

The Condition for Initiating, Maintaining, and Purpose of Hot Pursuit under International Maritime Law: Recommended Reforms for the 21st Century.

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Introduction

Existing international law dealing with hot pursuit has its roots in 'ILC' (International Law Commission) draft articles and commentaries, the 1958 Convention on High Seas and in the LOSC.¹ The right of hot pursuit, being of an exceptional nature should be exercised with appropriate caution. In this regard, the question arises whether it is required to maintain a comprehensive list of offences on which purpose is justified or whether it is enough to have a general rule. The scholars are not unanimous; some are particularizing the offence while others believe a general rule.²

In the 21st century, maritime law enforcement requires surveillance of large areas, which would require latest technologies. However, the traditional doctrine of hot pursuit largely founded during the 'cannon shot rule' era contains procedural requirements that might hinder the use of these technologies.

This article will first describe the conditions for initiating and maintaining hot pursuit under international law. The purpose of which the hot pursuit serves will be examined next. Finally, recommendations will be provided for the reforms required by the international law principles concerning hot pursuit.

The Elements of Hot Pursuit

In accordance with the international law, there are a number of procedural requirements to be fulfilled to exercise a successful hot pursuit. One of the basic necessities is that the pursuit be 'hot' or immediate. The term "hot pursuit" implies that the pursuit commences as soon as possible upon committing an offense.³ There is no need to commence pursuit as the instant violation is detected. However, avoiding an unnecessary delay between detection of the offense and initiation of pursuit will remove the doubts on pursuit's legitimacy.⁴ In addition to the pursuit being immediate, the Article 111 of the LOSC requires the following preconditions for a valid exercise of the right.

¹ Donald R Rothwell and Tim Stephens, *The International Law of the sea*, Hart Publishing, Oxford, 2010, p.415.

² Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law: Second Edition*, Martinus Nijhoff Publishers, Netherlands, 2002, p.129.

³ RJ Baird., "Arrests in Cold Climate (Part 2): Shaping Hot Pursuit through State Practice," *Antarctic and Southern Ocean Law and Policy Occasional Papers*, No. 13, 2009, p6.

⁴ Craig H. Allen, "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices," *Ocean Development and International Law*, Vol. 20, No. 4, p. 318.

1. The coastal state must have a valid reason to believe that the vessel has violated the rules and regulations of that state.⁵
2. The hot pursuit must be commenced when the foreign vessel or one of its boats or other craft working as a team and using the foreign vessel as a mother ship known as constructive presence is within the internal waters, archipelagic waters, territorial sea, EEZ or contiguous zone of the coastal state.⁶
3. The hot pursuit can 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 from the foreign ship.⁷
4. The hot pursuit can only be exercised by warships/military aircrafts or authorized government vessels/aircrafts, which are clearly marked and identifiable.⁸
5. The hot pursuit must not be interrupted.⁹
6. The right of hot pursuit ceases upon the vessel entering the territorial sea of its own state or/ of a third state.¹⁰

The abovementioned conditions can be classified into two groups; conditions for initiating and conditions for maintaining a hot pursuit.

Conditions for initiating hot pursuit

There are four conditions that need to be fulfilled before commencing the hot pursuit under international law.

Good Reason

The LOSC stipulates that there should be 'good reason to believe' that a foreign vessel has violated the domestic rules and regulations of the state.¹¹ The wording adopted by the ILC in 1956 provides 'good reason' to be distinguished between certainties that an offense has been committed from mere suspicion. Hence, 'good reason to believe' is founded on strong indications but not on mere suspicion.¹² In other words, the appropriate level of formal reason lies in between mere suspicion and the existing knowledge.¹³ Connected with this point is the question whether a violation

5 LOSC, Article 111(1).

6 LOSC, Article 111(1) and (2).

7 LOSC, Article 111(1) and (4).

8 LOSC, Article 111(5).

9 LOSC, Article 111(1).

10 LOSC, Article 111(3).

11 Reuland, "The Customary Right of Hot Pursuit onto the High Seas:" p.568.

12 Baird, "Arrests in a Cold Climate (Part 2):" p. 6.

13 Ibid.

of police or administrative regulation of the coastal state entitles pursue. According to *POULANTZAS*, the opinion of authors *PIGGOTT* and *COBBETT* supports that minor offenses like leaving the port against orders should not give the right to pursue.¹⁴ On the other hand, *POTTER*, *FRENZEL*, *KALTENBORN*, *NIZZE* and *HUHN* take the opposite view and state 'a foreign private boat, which is believed to have violated national revenue or police or other laws while within the territorial belt, may be pursued...'¹⁵

Furthermore, the right of hot pursuit is not limited to ships that have committed offenses. The ILC, which was responsible for the draft convention recognized the right would continue for attempted offenses, but will be not obtained for previous offenses.¹⁶ The apprehension of *the MV Viarsa* by Australian law enforcement is an example to support how flag state challenged 'good reason' and lost the case. On the other hand, *MV Saiga* case illustrates how the flag state challenged 'good reason' and won the case.¹⁷

Commencement within coastal state maritime jurisdiction

Hot pursuit may commence when an alien vessel commits an offense while physically or constructively being present in the waters of the enforcing state jurisdiction. Both High Seas Convention being and LOSC recognize the right of hot pursuit for violations of domestic law by the physical presence of foreign vessels within coastal state's internal waters, territorial sea and contiguous zone.¹⁸ The coastal State may enact legislation in accordance with its sovereign rights in EEZ which may include, for example, to protect fisheries or prevent pollution within the zone.¹⁹ The LOSC provides hot pursuit for violating coastal state law and regulations applicable to the coastal state's EEZ, continental shelf and the safety zones around continental shelf installations.²⁰ Moreover, in accordance with prevailing or customary international law, a vessel on the high sea is regarded as constructively present in waters over which the coastal state has jurisdiction. A vessel is constructively present;

If one of the vessel's boats violates coastal state law while located within coastal state waters, or if the vessel is a Mothership, working as a team with other craft that violated coastal state law while located within coastal state waters.²¹

14 Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law: Second Edition*, Martinus Nijhoff Publishers, Netherlands, 2002, pp.135-136.

15 Ibid, p.136.

16 Reuland, "The Customary Right of Hot Pursuit onto the High Seas:" p.570.

17 Ibid.

18 Allen, "Doctrine of Hot Pursuit:" p. 314.

19 N. D. Koroleva, "The Right of Pursuit from the EEZ," *Marine Policy*, Vol. 14, No. 2, 1990, p. 139.

20 Allen, "Doctrine of Hot Pursuit:" p. 314.

21 Ibid.

Order to Stop

The enforcement vessel must first order offending vessel to stop in order to indicate that it had been detected, identified and is being ordered to heave for boarding. The LOSC clearly states that the signal is to be visual or auditory. It should be given at a distance which enables the signal to be seen or heard from the foreign vessel.²² However, the use of radio broadcast to signal to stop is a debatable. When drafting the 1958 High Seas Convention, the ILC had excluded, using a radio broadcast for stop order stating that there may be no limit on the distance from which a signal may be given.²³

Type of Vessel

Hot pursuit can only be undertaken by military vessels, and aircraft is well grounded under international law. Similarly, both 1958 and 1982 conventions provide hot pursuit by authorized government ships and aircraft that are 'clearly marked and identifiable as being on government service.'²⁴ Therefore, all coast guard, ministry of defense surface vessels and air crafts including fisheries enforcement vessels and naval submarines are authorized to engage in hot pursuit. Vessel and aircraft, which have been, specially authorized to enforce state laws operated by other government agencies may similarly engage in hot pursuit, if they are clearly marked and identifiable as government craft.²⁵

Conditions for maintaining hot pursuit

Once the hot pursuit is initiated there are requirements to be fulfilled to maintain it under international law.

Continuous and uninterrupted Pursuit

Although the term 'interrupted' is not clearly defined in the LOSC, the article 111 provides that the pursuit be continued as far as it is uninterrupted. The international law states, 'first pursuing craft should continue the pursuit until another craft, summoned by the first or sent by the coastal authorities on request, arrives on the scene to take over pursue.'²⁶ There are three reasons for the interruption; firstly, interruption as a result of natural reasons such as an inability to observe the fleeing vessel as a result of unfavorable weather or darkness. Secondly, mechanical failure in the enforcing crafts and thirdly, for other reasons such as a stop to arrest the small boats of fleeing vessel or in an attempt to gather evidence left behind by the fleeing vessel.²⁷ Apprehension of *South Tomi* in 2001 by Australian enforcement vessel *Southern Supporter* with the support of the South African Navy

22 William C. Gilmore, "Hot Pursuit: The Case of R. v. Mills and others," *International and Comparative Law Quarterly*, Vol. 44, October 1995, p. 956.

23 James Marissen, "Hot Pursuit or No Pursuit? The F.V. South Tomi Arrest in 2001" *Australian and New Zealand Maritime Law Journal*, Vol. 16, 2002, p. 77.

24 Vasilios Tasikas, "Unmanned Aerial Vehicles and the Doctrine of Hot Pursuit: A New Era of Coast Guard Maritime Law Enforcement Operations," *Tulane Maritime Law Journal*, Vol. 29, 2004, p. 72.

25 Ibid.

26 Poulantzas, *The Right of Hot Pursuit in International Law*, p.227.

27 Ibid, p.212.

is a perfect example of 'continuous' pursuit. The Australian Law enforcement authorities were involved until the end despite the change of government vessels.²⁸

Cessation of Hot Pursuit

The entry of the pursued vessel into the territorial waters of its own or a third state ends the hot pursuit. Not only that but also, when it is interrupted or abandoned.²⁹ Hot pursuit needs not cease when a fleeing vessel enters the other maritime zones beyond the territorial sea of its flag state or a third state. However, the restriction on the pursuit into another state's territorial sea is designed to protect violation on the coastal state's sovereignty.³⁰ The Law of the Sea and High Seas conventions prohibit the resumption of hot pursuit, if the pursued vessel would return to the high seas after entering into a territorial sea of its own or a third state.³¹ However, there are occasions where this provision had been used to get safe heaven. Australian fisheries authorities have uncovered that the vessel *MV Lena* received instructions to enter French waters, and similar evidence uncovered in the *South Tomi Case* where ship owners instructed the master to enter a third state.³² Both examples revealed that the possibility of intentional evasive action by fleeing vessels using the protection provided by LOSC Article 111.

Purpose of Hot Pursuit

Coastal states have a number of areas to be protected under the LOSC in their adjacent waters. The LOSC recognizes state authority in each respective zone. As an example, a coastal state's right to impose civil and criminal law applicable to their state within internal waters and territorial sea; custom, fiscal, immigration and sanitary laws within its contiguous zone. In the same way, hot pursuit supports managed natural resources within the exclusive economic zone, and continental shelf; and to enforce the law with respect to damage by marine pollutants.³³

The right of hot pursuit is required for striking a balance between the freedoms of navigation on the high seas and commonly held interest of effective implementation of laws. 'Recognition of a right of hot pursuit, promotes public order by allowing coastal states to more effectively enforce their laws while minimizing international conflicts.'³⁴ A coastal state which is unable consistently to arrest and prosecute vessels that violate laws protecting its adjacent waters cannot deter future violations. If vessels are able to prevent apprehension by fleeing to the high seas, the coastal state's deterrence will be undermined. Therefore, a coastal state can ensure that it will maintain the enforcement authority needed to deter violations of its laws.³⁵

28 Marissen, "Hot Pursuit or No Pursuit?" p. 78.

29 Baird, "Arrests in a Cold Climate (Part 2):" p. 12.

30 Reuland, "The Customary Right of Hot Pursuit onto the High Seas:" p.576.

31 Ibid, p. 580.

32 Baird, "Arrests in a Cold Climate (Part 2):" p. 13.

33 Allen, "Doctrine of Hot Pursuit:" p.311.

34 Ibid.

35 Ibid.

Recommendations for reform

Rule of hot pursuit has evolved over, by centuries of state practice, to serve a generation of local fisheries. But, today the principle has come under intense pressure as a result of extensive fishing fleets and enormous size area to be patrolled. This requires more flexible rules than traditional doctrine, while respecting high seas' freedom. The proposed reforms are discussed below.

Determining the Location

Before hot pursuit, the law enforcement vessel must verify whether the offending ship is lawfully stationed within their maritime zone of jurisdiction. The international law requires enforcing vessel 'satisfies' itself, by available 'practicable means' that the offending vessel is in the waters where the littoral state may lawfully exercise its right of hot pursuit. But, the LOSC does not mention the exact method of fixing an offending vessel.³⁶ The development of technology has resulted in numerous methods for fixing the ships at sea. For example, using Radars with plotting facility, aerial photography and satellite technology are some of the common methods in use. The flexible language of LOSC should allow any method as long as reliability and accuracy are maintained, provided that they stand judicial scrutiny.

Stop Signal

The debate over the traditional visual or auditory signal to stop in the doctrine of hot pursuit has become obsolete. Today the marine communication has advanced in such a way that the vessel operators could always communicate by radio using satellites. For example, foreign vessels fishing within the United States EEZ are required to maintain a continuous listening watch on a selected frequency.³⁷ This means, as long as the offended vessel could receive the stop order, through reliable equipment, there is no logical reason for not conveying such an order, through the commonly available frequency.

Continuous Pursuit and Resumption

The traditional method of maintaining continuous visual connection is now obsolete with the developing tracking technology.³⁸ Modern electronic tracking methods, for example, Radars equipped with computerized plotting equipment; sea-floor mounted acoustic sensors; radio transponders and sonar or electronic emission scanning have dramatically changed the situation.³⁹ The law enforcement vessel can continue hot pursuit, by using advanced tracking facilities, during periods of poor visibility, machine breakdowns and momentary ceasing of pursuit to pick up evidence of the suspected ship. Importantly, enforcement vessels can keep monitoring the fleeing vessels which enter the territorial seas of its own or a third state during the pursuit and enter again upon the high seas with the use of tracking facilities.⁴⁰ The international law, does not permit the resumption of hot pursuit when pursued vessel enters the sovereignty of its own or a third state, but the technology can

36 Reuland, "The Customary Right of Hot Pursuit onto the High Seas:" p.582.

37 Allen, "Doctrine of Hot Pursuit:" p. 323.

38 Ibid, p. 324.

39 Ibid.

40 Ibid.

identify the offending vessel when it returns to the high seas. Therefore, there is no logical reason to put restrictions on resumption of a hot pursuit.

Furthermore, when positively identified, the new technology enables passing all information to nearby enforcement craft, which is in a position, to intercept the offending vessel.⁴¹ The existing international law, permits relay in hot pursuit from a government aircraft to a government ship, and vice versa, but LOSC is silence in relay from government to another government ship.⁴² This uncertain area could be addressed with the assistance of the latest technology.

Cooperative hot pursuit

Regulating the ocean has become a daunting task for the coastal states that have vast areas of maritime jurisdiction. Cooperative management of the ocean is one of the fundamental approaches to address the issue. For example, during the record breaking apprehensions of *South Tomi* and *Viarsa I* the Australian enforcement agencies supported by the South African and United Kingdom intercepted and arrested the offending vessels.⁴³ But, the LOSC does not contain any conditions with respect to collective hot pursuit.⁴⁴ Although it seems novel, these two incidents of multilateral hot pursuit do not compromise the concept of hot pursuit. Rather they illustrate the integration of State practice to an evolving situation in recognizing their validity, hot pursuit remains a cogent right in the 21st century.⁴⁵

Constructive presence

Another area of uncertainty in the LOSC art 111 is the meaning of "mother ship". It states, to launch hot pursuit, one of "its" boats should remain outside the EEZ of the offending state. State practice with respect to age old fisheries cases has been where smaller craft, including canoes, have operated in the relevant jurisdiction while the mother ship has been located outside. This is, however, an unlikely scenario today seeking to rely on to target stores and bunkering vessels or those engaged in transshipment while on high seas areas adjacent to their EEZs.⁴⁶

In summary, considering the above facts, these recommendations could be made as reforms of the international law in related to hot pursuit.

1. Any reliable tracking or plotting technologies should be allowed to initiate and maintain hot pursuit, by enforcement vessel.
2. The enforcing vessels should be allowed to use all practicable methods to give stop signal that is capable of being received and understood by the offending vessel.

41 Ibid.

42 Erick Jaap Molenaar, "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*," *International Journal of Marine and Coastal Law*, Vol 19, No. 1, 2004, p. 30.

43 Gullett and Schofield, "Pushing the Limits of the Law of the Sea Convention:" p. 574.

44 Molenaar, "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean:" p. 37.

45 Baird, "Arrests in a Cold Climate (Part 2):" p.15.

46 Gullett and Schofield, "Pushing the Limits of the Law of the Sea Convention:" p.570.

3. Any of the enforcing vessels should be allowed to pass over a hot pursuit to another enforcing vessel of the same nationality.
4. Multilateral hot pursuit should be permitted.
5. Consider all modern types of ships in the high seas as mother ships and its crafts under 'constructive presence', when interpreting LOSC provision.
6. The pursuit once terminated should be permitted to resume.

Conclusion

The doctrine of hot pursuit, being of an exceptional nature should be exercised with proper care when using law enforcement activities. The right protects the authority of the coastal state Law enforcement activities by denying an offending ship the opportunity to escape arrest by fleeing to the high seas. But the doctrine is restricted to the olden days of 'cannon shot era' where nations had limited sea area. New monitoring and tracking technologies promise to revolutionize maritime law enforcement operations. These innovations and reforms will be needed to achieve economical coverage of the vast maritime areas of concern. The doctrine must be allowed to evolve if it is to be a viable enforcement action against increasing transnational crime in the 21st century.

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