law, as in fishing without a license; the second is that of failure to surrender when the power to compel surrender has been exercised by the local authorities. The latter may then elect to pursue.

O'Connell, Law of the Sea, supra note 2, at 1077-78 (citation omitted) (emphasis added).

18. Statement of Sir Charles Russell, reprinted in Fur Seal Arbitration, 13 Proc. Trib. Arb. 300 (U.S.-Gr. Brit. 1895).

19. See generally Reuland, supra note 3 (discussing the exclusivity principle in depth).

20. See generally id.

21. Brownlie, Use of Force, supra note 9, at 302; O'Connell, Law of the Sea, supra note 2, at 1079.

that "[t]he right of hot pursuit may be exercised only by warships or military aircraft."[22] The Convention further provides that "other ships or aircraft on government service specially authorized to that effect"[23] may also engage in hot pursuit. Article 111(5) of the 1982 Convention on the Law of the Sea maintains this distinction between military craft and specially authorized ships and aircraft, although it additionally provides that specially authorized ships and aircraft must be "clearly marked and identifiable" as such.[24] Both conventions limit the exercise of the right to those craft vested with the imprimatur of state authority.[25] This limitation ensures state responsibility for the actions of instrumentalities authorized to act on behalf of the state.[26] A state need not manifest its connection to warships and military aircraft, for the connection between such instrumentalities and the state is self-evident.[27] Other pursuit craft must be specifically authorized to exercise the right of hot pursuit.[28]

The first category of pursuit craft named in the two sea conventions comprises warships and military aircraft. A warship, within the meaning of the 1958 High Seas Convention, is "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."[29] The 1982 Convention on the Law of the Sea follows this

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22. HSC, supra note 2, art. 23(4). For convenience of reference, the term "warship" used below shall refer to any ship or aircraft, whether military or otherwise, competent to exercise the right of hot pursuit.

23. Id. The provision reads in full: "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." Id.

24. The entire provision reads: "The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect." LOSC, supra note 2, art. 111(5).

25. Id.; HSC, supra note 2, art. 23(5).

26. McDougal & Burke, supra note 4, at 894. On state responsibility for wrongful hot pursuit, see infra part III.E.6.

27. HSC, supra note 2, art. 23(4); LOSC, supra note 2, art. 111(5). Poulantzas nevertheless warns that

> military aircraft or warships will usually intervene after a special order is given to them, or [after they] are summoned by State authorities, in case of infringement of laws whose enforcement is left to some other authority of the coastal State like . . . 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.

Poulantzas, supra note 13, at 196.

28. HSC, supra note 2, art. 23(4); LOSC, supra note 2, art. 111(5).

29. HSC, supra note 2, art. 8(2).

definition, but adds that a warship may belong to "armed forces" of a state, not merely to the naval forces thereof.[30] Although neither sea convention defines "military aircraft," it is not illogical to assume that the term as there employed refers to the aircraft analogue of a warship: a military aircraft is an aircraft belonging to the armed forces of a state, bearing the markings as such, and subject to the command of armed forces personnel under discipline.[31]

The second category of pursuit craft consists of ships or aircraft in government service other than warships or military aircraft.[32] Such government instrumentalities, unlike warships or military aircraft, must be authorized to exercise the right of hot pursuit[33] and, pursuant

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30. LOSC, supra note 2, art. 29.

31. See Poulantzas, supra note 13, at 195-96 n.288; see also infra part III.E.5 (pursuit by aircraft is a progressive development of the High Seas Convention, which presents certain unique problems); cf. HSC, supra note 2, art. 8(2); LOSC, supra note 2, art. 29 (giving the analogous definition for a warship).

32. HSC, supra note 2, art. 23(4); LOSC, supra note 2, art. 111(5).

33. HSC, supra note 2, art. 23(4); LOSC, supra note 2, art. 111(5). The commentary to the International Law Commission draft High Seas Convention indicates as follows:

> The Commission wished to make it clear that the right of hot pursuit may be exercised only by warships and ships on government service specially authorized by the flag State to that effect. It is quite natural that customs and police vessels should be able to exercise the right of hot pursuit, but there can be no question of government ships on commercial service, for example, claiming that right.

Report of the International Law Commission to the General Assembly, cmt. (2)(b), [1956] 2 Y.B. Int'l L. Comm'n 253, 285, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

With respect to the United States, Congress has authorized vessels of the Coast Guard to seize vessels subject to the jurisdiction of the United States:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested . . . or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture . . . such vessel or such merchandise or both, shall be seized.

14 U.S.C.A. § 89(a) (West 1990); see 19 U.S.C.A. §§ 1401(i), 1581(a), 1709(b) (West 1980); 19 C.F.R. § 162.3 (1992); see also United States v. Postal, 589 F.2d 862, 872 n.15 (5th Cir.) (citing United States v. Freeman, 579 F.2d 942, 945 n.4 (5th Cir. 1978)), cert. denied, 444 U.S. 832 (1979). The Commander's Handbook on the Law of Naval Operations notes:

> Because of *posse comitatus* limitations, the right of hot pursuit is not normally exercised by the U.S. Navy or U.S. Air Force but rather by U.S. Coast Guard forces; however, U.S. Navy or U.S. Air Force forces may properly exercise the right of hot

to the 1982 Law of the Sea Convention, must also be "clearly marked and identifiable as being on government service."[34] Such special authorization ensures the legal identity between the state and its instrumentalities. McDougal and Burke question whether the language of the High Seas Convention provision on hot pursuit ought to be "thought to mean that a vessel must obtain specific authority to engage in hot pursuit in a particular incident."[35] They argue that an affirmative answer would be contrary to desirable community policy, inasmuch as

> [i]t is not specific authority to pursue which is required in common interest, but only the general authority to apply laws, from which it follows that the vessel is authorized to take the necessary measures to that end. This is all that is required to secure the policy at stake, that of assuring the responsibility of a state for the actions of public vessels on the high seas.[36]

Poulantzas supports this interpretation, arguing that "[t]his special authorization required by the Convention does not apply in every special case, but is a general authorization to special classes of vessels, like [sic] coast-guard ships, fishery protection vessels, to exercise their special duties for the enforcement of which the right of hot pursuit will also be permitted."[37]

Neither convention discusses whether the ships of a federal state's local governments are authorized to carry out pursuit. Presumably, this matter is left for local authorities to resolve with their federal government, and international law would not likely be offended at the exercise of such authority. A federal government would, however, remain answerable internationally for actions taken by its component entities.[38] For this reason, federal governments may be wary of permitting local law enforcement entities to carry out tasks that may implicate them.

> pursuit if U.S. Coast Guard forces are not in a position to initiate or continue such pursuit.

Commander's Handbook, supra note 15, § 3.9, at 3-16 n.44 (citations omitted); see also Defense Policy Panel and Investigations Subcomm. of the House Comm. on Armed Services, 100th Cong., 2d Sess., Narcotics Interdiction and the Use of the Military: Issues for Congress 8, 36 (Comm. Print 1988).

34. LOSC, supra note 2, art. 111(5).

35. McDougal & Burke, supra note 4, at 919-20.

36. Id. at 920.

37. Poulantzas, supra note 13, at 197.

38. D. Grieg, International Law 94 (2d ed. 1976).

2. *Pursued Vessels*

International law limits the categories of ships against which a state may lawfully exercise its right of hot pursuit. Warships, as defined above,[39] are generally immune from the jurisdiction of any state other than their flag state and are not amenable to hot pursuit onto the high seas.[40] Similarly, non-commercial ships in the service of a foreign government are generally immune from jurisdiction on the high seas.[41] Although such vessels enjoy immunity from hot pursuit, they are nevertheless obliged to respect the laws of the littoral state; the immunity afforded them is immunity only from the enforcement jurisdiction of the state.[42] The flag state may be held to answer for the violation of local legislation by such vessels,[43] but only in self-defense may the littoral state pursue and arrest the warships or non-commercial ships of a foreign sovereign.[44] Commercial ships in government service, as well as all private ships, are subject to the jurisdiction of the littoral state.[45]

B. *Offenses Giving Rise to the Right of Hot Pursuit*

1. *Seriousness of the Offense*

Neither the 1958 High Seas Convention nor the 1982 Convention on the Law of Sea describes the offenses that give rise to the right of hot pursuit. The conventions merely provide that a state may exercise

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39. See supra note 22 and accompanying text.

40. HSC, supra note 2, art. 8(1); Convention on the Territorial Sea and the Contiguous Zone, opened for signature Apr. 29, 1958, art. 21, 15 U.S.T. 1606, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) [hereinafter TSC]. Article 95 of the 1982 Convention on the Law of the Sea provides that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." LOSC, supra note 2, art. 95.

41. HSC, supra note 2, art. 10; LOSC, supra note 2, art. 96. The 1982 Convention provides that "[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State." Id.

42. R.R. Churchill & A.V. Lowe, The Law of the Sea 77 (1983).

43. LOSC, supra note 2, art. 31. The littoral state may require non-complying warships to exit the territorial sea. Id. art. 30. The international remedies available to a state confronted with an offensive foreign warship depend upon the nature of the threat presented by the warship. A state merely uncomfortable with a warship in its backyard may file diplomatic protests or otherwise address its concerns to the flag state of the warship. If, on the other hand, the warship is an active menace to the security or territorial integrity of the state, the state may direct harsher sanctions against the warship's flag state or, in extreme cases, take action against the warship. See generally Grieg, supra note 38, at 876-78 (describing the customary international law right of self-defense).

44. See Poulantzas, supra note 13, at 192 n.271.

45. The notion that the commercial ships of a government lack immunity is not uncontroversial. See id.

the right of hot pursuit against a ship that the state reasonably believes has "violated the laws and regulations of that State."[46] This open-ended language is read to provide that international law does not *in stricto jure* limit the right of hot pursuit to a predefined set of offenses.[47] That is, the coastal state may pursue onto the high seas a foreign ship violating any local law or regulation, no matter how trivial.

The issue of the range of offenses giving rise to the right of hot pursuit arose before the United States District Court for the District of Maine in *United States v. F/V Taiyo Maru, Number 28, SOI 600,* where the United States Coast Guard seized a Japanese fishing vessel on the high seas after hot pursuit from the contiguous zone off the coast of Maine.[48] The defendant, accused of violating United States fisheries laws, argued that article 23 of the High Seas Convention (HSC) "limits the government's right of hot pursuit from a contiguous zone to the four purposes for which Article 24 [of the Territorial Seas Convention (TSC)] authorizes the establishment of such a zone, and the enforcement of domestic fisheries law is not one of the purposes recognized by Article 24."[49] The court rejected this argument. The court acknowledged that HSC article 23 permits hot pursuit from a contiguous zone established for one of the four purposes articulated in TSC article 24.[50] But the court went on to find that TSC article 24 does not prohibit the establishment of a contiguous zone for other purposes, and that HSC article 23 does not limit the right of hot pur-

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46. HSC, supra note 2, art. 23(1); see LOSC, supra note 2, art. 111(1).

47. O'Connell observes:

> There was at one time a view that hot pursuit arose only in respect of certain categories of offenses . . . , but the predominant view at the time of the Geneva Conference was that there was no limit to the catalogue of offences committed in the territorial sea for which pursuit was authorized. The reference in Article 23 of the Geneva Convention to "an infringement of the laws and regulations of a coastal State" would seem to allow hot pursuit whenever a law has been broken, whatever its character. An alternative proposal in the International Law Commission was rejected because of opposition to the idea that pursuit could be instituted in defence of some international interest as distinct from the administration of the law.

O'Connell, Law of the Sea, supra note 2, at 1080 (citations omitted). This issue was not settled among publicists prior to the entry into force of the High Seas Convention, nor even thereafter to some extent. See Poulantzas, supra note 13, at 135-37.

48. United States v. F/V Taiyo Maru, Number 28, SOI 600, 395 F. Supp. 413, 415 (D. Me. 1975).

49. Id. at 419.

50. Id. Article 24 of the Territorial Seas Convention provides that "[i]n a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to . . . [p]revent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea." TSC, supra note 40, art. 24(1)(a).

suit to the purposes in article 24 and against other purposes.[51]

Although international law does not strictly limit the exercise of the right of hot pursuit to serious violations of local law, international comity and goodwill counsel against exercising the right in response to innocuous or trivial offenses.[52] Comity obliges a state to respect the sovereign equality of other states and to afford them the appropriate degree of respect.[53] Although the principle of comity does not legally constrain a state to behave in one way or another—a characteristic that distinguishes comity from international law—states nevertheless abide by established principles of comity because it is in their best interest to do so. A state that fails to act hospitably to its neighbors and pursues their ships without good cause may well find its own merchant fleet subject to the same abuse.[54]

O'Connell suggests another limitation, arguing that pursuit for trivial offenses of local law "would be a disproportionate exercise of power if it were tantamount to a restraint on freedom of navigation."[55] The principle of freedom of navigation, however, obtains to the high seas and not to the territorial sea, where states do not possess an unqualified freedom of navigation. Within the territorial sea of another state, ships have the right of innocent passage only, and this right terminates whenever the passage ceases to be innocent.[56] The question, therefore, is whether the breach of an inconsequential local law destroys innocence. The 1982 Convention on the Law of the Sea provides that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[57] The Convention enumerates certain activities that are prejudicial to the peace,

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51. *Taiyo Maru*, 395 F. Supp. at 419. For further analysis of the right of hot pursuit from the contiguous zone, see infra notes 78-86 and accompanying text.

52. Brownlie observes:

> International comity, *comitas gentium*, is a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual respect, and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from customs duties. Oppenheim writes of "the rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them."

Brownlie, supra note 2, at 31 (citations omitted).

53. 1 L. Oppenheim, International Law 196 (3d ed. 1920).

54. McDougal & Burke, supra note 4, at 895 ("The demands of reciprocity and the possibilities of normal retaliation appear ample to assure that this discretion is not abused by unreasonable exercise of local control.").

55. O'Connell, Law of the Sea, supra note 2, at 1080. For this reason, O'Connell observes that "some qualitative notion seems to be built into Article 23 [of the High Seas Convention]." Id.

56. TSC, supra note 40, arts. 14(1), 16(1).

57. LOSC, supra note 2, art. 19(1).

good order, or security of the coastal state, including "any . . . activity not having a direct bearing on passage."[58] Presumably, even a trivial offense may offend the right of innocent passage if it is unrelated to passage, in which case the coastal state would have the right to proceed against the vessel[59] and pursue her onto the high seas should she take flight. It therefore seems likely that pursuit for trivial infractions that occur on the territorial seas would not offend freedom of navigation on the high seas although such pursuit may offend comity. Because pursuit for trivial offenses does not offend any presumed right of free navigation within the territorial sea, comity remains the only meaningful check upon a state's discretion to exercise its right of hot pursuit.

Hence, the seriousness of the infraction does not affect whether the right of hot pursuit obtains, although it certainly informs the littoral state's decision whether to exercise the right as well as other associated decisions, such as whether to resort to force.[60] The coastal state's decision to exercise the right of hot pursuit is also influenced both by the formidable constraint of comity and by the practical reality that states are not likely to find petty offenders worth the trouble of pursuit. Moreover, ships guilty of petty offenses are unlikely to risk the dangers of flight in the hope of avoiding arrest for a trivial offense.[61] Such flight may, however, indicate that the vessel is engaged in an activity less trivial than originally thought. But this raises a question that is best dealt with in its proper context.[62]

2. *Reasonable Suspicion*

The High Seas Convention and the later Convention on the Law of the Sea provide that the right of hot pursuit obtains "when the competent authorities of the coastal State have *good reason to believe* that the ship has violated the laws and regulations of that State."[63] That a

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58. Id. art. 19(2)(l).

59. Id. art. 25(1).

60. See infra part III.E.4 (discussing the right to resort to force); see also Greig, International Law, supra note 38, at 312.

61. McDougal and Burke write:

> It seems somewhat unreal to be concerned about the seriousness of the offense, for it is doubtful whether a vessel "suspected" of violating an innocuous local ordinance would find it worthwhile to seek to escape an apprehending ship. In practical terms it is also subject to grave doubt that a coastal state would attempt, save for political harassment, to impose the severe sanction of arresting and detaining a vessel for a nominal violation of local law.

McDougal & Burke, supra note 4, at 895.

62. See infra part III.B.2 (discussing reasonable suspicion).

63. HSC, supra note 2, art. 23(l); LOSC, supra note 2, art. 111(1) (emphasis added); see

state must have "good reason" to suspect an infringement prevents a state from pursuing a ship on the bare suggestion that she has violated some local law or regulation. But the good reason standard does not limit the availability of hot pursuit to circumstances in which the coastal state has actual knowledge of an infringement. The appropriate standard, therefore, lies somewhere between mere suspicion and actual knowledge.[64] Because the propriety of any particular exercise of hot pursuit depends on the factual milieu out of which the pursuit arises, it is probably not possible—nor indeed prudent—to be more precise than this.[65]

Commander's Handbook, supra note 15, at 3-15 to 3-16 ("The hot pursuit of a foreign ship may be undertaken as a law enforcement action when the coastal or island nation *has reason to believe* that the ship has violated the laws and regulations of that nation.") (emphasis added).

64. The United States Navy's Annotated Supplement to the Commander's Handbook notes that the Law of the Sea Convention "requires that there be 'good reason' to believe such a violation has occurred. Regardless of how much this raises the standard, it is clear that mere suspicion does not trigger the right, and actual knowledge of an offense is not required." Commander's Handbook, supra note 15, at 3-16 n.39 (citing O'Connell, Law of the Sea, supra note 2, at 1088). This standard applies equally to the contiguous zone, although the Convention language is somewhat unclear on this point. See McDougal & Burke, supra note 4, at 906-08.

Poulantzas posits that " '[g]ood reason to believe' means that the belief of the competent authorities must be founded on strong indications and not on sheer suspicions and suppositions." Poulantzas, supra note 13, at 156-57 n.128. Poulantzas describes the standard as one of "reasonable suspicion" — a term not unfamiliar to United States lawyers. Id. at 157 & n.130; see McDougal & Burke, supra note 4, at 896.

One may draw a useful analogy between the "good reason to believe" standard and "reasonable suspicion" notion employed by courts interpreting the Fourth Amendment to the United State Constitution. Although no United States court has addressed this precise issue, the question arose in United States v. Williams, 617 F.2d 1063 (5th Cir. 1980), whether a similar provision of the High Seas Convention satisfied the Fourth Amendment. Article 22 of the High Seas Convention permits a state to board the vessel of another state on the high seas if there exists "reasonable ground" to believe that such vessel is engaged in a proscribed activity. HSC, supra note 2, art. 22. The Fifth Circuit found that "article 22 is reasonable within the meaning of the Fourth Amendment." *Williams*, 617 F.2d at 1083.

Article 22 bears a close similarity to article 23, the hot pursuit provision of the High Seas Convention; the language "reasonable ground" connotes much the same meaning as "good reason to believe." One may reasonably suggest by analogy that "good reason to believe" fits within the meaning of "reasonable ground" as construed pursuant to the Fourth Amendment. Given such a construction, one may reasonably make reference to Fourth Amendment jurisprudence in order to flesh out the bare language of the hot pursuit provision. See United States v. Hensel, 699 F.2d 18 (1st Cir. 1983). For a discussion of the Fourth Amendment as it applies on the sea, see generally James S. Carmichael, At Sea with the Fourth Amendment, 32 U. Miami L. Rev. 51 (1977); Note, High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea, 93 Harv. L. Rev. 725 (1980).

65. States are unlikely to take unfair advantage of this necessarily imprecise standard because of the twin constraints of comity and the requirement that states compensate the victims of unjustified hot pursuit. See supra notes 52-53 and accompanying text (discussing comity); see also infra part III.E.6 (discussing the requirement of compensation for unjustified hot pursuit).

One may question whether the flight of a ship onto the high seas is in itself good reason to believe the ship has committed some delict sufficient to justify hot pursuit. A warship may be tempted to pursue a ship that makes quickly for the high seas upon catching sight of her. Such behavior is suspicious beyond a doubt, and perhaps it is also "good reason to believe" that the ship has violated a local law or regulation. On the high seas, vessels that flee from approaching warships may be brought to and visited by the warship.[66] If this right obtains on the high seas, there is no reason why it ought not obtain within the state's own territorial sea. Hence, even if the warship originally lacked good reason to believe the vessel was engaged in some proscribed activity, the flight of the vessel could well be sufficient to justify pursuit onto the high seas.

3. *Attempted Offenses, Prior Offenses, and Offenses Committed by Passengers*

Hot pursuit is available against ships attempting delicts within the marginal seas of a state; the right is not limited to ships that have committed, or are suspected of having committed, actual delicts. This proposition is by no means clear from the High Seas Convention, which provides that the right obtains whenever a ship "*has violated* the laws and regulations of [a] State."[67] Nevertheless, a close look at the *travaux préparatoires* of the Convention reveals that the International Law Commission—the body responsible for the draft convention—believed that the right would obtain for attempted offenses.[68] O'Connell observes that

> when Brazil proposed to the International Law Commission that the draft Article should refer to an offence which was about to be committed, the Special Rapporteur thought that this was superfluous, and it was considered in the Commission that the suggestion was already implied in the text. This has prompted the conclusion that hot pursuit is available in respect of attempted offences.[69]

Hence, a state may pursue a ship for attempted, as well as actual, violations of local laws or regulations.

The sea conventions do not provide whether hot pursuit is available

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66. See Reuland, supra note 3, at 1172-73 n.27.

67. HSC, supra note 2, art. 23(1) (emphasis added).

68. International Law Commission of the Work of its Eighth Session, [1956] 1 Y.B. Int'l L. Comm'n 49, 50, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

69. O'Connell, Law of the Sea, supra note 2, at 1089 (citations omitted).

for prior delicts. That is, may a coastal state effect hot pursuit of a vessel that flees to the high seas to avoid arrest for a prior delict? Were the right not available under such circumstances, a state would have to cease pursuit as the ship passed outside of state territory onto the high seas. Such a rule unacceptably hinders effective law enforcement. Nevertheless, the exercise of hot pursuit against a vessel fleeing arrest for prior delicts resembles "resumption" of hot pursuit, which international law forbids.[70]

A possible solution to this dilemma is to view the second flight itself as a new offense. If a state may arrest a vessel for prior delicts, and if the vessel takes to the high seas to avoid such lawful arrest, such flight would constitute a new wrong and the state may then give pursuit. Such pursuit would not, therefore, be deemed a wrongful resumption of pursuit by the state inasmuch as the pursuit is for a newly arisen offense. Once brought within the jurisdiction, however, the vessel could be held accountable for prior delicts.

Offenses committed by the passengers of a ship that cannot be attributed to the ship itself do not justify hot pursuit. The right of hot pursuit is available only for those offenses committed under the color of authority of those in control of the ship;[71] the sea conventions provide that pursuit may begin when the state suspects that "*the ship* has violated the laws and regulations of that State."[72] The coastal state may assert its jurisdiction against the ship only, and not against her passengers and crew, who remain under the jurisdiction of the flag state.[73] Should the passengers of a non-national ship be suspected of having offended the laws of the coastal state, the authorities of the coastal state have recourse through diplomatic channels. The coastal state may request extradition of the suspected individuals from the flag state, but it may not pursue the ship onto the high seas unless their actions are somehow attributable to the ship itself.

If the actions of persons aboard the ship are attributable to the ship, the right of hot pursuit obtains against her. The attribution of delicts to the ship, however, raises enormous difficulties in certain cases

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70. See infra part III.D.3 (discussing resumption of hot pursuit).

71. See O'Connell, Law of the Sea, supra note 2, at 1077.

72. HSC, supra note 2, art. 23(1); LOSC, supra note 2, art. 111(1) (emphasis added).

73. O'Connell, supra note 2, at 1077. See generally McDougal & Burke, supra note 4, at 291-302 (discussing "claims to prescribe and to apply policy to persons aboard vessels in the territorial sea"). But see Carmichael, supra note 4, at 57 ("A coastal state . . . may board a foreign merchant ship passing through its territorial waters to arrest a person or investigate a crime allegedly taking place within its territorial seas if the consequences of the crime extend beyond the ship and disturb the peace of the coastal state." (citation omitted)).

because ships operate through natural persons, and it may be well nigh impossible to ascertain which individuals aboard a ship operate under color of authority. In other cases, however, the attribution will be apparent, as when the delict was committed by, or could not have been committed but for the involvement of, the ship's authorities. The crucial question, therefore, is whether there exists a sufficiently strong nexus between the delict, the ship's authorities, and the person who committed the wrong. That is, the delict must have been committed under color of the ship's authority.

Normally, the foregoing requirement means the delict must actually have been committed by those commanding the ship. If the delict is committed by a private person aboard the ship, the delict may be attributable to the ship only if committed with the sanction of the ship's authorities. The ship's authorities might sanction such conduct, for example, by knowingly failing to prevent the commission of the delict or by taking steps after the fact to prevent the littoral state's just execution of the law against the wrongdoer. It is also reasonable to suggest that if a ship flees from an approaching warship, the warship may exercise her right of hot pursuit, and it would not matter that the wrong was committed by a passenger without the sanction of the ship's authorities. By fleeing, the ship's authorities implicitly sanction the passenger's actions or, as discussed above, commit a wrong themselves which is sufficient to justify pursuit. The authorities of the ship must knowingly sanction or otherwise participate in the offensive action, however, in order for the coastal state to attribute the passenger's behavior to the ship.

In any event, a state should not undertake pursuit absent good reason to believe that attribution is valid. I suggest that the formula contained in the sea conventions—that a state must have "good reason to believe that the ship has violated the laws and regulations of that State" before hot pursuit may commence—contains two elements. First, the state must have good reason to believe that an offense has in fact been committed.[74] And second, the state must have good reason to believe that "the ship" has committed the offense; that is, the state must have good reason to believe that the offense is attributable to the ship itself. Absent good reason to believe that the offense is attributable to the ship, the right of hot pursuit does not obtain.[75]

74. See supra part III.B.2.
75. See supra part III.B.3.

C. *Commencement*

International law defines the waters from which a state may lawfully undertake hot pursuit. The 1982 Convention on the Law of the Sea provides that hot pursuit "must be commenced when the foreign ship . . . is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State."[76] Pursuit is available for offenses committed within these waters only. Article 111(2) of the Convention expands this limitation, providing that "the right of hot pursuit shall apply . . . to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations."[77] This latter provision may not reflect the existing state of customary international law, although it would be binding among Convention signatories when in force.

Pursuit is available for certain offenses committed within the contiguous zone.[78] This principle, at one time controversial,[79] exists today as an axiom of international law and is codified in both sea conventions.[80] Pursuit from within the contiguous zone is, however,

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76. LOSC, supra note 2, art. 111(1). The 1958 High Seas Convention contains the same language except for the reference to "the archipelagic waters." HSC, supra note 2, art. 23(1).

77. LOSC, supra note 2, art. 111(2).

78. A state's contiguous zone is the area contiguous to its territorial sea, where the state has the right to prevent and punish infringement of certain local laws; the contiguous zone "may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured." LOSC, supra note 2, art. 33.

79. See O'Connell, Law of the Sea, supra note 2, at 1081-85. Sir Gerald Fitzmaurice has been a vigorous opponent of the right of hot pursuit from the contiguous zone. See Fitzmaurice, The Case of the *I'm Alone*, 1936 Brit. Y.B. Int'l L. 82, 95-100; Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law, 1954 Brit. Y.B. Int'l L. 371, 380-81; Fitzmaurice, Some Results of the Geneva Convention on the Law of the Sea, 8 Int'l & Comp. L.Q. 78, 115-17 (1959).

80. HSC, supra note 2, art. 23(1); LOSC, supra note 2, art. 111(1). For United States judicial treatment of the proposition, see The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826) ("American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication."); The Newton Bay, 36 F.2d 729 (2d Cir. 1929); The Resolution, 30 F.2d 534 (E.D. La. 1929); The Vinces, 20 F.2d 164 (E.D.S.C. 1927); Gillam v. United States, 27 F.2d 296 (4th Cir. 1928); United States v. F/V Taiyo Maru, Number 28, SOI 600, 395 F. Supp. 413 (D. Me. 1975); The Pescawha, 45 F.2d 221 (D. Or. 1928).

Frequently cited in this connection is the 1935 case of the *I'm Alone*, in which the United States Coast Guard pursued from the contiguous zone a Canadian schooner suspected of smuggling liquor into the United States. "I'm Alone" Case (Can. v. U.S.), 3 R. Int'l Arb. Awards 1613 (Joint Interim Report of the Commissioners of 30 June 1933); "I'm Alone" Case (Can. v. U.S.), 3 R. Int'l Arb. Awards 1616 (Joint Final Report of the Commissioners of 5 Jan. 1935); see Sir Gerald Fitzmaurice, The Case of the *I'm Alone*, 1936 Brit. Y.B. Int'l L. 82; William C. Dennis, The Sinking of the *I'm Alone*, 23 Am. J. Int'l L. 351 (1929).

limited to the enforcement of certain rights. The High Seas Convention provides that "[i]f the foreign ship is within a contiguous zone . . . the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established."[81] Article 24 of the Convention on the Territorial Sea and the Contiguous Zone provides that a state may establish a contiguous zone for the enforcement of its customs, fiscal, sanitary, and immigration laws.[82] The Convention does not, however, limit a state's competence to these four objectives, and at least one United States court has found that "nothing in the Article precludes the establishment of such a zone for other purposes, including the enforcement of domestic fisheries law."[83] The court considered the negotiating history of the High Seas Convention in reaching its determination that hot pursuit may commence from the contiguous zone for the enforcement of laws established for purposes other than those set out in article 24.[84] Presumably, however, littoral state legislation concerning the contiguous zone cannot be as extensive as that concerning the territorial sea. The contiguous zone, in other words, is not simply another twelve miles of territorial sea—it serves as a buffer zone for the protection of the littoral state's territory and territorial sea.[85] Accordingly, although a state's legislative jurisdiction within the contiguous zone may not be limited to the four purposes set out in both sea conventions, such laws should nevertheless be limited to the protection of the state's territory and territorial sea.[86] It follows that hot pursuit may

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81. HSC, supra note 2, art. 23(1). The Law of the Sea Convention repeats this provision without meaningful modification. LOSC, supra note 2, art. 111(1).

82. TSC, supra note 40, art. 24(1)(a). Article 33(l)(a) of the Law of the Sea Convention mirrors article 24(1)(a) of the 1958 Convention on the Territorial Sea and the Contiguous Zone. LOSC, supra note 2, art. 33(1)(a).

83. *Taiyo Maru*, 395 F. Supp. at 419; see also the discussion of the *Taiyo Maru* case supra at part III.B.1. The United States Navy's Annotated Supplement to the Commander's Handbook notes that "[i]f the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established." Commander's Handbook, supra note 15, at 3-16. The Handbook goes on:

> The doctrine applies to all violations within the territorial sea and to violations of customs, fiscal, sanitary, and immigration laws and regulations in the contiguous zone. However, some contend hot pursuit commenced in the contiguous zone may be only for offenses committed in the territorial sea, and not for offenses in the contiguous zone.

Id. at 3-16 n.42 (citing O'Connell, Law of the Sea, supra note 2, at 1083-84).

84. *Taiyo Maru*, 395 F. Supp. at 420-21.

85. TSC, supra note 40, art. 24(1)(a); LOSC, supra note 2, art. 33(1)(a).

86. The reasoning of the *Taiyo Maru* court on this score is not altogether convincing, and the decision should not be read as authority for the proposition that a littoral state has unlimited prescriptive authority within its contiguous zone. The decision really concerned the authority of the United States to enact fishing laws affecting the sea within twelve miles of the

not be commenced from the contiguous zone for violations of laws that do not reasonably comport with the littoral state's legislative competence with respect to this zone.

Pursuant to the 1982 Convention on the Law of the Sea, the littoral state may pursue vessels from the exclusive economic zone (EEZ) or from the waters over the continental shelf. This right does not appear in the 1958 High Seas Convention and is a progressive development of international law codified in the 1982 Convention. Under the 1982 Convention, a state may pursue from within the EEZ or from the waters above the continental shelf a ship suspected of violating the "laws and regulations of the coastal State applicable in accordance with . . . [the 1982] Convention to the exclusive economic zone or the continental shelf."[87] In the EEZ, the littoral 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."[88] The state may enact legislation consistent with these sovereign rights. Such legislation may seek, for example, to protect fisheries or to prevent pollution within the zone. The legislative competence of the littoral state over the EEZ is more limited than over the contiguous zone or territorial sea.[89] Hence, the right of hot pursuit from the EEZ is correspondingly more narrow than in these other marginal seas.[90]

The littoral state may also pursue non-national ships from waters above the continental shelf. The regime of the continental shelf is another progressive development of the 1982 Convention, permitting

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United States coastline. At the time of the decision, the United States' territorial sea was three miles, and the United States maintained a fishing zone of twelve miles. The court's discussion of Congress' consideration of the High Seas Convention focused on the right of the United States to assert exclusive fisheries jurisdiction, which the United States refused to yield in the treaty negotiation. For this reason, the *Taiyo Maru* court reasonably held that the United States' assertion of exclusive fisheries jurisdiction over twelve miles of coastal waters was not inconsistent with the High Seas Convention. *Taiyo Maru*, 695 F. Supp. 413. With the entry into force of the Law of the Sea Convention, which establishes an exclusive economic zone for the use of the littoral state, the concerns that form the basis of the court's opinion will be somewhat alleviated.

87. LOSC, supra note 2, art. 111(2).

88. Id. art. 56(1)(a).

89. Id. arts. 56, 60(4) (defining the rights of the coastal state in the EEZ).

90. Id. art. 111(2); see also O'Connell, Law of the Sea, supra note 2, at 1081 (asserting that since the scope of legislative authority is more narrow for extraterritorial offenses (like those offenses committed in the EEZ), the catalogue of offenses giving rise to the right of hot pursuit must be "stringently scrutinized.")

the littoral state the sovereign right to explore and exploit the continental shelf.[91] The violation of any law enacted by the littoral state consistent with its sovereign rights over the continental shelf may give rise to the right of hot pursuit.[92] Because the authority of the littoral state over the continental shelf is the most limited of all the marginal zones, the catalogue of infractions giving rise to the right of hot pursuit over the continental shelf is very slim.[93]

A state also has the right, under the 1982 Convention, to pursue ships from the "safety zone" established around artificial islands, installations, and structures in the exclusive economic zone. A state may establish a safety zone in order "to ensure the safety both of navigation and of the artificial islands, installations and structures."[94] The breadth of the safety zone ordinarily may not exceed a five hundred-meter radius. A non-national ship threatening navigation within the safety zone or posing a danger to an artificial island, installation, or structure may be pursued from the safety zone.[95]

D. *Termination of the Right*

1. General Rule

The right of hot pursuit terminates in the territorial waters of any state but the pursuing state. This principle is codified in both the 1958 High Seas Convention and the 1982 Convention on the Law of the Sea, which provide that "[t]he right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State."[96] Accordingly, a state may not pursue a vessel into the territorial waters of another state without offending international law. This limitation on the exercise of the right of hot pursuit is uncontroversial,[97] although there is mixed opinion as to whether pursuit may be resumed after termination.[98]

The termination of the right of pursuit at the territorial sea of another state does not apply to other maritime zones beyond the terri-

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91. LOSC, supra note 2, art. 77(1).

92. Id. art. 111(2).

93. Id. art. 77 (defining the rights of the coastal state over the continental shelf). "Continental shelf" is defined in the preceding article. Id. art. 76.

94. Id. art. 60(4).

95. Id. art. 111(2).

96. Id. art. 111(3); HSC, supra note 2, art. 23(2).

97. Commander's Handbook, supra note 15, at 3-16; see D.W. Bowett, Self-Defence in International Law 83 (1958); Brierly, supra note 2, at 314; Brownlie, supra note 2, at 252; Churchill & Lowe, supra note 42, at 152; Greig, supra note 38, at 314; McDougal & Burke, supra note 4, at 918; O'Connell, Law of the Sea, supra note 2, at 1090-91.

98. See infra part III.D.3.

torial sea. The sea conventions provide merely that pursuit terminates within the territorial sea, without reference to other marginal seas.[99] Accordingly, a state is not barred from pursuing a non-national vessel into the exclusive economic zone or even the contiguous zone of another state.[100] Such zones are deemed high seas for the purposes of hot pursuit.

2. *A Possible Exception*

Professor Bowett recognizes the argument that a limited exception to the foregoing rule may exist. The argument suggests that "the pursuit of pirate vessels can be continued within the territorial waters of another state if that state is not in a position to take up the pursuit itself."[101] Even so, the exercise of jurisdiction against the pirate vessel flows from the coastal state, which retains the right of trial.[102] The argument is a good one, for without such an exception, a pirate may escape capture by fleeing to the territorial sea of any state unwilling or unable to take up pursuit.

Although desirable on one level, the expansion of this exception into a broader right to pursue any suspect vessel into the territorial sea of a third state presents certain problems, even if the coastal state authorizes the pursuing ship to continue pursuit within its territorial sea. Certainly, an expansion of the right of hot pursuit would increase the effectiveness of law enforcement. Nevertheless, the legal basis for such an expansion is not beyond question. If the coastal state purports to allow the pursuing vessel to continue pursuit of the fleeing vessel within its territorial sea, the coastal state must first clearly possess jurisdiction over the fleeing ship—the coastal state cannot delegate jurisdiction it does not possess. Whether a state into whose territorial sea a pursued ship flees may take up pursuit itself or may authorize the foreign warship to continue pursuit, depends upon whether there exists an independent basis for the exercise of jurisdiction—actual or vicarious—by that state.[103]

Establishing an independent jurisdictional basis is not always a simple matter. Ordinarily, under the territorial principle of jurisdiction,

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99. See LOSC, supra note 2, art. 111(3); HSC, supra note 2, art. 23(2).

100. See Churchill & Lowe, supra note 42, at 152.

101. Bowett, supra note 97, at 83.

102. See id.

103. LOSC, supra note 2, art. 111(1) ("The hot pursuit of a foreign ship may be undertaken when the . . . coastal State [has] good reason to believe that the ship has violated the laws and regulations of that State.").

a state may exercise authority over persons within its territory.[104] Because a state's territorial sea is "territory" this principle would, at first blush, seem clearly to authorize the assertion of jurisdiction by the coastal state over ships within its territorial sea.[105] Nevertheless, ships within the territorial sea of another state enjoy the right of innocent passage, enabling them to pass unhindered through the territorial sea of that state so long as their passage "is not prejudicial to the peace, good order or security" of the state.[106] The dispositive question, therefore, is whether the passage of a pursued vessel may be deemed prejudicial to the coastal state.

A ship may prejudice a coastal state by its very presence in the territorial sea, without committing any particular act. Churchill and Lowe observe that the Territorial Sea Convention, "which seems to be consistent with the actual practice of States, and so with customary law, clearly *does not require the commission of any particular act, or violation of any law, before innocence is lost.*"[107] The 1982 Law of the Sea Convention, which retains the language of the Territorial Sea Convention, defines innocent passage "by reference to prejudice to coastal State interests, *whether occasioned by any specific act of the vessel or not, and whether or not it involves any violation of coastal State laws.*"[108] Accordingly, the "mere presence of [a] ship could be enough to threaten the coastal State."[109]

Whether the presence of a pursued vessel within a state's territorial sea can be deemed non-innocent depends upon the nature of the conduct of which she is accused. That is, the bare fact of her pursuit need not necessarily amount to her loss of innocence. Recall that a state may *in stricto jure* take up pursuit for the smallest of infringements: on the one hand, the presence of a ship pursued for an inconsequential infringement may not be "prejudicial to the peace, good order or security of the coastal State,"[110] but on the other hand, her very flight from arrest raises a good reason to believe that she has committed

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104. See Greig, supra note 38, at 210.

105. See Churchill & Lowe, supra note 42, at 68 ("The territorial sea is subject to the sovereignty of the coastal State, and the only right which foreign ships have to be in the territorial sea of the State . . . is the right of innocent passage.").

106. LOSC, supra note 2, art. 19(1).

107. Churchill & Lowe, supra note 42, at 66 (emphasis added) (citing TSC, supra note 40, art. 14(4)).

108. Churchill & Lowe, supra note 42, at 67 (emphasis added) (citing LOSC, supra note 2, art. 19(1)).

109. Churchill & Lowe, supra note 42, at 65.

110. LOSC, supra note 2, art. 19(1).

other, more grave delicts.[111] The coastal state must therefore be able to demonstrate that the presence of the pursued vessel is "prejudicial to the peace, good order or security of the coastal State"[112] even though the vessel has committed no delict within the territorial sea of the state.

The presence of a pursued vessel may indeed be cause enough for the coastal state to deem her non-innocent and suspend her right of passage.[113] Even though a ship commits no prejudicial action within the territorial sea of the coastal state, the state may not wish to have within its territory ships reasonably suspected by another state of having committed an infraction. The coastal state may fear for its own security or territorial integrity. For example, a ship suspected of polluting the territorial sea of State A is pursued into the territorial sea of State B. State B may suspend the passage of the ship because her alleged prior delictual conduct, coupled with her flight from capture, raises a reasonable belief that she presents a threat to the security or territorial integrity of the coastal state. She is, therefore, non-innocent, and the coastal state may either elect to arrest her itself[114] or authorize the original pursuing ship to effect seizure.

Underlying the foregoing discussion is a fundamental policy question: may the right of innocent passage be used as a shield by ships accused of wrongdoing? The right of innocent passage is an exception to the territorial jurisdiction of the coastal state in its territorial sea. It is a pragmatic limitation placed upon the coastal state to enable ships to pass from point to point in their peaceful occupation. The right of innocent passage—as the name suggests—was never intended and does not exist to provide safe haven to ships fleeing capture.[115]

3. *Resumption of Hot Pursuit*

Once the fleeing vessel enters into its own territorial waters or those of a third state, the right of pursuit is terminated. International opinion is divided over whether pursuit may resume if the pursued vessel

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111. See supra note 66 and accompanying text.

112. LOSC, supra note 2, art. 19(1).

113. The Law of the Sea Convention states that any "activity not having a direct bearing on passage" may prejudice the peace of the coastal state and thus render the vessel's passage non-innocent. Id. art. 19(2)(l).

114. See Churchill & Lowe, supra note 42, at 68 ("[S]hips which have stepped outside the right of innocent passage are subject to the full jurisdiction of the coastal State and may . . . be arrested by the coastal State for any violations of its laws.").

115. The Law of the Sea Convention holds that a ship's passage is no longer innocent if the ship engages in any "activity not having a direct bearing on passage." LOSC, supra note 2, art. 19(2)(l).

re-enters the high seas.[116] Both the Law of the Sea Convention and the High Seas Convention nevertheless appear to disallow resumption.[117] "Such a resumption," argues Colombos, "appears undesirable as it prolongs a right which ought to be exceptional, and moreover, the right of 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 the narrow sense."[118] On the other hand, McDougal and Burke write:

> There appears . . . to be no sound reason for considering that the pursuit cannot be commenced again as soon as the suspect vessel again appears on the high seas. The general interest in navigation seems no more offended by the pursuit and arrest of a vessel which occurs after this interval of time has intervened than where pursuit and arrest occur immediately after the proscribed conduct. It is not probable that such a prescription would be abused because a state is unlikely to regard a minor violation so seriously as to warrant the high expenditure necessary to support continuous surveillance of a particular ship.[119]

Poulantzas, however, takes issue with McDougal and Burke's argument, writing that

> what this view overlooks is that the cessation of the pursuit resulted already in the discontinuance of the jurisdictional link existing between the two vessels in question. Indeed, the exceptional circumstances obtaining after an in *flagrante delicto* and an immediate and continuous pursuit did cease to exist. Moreover . . . [the] Convention on the High Seas explicitly provided for cessation of the right of hot pursuit and not for an interruption of hot pursuit. Besides, the State of the pursuing vessel may have recourse—if possible—to the procedure of extradition of the offenders following the

116. See O'Connell, Law of the Sea, supra note 2, at 1091 ("Academic opinion has ranged between disapproval of any resumption of pursuit, the opinion that pursuit may be resumed, apparently regardless of the interval, because no general interest in navigation would be offended, and concession on a short interval.") (citations omitted).

117. Although neither convention contains a provision addressing this precise issue, both provide without qualification that "*[t]he right of hot pursuit ceases* as soon as the ship pursued enters the territorial sea of its own State or of a third State." LOSC, supra note 2, art. 111(3); HSC, supra note 2, art. 23(3) (emphasis added).

118. Colombos, supra note 16, § 173, at 169-70.

119. McDougal & Burke, supra note 4, at 898.

cessation of the pursuit.[120]

Nevertheless, 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."[121] The matter, however, does not appear to be settled, and it is likely that the question will be resolved "on the special circumstances of . . . [each] case."[122]

If 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. International order would undoubtedly suffer if this were true. Nevertheless, the international community of states has available other means to enforce law and order upon the high seas. Even if pursuit may not be resumed once terminated by entry of the pursued ship into the territorial waters of a third state, redress against the ship may still be pursued through diplomatic channels. Also, there remains the possibility, discussed above, that the state into whose territorial sea the pursued ship flees may itself take up pursuit.[123]

Although the fact remains that the "no resumption" rule—if it is indeed a rule, and this is by no means clear—hampers effective law enforcement, the enforcement of law is not the sole concern. If it were, states could take extraordinary measures in the name of law enforcement. There are, however, other equally important considerations in play—namely state sovereignty, as expressed in the general rule disallowing interference with the ships of another state.[124] The right of hot pursuit represents an exception to this general rule, and states are naturally wary about the expansion of this exception insofar as it results in a corresponding diminution of their exclusive sovereign competence over their vessels. The right of hot pursuit, therefore, strikes a balance between the need for effective law enforcement and the rule of exclusive jurisdiction.[125] An expansion of the right of hot pursuit to allow resumption of pursuit may tip this balance precariously against the sovereign rights of the flag state. It is perhaps best, therefore, that the right of hot pursuit be limited to occasions in which pursuit is "hot".

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120. Poulantzas, supra note 13, at 231.

121. Id.

122. Id.

123. See supra part III.D.2.

124. See supra note 1 and accompanying text.

125. See supra part II (discussing the rationale that underlies the right of hot pursuit).

E. *Nature of the Pursuit*

1. Ascertaining Location

Before a ship of the littoral state may lawfully exercise its right of hot pursuit, it must ascertain whether the offending ship is indeed within a maritime zone over which the state may exercise jurisdiction. The 1982 Convention on the Law of the Sea provides:

> Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued . . . is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf.[126]

Because the authority to take action against a suspect ship depends upon the zone in which the suspect ship is located—the nature of actionable offenses being a function of the purpose for which the zone is established[127]—it is important for the ship of the littoral state to ascertain accurately the location of the suspect ship. The Convention, however, does not prescribe the precise method to be used to ascertain the location of the suspect ship. Instead, the location of the ship may be determined by "such practicable means as may be available."[128] This provision enables the warship to use whatever means are at hand to ascertain the location of the suspect ship. If the warship satisfies herself that the suspect ship is within a zone from which she may be pursued, the warship may properly exercise her right of hot pursuit. That the warship is "satisfied" that the suspect vessel is within the zone, however, "does not necessarily, and certainly ought not, erect an irrebuttable presumption that the determination was accurate."[129]

2. Signals

Before pursuit may commence, the warship must signal to the suspect ship that she must heave to and await the approach of the warship. If the signal is given in such circumstances that it ought to be

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126. LOSC, supra note 2, art. 111(4). Article 111(4) of the Law of the Sea Convention restates article 23(3) of the High Seas Convention, and adds the language concerning the exclusive economic zone and the continental shelf in order to account for the extension of the right of hot pursuit to these areas. Cf. HSC, supra note 2, art. 23(3).

127. See supra part III.C.

128. LOSC, supra note 2, art. 111(4). The Law of the Sea Convention provision repeats without modification the corresponding provision of the High Seas Convention. See HSC, supra note 2, art. 23(3).

129. McDougal & Burke, supra note 4, at 917.

received, the warship may pursue the suspect vessel if the signal is ignored. The Convention on the Law of the Sea provides that "[t]he 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."[130] This provision ensures that the signal to stop is given when the warship and the suspect vessel are in close quarters. Curiously, this limitation prevents the use of radio as a means to give the signal to stop.[131]

The signal requirement proved of crucial importance to the United States Court of Appeals for the Fifth Circuit's *United States v. Postal* opinion.[132] The case concerned the Grand Cayman vessel *La Rosa*, which the United States Coast Guard stopped, boarded, and seized on the high seas. The Coast Guard vessel *Cape York* first encountered the *La Rosa* within the United States' territorial sea. The *Cape York* approached the *La Rosa* for purposes of ascertaining her identity and nationality. A boarding party was detailed to the *La Rosa*, where the boarding officer questioned the crew and became suspicious that the *La Rosa* was carrying contraband. The boarding officer was ordered back to the *Cape York*, but the *Cape York* surveilled the *La Rosa* until she departed the territorial sea of the United States. At that point, the *Cape York* signalled the *La Rosa* and dispatched a second boarding party which seized her.[133]

The Fifth Circuit ruled that the Coast Guard's arrest of the *La Rosa* was unjustifiable.[134] In so ruling, the court dismissed the notion that the arrest of the *La Rosa* constituted a lawful exercise of the right of hot pursuit because, among other things, the "giving of visual and auditory signals to stop . . . did not occur until immediately before the second boarding, which took place beyond the twelve-mile limit."[135]

The signal requirement may perhaps be foregone in certain circumstances. In the case of *The Newton Bay*, for example, the Second Circuit held that the failure to signal did not impair the otherwise lawful seizure of a British vessel pursued onto the high seas by the United

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130. LOSC, supra note 2, art. 111(4). This provision mirrors the High Seas Convention. HSC, supra note 2, art. 23(3). The Commander's Handbook adds that "[i]t is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone." Commander's Handbook, supra note 15, § 3.9, at 3-16.

131. See McDougal & Burke, supra note 4, at 917-18; O'Connell, Law of the Sea, supra note 2, at 1091.

132. United States v. Postal, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979).

133. Id. at 865-68.

134. Id. at 872-73.

135. Id. at 872 (citing Poulantzas, supra note 13, at 204).

States Coast Guard.[136] The court "did not regard . . . the so-called 'hot pursuit' doctrine as holding that a definite signal must be given to the vessel to stop,"[137] giving two reasons for its decision. First, "[a]s a practical matter, it would be useless to signal by a blast or horn, or by firing shots . . . [because] the vessel was attempting to escape."[138] Second,

> [t]he action of the Newton Bay in attempting to escape and avoid capture by the Coast Guard is clear enough evidence that the master and the crew of the Newton Bay knew that the officers of the United States were after them for the purpose of enforcing the laws of the United States.[139]

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.

3. Continuous Pursuit

Once pursuit is underway, it "may only be continued . . . if the pursuit has not been interrupted."[140] That is to say, the "[p]ursuit must be hot and continuous."[141] If the pursuit is interrupted at any time, the right to pursue is lost and pursuit may not be resumed. If, for example, the suspect vessel enters the territorial sea of a third state and the warship must abandon pursuit, pursuit may not be resumed if the suspect vessel enters again upon the high seas.[142] The interruption must, however, be significant.[143] For example, if the warship ceases pursuit momentarily to pick up dories of the suspect ship or if the ship is momentarily lost in fog, pursuit may recommence.[144] Pursuit by relay is permissible because the warship that effects actual capture need not necessarily be the same as the ship that initiated pursuit.[145]

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136. The Newton Bay, 36 F.2d 729 (2d Cir. 1929).

137. Id. at 731.

138. Id.

139. Id. at 732.

140. LOSC, supra note 2, art. 111(1); HSC, supra note 2, art. 23(1); Commander's Handbook, supra note 15, at 3-16.

141. Churchill & Lowe, supra note 42, at 152.

142. See supra part III.D (discussing termination of the right of hot pursuit).

143. See supra part III.D.3 (discussing resumption of hot pursuit).

144. See infra part IV (discussing the doctrine of constructive presence).

145. Churchill & Lowe, supra note 42, at 152. The 1982 Convention does discuss relay pursuit by aircraft in coordination with ships. LOSC, supra note 2, art. 111(6)(b).

4. The Use of Force

International law permits the use of force in effecting the arrest of a suspect vessel, although this right is not codified as such in either the 1958 or 1982 sea conventions.[146] Once one accepts that a warship is authorized to arrest a suspect ship, it follows that the warship may resort to whatever force is reasonably necessary to exercise this authority because the right of hot pursuit, without a corresponding right to resort to force to effect it, would be a nullity.[147] The flag state of the warship, of course, remains liable for any use of unjustified force.[148]

The use of force against a suspect vessel must, however, be both necessary and reasonable.[149] Force must be necessary in the sense that there must exist no other practicable means by which to effect the arrest of the suspect vessel.[150] Even when all other means have been exhausted, the warship must ensure that the force directed against the suspect ship is a reasonable and measured response to the ship's refusal to submit to arrest.[151] Whether the use of force on any particular occasion is justified depends upon the nature of the offense of which the ship is suspected, the weight of evidence implicating the suspect vessel in the offense, and the obstinacy of the suspect vessel in resisting arrest.[152] Accordingly, an appropriate measure of force in a particular situation may include sending a volley over the suspect ship's bow[153] or, in extreme cases, physically disabling her ability to flee.[154]

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146. See LOSC, supra note 2, art. 111; HSC, supra note 2, art. 23.

147. The United States statute authorizing search and seizure of vessels under United States jurisdiction on the high seas provides that the Coast Guard may "use all necessary force to compel compliance." 14 U.S.C.A. § 89(a) (1990).

148. See infra part III.E.6 (discussing compensation).

149. See Churchill & Lowe, supra note 42, at 152.

150. Id.

151. Id. at 153.

152. Id.

153. Ordinarily, the warship must first send a shot across the bows of the fleeing suspect ship. See The *Red Crusader*, 35 I.L.R. 485, 499 (Commission of Enquiry (Denmark-U.K.) 1967).

154. In the *I'm Alone* arbitration, the Commissioners reported that, assuming there exists a right of hot pursuit, a state

> might . . . 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 purpose, the pursuing vessel might be entirely blameless.

I'm Alone Case (Can. v. U.S.), 3 R. Int'l Arb. Awards 1613, 1615 (Joint Interim Report of the Commissioners of 30 June 1933).

In United States v. Hensel, the United States District Court for the District of Maine

5. *Pursuit by Aircraft*

Both of the recent sea conventions permit hot pursuit by aircraft.[155] The aircraft permitted to engage in hot pursuit must, like ships, be connected to the state in some official capacity.[156] Naturally, the use of aircraft in the exercise of a state's right of hot pursuit presents special problems not shared by ships. In particular, fixed-wing aircraft are ordinarily unable to effect the arrest of a ship due to their low mobility over the water and inability to dispatch boarding parties. Helicopters, on the other hand, are as agile as ships and may be able to detail boarding parties.

The 1982 Convention recognizes the special limitations of aircraft and provides that when hot pursuit is undertaken by aircraft, "the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship."[157] The provision continues:

> It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.[158]

This provision maintains the signal and continuous pursuit requirements, which apply equally to pursuit by warships.[159]

6. *Compensation for Wrongful Pursuit*

The flag state of the warship is liable to pay compensation to the suspect ship for any damage she may suffer as the result of a wrongful pursuit onto the high seas. Both sea conventions provide, in identical

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described the use of force by the Canadian warship *Louisbourg* against the *Patricia*, a vessel avoiding arrest:

> The Canadians swung the *Louisbourg* around the *Patricia* at high speed in an attempt to stop it with its wake. When that failed, they fired a 12-gauge shotgun across the *Patricia*'s bow. The sailors aboard the *Patricia* ducked, and the Canadians then aimed at the wheelhouse where three or four men apparently stood. The Canadians blasted the wheelhouse twice, and the *Patricia* came to a halt.

United States v. Hensel, 699 F.2d 18, 22 (D. Me. 1983).

155. HSC, supra note 2, art. 23(5); LOSC, supra note 2, art. 111(5).

156. See supra part III.A.1.

157. LOSC, supra note 2, art. 111(6)(b). Pursuit by relay is expressly sanctioned in the sea conventions only with respect to aircraft.

158. LOSC, supra note 2, art. 111(6)(b).

159. See supra parts III.E.2 (discussing the signal requirement) and III.E.3 (discussing the continuous pursuit requirement).

language, as follows: "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained."[160] It should be emphasized that compensation must be made only in "circumstances which do not justify the exercise of the right of hot pursuit."[161] Conversely, compensation need not be made when the circumstances are sufficiently suspicious to justify hot pursuit—even if the suspicions later prove unjustified. Presumably, if the warship has "good reason to believe that the ship has violated the laws and regulations of" the flag state, hot pursuit is justified,[162] and no compensation need be made if the suspect ship is later found innocent. Accordingly, compensation must be paid only for pursuit unjustified *ab initio*.

IV. CONSTRUCTIVE PRESENCE

Under the doctrine of constructive presence, a ship may be pursued onto the high seas if any of her boats are reasonably suspected of having committed a delict within the marginal seas of the littoral state, even if the ship herself is not actually within such marginal seas.[163] The ship in this case is deemed constructively present in the marginal seas within which her ships are operating.[164] This principle is codified in the sea conventions, which provide that the right of hot pursuit obtains "when the foreign ship or one of its boats is within" the marginal seas of the littoral state.[165] The conventions go on to provide that "[h]ot 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" marginal seas of the pursuing state.[166]

The *locus classicus* of the doctrine of constructive presence is the

160. LOSC, supra note 2, art. 111(8); HSC, supra note 2, art. 23(7).

161. LOSC, supra note 2, art. 111(8); HSC, supra note 2, art. 23(7).

162. See supra part III.B.2 (discussing reasonable suspicion).

163. See Colombos, supra note 16, §§ 177-79; Greig, supra note 38, at 310-11; Poulantzas, supra note 13, at 243-51; O'Connell, Law of the Sea, supra note 2, at 1092-93; Commander's Handbook, supra note 15, at 3-16 n.40. See generally Ficken, The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U. Miami L. Rev. 700 (1975).

164. See Colombos, supra note 16, §§ 177-79.

165. LOSC, supra note 2, art. 111(1); HSC, supra note 2, art. 23(1).

166. LOSC, supra note 2, art. 111(4). O'Connell points out that article 111(4) is "not . . . operative to establish the rule, but circumstantial as to its application; and it makes pursuit conditional on teamwork and use of the vessel as a mother ship." O'Connell, Law of the Sea, supra note 2, at 1093.

nineteenth century case of the *Araunah*.[167] In that case, Russia seized the British Columbian schooner *Araunah* on the high seas, alleging that her crew had engaged in illegal sealing from canoes within Russian territorial waters. The British government, which at that time exercised sovereignty over Canada, acknowledged the propriety of Russia's actions. Lord Salisbury declared that

> even if the *Araunah* at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters.[168]

Subsequent jurisprudence supports the principle announced in the *Araunah* case that ships may be found constructively present within the marginal seas of the littoral state for purposes of the right of hot pursuit.[169]

V. CONCLUSION

The right of hot pursuit today exists as a matter of customary international law. As a general proposition, this is uncontroversial. Nevertheless, there exists in the writings of commentators much uncertainty over the precise boundaries of this rule. For example, international law does not clearly provide whether pursuit, once terminated, may be resumed. Furthermore, there is doubt whether a coastal state may arrest a ship that has fled into the state's territorial sea after pursuit by the warships of another state. These uncertainties are particularly troublesome because they demand a delicate balancing of three imperatives of international law—state sovereignty, freedom of the seas, and enforcement of law and order.

I have tried to put forward various arguments based on these fundamental interests to fill the interstices of the codifications of the right of hot pursuit. These arguments derive mostly from state practice, the writings of publicists, and—one hopes—good sense. Any attempt to flesh out the black letter of the codifications of the right, however,

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167. The *Araunah* Case, reported in 1 J. Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 824 (1898).

168. Id. at 824-25 (quoting the statement of Lord Salisbury).

169. See, e.g., The Panama, 6 F.2d 326 (S.D. Tex. 1925); The Marjorie E. Bachman, 4 F.2d 405 (D. Mass. 1925); United States v. 1,250 Cases of Liquor (The Henry L. Marshall), 286 F. 260 (S.D.N.Y. 1922); The Grace and Ruby, 283 F. 475 (D. Mass. 1922); The Tenyu Maru, 4 Alaska Rep. 129 (1910).

is necessarily hampered by the lack of relevant state practice. There simply is not a critical mass of practice sufficient to give rise to any proposition of law significantly more particular than that set out in article 111 of the Law of the Sea Convention. Because the formation of international law relies upon state practice, final resolution of these questions is inappropriate at this time. In the meantime, states engaging in the right of hot pursuit have a sufficiently established framework within which to operate.