

The Doctrine of Hot Pursuit under International Law

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ABSTRACT

The doctrine of hot pursuit is a narrow but significant exception to the freedom of the high seas and a unique mechanism born of the coastal state's right to project its jurisdiction beyond the shoreline. Hot pursuit is entrenched in customary international law and treaty, and the limits contained therein are intended to safeguard the balance of rights between flag and coastal states. The exercise of hot pursuit is limited in time, space and purpose—it must be 'hot' and it must be continuous. This thesis critically analyses the early development of hot pursuit from its theoretical foundations to its crystallisation and codification, as well as in recent employment in response to contemporary challenges.

As states contemplate a broad spectrum of maritime security challenges that threaten to outpace the development of customary international law, there has been a call for a more flexible interpretation of hot pursuit. The research examines the discourse that has emerged with respect to multilateral hot pursuit and concludes that ad hoc and formalised cooperative arrangements can address conduct that would otherwise go unpunished. By examining shortfalls within the law, this study evaluates state efforts to construct alternative approaches to conventional, unilateral hot pursuit within the law of the sea framework.

This thesis examines the merits of alternative approaches: instituting multilateral frameworks and bilateral agreements, strengthening domestic regimes and employing innovative technology. The use of bilateral agreements is largely positive—they abbreviate the consent process and can assist capability-challenged states. Likewise, states optimise domestic frameworks by drafting expansive provisions applicable to the municipal framework—the arena in which most hot pursuit disputes are adjudicated. While there is vast potential for hot pursuit to utilise emerging technology, this thesis identifies at least one element—communicating a valid signal—that remains a sticking point for contemporary applications of hot pursuit. Although the scope of hot pursuit has broadened, it is clear that without further development the current framework reflected in the theoretical foundations will fall short.

By examining a range of alternative approaches, the research concludes that hot pursuit can assist states in overcoming the contemporary challenges of weak governance, limited capabilities, strategic initiatives, regional tensions and geopolitical issues. The

breadth of this research highlights the limitations of the law and the factors driving states to develop solutions to meet their respective enforcement needs. Finally, this thesis offers lessons for states aiming to address gaps in the law and ultimately contributes to the growing body of the law of the sea.

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LIST OF ABBREVIATIONS

AFMA	Australian Fisheries Management Authority
ASEAN	Association of Southeast Asian Nations
ACV	Australian Customs Vessel
ADF	Australian Defence Force
AIS	Automatic Identification System
C3	command, control and communications
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
EC	European Commission
EEZ	Exclusive Economic Zone
HIMI	Heard and McDonald Islands
IUU	illegal, unreported and unregulated
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
IPOA-IUU	<i>International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing</i>
ITLOS	International Tribunal for the Law of the Sea
LMR	Living Marine Resources
MOU	Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development
ReCAAP	<i>Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia</i>
RFMO	Regional Fisheries Management Organisation
RHIBs	Rigid Hull Inflatable Boats
RAN	Royal Australian Navy
PSI	Proliferation Security Initiative
SAR	synthetic aperture radar
SAS	South African Ship
SAN	South African Navy
SANDF	South African National Defence Forces
SADC	Southern African Development Community
SASR	Special Air Service Regiment
VMS	Vessel Monitoring Systems
UK	United Kingdom
UNCLOS	<i>United Nations Convention on the Law of the Sea</i>
US	United States
USCG	United States Coast Guard
USPACOM	US Pacific Command
WMD	Weapon of Mass Destruction

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*Behind this mask there is more than just flesh.
Beneath this mask there is an idea...
and ideas are bulletproof.*

Alan Moore, *V for Vendetta* (1986)

PART I
INTRODUCTION

CHAPTER 1: INTRODUCTION

1.1 Overview

The doctrine of hot pursuit is securely founded in customary international law and the *United Nations Convention on the Law of the Sea*¹ (UNCLOS) and until recently has been relatively unchanged. As a result of a recent resurgence of hot pursuit, which has been employed in new and more cooperative ways, the current scope of hot pursuit is unclear. While its contemporary use demonstrates the continuing relevance of hot pursuit as a maritime enforcement tool, a re-examination of hot pursuit is necessary to comprehensively grasp all its relevant characteristics and the scope of its utility. State practice has been ad hoc and, due to the infrequency of relevant fact scenarios, this area of law lacks consistent judicial commentary.² What is clear is that because of new³ and renewed⁴ maritime challenges, there is an increased desire by states to strengthen control over maritime zones. Despite states' intent to address maritime security concerns and the combined political will to strengthen enforcement measures in the maritime domain,⁵ amendment of UNCLOS is unlikely.⁶ Rather, these concerns are prompting the development of more appropriate and effective responses or, alternatively, a re-examination of existing methods to address emerging issues.⁷

¹ Opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

² Matters involving hot pursuit were considered by the International Tribunal for the Law of the Sea (ITLOS) in the *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Admissibility and Merits) (1999) 120 ILR 143 ('*M/V Saiga*') and the *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159 ('*Volga*'). The former confirmed that all conditions must be complied with for a pursuit to be valid and the latter did not comment on the pursuit itself (instead the Tribunal confined its comments to the issue of prompt release).

³ Terrorism and the trafficking of weapons of mass destruction (WMDs) has prompted a number of legal developments, such as the bilateral shiprider agreements (discussed in Chapters 6 and 7) and the Proliferation Security Initiative (PSI) (see, eg, Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011), ch 4).

⁴ The resurgence of piracy and illegal fishing in contemporary guises are examples of this.

⁵ For example, there has been significant cooperation between states through the development of the PSI in response to the threat of WMD trafficking. The PSI was first negotiated on 23 September 2003.

⁶ UNCLOS arts 312–316 provide a mechanism for amendment. There is an option for the creation of Implementing Agreements to fill the gap, but there are attendant difficulties with this process as well. For example, *UN Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (the '*Fish Stocks Agreement*') opened for signature on 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001). See also, James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2013), chs 3 and 4.

⁷ In response to maritime security threats, 'there is a willingness among states to cooperate in developing new rules and revising old rules in support of their common interest' (Klein, above n 3, 324).

Although codified hot pursuit reflects pre-existing⁸ customary international law,⁹ innovative use of hot pursuit has since taken place, therefore necessitating an assessment of whether such conduct is isolated or forms part of a more general and consistent practice.¹⁰ The existence of customary international law is determined by uniform state practice and *opinio juris*—a belief of the state that certain conduct conforms with international law.¹¹ *Opinio juris* can be somewhat difficult to determine.¹² Nonetheless, review of the literature and materials arising from the contemporary use of hot pursuit identifies evidence of tangible developments in this area. This research will identify and evaluate these developments. An assessment of these issues may also facilitate the identification of best practice and aid other states seeking to address maritime security challenges.

The seminal work on hot pursuit in international law by Nicholas Poulantzas was first published in 1969.¹³ This thesis will take a different approach to the subject. Rather than a systematic examination of domestic legislation and jurisprudence, this research will include a comparative analysis of the United States (US) and Australia—both states having consistently employed hot pursuit during this period of flux.¹⁴ As part of this analysis, state practice will be assessed to identify the benefits and challenges that stem from hot pursuit operations.

⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 ('*Nicaragua*') para 176. Although the doctrine of hot pursuit has been established in customary international law for some time (as further examined in Chapter 2), a fundamental understanding of the process of crystallisation is necessary to assess any further development.

⁹ In cases such as *The Ship 'North' v The King* [1906] 37 SCR 385 and *I'm Alone (Canada v United States)* (1935) 3 RIAA 1609 (discussed in Chapter 2). The codification process is examined in Chapter 3.

¹⁰ This is best summarised as, 'The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule' (*Nicaragua* [1986], 186).

¹¹ *The North Sea Continental Shelf Cases (Germany v Denmark)* [1969] ICJ Rep 3, 39. See also, Vaughan Lowe, *International Law* (Oxford University Press, 2007) 36–63; James R Crawford, 'The Identification and Development of Customary International Law' (Keynote speech delivered at the Spring Conference of the ILA British Branch—Foundations and Futures of International Law, The Dickson Poon School of Law, London, 23 May 2014) <<http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001>>.

¹² Multiple factors must be considered: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules derived from custom, or indeed developing them' (*Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 29–30). See also, Lowe, above n 11, 38.

¹³ Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff, 2nd ed, 2002) 93–118. The second edition is a reprint of the first edition (published in 1969) with a supplementary update. See Bill Gilmore, 'Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law*, Second Edition. The Hague, Martinus Nijhoff Publishers, 2002—Book Review' (2004) 15 *European Journal of International Law* 224.

¹⁴ State practice requires some scrutiny: 'It is necessary to exercise care when analyzing State practice. Claims appearing on the statute book may have been quietly abandoned or may never have been enforced, and therefore may not represent the actual "practice" of the State' (R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 11).

The US and Australia have been selected as case studies for a number of reasons. Both countries are of a similar size with large maritime areas and, as such, both experience transnational crimes arising from their respective geopolitical circumstances. These unique factors make maritime law enforcement and effective ocean overwatch extremely difficult to achieve. Secondly, each state contributes a different perspective, with Australia being an early signatory to UNCLOS and the US being yet to become a signatory. Although the US remains bound by customary international rules governing the law of sea, hot pursuit has been utilised in an innovative fashion to overcome challenges arising from the region. Lastly, although both states are somewhat similar in structure (ongoing defence interoperability and cooperation being a testament to this), the US and Australia are at opposing ends of the capability spectrum. As a maritime law enforcement tool, hot pursuit appears to be effective for both states in terms of meeting at least one aspect of strategic intent. How this may occur—hot pursuit aiding vast military powers such as the US and capability-challenged states such as Australia—will be examined so that appropriate lessons learned may be developed. This analysis will provide guidance on best practice approaches to integrating hot pursuit into municipal frameworks to best address maritime security concerns.

At first glance, the exercise of the doctrine of hot pursuit under UNCLOS appears reasonably straightforward; an arrest on the high seas is valid if the preconditions are met. These conditions, negotiated without significant opposition, were intended to facilitate coastal state enforcement beyond the shoreline without subverting the freedom of the high seas. However, in recent times, hot pursuit has undergone a period of development and an unprecedented consistent practice of cooperative enforcement has begun to emerge. There are also other variables at work that appear to be shaping the contemporary development of hot pursuit. Before articulating the specific research questions to be pursued in this research, a synopsis of the background to hot pursuit is set out below.

1.2 Background

In order to conduct an effective analysis of hot pursuit, it is necessary to explore a number of factors ancillary to the theoretical fundamentals. These issues touch on the early development of hot pursuit, the nature of jurisdiction under the law of the sea and the role of common law ‘fresh pursuit’. Although a relatively recent legal device in the history of this legal area, hot pursuit has developed parallel to other themes in

international law of the sea. Therefore, an examination of these three issues is essential to the scope and structure of this thesis, as it will construct the groundwork for an analysis of core issues and contextualise hot pursuit.

1.2.1 Early Development

Prior to the development of customary law and treaties, the ability to control areas of the high seas was crucial to state sovereignty and trade. The oceans were a highway for commerce and a battleground for imperial ascendancy. Consequently, there were various attempts by European powers to assert ownership over large expanses of the high seas.¹⁵ During this time, Hugo Grotius published *Mare Liberum*,¹⁶ stating his view that the high seas constituted an area open to all.¹⁷ Although other eminent writers contested the claims in *Mare Liberum*,¹⁸ there is evidence that a number of trading areas already practiced freedom of navigation¹⁹ and the freedom of the high seas became absolute from the eighteenth century onwards.²⁰

Freedom of the high seas did not necessarily preclude coastal states from exercising sovereignty beyond the shoreline²¹ and there was early recognition that these competing interests ought to co-exist.²² States wished to exert greater control over internal waters,

¹⁵ Often by royal or papal declaration, such as the *Treaty of Tordesillas* that arose from Pope Alexander VI. For a detailed history on the development of freedom of the high seas refer to *ibid*; Ram Prakash Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1983).

¹⁶ Hugo Grotius was employed by the Dutch East India Company and wrote his treatise largely in response to political unrest regarding Dutch entry into the Far East for the purposes of trade. For a more detailed overview, see C H Alexandrowicz, 'Freitas versus Grotius' (1959) 35 *British Yearbook of International Law* 162.

¹⁷ 'I shall base my argument on the following most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it' (Grotius, Hugo, *The Freedom of the Seas, or the Right to Which Belongs to the Dutch to Take Part in the East Indian Trade* (James B Scott ed, Ralph van Deman Magoffin trans, Oxford University Press, 1916) 7 [trans of: *Mare Liberum* (first published 1608)]).

¹⁸ Including John Selden, *Of the Dominion, or, Ownership of the Sea. Two Books* (Marchamont Nedham trans, Special Command, 1652) [trans of: *Mare Clausum: seu de dominio maris libri duo* (first published 1635)]; Sir Philip Medows, *Observations Concerning the Dominion and Sovereignty of the Seas being an Abstract of the Marine Affairs of England* (Edward Jones, 1689); William Welwood, *Abridgement of All Sea-Lawes* (Humfrey Lownes, 1613). In 'Title XXVII' in *Abridgement of All Sea-Lawes*, Welwood opposed *Mare Liberum* on the grounds that the coastal state, Scotland in this case, retained fishing rights over waters adjacent to the shoreline—a sentiment echoed today in the the modern law of the sea, most notably the concept of a country's Exclusive Economic Zone (EEZ).

¹⁹ Ram Prakash Anand, above n 15, 228 and, by the same author, *International Law and the Developing Countries* (Martinus Nijhoff, 1987) 56. For further discussion of the influence of Asian maritime trade practices on Grotius' development of *Mare Liberum*, see C H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon, 1967) 44.

²⁰ Churchill and Lowe, above n 14, 205 and Constantine John Colombos, *The International Law of the Sea* (Longmans, Green and Co, 6th ed, 1967) 48.

²¹ Churchill and Lowe, above n 14, 71–72.

²² Cornelius van Bynkershoek, *The Dominion of the Sea* (Ralph van Deman Magoffin trans, Oxford University Press, 1923) [trans of: *De Dominio Maris* (first published 1703)].

ports and those waters adjacent to their coastlines as this afforded better security of approaches and a degree of control over marine resources.²³ The gradual development of a territorial jurisdiction was slowed by disagreement regarding both the breadth and the nature of the zone.²⁴ Although the development of hot pursuit was many years away, coastal state jurisdiction began to take shape as a result of the burgeoning territorial zone.

Dutch jurist Cornelius van Bynkershoek was the first scholar to refer to hot pursuit as a possible exception to the freedom of the high seas.²⁵ It must be acknowledged that Bynkershoek's treatment of hot pursuit was centred on conduct during naval warfare, due in part to the broad application of naval operations at this time.²⁶ In short, Bynkershoek claimed that hot pursuit could lawfully ensue where a foreign vessel had committed an act of aggression within coastal state waters and fled onto the high seas or into neutral waters.²⁷ Due to the inviolable status of neutrality, Bynkershoek argued for hot pursuit without real success.²⁸ This was symptomatic of the time, as naval power was critical to sovereignty and freedom of navigation was evident but as yet undefined.²⁹ Putting aside the obvious difficulties of the inviolability of neutral territory, Bynkershoek also suggested that the laws of war permitted pursuit or aggression against an enemy on the high seas.³⁰

To a large degree, critics did not oppose Bynkershoek's claims that pursuit was an exception to the freedom of the high seas. Rather, most criticism was focused on why incursions, whether they be the result of pursuit or not, contravened the inviolable nature of neutral waters. Had Bynkershoek further developed his thesis of 'pursuit' as

²³ Three reasons have been given for control of the developing maritime belt: defence, security of trade and marine resources (Colombos, above n 20, 87).

²⁴ Colombos, above n 20, 187–182. For more detail on the development of the territorial sea, see Philip C Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (Jennings, 1927).

²⁵ Cornelius van Bynkershoek, *Quaestionum Juris Publici* (Frank Tenney trans, Oceana Publications 1964) [first published 1717].

²⁶ A good summary of Bynkershoek's approach to hot pursuit can be found in G Blaine Baker and Donald Fyso (eds), *Essays in the History of Canadian Law: Quebec and the Canadas* (University of Toronto Press, 2013).

²⁷ *Ibid* 77.

²⁸ Bynkershoek's contemporary critics included Henry Wager Halleck. Bynkershoek's views were heavily influenced by political events involving the Dutch Royal Fleet. His views were later adopted by Richard Lee in *A Treatise of Captures in War* (W Sandby, 1759). Both claimed that it was lawful in the heat of the battle to pursue an enemy vessel fleeing from coastal state waters to neutral waters.

²⁹ Colombos, above n 20, 63; Medows, above n 18.

³⁰ Bynkershoek's views on hot pursuit permitted entry into neutral coastline waters to continue the pursuit of an enemy subject to a condition presumably to preserve the inviolability of neutrality: 'it is lawful to pursue the enemy along the coast even near the land, or into a bay or river, provided we spare the land forts, though they should assist the enemy, and provided we do not involve our friends in the danger' (Bynkershoek, above n 25, 57).

distinguished from acts of ‘aggression’ on the high seas and addressed the inviolability of neutral waters, his discussion may have been more successful.³¹ The case of the *Anna*,³² examined in Chapter 2, revived Bynkershoek’s somewhat tenuous link to hot pursuit. Admittedly, the *Anna* also involved an incursion into neutral territory; however, the Court elicited comments that placed the early development of hot pursuit into context.³³ While Bynkershoek’s views can be distinguished from a contemporary definition of hot pursuit in a number of ways,³⁴ he laid a theoretical foundation on which an interdiction right outside naval warfare could be developed. This concept has much more in common with modern day theories of hot pursuit than the ancient custom of ‘fresh pursuit’³⁵ and is discussed below in section 1.2.4. In summary, as the first scholar to advocate a possible right of pursuit of vessels onto the high seas, the influence of Bynkershoek, albeit an inelegant one, ought to be acknowledged.³⁶

1.2.2 Theories of State Jurisdiction

An appropriate understanding of the nature of jurisdiction is necessary to conduct an examination of the theoretical foundations of hot pursuit.³⁷ As a limited exception to high seas freedoms, hot pursuit involves competing jurisdictions. A coastal state exercises jurisdiction over its adjacent maritime zones and hot pursuit permits the extension of that power over foreign vessels onto the high seas. At the same time, foreign vessels enjoy certain rights within adjacent zones and, subject to innocent passage for example, are largely subject to the exclusive jurisdiction of the flag state and are free from coastal state interference. The unique status of hot pursuit involves a balance of these competing interests.

³¹ ‘The idea that jurisdiction could be extended by way of a hot pursuit had been started and, if not suitable as a justification of an enemy’s capture in neutral waters, it could be and was moulded in a different form during the nineteenth and twentieth centuries by writers, Statesmen and jurists alike to satisfy a new and growing communal need in policing territorial waters’ (Douglas Sherlock, ‘The Doctrine of Hot Pursuit’ (1968) 7 *Military Law and Law of War Review* 25, 25).

³² *Anna* (1805) 5 C Rob 373.

³³ Kinji Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (Kluwer Law International, 1998) 170.

³⁴ See, eg, Susan Maidment, ‘Historical Aspects of the Doctrine of Hot Pursuit’ (1972–1973) 46 *British Yearbook of International Law* 365, 370.

³⁵ Distinguishable from the law enforcement practice in the US that may be used to prevent the escape and affect the arrest of fleeing suspected criminals.

³⁶ Sherlock, above n 31, 24; Glanville L Williams, ‘The Juridical Basis of Hot Pursuit’ (1939) 20 *British Yearbook of International Law* 83, 87.

³⁷ ‘[U]ltimately the legal basis of all aspects of jurisdiction remains the same, namely State sovereignty—and whatever the label attached, jurisdiction remains the external manifestation of the power of the State’ (Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff, 2007) 6).

In light of new world maritime security concerns, there are now additional tensions that may shape responses when exercising jurisdiction in the maritime domain. In this respect, jurisdiction refers to the authority of states to impose and enforce regulations regarding conduct.³⁸ The exercise of authority may affect individuals, entities, property and the activities of a state itself.

Jurisdiction is inherently a part of state sovereignty and,

Any visitation, molestation, or detention of vessels bearing the flag of a friendly State by force, or by the exhibition of force, is in derogation of the sovereignty of that State. All these things, the right of hot pursuit claims on behalf of the pursuing State.³⁹

In terms of how jurisdictional theory has been codified, it has been said that,

[T]here is no one theory of jurisdiction that underlies the various powers and competences accorded to States under the 1982 Convention. Elements of territorial sovereignty, nationality, and protective and universal principles of jurisdiction, recognised by customary international law, are intertwined with special functionally-based State competencies.⁴⁰

The powers to create and apply laws are described as prescriptive powers. Prescriptive powers may be limited in a number of ways; by *ratione loci* (territory), *ratione personae* (class of persons, e.g., citizens) or *rationi materiae* (type of matter, e.g., fishing in the EEZ).⁴¹ The powers to adjudicate and compel compliance (including the exercise of judicial power) are described as enforcement powers. As a general principle of international law, states cannot enforce domestic law beyond their territory without an international agreement or explicit rule under customary international law.⁴² In certain circumstances it may be permissible to do so extra-territorially (given that jurisdiction does not equate to territory), but these exceptions are very limited.⁴³ Under the law of the sea, the matter is further complicated by differing jurisdictional (maritime) zones. Hot pursuit is one such exception to enforcement jurisdiction.

³⁸ Ian Brownlie, *The Principles of International Law* (Oxford University Press, 7th ed, 2008) 299.

³⁹ Sir Francis Taylor Piggott, *Nationality, Including Naturalization and English Law on the High Seas and Beyond the Realm* (William Clowes and Sons, 1907) vol 2, 35.

⁴⁰ Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35(2) *International and Comparative Law Quarterly* 320, 343.

⁴¹ Churchill and Lowe, above n 14, 11–12.

⁴² *Lotus (France v Turkey)* [1927] PCIJ Rep ser A no 10.

⁴³ For further discussion of jurisdiction in the context of the law of the sea, refer to Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 7–10.

Hot pursuit validates the exercise of jurisdiction by a coastal state over a foreign vessel on the high seas. An arrest on the high seas presents two problems: physical dislocation from the coastal state and the status of foreign persons and property. Pursuant to Article 92 of UNCLOS,⁴⁴ the flag state has the exclusive right to exercise legislative and enforcement jurisdiction over that vessel on the high seas. States may assign laws to aircraft and vessels that transit beyond the shoreline and maritime zones.⁴⁵ Various rights and duties are conferred upon the flag state to regulate registered vessels and maintain a registry. Therefore, the exercise of any exception to the freedom of the high seas will frequently contend with exclusive flag state jurisdiction.

There is also the competing interest of the flag state's control and interest in property, and possibly any citizens on board. By virtue of citizenship, flag states also retain a degree of interest in, and jurisdiction over, its nationals wherever they are. In relation to flag state responsibilities, Article 94(1) of UNCLOS sets out that every state shall exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Registration and regulation under the flag state regime in international law has consequences for safety at sea, security, navigation and the environment. Further, in the absence of a claimed or legitimate hot pursuit, the flag state may assert jurisdiction for crimes committed on board vessels and aircraft.⁴⁶

The exclusive jurisdiction of the flag state must be free from interference 'save in exceptional cases provided for in international treaties or in this Convention'.⁴⁷ The right to board a non-flag state vessel can be permitted by treaty⁴⁸ and is incorporated in a range of agreements.⁴⁹ For example, Article 21 of the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*⁵⁰ ('Fish Stocks Agreement') introduced increased powers of inspection by non-flag states pursuant to the Regional Fisheries Management Organisation (RFMO) regime. However, a vessel suspected on

⁴⁴ Also Article 6 of the *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962). There are 46 signatories and 63 parties.

⁴⁵ *Commonwealth Criminal Code 2000* s14.1(2) (Standard Geographical Jurisdiction).

⁴⁶ UNCLOS art 94(2)(b).

⁴⁷ UNCLOS art 92(1).

⁴⁸ UNCLOS art 110(1).

⁴⁹ Discussed in Chapter 6.

⁵⁰ *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001).

reasonable grounds of conducting illegal, unreported and unregulated (IUU) fishing can only be boarded and inspected with the consent of the flag state.⁵¹ Accordingly, '[t]he principle of exclusive flag State jurisdiction is fiercely protected, and generally speaking, the exceptions are few and far between'.⁵² Attempting to obtain consent of the flag state can be time consuming, impractical and fraught with difficulties. Alternatively, where the relevant conditions of hot pursuit exist, an authorised vessel of a coastal state can visit, board, search and seize and pilot the vessel (with its crew detained) to a home port for the purposes of prosecution and confiscating the vessel and its catch. In practice however, flag states do not always exhibit the willingness or ability to act in relation to obligations of control and compliance over their vessels. The problem of 'open registries' or 'flags of convenience' adversely affects many aspects of modern shipping and state-sponsored ocean use.⁵³ In the absence of flag state consent or conditions for the conduct of a hot pursuit, states are often powerless to enforce laws relating to IUU fishing. Coastal states experience similar frustrations with regards to piracy, drug trafficking and irregular migration. This is particularly problematic for states subject to geopolitical challenges, such as Australia, and states proximate to crowded maritime regions, such as the US.⁵⁴

To exercise law in an extraterritorial manner, there must be a link between the unlawful conduct and the forum. In the case of hot pursuit and capture on the high seas, the link will most commonly constitute a breach of domestic fishing laws within the relevant maritime zone. The domestic law ought to give the coastal state the power to interdict on the high seas (and escort to port for prosecution) pursuant to Article 111 of UNCLOS. To exceed the provisions of international law as it relates to hot pursuit risks claims of invalidity,⁵⁵ as domestic law should be consistent with international law. Further, state parties are required to act in good faith—a general principle echoed in Article 300 of UNCLOS: 'State Parties shall fulfill in good faith the obligations

⁵¹ *Fish Stocks Agreement* art 20(6).

⁵² Camille Goodman, 'The Regime for Flag State Responsibility in International Fisheries Law—Effective Fact, Creative Fiction, or Further Work Required?' (2009) 23 *Australia and New Zealand Maritime Law Journal* 157, 164; Matthew Gianim and Walt Simpson, 'The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover For Illegal, Unreported and Unregulated Fishing' (Report, Australian Government Department of Agriculture, Fisheries and Forestry, 2005); Eric Powell, 'Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience' (2013) 19(1) *Annual Survey of International and Comparative Law* 263.

⁵³ See, eg, Goodman, above n 52.

⁵⁴ See for generally regarding maritime boundaries, International Mapping, *Maritime Boundaries of the World Poster* (2017) <<http://internationalmapping.com/maritime-boundaries-of-the-world>>.

⁵⁵ 'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law' (*Draft Declaration on Rights and Duties of States*, adopted by the International Law Commission (ILC) at its 1st Session (December 1949) art 13).

assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right'. This suggests that more than technical compliance is required when engaging in conduct that invokes UNCLOS obligations.⁵⁶

Flag state jurisdiction is not absolute. While flag states exercise jurisdiction over crimes committed on vessels including while on the high seas, flagged vessels themselves do not possess territoriality. However, the violation of coastal state law constitutes one of the exceptions referred to in Article 92(1) of UNCLOS. Specifically, interdiction and apprehension by hot pursuit on the high seas, for all intents and purposes, has the same effect and authority as interdiction and apprehension within the territorial sea of the coastal state for violations of coastal state law. The invocation of hot pursuit powers projects domestic enforcement powers onto the high seas and, unlike other 'high seas exceptions' that draw authority from international causes, the exercise of jurisdiction is based solely on the national interest of the coastal state.⁵⁷ The practical difficulties in conducting enforcement operations on the high seas will frequently frustrate the exercise of coastal state jurisdiction. Recent state practice has demonstrated that the coastal state will have more success enforcing self-regarding legislation by entering bilateral, multilateral or regional regimes.⁵⁸

Although the high seas are considered an area beyond the jurisdiction of coastal states, there are several limited exceptions that permit interference by a non-flag state. These include the transport of slaves,⁵⁹ piracy,⁶⁰ drug trafficking,⁶¹ unauthorised broadcasting⁶² and pollution arising from maritime casualties that threaten coastlines and related interests.⁶³ Provided the relevant conditions are met for hot pursuit, there is the potential for any coastal state to exercise jurisdiction over any vessel on the high

⁵⁶ See *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) Award on Jurisdiction and Admissibility* (Arbitration) 23 RIAA 1 (4 August 2000) and the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-East Pacific Ocean (Chile v European Community)*, ITLOS Case No 7, ICGJ 340 (20 December 2000) para 3.

⁵⁷ Unilateral enforcement operations are difficult to sustain and 'there must also be strong national incentives for such regional cooperation to occur' (Robin Warner, 'Jurisdictional Issues for Navies involved in Enforcing Multilateral Regimes Beyond National Jurisdiction' (1999) 14(3) *International Journal of Marine and Coastal Law* 321, 327–328).

⁵⁸ For example, Australian government assets conducted a hot pursuit of the *M/V South Tomi* for 6,100 kilometres, finally culminating in the capture of the vessel (with the assistance of South African authorities) on 12 April 2001 some 320 nautical miles south of Cape Town.

⁵⁹ UNCLOS art 99.

⁶⁰ UNCLOS art 100.

⁶¹ UNCLOS art 108.

⁶² UNCLOS art 109.

⁶³ UNCLOS art 221.

seas. Although a coastal state is merely enforcing domestic law, for example in relation to IUU fishing, drug trafficking and irregular migration, the exercise and consequences of enforcement contemplate much more.

1.2.3 Distinguishing ‘Hot Pursuit’ From ‘Fresh Pursuit’

Although the phrase ‘hot pursuit’ is mentioned in media reports in relation to incursions and the tracking of terrorists,⁶⁴ it is unequivocal that hot pursuit on land is not permitted under international law.⁶⁵ There are existing international arrangements for breaches of criminal law; however, these are subject to conditions, time and distance limitations and revocation.⁶⁶ That being said, the origin of hot pursuit is often attributed to the common law practice of ‘fresh pursuit’.⁶⁷ Fresh pursuit, found in the Greek Code, Byzantine Law and British common law, permitted landowners or hunters to pursue animals across fence lines (usually estate or privately owned parkland) to capture or kill game. Examples of fresh pursuit have also included straying cattle, bees and game.⁶⁸ The essence of fresh pursuit was that a claimant may enforce property rights in relation to chattels (i.e., one or more animals) on another’s property and avoid a possible civil claim for trespass.

Thus, not only is hot pursuit on land unlawful, hot pursuit at sea is clearly distinguishable from fresh pursuit for a number of reasons. Fresh pursuit is confined to land and unlawful entry may constitute trespass onto private land. For an individual to cross a state territorial border without authority is to illegally enter and risk detention, prosecution and deportation. For armed forces or equivalent foreign groups to do so may constitute a violation of territorial integrity and act of aggression.⁶⁹ Hot pursuit has

⁶⁴ See, eg, Lionel Beehner, ‘Hot Pursuit in Syria and in History’, *The Washington Post* (online), 28 September 2014 <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/28/hot-pursuit-in-syria-and-in-history>>; Tom Ruys, ‘Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey’s Military Operations against the PKK in Northern Iraq’ (2008) 9(2) *Melbourne Journal of International Law* 334, 338.

⁶⁵ Justifying cross-border incursions by means of hot pursuit has not only been in relation to Northern Iraq but also in parts of Africa. For a discussion see E Hughes, ‘In (Hot) Pursuit of Justice? The Legality of Kenyan Military Operations in Somalia’ (2012) 20(3) *African Journal of International and Comparative Law* 471, 479.

⁶⁶ Police are permitted to pursue fleeing suspects across borders of certain states without requesting permission pursuant to Article 41 of *The Schengen Convention Implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders*, opened for signature 14 June 1985 (entered into force 26 March 1995) and *The Convention Implementing the Schengen Agreement*, opened for signature 19 June 1990 (entered into force 1 September 1993).

⁶⁷ Williams, above n 36, 85; Poulantzas, above n 13, 4–7.

⁶⁸ Poulantzas, above n 13, 5.

⁶⁹ Article 2(4) of the *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

been distinguished from fresh pursuit in the earliest of cases dealing with hot pursuit.⁷⁰ Accordingly, fresh pursuit will not be discussed further in this thesis.

1.2.4 Recent Development of Hot Pursuit

The relatively recent resurgence of hot pursuit has prompted a re-evaluation of its precise status in contemporary circumstances. This has been parallel to the emergence of modern maritime security threats and an increasing desire by states to develop means to strengthen sovereign control over maritime zones within existing frameworks. In an area of law that is slow to change, there is evidence that new and innovative methods are underway⁷¹ as states hasten to close the legal gaps. While these developments have been considered independently, what has yet to be undertaken is a thorough assessment of hot pursuit and its utility for modern maritime security issues.

While the majority of scholars have considered the application of hot pursuit in the context of IUU fishing,⁷² hot pursuit has been used to conduct maritime law enforcement to tackle other issues, such as piracy and irregular migration. This thesis examines hot pursuit in relation to IUU fishing and other crimes. Although there has been exploration of the US employment of shiprider agreements,⁷³ the practice of forward embarkation of government officials (or ‘shipriders’) onto other states’ vessels, a more recent investigation of treaty practices in relation to the US and beyond is necessary.⁷⁴ Bilateral agreements, particularly those integrating shiprider provisions, contemplate provisions that go beyond the conventional elements of hot pursuit and have considerable potential for states aiming to strengthen control over maritime

⁷⁰ Williams also distinguished the two: ‘It does not follow that there has been any borrowing from the common law of fresh pursuit; the rule is so natural that it was probably worked out spontaneously’ (above n 36, 92).

⁷¹ Klein, above n 3, 302; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 25.

⁷² See, eg, Craig H Allen, ‘Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices’ (1989) 20(4) *Ocean Development and International Law* 309; E J Molenaar, ‘Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*’ (2004) 19(1) *The International Journal of Marine and Coastal Law* 19; Rachel Baird *Aspects of Illegal, Unreported, and Unregulated Fishing in the Southern Ocean* (Springer, 2006); Randall Walker, ‘International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century’ (2011) 17 *Auckland University Law Review* 194.

⁷³ Such as Bill Gilmore, ‘Counter-Drug Operations at Sea: Developments and Prospects’ (1999) 96 *Commonwealth Law Bulletin* 609; Joseph E Kramek, ‘Bilateral Maritime Agreements Counter-Drug and Immigrant Interdiction: Is This the World of the Future?’ (2000) 31(1) *Inter-American Law Review* 121.

⁷⁴ Shiprider agreements are not confined to the US. See, eg, Article 7 of the ‘Djibouti Code of Conduct on Countering Piracy’ prescribed in *Protection of Vital Shipping Lanes*, IMO Doc C 102/14 (3 April 2009) (the ‘Djibouti Code’) and Article 9 of the *Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa* (25 June 2013). See also Douglas Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (2010) 59(1) *International and Comparative Law Quarterly* 141.

zones.⁷⁵ This will be further examined in Chapter 6 of this thesis. At least one commentator has suggested that a re-evaluation of hot pursuit as a maritime enforcement mechanism is necessary.⁷⁶ The question is whether the evidence points to an emerging, tangible change in customary international law⁷⁷ or, alternatively, whether a broader and more contemporary interpretation of the law is all that is needed to address enforcement needs.⁷⁸ Given the nature of changes to international law, it is not surprising that the latter approach has significant support. However, there is also merit in the argument for a more cautious approach to contemporary hot pursuit which defers to the conventional norms of customary international law, rather than interpreting the law to suit contemporary needs.⁷⁹

1.3 Research Questions

The overarching purpose of this thesis is to critically analyse the current scope of the law on hot pursuit and how it may be employed and developed further. This necessarily involves a critical analysis of the evolution and development of the law on hot pursuit examined in the context of historical and contemporary practice. This then leads to the articulation of lessons learned for states in terms of utilising hot pursuit for maritime law enforcement, as well as proposals for the future development of the law.

Four key research questions flow from the thesis:

1. What are the origins of hot pursuit and how has the doctrine developed?
2. What is the current scope of hot pursuit under customary international law and treaty, including its fundamental elements?

⁷⁵ Fabio Spadi, 'Bolstering the Proliferation Security Initiative at Sea: A Comparative Analysis of Ship-Boarding as a Bilateral and Multilateral Implementing Mechanism' (2006) 75(2) *Nordic Journal of International Law* 249.

⁷⁶ 'An updated analysis is overdue, both to describe the doctrine as it is currently practiced and to identify problem areas' (Allen, above n 72, 310); Rachel Baird, 'Arrests in a Cold Climate (Part 2)—Shaping Hot Pursuit Through State Practice' in Rachel Baird and Denzil Miller (eds), *Antarctic and Southern Ocean Law and Policy Occasional Papers No 11, Special Edition: In Acknowledgement of Dr Denzil Miller* (Law School, University of Tasmania, 2009) 1. Walker, similarly states, '[W]ithout a liberal and purposive judicial interpretation, art 111 is likely to prohibit rather than promote, more effective law enforcement procedures' (above n 72, 194).

⁷⁷ Molenaar, above n 72, suggests that although multilateral hot pursuit was not yet a concept at the time of writing in 2004 (at 31), recent state practice pointed to its validity (at 33) and it is consistent with the aims of international law (at 40).

⁷⁸ Allen, above n 72, 314 states that hot pursuit 'provisions require careful and precise interpretation'; Walker, above n 72, 195 states that 'the doctrine of hot pursuit must be interpreted in the context of these new priorities'; Baird, above n 76, 16 states that 'the adaptation of the exercise of hot pursuit to fit 21st century circumstances should not be linked to other coastal State initiatives to address maritime security concerns related to terrorism threats'.

⁷⁹ Warwick Gullett, 'Legislative Implementation of the Law of the Sea Convention in Australia' (2013) 32(2) *University of Tasmania Law Review* 184, 282.

3. How has hot pursuit been utilised more recently by states and what challenges are they seeking to address?
4. What challenges remain and how could the law be applied to address those challenges?

The first research task is to explore the early formation of hot pursuit and to determine how the development of hot pursuit has led to its current scope. The challenge to maintain an appropriate balance between coastal and flag state interests on the high seas has been one of the earliest influences on the formation of hot pursuit. How this balance is maintained in contemporary governance in the context of emerging maritime security trends is also an issue for examination.

The status of hot pursuit as a limited exception to high seas freedoms is significant and necessitates an innate understanding of the long-term implications. By examining the early development of hot pursuit, the future direction of the law can be predicted with more certainty. The authority for the initial development of hot pursuit is derived from sovereignty, chiefly as a means for the coastal state to project its jurisdiction beyond the shoreline. Given the lingering uncertainty that existed during the development of territorial waters, it is important to identify the drivers that ultimately overcame the indecision and consolidated the right. This research will include an analysis of whether these same drivers continue to shape pursuit today or, conversely, whether there are other new influences.

The theoretical foundations will provide a context for the examination of contemporary developments. More specifically, the analysis of hot pursuit's development will provide additional insight into its individual preconditions. The preconditions that limit the exercise of hot pursuit will be critically analysed to ascertain the limits of hot pursuit in which a state must operate when giving effect to law enforcement aims. This is important to the research because these limits are intended to safeguard the balance between flag and coastal state rights. However, the fundamental elements of hot pursuit are not necessarily conclusively settled at this time. An exploration of the current scope of hot pursuit will identify and assess any fluidity to these elements to establish whether tangible development has taken place.

This thesis explores the limits of hot pursuit and those trends arising from recent innovative practice to provide a basis for subsequent analysis of the state practice of hot pursuit by the US and Australia. Contemporary practice in the areas of drug trafficking,

people smuggling and IUU fishing will be explored, and the specific development of two approaches: multilateral hot pursuit and bilateral agreements. By incorporating a comparative analysis of states that conduct hot pursuit operations, strengths and weaknesses can be identified and contribute to a body of knowledge that may assist other states to maximise the benefits of hot pursuit (unilaterally or cooperatively). The literature emphasises the utility of hot pursuit for the purposes of addressing IUU fishing, but beyond that a degree of legal uncertainty persists. This research aims to fill that gap. These findings will broaden understanding of the contemporary status and scope of hot pursuit and contribute to knowledge of the field. The final task of this thesis is to identify remaining challenges to the application of hot pursuit in international law.

1.4 Literature Review

Hot pursuit largely originated from state practice, becoming established in customary international law and codified in treaty soon afterwards. In addition to the treaties themselves, the literature on the origins of hot pursuit is largely focused on the case law and secondary materials arising from the codification process, such as the *travaux préparatoires* and accompanying commentary. While these sources reveal the early direction of hot pursuit development, their effect on later developments is more limited.

Commentary in the period between inception into customary international law and UNCLOS demonstrates that a degree of uncertainty has dogged the application of hot pursuit for some time.⁸⁰ This is particularly evident in the domestic sphere where legislation and jurisprudence can be inconsistent with international law.⁸¹ This tendency was identified in the seminal work on hot pursuit in 1969,⁸² and the *M/V 'Saiga'* case is a more recent example of this.⁸³ In that case, the Tribunal found that Guinea had erroneously declared a general 'customs radius' legislation applicable to its EEZ and that it ultimately had no power to arrest foreign bunkering vessels therein.⁸⁴ Even so,

⁸⁰ Williams, above n 36; Maidment, above n 34.

⁸¹ Shearer, above n 40; Robert C Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33 *Virginia Journal of International Law* 557, 589.

⁸² Poulantzas, above n 13, 93–94.

⁸³ *M/V Saiga*, 127.

⁸⁴ Per UNCLOS art 60(2), coastal states retain the power to apply customs laws and regulations to the artificial islands, installations and structures in their EEZ.

wider evidence⁸⁵ suggests that there is ongoing uncertainty compounded by the lack of jurisprudence and widespread state practice.⁸⁶

Some commentators have suggested that a functional approach be taken to the application of hot pursuit⁸⁷—a conclusion supported by others at later dates.⁸⁸ In addition to inconsistencies arising from common law since that time, states have begun to maximise the application of hot pursuit within municipal and regional frameworks. As this research will include an analysis of state practice, the theories on the parameters of hot pursuit will be a useful framework.

Although hot pursuit is an established principle of customary international law and treaty, there is uncertainty regarding the limits of its fundamental elements. A number of commentators consider multilateral hot pursuit as being already permitted within the international framework, thus removing the requirement for further development.⁸⁹ This is evidenced by assessments of the hot pursuits conducted by Australia in the Southern Ocean.⁹⁰ Due to the infrequency of hot pursuit operations,⁹¹ the literature is narrowly focused on this particular approach to hot pursuit. The nature of the legislation and fact scenarios has meant that subsequent judicial treatment has been limited.⁹² Despite these challenges, these pursuits are contemporary examples that will provide the basis for the examination of wider implications of hot pursuit. Other recent developments that have been considered in the context of broader enforcement considerations, such as piracy, drug trafficking and the PSI will also be a useful context for the current research.⁹³

⁸⁵ For example, Klein, above n 3, 11 noted that '[w]hile the precise parameters of this right are ambiguous as a matter of international law, further complications arise through different interpretations of the right of hot pursuit in domestic legislation'.

⁸⁶ Reuland, above n 81, 557 noted the difficulties of the very few cases that addressed hot pursuit: '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'.

⁸⁷ A functional approach is a 'practicality over technicality' approach whereby effective enforcement is conducted without damaging the balance between the coastal state and navigating vessels. This was first discussed in Allen, above n 72, 321.

⁸⁸ Churchill and Lowe, above n 14; Klein, above n 3; Walker, above n 72.

⁸⁹ Baird, above n 77; Molenaar and Walker, above n 72.

⁹⁰ Such as Molenaar, above n 77; Baird, above n 72.

⁹¹ There have been a number of hot pursuits of vessels in the Southern Ocean, including the Togo-flagged *South Tomi*, Uruguayan-flagged *Viarsa* and *Maya V* and the Russian-flagged *Lena* and *Volga*. Of these, all but the *Lena* were apprehended as a result of hot pursuits.

⁹² The *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159, for example, dealt with prompt release of the vessel and not hot pursuit per se.

⁹³ In addition to bilateral and multilateral arrangements, the following are examples of material to be considered in this context: Guilfoyle, above n 43; Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing, 2013); Michael A Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46(1) *Harvard International Law Journal* 131; Jon D Peppetti, 'Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats'

Hot pursuit has been used more frequently, and in more cooperative methods, to address transnational crimes. This has occurred in both an ad hoc way and by agreement, indicating that customary international law is amenable to tangible development even when concerning fundamental high seas freedoms. The literature that deals with analogous enforcement issues, such as PSI and piracy, point to widening acceptance of work-around arrangements that facilitate more direct action within the international framework on issues of shared interest.⁹⁴ Although these issues occur in the context of formalised agreements, the collective interest has been the impetus for the use of more innovative methods.⁹⁵ The discussion of these agreements can identify trends that can assist with examining how the law on hot pursuit can be applied to address maritime security challenges.

A number of eminent commentators emphasise that any extraordinary exercise of hot pursuit, such as the continuation of a pursuit into the territorial sea, can only occur with an express waiver of sovereignty by the third state.⁹⁶ In this respect, the bilateral agreements in relation to France and Australia, the Niue treaty area, West and East Africa as well as various US arrangements are important primary sources for examination.

Some question the link between the state practice and the fundamental principles of UNCLOS, espousing a cautious approach to state-made law.⁹⁷ For example, although Walker argues that interpretation is the key to applying a more expansive hot pursuit, he ultimately acknowledges that a decisive comment by ITLOS could limit this practice. Some commentators state more generally that links must be maintained with the fundamental principles in treaty and customary international law of hot pursuit.⁹⁸ Again, this is indicative of a cautious approach to hot pursuit as a limited exception. This

(2008) 55 *Naval Law Review* 73.

⁹⁴ Rayfuse, above n 84; Rob McLaughlin, ‘“Terrorism” as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2001’ (2011) 14 *Yearbook of International Humanitarian Law* 391; Mark J Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (Adelphi Papers Series No 376, International Institute for Strategic Studies, 2005). See also Klein, above n 3.

⁹⁵ Guilfoyle, above n 43; Klein, above n 3.

⁹⁶ Rothwell and Stephens, above n 71, 418; Warwick Gullett and Clive Schofield, ‘Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean’ (2007) 22(4) *The International Journal of Marine and Coastal Law* 545, 566; Robin Warner, ‘Australia’s Maritime Challenges and Priorities: Recent Developments and Future Prospects’ in J Ho and S Bateman (eds), *Maritime Challenges and Priorities in Asia: Implications for Regional Security* (Routledge, 2012) 251–271, 261–262.

⁹⁷ Gullett and Schofield, above n 96, 546.

⁹⁸ Rayfuse, above n 84, 200; Gullett and Schofield, above n 96, 569; Warner, above n 96, 261.

theory highlights the difficulty of assessing hot pursuit in the absence of consistent practices and jurisprudence.

As the focus of more recent literature has been on the Australian hot pursuits of the early 2000s, there is a small pool from which to draw upon when considering how the law can be applied to address current challenges. Accordingly, other sources of information not directly engaging with hot pursuit as a method of law enforcement will be considered and will nonetheless contribute to an understanding of the gaps in law and practice. The treaty framework itself has not changed and is unlikely to do so in the near future, while the lack of other primary sources necessitates a greater focus on secondary sources. Additionally, the Australian maritime powers legislation has been overhauled in 2013 and, with regards to comparative analysis, there is a shortage of cases and secondary materials in this area.

Most commentators consider that a more flexible or functional approach to the application of hot pursuit is necessary.⁹⁹ However, the degree of consensus in relation to the fundamental elements is uncertain. In this context, the literature tends to rationalise the development of hot pursuit as a means to address contemporary problems arising in the maritime domain, chiefly in relation to IUU fishing (though there are other applications). Nonetheless, similar conclusions have been reached that are relevant to an assessment of the contemporary scope of hot pursuit. The main value of these themes is as a framework from which to consider the limits of the principal elements.

Analysis of maritime security challenges is currently emerging¹⁰⁰ and this exploration considers one of the core issues arising from the application of hot pursuit: addressing the balance between coastal and flag state interests. This perspective, coupled with the shared interest approach to agreements, could mean that there are a number of ways that the law may be used to address unresolved issues. The literature can provide insight into differing approaches to interpretation and highlights the difficulties in assessing developments in customary international law.¹⁰¹ The desire for change to the law ought not to outweigh the evidence of change, and this is particularly evident in the area of

⁹⁹ Allen, above n 72, 322; Churchill and Lowe, above n 14, 216; Walker, above n 72, 217–218; Klein, above n 3, 113; Vasilios Tasikas, ‘Unmanned Aerial Vehicles and the Doctrine of Hot Pursuit: A New Era of Coast Guard Maritime Law Enforcement Operations’ (2004) 29 *Tulane Maritime Law Journal* 59.

¹⁰⁰ The seminal work being Klein, above n 3. Other examples include James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff, 2013); Natalie Klein, Joanna Mossop and Donald Rothwell (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge, 2009) and Rupert Herbert-Burns, Sam Bateman and Peter Lehr, *Lloyd’s MIU Handbook of Maritime Security* (CRC Press, 2008).

¹⁰¹ Gullett and Schofield, above n 96, 546; Molenaar, above n 72, 40.

IUU fishing. Opinions on the precise status of hot pursuit differ and there is evidence of increasing frustration in the face of multifaceted and well-resourced operators of drug trafficking, people smuggling and IUU fishing.¹⁰² This reflects the growing recognition that criminal enterprise operates maritime syndicates to move drugs, people and even weapons through maritime zones.¹⁰³ There has essentially been an effort to reconfigure enforcement tools to effectively counter new forms of criminal enterprise. It is evident that the problem of flags of convenience, discussed elsewhere,¹⁰⁴ underwrites this seemingly asymmetrical relationship between coastal enforcement vessels and illegal operators at sea. While many impart a cautious optimism regarding the expansion of hot pursuit,¹⁰⁵ there is a lack of literature that conclusively evaluates the precise nature of hot pursuit in its current form.

1.5 Methodology

This thesis involves a doctrinal desk-based analysis of the origins and development of hot pursuit, followed by a comparative analysis based on case studies highlighting contemporary practice. To address the research questions and to counter the gaps identified in the literature review, the principle method of analysis will survey evidence of treaty, customary international law, state practice, judicial decisions, commentary and reports arising from international institutional frameworks, particularly in relation to *travaux préparatoires*.¹⁰⁶ In this thesis, relevant state practice will include enforcement operations, treaty practice and agreements, judicial decisions, legislation and supporting parliamentary documentation. Although this is not an exhaustive list,¹⁰⁷ other material includes doctrine and policy of Department of Defence and law

¹⁰² Rachel Baird, 'Australia's Response to Illegal Foreign Fishing: A Case of Winning the Battle but Losing the War?' (2008) 23(1) *International Journal of Marine and Coastal Law* 95, 122.

¹⁰³ Henrik Österblom, Andrew Constable and Sayaka Fukumi, 'Illegal Fishing and the Organized Crime Analogy' (2011) 26(6) *Trends in Ecology and Evolution* 261; United Nations Office on Drugs and Crime, *Transnational Organized Crime in the Fishing Industry. Focus On: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking* (2011); Robin Warner, 'Joining Forces to Combat Crime in the Maritime Domain: Cooperative Maritime Surveillance and Enforcement in the South Pacific Region' (2008) 8 *New Zealand Armed Forces Law Review* 1, 5.

¹⁰⁴ See all, above n 52.

¹⁰⁵ Molenaar, Allen and Walker, all above n 72.

¹⁰⁶ State practice may encompass a significant range of activities, from executive decisions and manuals to judicial decisions and legislation. For a more extensive but not exhaustive list, see Brownlie, above n 38, 6.

¹⁰⁷ When considering the sources of international law, reference must also be made to Article 38(1) of the *Statute of the International Court of Justice*. The purpose of the International Court of Justice (ICJ) is to determine disputes by applying international conventions, international custom, evidence of a general practice, general principles of law recognised by civilised nations and, subject to Article 59 (the decision of the ICJ has no binding force except between the parties and in respect of that particular case), judicial teachings and teachings of highly qualified publicists. These materials where applicable will be examined in this thesis.

enforcement agencies. An historical assessment of these materials in Part II will flesh out the origins and theoretical foundations of hot pursuit to critically analyse contemporary development. This will require an examination of contemporary material in Part III in the form of legislation, case law, articles, government records and reports, and material arising from bilateral arrangements, regional and international frameworks.

As a part of this research in Part III, a comparative analysis of two states will be conducted to identify critical strengths and weakness arising from the application of hot pursuit. A global analysis of the practice of all states is unachievable within the confines of this thesis. Consequently, the US and Australia have been selected for comparative analysis due to the proliferation of hot pursuit practice in their respective regions and for the lessons the case studies will offer. In spite of a relatively smaller enforcement capability, Australia's experience will offer valuable insight into the development of best-practice approaches. The historical and legislative framework of each state will provide a context for the analysis of hot pursuit as a means of contemporary maritime law enforcement. This aspect of the research will also examine how hot pursuit is incorporated into the respective legal frameworks, focusing on three key maritime law enforcement areas: IUU fishing, irregular migration and drug trafficking. An assessment will be conducted of the applicable legislation that grants maritime law enforcement powers and the relevant bodies to which this authority is awarded.

This analysis will compare and contrast the experiences of the US and Australia and will necessitate an understanding of policy objectives in the current strategic climate. The methodology of analysis will also include an assessment of external engagement with regional partners and international institutions. The US and Australia have both entered into bilateral agreements with hot pursuit provisions that they employ to target different transnational crimes. The legal and policy issues that arise from the use of bilateral agreements will be evaluated against the applicable international law. This approach builds upon earlier consultation with representatives of relevant government departments, including Customs and Border Protection, Fisheries, the Australian Defence Force (ADF) and other militaries and non-government organisations.

The evidence gathered in this area will identify the practical challenges that arise as a result of hot pursuit operations and where the law falls short. Despite a number of similarities between the US and Australia, it is the differences at this level that have shaped singular approaches to their respective maritime enforcement regimes. This is

also partially due to differing geopolitical challenges in their respective regions, with these differences influencing policy objectives. By comparing these systems of law, fundamental theories regarding hot pursuit may be broadened to promote an effective uniform approach to maritime law enforcement.

1.6 Synopsis

This thesis is divided into four parts. Chapter 1 is contained in Part I and outlines the background to the research.

Part II, encompassing Chapters 2 to 4, sets out the theoretical foundations for this work. Chapter 2 analyses the significant cases that have contributed to the development of hot pursuit up to and including the issues that influenced the crystallisation of hot pursuit into customary international law. Chapter 3 examines the development of hot pursuit during the codification process up until the conclusion of UNCLOS. Chapter 4 analyses individual elements of hot pursuit as set out in international law, providing a systematic examination of the preconditions that must be met for the lawful conduct of hot pursuit. The key issues debated in *travaux préparatoires* are considered to best comprehend the primary elements of hot pursuit that are analysed in Part III. Many of the key issues examined in Part II relating to the early development of hot pursuit resonate during the analysis of contemporary development in Part III.

Part III, comprising Chapters 5 to 7, examines the recent development of hot pursuit since the inception of UNCLOS and focuses on the contribution of state practice, academic scholarship, jurisprudence and municipal and international frameworks. Chapter 5 considers the contemporary nature of hot pursuit and the elements emerging post-UNCLOS, particularly in the context of scholarly scrutiny. An appraisal of these most recent developments will contemplate their position with regards to customary international law and attempt to address the legal uncertainty surrounding the scope of contemporary hot pursuit. Chapter 6 analyses other approaches arising in the context of contemporary practice as alternatives to the conventional application of hot pursuit. In spite of the consensus regarding a doctrine in flux, opinions diverge on this point and the precise nature of contemporary hot pursuit is uncertain. The literature is critically examined in Chapter 6 to assess the tangible developments as they affect each requirement.¹⁰⁸ A comparative analysis of the US and Australia in Chapter 7 will

¹⁰⁸ *M/V Saiga* is discussed further in Chapter 5.

provide insight into the utility of hot pursuit in practical terms within differing municipal frameworks, regionally and within relevant international institutional frameworks. This chapter will consider the strengths and weaknesses of hot pursuit practice in the context of the states and areas where the law needs further development. Any lessons learned from the US and Australian experiences can inform future efforts to address maritime security concerns elsewhere.

A number of themes are evident from the literature review. First, the commentaries overwhelming suggest that the development of hot pursuit has been underway since the 1990s.¹⁰⁹ This discourse has largely been in response to Australia's remarkable hot pursuits conducted in the Southern Ocean, which generated popular support and political mileage for the government of the day.¹¹⁰ These pursuits will be examined in detail in Chapter 7. More recently, a focus on regional security in the Asia-Pacific region and the wider Indian Ocean area has also been underway.¹¹¹ This issue will also influence some of the findings in Chapter 7. As expected, the perpetual balancing act between coastal state interests and high seas freedoms has much wider implications under the guise of maritime security, which will influence some of the findings of this thesis.

Part IV encompasses Chapter 8, including the summary of key findings, recommendations and conclusion. Chapter 8 will set out the key findings of contemporary development built upon the theoretical foundations of hot pursuit. Ultimately, this thesis aims to provide resolution of legal uncertainty regarding the parameters of hot pursuit and to identify measures that may strengthen coastal state

¹⁰⁹ Klein, above n 3; Molenaar, Baird, Allen and Walker, all above n 72; Gullett and Schofield, above n 96, 574.

¹¹⁰ Australian Minister for Fisheries, Forestry and Conservation Senator Ian McDonald stated that 'this chase is a warning to the pirates and poachers who invade Australia's waters to fish illegally, possibly destroying a fragile marine ecosystem and threatening the sustainability of valuable fish stocks, that Australia will pursue them to the end of the earth to stamp out this illegal activity' (Ellison, Chris (Minister for Justice and Customs), Ian Macdonald (Minister for Fisheries, Forestry and Conservation) and Dr Sharman Stone MP (Parliamentary Secretary to the Minister for the Environment), 'The *Viarso* Has Admitted Who It Is' (Joint Media Release, 24 August 2003) <<http://www.customs.gov.au/site/content3785.asp>>). See also Ian Hay, 'Another One That Didn't Get Away', *Australian Antarctic Magazine*, Spring 2001 (2) <[http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-2-spring-2001/international/another-one-that-didnt-get-away!](http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-2-spring-2001/international/another-one-that-didnt-get-away!>)>; ABC, 'Hot Pursuit on the High Seas', *The Law Report*, 2 March 2004 (Damien Carrick) <<http://www.abc.net.au/radionational/programs/lawreport/hot-pursuit-on-the-high-seas-the-nagle-report---25/3410368>>.

¹¹¹ See, eg, Ralph A Cossa et al, 'The United States and the Asia-Pacific Region: Security Strategy for the Obama Administration' (Report, Center for Strategic and International Studies, February 2009); Karl Claxton, 'Securing the South Pacific: Making the Most of Australia's Renewed Regional Focus' (Report, Australian Security Policy Institute, 11 July 2013); Rory Medcalf, 'Pivoting the Map: Australia's Indo-Pacific System' (Strategic Paper, Centre of Gravity Series Paper #1, ANU Strategic and Defence Studies Centre, November 2012).

control over maritime zones. After a comprehensive re-examination of the doctrine of hot pursuit in previous chapters and having drawn upon an analysis of contemporary developments, the research concludes with an assessment of the key findings and the way ahead.

1.7 Conclusion

Although hot pursuit was first considered in the context of belligerency, not long after the declaration of *Mare Liberum*, this was ultimately a false start in the development of hot pursuit.¹¹² Rather, substantive development of hot pursuit could not begin until a rudimentary notion of territorial jurisdiction was more firmly in place. In its early development, hot pursuit was also shaped by competing notions of jurisdiction; an enduring tension existed—and still exists—between coastal state influence over adjacent waters and flag state freedoms. This was occurring at a time when control of the oceans was integral to state sovereignty, security and trade. From this, the authority to exercise control over adjacent waters and potentially enforce municipal law on the high seas has developed into the multi-layered and complex jurisdictional framework that exists today. While hot pursuit has been formed in this context, as a result of its contemporary resurgence the current scope of hot pursuit is unclear.

The early formation of hot pursuit through crystallisation and codification will be examined in the next part, as will the analysis of its fundamental elements. An examination of these three issues will construct theoretical foundations for an analysis of contemporary development and place hot pursuit in a context that is essential to the overall scope and structure of this thesis. The initial development of hot pursuit up to and including its inception into customary international law will be first examined in Chapter 2.

¹¹² Bynkershoek, above n 25, first argued the case for hot pursuit in an era when interdiction on the high seas outside naval warfare was limited. See also Akashi, above n 33.

PART II

THEORETICAL FOUNDATIONS

In Part II, the theoretical foundations of the doctrine of hot pursuit are examined. Chapter 2 examines relevant examples of early case law addressing hot pursuit to develop a better grasp of the issues that shaped its development prior to codification. Chapter 3 assesses the codification process of hot pursuit from its earliest inclusion in negotiations up until the adoption of UNCLOS in 1982. Chapter 4 examines the preconditions of hot pursuit set out in customary international law and UNCLOS. The analysis in Part II will inform the research in Part III on the contemporary development of hot pursuit beyond its theoretical foundations to determine whether hot pursuit can meet the needs of contemporary maritime security.

CHAPTER 2: CUSTOMARY INTERNATIONAL LAW

2.1 Introduction

The development of hot pursuit as customary international law was piecemeal and somewhat protracted. Although jurists such as Bynkershoek¹ argued the merits of developing the right as a means of strengthening state sovereignty, there was considerable opposition to hot pursuit in the late nineteenth century.² Prior to its inception, hot pursuit was often claimed as an ancillary right to the seizure of belligerent or other third party vessels and their cargo³ during the determination of prize.⁴ A great deal of trade traversed the oceans and it was an economic imperative that the rights of states were preserved on the high seas. As a consequence, doubts as to the validity of hot pursuit persisted for some time.⁵ It is in these unique circumstances—in the absence of treaty and inextricably linked to the burgeoning concept of territorial waters—that hot pursuit crystallised to become a part of customary international law.

The early development of hot pursuit was impeded by a number of factors. First, hot pursuit was often a secondary or add-on issue to proceedings, thus resulting in few cases directly addressing its validity. Its progression towards acceptance as customary international law was also hindered by the practice of defendants raising hot pursuit as a last means of legal defence, rather than a justification for interdiction. In some cases, state-sponsored fishing vessels were caught red-handed in another state's waters and, as a result, there were other strategic sensitivities at play.⁶ Although issues of sovereignty were vital to the consideration of earlier cases,⁷ the desire to strengthen sovereign control over maritime zones, chiefly to address smuggling and illegal fishing, became the driving force for hot pursuit to take shape as customary international law.

¹ Cornelius van Bynkershoek, *Quaestionum Juris Publici* (Frank Tenney trans, Oceana Publications, 1964) [first published 1717]. See also Richard Lee, *A Treatise of Captures in War* (W Sandby, 1759).

² See, eg, Nicolas Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff, 2nd ed, 2002) 42–43.

³ *Ibid.*

⁴ Prize refers to vessels and cargo captured during armed conflict during which time ownership transfers to the captor. Private entities were often permitted to acquire property under the prize law. An example of hot pursuit being raised in a prize matter is the case of the *Anna* 5 C Rob 373 (1805). See generally Constantine John Colombos, *A Treatise on the Law of Prize* (Longmans, Green and Co, 1949).

⁵ See also Glanville L Williams, 'The Juridical Basis of Hot Pursuit' (1939) 20 *The British Yearbook of International Law* 83, 89.

⁶ See, eg, *Araunah* (1888) I Moore 824.

⁷ See *Anna* 5 C Rob 373 (1805).

This chapter examines the development of hot pursuit leading up to its inception into customary international law. Clearly distinguishable from the rules of prize, hot pursuit eventually came to be used by states as a means of enforcing laws within adjacent maritime zones, primarily in relation to customs, illegal fishing and the trade of alcohol. While hot pursuit was not widely accepted in the nineteenth century, it eventually came to form a part of customary international law in the late 1930s, shortly after the end of the prohibition era. Hot pursuit became more widely utilised to enforce prohibition law, resulting in the momentum necessary to meet the threshold of customary international law. As states sought greater control over waters beyond the shoreline, state practice developed as a method of maritime law enforcement to address customs violations. The US played a significant role in this respect. Maritime enforcement methods were driven by policy needs, but were also closely linked to issues of sovereignty and trade. The cases that contributed to the development of hot pursuit under customary international law are explored below.

2.2 Constructive Presence and the Development of Hot Pursuit

Constructive presence permits the arrest of vessels outside coastal state maritime zones in circumstances where a ‘mothership’ supports the operation of smaller vessels operating within coastal state zones. The ship and its minor vessels are taken to be as one and no distinction is made when proceedings are brought for violations of domestic law. Like hot pursuit, the doctrine of constructive presence is a limited exception to territoriality. There is much authority in customary international law,⁸ such as the *Henry L Marshall*,⁹ the *Araunah*¹⁰ and others¹¹ that serve as authority for constructive presence and the doctrine is also reflected in the *Convention on the High Seas 1958*¹² and *Convention of Law of the Sea 1982*.¹³ In this thesis, constructive presence is relevant in

⁸ Such as the *Grace and Ruby* (1922) 283 Fed 475 and *Tenyu Maru* (1910) 4 Alaska 129. See generally Poulantzas, above n 2, ch VI; William Gilmore, ‘Hot Pursuit and Constructive Presence in Canadian Law Enforcement: A Case Note’ (1988) 12(2) *Marine Policy* 105.

⁹ (DC) 286 F 260 (1923).

¹⁰ (1888) I Moore 495.

¹¹ Other cases include *Grace and Ruby*; *Tenyu Maru*; *Contra R v Sunila and Soleyman* [1986] 2 NSSC 308.

¹² *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 23. Codification is examined in Chapter 3.

¹³ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 111(4). Constructive presence was considered briefly in the dissenting opinion of Golitsyn J in the ‘*Arctic Sunrise*’ Case (*Kingdom of the Netherlands v Russian Federation*) (Provisional Measures) (ITLOS, Case No 22, 22 November 2013) [35]. He found the arrest of the *Arctic Sunrise* lawful on the basis of her actions as a mothership and indicated that she could not claim freedom of navigation.

terms of exercising hot pursuit as an ancillary right of states and will only be examined as it affects the modern doctrine of hot pursuit.¹⁴

2.3 Relevant Case Law

2.3.1 Anna

The *Anna*¹⁵ is often cited as the first case to refer to hot pursuit,¹⁶ and involved the capture of a vessel during armed conflict between Britain and Spain. A British privateer captured the Spanish-flagged *Anna* just over three nautical miles from the US coastline which the Spanish considered to be on the high seas. Conversely, the US claimed that the captured vessel was within its neutral waters by measuring the point of capture as being three nautical miles from a baseline that began at Mississippi mud islands. British representatives argued that the vessel was subject to a lawful pursuit after refusing to submit to boarding and search, fleeing onto the high seas and subsequently being captured.

Lord Stowell relied on aspects of Bynkershoek's much earlier commentary, indicating that a vessel could be seized after a hot pursuit in limited circumstances.¹⁷ While the *Anna* appears to lend support to the development of a possible right of hot pursuit, the case does not constitute a tangible precedent. Ultimately, the Court found that the pursuit and subsequent apprehension were unlawful and deferred to extant law of prize to determine the outcome. Given the state of armed hostilities at the time of the capture of the *Anna*, the rules of prize were applicable to the facts. The judgment in the *Anna* contributed to the early formation of hot pursuit, but it would be some time before the right would be considered part of custom.

2.3.2 Church v Hubbart

In *Church v Hubbart*, the US Supreme Court considered the capture of a vessel beyond the territorial waters of Brazil by Portuguese authorities.¹⁸ Although the case is better

¹⁴ W Gilmore, 'Hot Pursuit: The Case of R v Mills and Others' (1995) 44 *International and Comparative Law Quarterly* 949, 954.

¹⁵ [1805] 5 High Court of Admiralty, 5 C Rob 373.

¹⁶ Poulantzas, above n 2, 43; Constantine John Colombos, *International Law of the Sea* (Longmans, Green and Co, 6th ed, 1967) 113.

¹⁷ 'A belligerent capture may be made in territorial waters on a part of the coast where no damage can be done, if the contest began or the summons to submit to search was made outside those waters, and there has been a hot continuous pursuit' (ibid 385).

¹⁸ 6 US (2 Cranch) 187 (1804).

known for its statements on jurisdictional protections,¹⁹ *Church v Hubbard* also contained early recognition of a developing hot pursuit. While the case did not specifically authorise hot pursuit, the judgment did emphasise the right of a state—a colonialist state in this case—to make laws enforceable beyond territorial waters.²⁰ Hot pursuit would develop much later as a consequence of the examination undertaken in *Church v Hubbard*.

2.3.3 *Marianna Flora*

While transiting along the coast of Africa, the US-flagged *Alligator* observed a merchant vessel to be in distress. The *Alligator* approached the *Marianna Flora* only to receive fire once in range. Both vessels fired at each other until, after several attempts, the captain of the *Alligator* was able to defuse the situation. The crew of the *Marianna Flora* claimed to believe that they were being attacked by pirates. Nonetheless, the vessel and her crew were detained and transported to the US.²¹ Accordingly, the facts of the *Marianna Flora* did not directly address hot pursuit, but the views expressed by the Admiralty Division of the US Supreme Court in *obiter dicta* are significant to the right's advancement. Story J stated that, 'It has been held in the courts of this country, that 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'.²² As a result, the *Marianna Flora* is often cited as early recognition of hot pursuit. Story J went on to state that the right to capture is accompanied by a responsibility to award 'full compensation' should the seizure not be justified. As an exception to high seas freedoms, compensation would become a fundamental element of hot pursuit and this case reflects an early intention to build safeguards into its use.

2.3.4 *Araunah*

The *Araunah* incident resulted in arbitration to consider allegations of illegal sealing by a Canadian vessel in Russian waters.²³ Although the Russian Coastguard captured the *Araunah* outside Russian territorial waters, canoes were also found within Russian

¹⁹ Marshall CJ observed in *Church v Hubbard* that 'a nation's power to secure itself from injury might certainly be exercised in the marginal sea beyond the limits of territorial waters' (234).

²⁰ While affirming the territorial sovereignty of the coastal state, '[t]he authority of a nation, within its own territory, is absolute and exclusive' (234) and in limited conditions a state can exercise jurisdiction '[i]f they are such as are reasonable and necessary to secure their laws from violation' (235).

²¹ *Marianna Flora* 24 US (11 Wheaton) 1 (1826).

²² *Marianna Flora* 42 (Story J).

²³ (1888) I Moore 824.

territorial waters less than half a mile from shore. Importantly, the *Araunah* herself did not enter Russian territorial waters at any time. The Russian Coastguard arrested the *Araunah* as a mothership for the illegal conduct of its auxiliary craft. In the absence of consent or licensing to operate in Russian territorial waters, the Court found that the Russian Coastguard had acted lawfully by seizing the *Araunah* on the high seas after a pursuit. As the flag state, the United Kingdom (UK) did not oppose the facts in relation to hot pursuit or the status of the vessel as a mothership. The determination in the proceedings treated the canoes and the mothership as one for the purposes of enforcing Russian law, thereby safeguarding the ability to exercise jurisdiction over adjacent waters. This case is one of the earliest examples of constructive presence and also represents a significantly broader acceptance of hot pursuit. The use of motherships hovering outside coastal state waters with auxiliary vessels operating in sealing, hunting and fishing industries was common at this time. The utility of motherships continues to be a significant contemporary theme in distant-water IUU fishing²⁴ and drug trafficking²⁵ and piracy.²⁶

2.3.5 *Itata*

While the *Itata*²⁷ is another case that does not directly deal with hot pursuit on the facts, it is often cited as important in the development of hot pursuit. In this matter, the Chilean opposition party sent a merchant vessel to the US to collect weapons intended for use in a planned coup. The *Itata* took on her cargo, but was seized by US authorities at the San Diego port on the basis of violating the neutral status of the US. In spite of this, the *Itata* fled onto the high seas as it headed towards Chile and was pursued by a contingent comprised of ships from the US Navy, the British Royal Navy and the German Imperial Navy. This contingent may have constituted an early example of multilateral hot pursuit had the vessels been able to effectively shadow the *Itata*—instead, she made her escape.²⁸ Ultimately, however, another US contingent waiting for the *Itata* at the Chilean port of Iquique arrested her upon arrival.²⁹ Hot pursuit did not

²⁴ See, eg, D Pauly et al, 'China's Distant-Water Fisheries in the 21st Century' (2014) 15(3) *Fish and Fisheries* 474.

²⁵ Allyson Bennett, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act' (2012) 37(2) *Yale Journal of International Law* 433, 441.

²⁶ Douglas Guilfoyle, 'Somali Pirates as Agents of Change in International Law-Making and Organisation' (2012) 1(3) *Cambridge Journal of International and Comparative Law* 81, 84.

²⁷ (1892) 3 Moore 3067.

²⁸ Osgood Hardy, 'The *Itata* Incident' (1922) 5(2) *The Hispanic American Historic Review* 195, 220.

²⁹ This matter had significant diplomatic and political ramifications for not only Chile, but for the US and the UK (see *ibid*, 224–225).

take place, but the incident contributed to the development of hot pursuit with the regards the termination of the chase by entry into the waters of a third state.

Once seized in Chile, the *Itata* was escorted back to the US for prosecution. After a joint investigation, the Attorney-General's prosecutor³⁰ declined to proceed on the basis of jurisdiction while the Solicitor-General proceeded and failed to convict on two separate occasions.³¹ The matter was later considered by a US-Chilean Commission in a claim for compensation by the vessel's owner. The commission upheld a claim for extraordinary repairs to the *Itata* on the basis that the US had exceeded its powers by attempting to enforce its municipal laws in the territory of another.³² While hot pursuit was not specifically addressed, the judgment found that any legitimate pursuit would be terminated upon entry to another state's territorial waters.³³ This finding is consistent with the fundamental limitation regarding cessation of hot pursuit and is reproduced in UNCLOS.³⁴ More recent developments in relation to the inviolability of third state's territorial waters are examined in section 5.7.1.

2.3.6 The Bering Sea Fur Seal Arbitration

In this matter, the British and US governments disputed sealing boundaries in the respective maritime zones of British Columbia and Alaska adjacent to the Bering Sea.³⁵ A US cutter captured three British Columbian sealers, the *Carolena*, *Onward* and *Thornton*, who had been sealing within US jurisdiction 60 nautical miles from the Alaskan shore. As the fur seal industry was of considerable economic importance to the US, the coastal state was intent on protecting the marine resources, even beyond the limit of three nautical miles. At this time, the freedom of the high seas was key to ocean management and coastal state jurisdiction was very much limited to a narrow belt.³⁶

The US argued that a valid hot pursuit had occurred and that the arrests were legitimate. This was a strategic move designed to discourage others from fur sealing in the Bering

³⁰ The Attorney-General provides advice to the government and are assigned to judicial districts. In this instance, the federal prosecutor assigned to the area was Henry Gage.

³¹ The US Solicitor-General represents the interests of the federal government in matters before the US Supreme Court. In this instance, the Solicitor-General was William Taft (later US President).

³² *South American Steamship Co v United States* (Commission for the Settlement of Claims under the Convention of 7 August 1892 concluded between the United States of America and the Republic of Chile) (1901) 29 RIAA 322, 326.

³³ *Ibid* 322.

³⁴ Codified in Article 111(3).

³⁵ *Bering Sea Arbitration (United States and Great Britain)* (1893) vol XIII, 300.

³⁶ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 19.

Sea. Initially, the British Attorney-General made a statement that lent support to recognition of the right of hot pursuit:

Take again the pursuit of vessels out of the territorial waters, but which have committed an offence against municipal law within territorial waters – which is a case my learned friend and myself... have had frequent occasion to consider. Here, again, there is a general consent on the part of nations to the action of a State pursuing a vessel under such circumstances, out of its territorial waters and on to the high sea.³⁷

Soon after making the statement, the British Attorney-General backtracked by acknowledging that while hot pursuit could be raised in limited circumstances, it was not a ‘strict right of international law’.³⁸ US diplomatic statements presented during proceedings indicated a belief that hot pursuit constituted customary international law. Ultimately, the US was alone in its support of recognition of the right at this time—though it can be inferred that the US had employed hot pursuit to support its policy aims and would do so again in future. As hot pursuit was an ancillary issue to the facts of this case, there was no conclusive determination as to the existence of the right. Nevertheless, these proceedings illustrate that development of the right of hot pursuit was certainly underway.

2.3.7 T M C Asser Arbitration: James Hamilton Lewis (1891), Cape Horn Pigeon (1891), C H White (1892), Kate and Anna (1892)

The first significant legal matter that considered an actual pursuit from territorial waters onto the high seas was in fact determined by arbitration. The Dutch jurist T M C Asser considered a matter in which Russian Coastguard vessels pursued onto the high seas and captured two US ships found sealing in Russian waters. Although there was some discussion as to what constituted territorial waters on the facts, Asser made a determination that, at that time, hot pursuit was not a right at law:

The contention that a ship of war might pursue outside territorial waters a vessel whose crew had committed an unlawful act in territorial waters or on the territorial waters or on the territory of a State, was not in conformity with the law of nations, since the jurisdiction could not be extended beyond the territorial sea, unless by express convention.³⁹

³⁷ *South American Steamship Co v United States* (Decision) 305 [1079].

³⁸ *South American Steamship Co v United States* (Decision).

³⁹ John Bassett Moore, *A Digest of International Law* (Government Printing Office 1906) 929.

The statement indicates that, outside a bilateral agreement, hot pursuit was not a customary norm, and this is a fair assessment of customary international law at the time.

In spite of his position on hot pursuit voiced during arbitration, Asser later denied he made a determination that hot pursuit was unlawful.⁴⁰ The reasons for repudiating his original statement were not given by Asser and his motives for doing so are not clear. His disavowal of his statement made during arbitration occurred in the years shortly after the arbitration. At this time, a number of international law experts published their support of hot pursuit. One can reasonably infer that Asser may also have been influenced by the publications of the *Institut de Droit International* (of which he was a founding member).⁴¹ Regardless of the findings and outcome of the arbitration proceedings, hot pursuit was resolutely emerging as a prospective doctrine of customary international law. This appears to be resource-driven and part of a broader move by states towards increasing control over maritime zones.⁴² While Asser may have been convinced by the US' argument that hot pursuit was not a right at law in this instance, it would soon become apparent that the US would recognise the utility of hot pursuit as a method of maritime enforcement. In fact, US state practice would be of particular significance in the evolution of hot pursuit into customary international law.⁴³

2.4 The Tide Turns: How Hot Pursuit Became Customary International Law

Despite a developing recognition of the right, hot pursuit remained just short of customary international law in the late nineteenth century. At the time, the absence of consistent practice, unambiguous precedent and a lack of consensus among international lawyers impeded crystallisation. Nonetheless, the tide soon turned as a result of increased state practice and *opinio juris* and hot pursuit became customary international law. Although not binding, the early private codification efforts that explicitly permitted

⁴⁰ In a subsequent statement of 1905.

⁴¹ Poulantzas, above n 2, 70.

⁴² Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 4. An example is the *International Convention for Regulating the Police of the North Sea Fisheries Outside Territorial Waters* which was concluded on 6 May 1882 between Belgium, Denmark, France, Germany, Netherlands and the UK.

⁴³ The US had engaged in litigation regarding the protection of marine resources in the Bering Sea Fur Seals and the T M C Asser Arbitrations, but was also proactive in other jurisdictional issues. For example, revenue officers were permitted to board and inspect vessels bound for US ports without a requirement of reasonable suspicion of specific violations by Act of July 18, 1866 Chapter 201 § 2 14 Statute 178, repealed by Act of June 22, 1936, Chapter 705, 49 Stat. 1820 (codified as amended at 14 USC §89 (1994)). See Megan Jaye Kight, 'Constitutional Barriers to Smooth Sailing: 14 U.S.C. § 89(a) and the Fourth Amendment' (1997) 72 *Indiana Law Journal* 571, 574.

hot pursuit onto the high seas were key drivers in this process. The *Institut de Droit International* published a Resolution in 1894, recognising pursuit as a legitimate means of enforcing coastal state law. The Resolution stated:

The littoral State has the right to continue on the high sea a pursuit commenced in the territorial sea, and to seize and pass judgment on the ship which has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power.⁴⁴

The Resolution represented the views of its 11 members—eminent jurists committed to the study and development of international law—and constituted a significant shift in the status of hot pursuit.⁴⁵ The International Law Association also adopted a similar provision permitting hot pursuit in 1894⁴⁶ and Harvard Research in International Law, upon its creation in 1929, also recognised hot pursuit as customary international law.⁴⁷ Beyond these private codification efforts (essentially the scholarly work of international non-government professional associations), other international lawyers such as Jessup independently expressed support for the recognition of the right.⁴⁸ Such support was sometimes expressed as a right of states to interdict and seize on the high seas or violation of domestic law, rather than explicitly articulated under the designation ‘hot pursuit’. By this time there had also been preliminary discussion of hot pursuit as an ancillary notion during negotiated attempts to formalise territorial waters.⁴⁹ Although not binding, the private codification efforts of these bodies represented significant progress towards recognition of hot pursuit as a doctrine of customary international law.

⁴⁴ Article 8 of Rule III, drafted in 1894 in Paris. In James Brown Scott (ed), *Resolutions of the Institute of International Law* (Oxford University Press, 1916).

⁴⁵ Later resolutions also permitted ‘prosecution’ on the high seas for acts committed in port. See Art 29, Resolution III, The Hague 1898.

⁴⁶ International Law Association, *Report of the Seventeenth Conference, Held at Brussels (October 1st–4th, 1895)* (International Law Association Reports of Conferences, vol 17, William Clowes and Sons, 1896) 112. As convenor of territorial waters at the *Institut de Droit International*, Thomas Barclay also proposed a (favourably received) hot pursuit provision during Association conference proceedings.

⁴⁷ Article 21 in ‘The Law of Territorial Waters’ (1929) 23 *American Journal of International Law* (Special Supplement) 245.

⁴⁸ Philip C Jessup, *The Law of Territorial Waters and Maritime Jurisdiction in Marginal Waters* (Jennings, 1927) 334. See also William Edward Hall, *A Treatise on International Law* (Oxford University Press, 4th ed, 1895) 266; Amos S Hershey, *The Essentials of Public International Law* (Macmillan, 1915) 199; Lassa Oppenheim, *International Law* (Longmans, Green and Co, 2nd ed, 1912); John Westlake, *International Law* (Cambridge University Press, 2nd ed, 1904).

⁴⁹ *Final of the Conference on the Legal Status of the Territorial Sea 1930*. The codification process is examined in Chapter 3.

State practice played a key role in the emerging development of hot pursuit, particularly as a consequence of the actions by coastal states to increase control over maritime zones.⁵⁰ In spite of discord regarding enforcement beyond three nautical miles and the prospect of a developing contiguous zone, there was a desire by a number of states to address unlawful conduct occurring in territorial and adjacent waters.⁵¹ The unique challenges of illegal maritime trade, particularly when countering hovering vessels, called for more robust means of preventing and prosecuting violations of domestic law. Anglo-American state practice of hot pursuit appears to have led the way in this respect.⁵² While both the UK⁵³ and the US⁵⁴ employed limited hot pursuit (or ‘chase’) provisions in anti-smuggling legislation, the demand for more effective maritime law enforcement became imperative during the US prohibition era.⁵⁵ The US government employed hot pursuit as an enforcement method to target liquor smuggling during prohibition.⁵⁶ The *Tariff Act 1922* permitted boarding of any foreign vessel within four leagues (12 nautical miles) of the shore.⁵⁷ For those foreign flag vessels subject to treaty, the jurisdictional zone was one hour’s sailing rather than a fixed physical distance. This standard provision, utilised in 16 other liquor treaties,⁵⁸ gave effect to US domestic prohibition legislation and smoothed the way for the employment of robust maritime enforcement powers—including hot pursuit.

In spite of disquiet regarding maritime enforcement beyond territorial waters, the US government employed hot pursuit to give effect to its domestic policy on prohibition.

⁵⁰ Rothwell and Stephens, above n 42, 4.

⁵¹ ‘It does not follow that this Government is entirely without power to protect itself from the abuses committed by hovering vessels’ (Charles E Hughes, ‘Recent Questions and Negotiations’ (Address before the Council of Foreign Relations, New York, 23 January 1924) in (1924) 18(1) *American Journal of International Law* 229, 231–232).

⁵² In 1919, Hershey concluded that, ‘it must be admitted that the weight of authority favors the doctrine and that the practice has the sanction of at least Anglo-American custom’ (‘Incursions into Mexico and the Doctrine of Hot Pursuit’ (1919) 13(3) *American Journal of International Law* 557, 568).

⁵³ The UK government enacted ‘Hovering Acts’ as early as 1709 to tackle smuggling by authorising enforcement measures over vessels in adjacent waters. While the series of acts projected British jurisdiction beyond the shore, their application was ordinarily intended for British and not foreign vessels. Nonetheless, s 180 of the *Customs Consolidation Act 1876* permitted continuation of a chase onto the high seas in limited circumstances: ‘The principle of chase and seizure sanctioned by the Hovering Acts is in reality the common law principle of hot pursuit’ (Sir Francis Taylor Piggott, *Nationality, Including Naturalization and English Law on the High Seas and Beyond the Realm* (William Clowes and Sons, 1907) vol 2, 41). See also Poulantzas above n 2, 103 and 93 respectively.

⁵⁴ The US Congress enacted a series of anti-smuggling acts as early as 1789. See Poulantzas, above n 2, 96.

⁵⁵ Introduced by the Eighteenth Amendment to the US Constitution on 17 January 1920 and repealed by the Twenty-First Amendment on 5 December 1933.

⁵⁶ *Ibid.*

⁵⁷ The powers of boarding officers were set out in s 581.

⁵⁸ The US entered into agreements with UK, France, Germany, Denmark, Spain, Norway, Sweden, Netherlands, Belgium, Greece, Italy, Poland, Japan, Panama, Chile and Cuba.

While very few states shared the US view on prohibition, a significant number entered into bilateral agreements with the US. Although the offences targeted existed only in domestic law, the bilateral agreements that underwrote the system sanctioned the practice of hot pursuit and, in part, also contributed to its wider recognition as customary international law.⁵⁹ These treaties were a precursor to contemporary US practice involving bilateral agreements regarding other transnational crimes such as drug trafficking and irregular migration. This theme also demonstrates a strong inclination on the part of the US to take an agreement-based approach to maritime law enforcement while shaping favourable conditions under which to operate.⁶⁰

Although prohibition was ultimately repealed in 1933, the illegal importation of liquor that violated customs tariffs continued. The *Anti-Smuggling Act 1935* targeted those vessels hovering beyond the twelve-nautical-mile limit and one-hour sailing distance that had remained safe under the *Tariff Act*. The effect of the somewhat lengthy s 1701 was to empower US customs or other state vessels to enforce customs laws against foreign vessels on the high seas by virtue of a declared ‘customs-enforcement area’ applicable to vessels of flag states joined in relevant treaty with the US. The Act permitted extension of the one hour sailing distance by executive arrangement with the treaty partner for an additional 100 nautical mile zone around hovering vessels. At the time, it was predicted that ‘[t]here are provisions in the Act which are open to grave questions which may cause serious international complications’.⁶¹ However, the more controversial provisions were not fully tested and contributed little in terms of state practice.⁶² The contemporary version of US anti-smuggling legislation, which now deals with narcotics, still employs provisions that authorise customs-enforcement areas.⁶³

It was at this time that state practice—driven by domestic policy—played a crucial role in garnering recognition of hot pursuit as a customary norm.⁶⁴ States were attempting to exercise greater control over maritime zones, particularly in relation to customs and marine resources as economic measures. In the case of the US, there were ongoing

⁵⁹ See Susan Maidment, ‘Aspects of the Doctrine of Hot Pursuit’ (1972–1973) 46 *British Yearbook of International Law* 365, 375.

⁶⁰ This will be examined further in Chapter 7.

⁶¹ Philip Jessup, ‘Discussion [comments]’ in *American Society of International Law Proceedings*, vol 22, Fourth Session (1928) 102.

⁶² For a detailed discussion see Ivan W Ficken, ‘The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law’ (1974–1975) 29 *University of Miami Law Review* 700.

⁶³ This is evaluated further in Chapter 7.

⁶⁴ Maidment, above n 59.

impediments to effective maritime enforcement of prohibition in spite of a robust municipal framework. These issues reflected a growing dissatisfaction with the law. At a time when states desired greater control, there was no mechanism to effect enforcement beyond territorial waters. The result was that the municipal frameworks of coastal states were no more than toothless tigers.

Accordingly, states embraced more cooperative methods of enforcement while exhibiting preparedness to conduct enforcement beyond territorial waters. This was largely in relation to illegal fishing⁶⁵ and related marine resource exploitation as well as prohibition.⁶⁶ The US began to employ hot pursuit (if not explicitly, then as an ancillary right to search and seizure) when enforcing its policies both domestically and by international agreement.⁶⁷ As a result, the US became the most conspicuous and consistent user of hot pursuit. Other examples of state practice appeared in Europe and South America—both the *Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors*⁶⁸ and the *Treaty on International Penal Law*, for example, explicitly permitted hot pursuit.⁶⁹ Although the treaties varied, clear and consistent themes emerged regarding territorial limits, the nature of the offence and the cessation of pursuit.⁷⁰ Accordingly, hot pursuit, once rejected by states and academic commentators alike, came to be accepted by the early twentieth century as a result of widespread and consistent state practice.⁷¹ This was paralleled by a number of judicial decisions that considered hot pursuit in detail. These decisions not only formally recognised hot pursuit as a customary norm, but also provided significant judicial insight on the elements of hot pursuit. These matters are examined below.

⁶⁵ *North Sea Fisheries Convention*, signed 6 May 1882 by the UK, Germany, Belgium, Denmark, France and the Netherlands (entered into force 15 May 1884).

⁶⁶ The *Convention respecting the Liquor Traffic in the North Sea 1887* was supplementary to the *North Seas Fisheries Convention*.

⁶⁷ Most obviously in the *Anglo-American Liquor Convention 1924*. Other states imposed periods of prohibition at this time, including Canada, Iceland, Norway, Finland and the Soviet Union.

⁶⁸ Signed 19 August 1925, 42 LNTS 73 (entered into force 23 December 1925). Also known as the ‘Helsingfor Treaty’, the parties included Germany, Denmark, Estonia, Finland, Latvia, Lithuania, Norway, Poland, Sweden, the Soviet Union and Danzig. See also the *Anglo-Finnish Treaty 1933*. Both are discussed in Colombos, above n 16, 172.

⁶⁹ Signed 19 March 1940. The parties included Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru and Paraguay.

⁷⁰ The treaties are discussed in more detail in Poulantzas above n 2, 59.

⁷¹ Colombos, above n 16, 170. See also Poulantzas, above n 2, 39; Tanaka above n 36, 169; RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 214; Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 899; Daniel Patrick O’Connell, *The International Law of the Sea* (Oxford University Press, 1984) 1076.

2.4.1 *The Ship 'North' v The King*

The *North* is a Canadian Admiralty case that explicitly recognised hot pursuit as part of customary international law in 1907.⁷² The US-flagged *North* was found to have taken halibut within three nautical miles of the Canadian coastline. The Canadian Coastguard apprehended two of the *North's* four dories and commenced a pursuit that resulted in the capture of the vessel outside the three-nautical-mile zone. Fresh halibut was found on board. The ship owners argued that treaty and supporting legislation were required to employ the right at law. The Admiralty Court as well as the Supreme Court upon appeal upheld the right of hot pursuit as one of the law of nations and rejected the notion that hot pursuit can only be applied by treaty. It was found that:

The right of pursuit is recognized by international law. It springs from the necessity of the case. It rests upon what in the last analysis is the base of so much international law in many analogous cases, the necessities of self-defence and protection. The growth of that body of customs known as international law, has only in modern times found recognition of hard and fast lines in some cases. In its still growing condition it must be tested in regard to the questions here raised by what appeals to all men as reasonable, where the occasion arises for the protection of the coast-line of the land, the three mile zone recognized as quasi appurtenant thereto, and the fish therein. This implies all else that demands the exercise of sovereign power beyond the land, to make the protecting power efficient within it.⁷³

At first instance and upon appeal, the Court upheld the right of hot pursuit and confirmed its existence as part of customary international law.⁷⁴ In cases dealing with disputes under the *Tariff Act*, US courts deferred to the findings in *North* as evidence of hot pursuit in customary international law. The case demonstrates the acceptance of hot pursuit into international law and its expansion to domestic law prior to formal legislative acceptance.

2.4.2 *Vinces*

The Federal Court in the prohibition-era *Vinces* case considered the application of the *US Tariff Act* and acknowledged the existence of hot pursuit in international customary

⁷² *The Ship 'North' v The King* [1906] 37 SCR 385.

⁷³ *The Ship 'North' v The King* 400 (Idington J).

⁷⁴ By this time, states were unequivocal about their rights to adjacent waters: 'The State is interested in preventing its shore fisheries from being poached, in repressing smuggling, and in being able to punish reckless conduct' (Hall, above n 48, 185).

law.⁷⁵ The British-flagged *Vinces* was observed and requested to stop while within the twelve-mile jurisdictional limit of the *Tariff Act* and one hour sailing distance of the *Anglo-American Liquor Treaty*. The *Vinces* failed to stop and was pursued by the US Coastguard (USCG), eventually captured on the high seas after having shots fired across her bow. Having left Halifax supposedly bound for Nassau, the *Vinces* was found to be carrying liquor without an appropriate manifest.

At first instance, the pursuit onto the high seas was deemed lawful and upheld on appeal, Parker J stating that, ‘we think it is clear, under the hot pursuit doctrine, that if the right of seizure existed at the time the vessel was signalled, the right was not lost because she has succeeded in getting farther from shore in her attempt to run away’.⁷⁶ The case upheld the right, not within the jurisdiction of the three-mile limit (as considered in the *North*), but rather as being within the limits imposed by legislation and by bilateral treaty. That is, the twelve-mile limit imposed by the *Tariff Act* and the one hour sailing distance of the *Anglo-American Liquor Treaty*.

At this time, prior to codification, there was no clear consensus among states regarding jurisdiction and territorial zones. As a part of efforts to target prohibition, the US overcame this uncertainty by entering into bilateral agreements and enacting complementary legislation. The Court in *Vinces* upheld the pursuit and subsequent arrest, finding that the pursuit could commence beyond the three-mile limit if prescribed by treaty or legislation. A number of cases followed *Vinces*, also influenced by the treaty and the *Tariff Act*, contributing to a much broader awareness and acceptance of hot pursuit.⁷⁷ Although the Canadian case of *North* explicitly rejected the requirement for a triggering treaty or Act to permit pursuit of a vessel beyond the three-mile limit, the US consolidated the employment of hot pursuit by treaty and legislation. This multi-layered approach to targeting transnational crime is indicative of later US efforts to address contemporary crime in the maritime domain.⁷⁸

⁷⁵ (1927) 20 Fed (2d) 164. The matter was upheld on appeal as *Gillam v US* (1928) 27 Fed (2d) 296.

⁷⁶ *Gillam v US* 299.

⁷⁷ See, eg, the *Katina*; a vessel captured by Egyptian authorities 10 miles from shore pursuant to a bilateral agreement with Greece, in Poulantzas, above n 2, 87–88.

⁷⁸ Examined in Chapter 7.

2.4.3 *I'm Alone*

Although the findings of *I'm Alone* are no more than non-binding recommendations,⁷⁹ there was confirmation by both Canada and the US that hot pursuit constituted a principle of customary international law.⁸⁰ Hot pursuit was not significantly expanded and, in particular, the crucial point at which the pursuit may be commenced or joined by additional vessels was neglected.

The *I'm Alone* was a Canadian vessel suspected of smuggling liquor into the US during the prohibition era. Upon finding the *I'm Alone* within US waters,⁸¹ the USCG vessel *Wolcott* ordered the *I'm Alone* to stop and, after this order was ignored, pursued the vessel onto the high seas. The *I'm Alone* continued to flee and an unbroken pursuit was conducted for two days. At one point, the *Wolcott* fired shots across the bow of the *I'm Alone* and, when the gun became jammed, called upon the USCG vessel *Dexter* to assist. The *Dexter* fired upon *I'm Alone* and she sank, killing a member of crew.

The determination of the *I'm Alone* case was subject to the *Anglo-American Liquor Treaty*. Original criminal charges against the captain and crew of the *I'm Alone* were later dropped and the matter handled through diplomatic letter between the governments of Canada and the US. Hot pursuit is not mentioned in the *Liquor Treaty*, although there are provisions permitting boarding and seizure of vessels in Article 2. Article 2 did not refer to use of force. Both governments agreed that hot pursuit existed in international law and their respective domestic regimes. There were, however, differing views on the facts—particularly as to when the pursuit commenced—and the subsequent diplomatic discussion prevented any significant agreement on the matter of the initiation of hot pursuit in customary international law.

The Canadian government made admissions that the *I'm Alone* had been engaged in liquor smuggling for some time, but argued that the vessel was, at first contact with the *Wolcott*, beyond the relevant maritime zone (i.e., on the high seas). Secondly, the Canadian government claimed that the *Dexter* came upon the *I'm Alone* from another direction and did not legitimately join the pursuit. Lastly, the Canadian government

⁷⁹ The matter was considered by a commission of experts pursuant to the bilateral *Anglo-American Liquor Convention* 1924. See 'S. S. "I'm Alone" (Canada, United States) in *Reports of International Arbitral Awards* (30 June 1933 and 5 January 1935) vol 3, 1609 <http://legal.un.org/riaa/cases/vol_III/1609-1618.pdf>.

⁸⁰ See, eg, US Department of Treasury, *Law Enforcement at Sea Relative to Smuggling*. (Government Printing Office, 1929) 3.

⁸¹ Art 2(3) stated that the relevant maritime zone was one-hour sailing time from the US coast or that of its territories.

raised a proportionality argument in that any enforcement powers conferred by the treaty ought to be exercised ‘to the reasonable minimum necessary for their enforcement’⁸² and that the sinking was an excessive and unlawful use of force.

Disagreement over the facts of the case and the particulars of hot pursuit resulted in diplomatic discussions breaking down. The matter was eventually considered by a panel of Joint Commissioners made up of senior judges of the respective Supreme Courts, pursuant to Article 4 of the *Liquor Treaty*. The Commission was to consider three questions. First, a determination of the ownership, control and management of the *I’m Alone*. Second, whether the US could exercise a right of hot pursuit subject to the *Liquor Treaty* when commenced either within an hour’s sailing distance or within 12 nautical miles of the coast and terminated on the high seas. Lastly, the Commission was to decide whether the sinking of the *I’m Alone* was lawful.

The Commission published a Joint Interim Report on 30 June 1933 that omitted conclusively dealing with the first (and arguably the most fundamental) issue, the legitimacy of hot pursuit.⁸³ Presumably based on a failure to agree on the limits or elements of hot pursuit as a legitimate right, the Report focused on answers to the remaining issues. Adding to the complexity was the fact that the British-owned Canadian-flagged vessel was in fact de facto controlled by US citizens.

The second question was not subject to a determination by the Commission, as the US government withdrew its arguments. The Commission failed to reach agreement on the commencement of a pursuit from within the Treaty’s one-hour sailing distance from shore and conclusion on the high seas. On the third and final issue, the Commission found that the sinking of the *I’m Alone* had been intentional and was unlawful. The Commission recommended that the US issue a monetary award of \$25,000 and apologise to the Canadian government. As de facto ownership and control of the *I’m Alone* was found to be with US and not Canadian citizens, the recommended award was in many ways intended to be a salve for diplomatic discord.

Ultimately, both Canada and the US had at this time recognised hot pursuit as an international customary norm. While the Commission did not find the opportunity to flesh out the elements of hot pursuit, its findings in relation to the unlawful sinking of

⁸² MS Department of State, Press Release, 26 April 1929.

⁸³ *South American Steamship Co v United States* (Decision), Commission for the Settlement of Claims under the Convention of 7 August 1892 concluded between the United States of America and the Republic of Chile (1901) 29 RIAA 322.

the *I'm Alone* were influenced by state practice and, to a limited extent, other findings under international law. The *I'm Alone* is often cited as authority for the appropriate use of force and was relied upon in the more recent case of *M/V 'Saiga'* considered by the ITLOS.⁸⁴

2.4.4 Ernest and Prosper Everaert

In this matter, a Belgian fishing vessel suspected of engaging in illegal fishing in French territorial waters was pursued by French Customs vessels and eventually captured on the high seas.⁸⁵ Remarkably, hot pursuit was permitted under both French⁸⁶ and Belgian⁸⁷ law. However, both states were also parties to the *North Sea Fisheries Convention*. The Convention provided limited powers for boarding on the high seas, but did not refer to hot pursuit either as a permissible or prohibited activity. The French Court found that to apply hot pursuit while subject to the Convention would

entail the risk of confusion between the rights of the pursuing ship and those of vessels entrusted by the treaty with the work of control over-fishing on the high seas. Such an exception to the principle of freedom of the high seas cannot be accepted by the court in the absence of evidence which is lacking in this case.⁸⁸

The French Court acknowledged the existence of hot pursuit under French law, but rejected any claim that it constituted customary international law. By this time, there was significant evidence of state practice and, importantly, hot pursuit was included in a provision of the *Final Act of the Conference for the Codification of International Law at The Hague* 1930. However, neither France or Belgium had ratified the agreement⁸⁹ and the Court referred to it as 'only a project not yet ratified by the States represented at the Conference'.⁹⁰ Although hot pursuit was a domestic enforcement tool of both states, the Court took an overly cautious approach and was reluctant to recognise hot pursuit as a part of customary international law. The case of *Ernest and Prosper Everaert* represents a missed opportunity by the French Court to have regard to developments under

⁸⁴ *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits) Judgment, 1 July 1999, 156. This case will be examined in Chapter 5.

⁸⁵ Annual Digest 1935–37, Case No 112 (*Tribunal correctional de Dunkerque*).

⁸⁶ Poulantzas above n 2, 81 refers to *Societe des Nations, Conference pour la codification du droit international II* as well as the *Code de Douanes* of 1926.

⁸⁷ Hot pursuit ('sans interruption') was affirmed on 7 June 1832. See *Bulletin Officiel des Lois et Arrêtés Royaux de la Belgique*, XLV, No 443. See also Erik Franckx, 'Belgium and the Law of the Sea' in Tullio Treves and Laura Pineschi (eds), *The Law of the Sea: The European Member Union and Its Member States* (Martinus Nijhoff, 1997) 67–68.

⁸⁸ Annual Digest 1935–37, Case No 112 (*Tribunal correctional de Dunkerque*).

⁸⁹ This conference is discussed further in the context of hot pursuit in Chapter 3, see also Appendix A.

⁹⁰ Annual Digest 1935–37, Case No 112 (*Tribunal correctional de Dunkerque*).

international law that would have had clear and practical consequences for the enforcement of French domestic law.

2.5 Conclusion

This chapter has examined the early development of hot pursuit under customary international law. The key drivers in this process have been case law, private codification efforts and, most importantly, escalating state practice. As states sought to exercise greater control over waters beyond the shoreline, hot pursuit started life as a tool of naval warfare, albeit without much success. Hot pursuit was in fact shaped by state practice in countering two very different issues: marine resource exploitation and smuggling.⁹¹ The motivation to employ hot pursuit more broadly was plainly driven by policy needs that were closely linked to fundamental issues of sovereignty and trade.

In spite of the patent need for a more effective enforcement method in adjacent waters, the development of hot pursuit into customary international law was relatively unhurried and the crystallisation process impeded by a number of factors. Concerns regarding the expansion of coastal state powers and possible erosion of sovereignty were a significant stumbling block. Although a number of cases have been considered in this chapter, it is apparent that a lack of fact-appropriate scenarios also contributed to the slow pace of development.

Ultimately, the desire to address maritime crime with a more effective enforcement method overcame any remaining obstacles to crystallisation. By the early twentieth century, hot pursuit had shaken off any connection to belligerency or the law of prize. Support was evident in jurisprudence, international law publications and state practice. In conjunction with significant state practice and private codification efforts, consistent recognition by municipal courts consolidated the rule.⁹² Accordingly, hot pursuit was included as a provision of the *Final Act of the Conference for the Codification of International Law at The Hague* in 1930. However, many of the challenges that arose during the development of customary international law were also present during the codification process.

The next chapter explores and analyses the many issues associated with shaping a right of interdiction outside naval warfare by examining the treaty development of hot pursuit

⁹¹ The tenuous link to naval warfare in the earliest stages of the development of hot pursuit are examined in Chapter 1. See also Maidment, above n 59, 380.

⁹² Poulantzas, above n 2, 93.

up until the conclusion of the *United Nations Law of the Sea Convention* in 1982. This period is particularly relevant because it examines the process by which UNCLOS became a constitutional framework in the context of hot pursuit. UNCLOS provides a degree of consistency, reliability and discernibility on the spectrum of ocean usage. While hot pursuit's development in customary international law was somewhat protracted, the foundations for hot pursuit were set in place early in the codification process. In this respect, UNCLOS acts as a collective reference from which to critically examine the limits of hot pursuit and any application of hot pursuit must be occur within the legal framework—comprising both treaty and customary international law.

CHAPTER 3: THE CODIFICATION OF HOT PURSUIT

3.1 Introduction

Chapter 2 examined the development of hot pursuit as a method of maritime enforcement under customary international law. Issues of sovereignty, trade and resource exploitation largely propelled the crystallisation process of hot pursuit. As states sought means to address customs violations in adjacent waters, the issue of determining fixed maritime zones proved to be a persistent challenge, one that unequivocally influenced the development of hot pursuit. Codification of these issues would result in consistency and certainty, and the opportunity to do so presented itself after hot pursuit became a part of customary international law.

The onset of the twentieth century saw extraordinary efforts by states to develop and codify international law.¹ Although World War I impeded the progress of state negotiations,² international law advanced more rapidly thereafter.³ Along with the trend towards codification of the laws of war in the early twentieth century, the impetus for more effective regulation of peacetime activities at sea also gained further momentum. By this time, the nature and complexity of ocean use had evolved significantly and states had already begun to formalise regional arrangements.⁴ Likewise, technological developments accelerated the exploitation of fishing stocks⁵ and other maritime industries⁶ and ultimately many states sought to exercise greater control over adjacent

¹ See, eg, *Convention respecting the Bombardment by Naval Forces in Time of War*, signed 18 October 1907, 205 ConTS 345 (entered into force 26 January 1910); *Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War*, signed 18 October 1907, 205 ConTS 349 (entered into force 26 January 1910); *Declaration concerning the Laws of Naval War* (signed and entered into force 26 February 1909). See generally Constantine John Colombos, *The International Law of the Sea* (Longmans, Green and Co, 6th ed, 1967) ch XI.

² A Third Peace Conference, primarily aimed at the development of the laws of war, was cancelled when World War I broke out. ILC, *The Work of the International Law Commission* (United Nations, 2007) vol II, 3.

³ *Ibid.*

⁴ See, eg, *Convention for Regulating the Police of the North Sea Fisheries*, signed 6 May 1882, 160 ConTS 219 (entered into force 15 May 1884).

⁵ For example, internal combustion engines were introduced in European fisheries at the turn of the century and ultimately replaced sailing vessels as a means of commercial fishing. Later, the advent of refrigeration contributed to the development of the fishing industry. See A Zugarramurdi, M A Parin and H Lupin, 'Economic Engineering Applied to the Fishery Industry' (Food and Agriculture Organization Fisheries Technical Paper No 351, Fishery and Aquaculture Economics and Policy Division, 1995) 9.

⁶ The introduction of more efficient engines facilitated the expansion of merchant shipping while advances in rail, road freight transport and canal construction contributed to the shipment of bulk cargoes. Additionally, commercial travel by sea was popular at this time, and the *Titanic* disaster in 1912

waters. As a result, the tension between coastal state sovereignty and freedom of the seas became more pressing. The mounting complexity of competing state interests called for more certainty and consistency, and the law of the sea developed as part of greater efforts to codify international law being undertaken at this time.

Although hot pursuit was already a part of customary international law, the right would have to be reconciled with a range of competing interests during the codification process of a universal framework. As more effective governance was required to address the broader law of the sea issues such as jurisdiction, navigation and marine resource exploitation, any consideration of hot pursuit would be tied to the progress of these types of fundamental issues. Nowhere was this more evident than the developing principle of coastal state sovereignty over the territorial sea.⁷ The broad elements of hot pursuit were established during the crystallisation period and the subsequent codification process was an opportunity for states to better shape hot pursuit as an enforcement method. However, the inclusion of hot pursuit in the codification of the law of the sea was tied to what would become a persistent impediment, the determination of the territorial sea boundary. Ultimately, the negotiations regarding hot pursuit form only a very small part of a much greater enterprise to construct a law of the sea regime. The conclusion of UNCLOS was a major achievement in of itself and any contemporary analysis of the parameters of hot pursuit must occur within the treaty framework. This chapter examines the method of codification of hot pursuit and its parameters from the earliest negotiations until the conclusion of UNCLOS. Although this was a protracted process, hot pursuit would also be influenced by other developments emerging within in the law of the sea during this time.⁸ The steps made towards codification of hot pursuit, those that reflect the contributions of new developments, are examined below.

contributed to rapid changes in the law that improved the safety of life and conditions of work at sea and resulted in the adoption of the first version of the *International Convention for the Safety of Life at Sea* (signed and entered into force 20 January 1914). The *Comite Maritime International*, established in 1896 (and a precursor to the International Maritime Organization (IMO) Legal Committee), drafted the *Salvage and Collision Conventions* of 1910, the *Limitation of Liability Conventions* of 1924 and 1927 and others. See Rosalie P Balkin, 'The Establishment and Work of the IMO Legal Committee' in Myron H Nordquist and John Norton Moore (eds), *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff, 1999) 263.

⁷ R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 74; Daniel Patrick O'Connell, 'The Juridical Nature of the Territorial Sea' (1971) 45 *British Yearbook of International Law* 303.

⁸ For example, the development of the 'archipelagic waters' and confirmation of an EEZ.

3.2 *The Hague Codification Conference, 1930*

The international codification of peacetime law of the sea was not explored in any detail until after the conclusion of World War I,⁹ at which time the League of Nations established a Committee of Experts for the Progressive Codification of International Law.¹⁰ The Hague Codification Conference was subsequently convened in 1930 to examine three areas of international law: nationality, territorial waters and state responsibility. These issues were considered ready for codification.¹¹ In the case of the law of the sea, there were already measures underway towards formalising sovereignty over the territorial sea¹² and a number of theories of coastal state control over the territorial sea had emerged.¹³ This trend was reflected in diplomatic exchanges, municipal courts and arbitration,¹⁴ as well as the efforts of private codification organisations.¹⁵ The Conference was an opportunity for states to form a working definition and go some way towards resolving disputes arising from fisheries, security and customs. Hot pursuit, already established in customary international law,¹⁶ was a maritime enforcement tool proven to address some of these issues offshore.¹⁷

While the Conference formally recognised the exercise of a coastal state's sovereignty over its territorial waters,¹⁸ it also brought to light the divergence of state views

⁹ Private codification efforts during this period are discussed in Chapter 2.

¹⁰ The League of Nations was established at the end of World War I under Part I of the Treaty of Versailles, 28 June 1919, to promote international cooperation and achieve peace and security. The Committee was convened on 22 September 1924. See Shabtai Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law (1925–1928)* (Oceana Publications, 1972).

¹¹ These three issues were considered 'ripe' for international agreement, as per Shabtai Rosenne (ed), *League of Nations Conference for Codification of International Law (1930)* (Oceana Publications, 1975), xiii.

¹² See Churchill and Lowe, above n 7, 74; O'Connell, above n 7, 303; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 21.

¹³ O'Connell, above n 7, 305–347.

¹⁴ Ibid.

¹⁵ Discussed in Chapter 2 (the comments are restricted to the development of hot pursuit). In addition to the organisations described in Chapter 2, such as the *Institut de Droit International*, the International Law Association and the Harvard Law School, others include the Japanese Association of International Law and the German Society of International Law, both of whom produced (separate) draft articles in 1926. See O'Connell, above n 7, 348.

¹⁶ Examined in Chapter 2. Hot pursuit became a part of customary international law by the early twentieth century, evident by consistent recognition by state practice, jurisprudence, international law publications, private codification efforts and municipal courts.

¹⁷ The anti-smuggling laws of the US were influential in this regard, as discussed in Chapter 2.

¹⁸ 'Conference for the Codification of International Law' (1930) 24(3) *American Journal of International Law* (Supplement: Official Documents) 169, 234. The Report also states that the authority exercisable over this zone is equivalent to that exercised over land. However, this must be measured against the existing right of innocent passage for which there is no land equivalent. See also Churchill and Lowe, above n 7, 74.

regarding the breadth of this zone.¹⁹ Agreement could not be reached at the Conference and the determination of the territorial sea zone would become a sticking point throughout the codification process. The Conference produced a number of draft articles²⁰ that were influential during later codification negotiations.²¹ There was some interest shown by a number of parties regarding the possible development of a contiguous zone, but this was dependent upon resolution of the issue of the territorial sea and was therefore a loftier aspiration for future consideration. Article 11 was a draft definition of hot pursuit and is in Appendix A.

The doctrine of hot pursuit was recognised without major debate at the earliest stage of codification of the law of the sea.²² This demonstrated an acceptance of a coastal state's right to exercise control over another state's vessel as an exception to high seas freedoms—something that had not long been reflected in customary international law. More importantly, the Conference found hot pursuit to be consistent with the functions of the territorial sea and did not alter the broad concept as it was under customary international law.²³ However, the Conference spent some time discussing the point at which a pursuit may be initiated and, given the opportunity to shape the doctrine of hot pursuit, a number of additional obligations were consequently drafted as safeguards against abuse of the right.²⁴ Evidently, states accepted hot pursuit as an exception to freedom of the high seas. However, hot pursuit also demanded thorough consideration of its parameters. Although the Conference merely produced draft articles, it is clear that hot pursuit had begun to take on some of the elements that would later become codified in the universal law of the sea framework.

Draft Article 11 states that, '[a] capture on the high seas shall be notified without delay to the State whose flag the captured vessel flies'. Notification to the flag state may have occurred informally beforehand, but once again Article 11 created a new obligation upon the coastal state that did not exist in customary international law. Nonetheless, it

¹⁹ Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law* (Martinus Nijhoff, 1983) 141. See also Jesse S Reeves, 'The Codification of the Law of Territorial Waters' (1930) 24(3) *American Journal of International Law* 486.

²⁰ 'Conference for the Codification of International Law', above n 18, 184.

²¹ It was argued that the Conference laid the groundwork for the later development of international law: 'If there was a shipwreck, there was also valuable salvage. There were substantial results' (Reeves, above n 19, 488).

²² 'The general doctrine of hot pursuit was recognized and formulated without serious difficulty' (Reeves, above n 19, 496).

²³ Glanville Williams, 'The Juridical Basis of Hot Pursuit' (1939) 20 *British Yearbook of International Law* 83, 91.

²⁴ For example, if radio signal was permitted alone, there may be no limit to the distance from which the order could be given ('Conference for the Codification of International Law', above n 18, 246).

was not necessarily an onerous obligation for the coastal state and was clearly designed to ‘avoid misunderstandings’²⁵ in special circumstances.

The last sentence was drafted as a result of discussion at the Conference regarding the point at which a pursuit may commence.²⁶ It created a new obligation on coastal states that had not previously existed in customary international law. However, the inclusion of new safeguards suggests that many states considered hot pursuit in need of further clarification and development.

While it was constructive that the Conference affirmed the core elements of hot pursuit as it was set out in customary international law, a number of areas requiring additional safeguards were also identified. The Conference recognised the utility of hot pursuit, but also emphasised that it must only be exercised in exceptional circumstances. As a result, even at this very early stage of the codification process states were attempting to shape hot pursuit. Some progress was made at this stage in relation to the drafting of hot pursuit provisions, but ultimately the failure to codify a territorial seas convention was the result of conflicting views on the breadth of territorial waters.²⁷ Nonetheless, it is clear that by this time hot pursuit was already customary international law and, as a result of the Conference, had been adapted with a number of safeguards, albeit in draft form, for future consideration.

3.3 The Report of the International Law Commission, 1956

After World War II, the demise of the League of Nations would prompt a more comprehensive approach to capturing international law.²⁸ The United Nations General Assembly established the permanent ILC²⁹ to promote the progressive development and codification of international law.³⁰ The membership of ILC is made up of persons of

²⁵ The Committee observed that ‘The arrest of a foreign vessel on the high sea (sic) is an occurrence of so exceptional a nature that, to avoid misunderstandings, the State whose flag the vessel flies must be notified of the reasons for the arrest’ (‘Conference for the Codification of International Law’, above n 18, 246).

²⁶ ‘Conference for the Codification of International Law’, above n 18, 246.

²⁷ O’Connell, above n 7, 351.

²⁸ The League was unable to engage in collective security and disarmament while military aggression intensified leading up to the breakout of World War II. The UN was founded in 1945 at the end of World War II and is guided by the principles contained in the *Charter of the United Nations* (‘UN Charter’).

²⁹ The ILC and its *Statute of the International Law Commission* (‘ILC Statute’) was established by the General Assembly in GA Res 174 (II), UN GAOR, 2nd sess, 123th mtg, UN Doc A/Res/174 (1947) pursuant to Art 13(1) of the UN Charter that states ‘The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification ...’.

³⁰ ILC Statute art 1.

recognised competence in international law³¹ drawn from areas of expertise that include academia, government and diplomatic service and international organisations.³² Fittingly, the core task of the ILC is not only in its founding Resolution, but is also enshrined in the UN Charter itself.³³ This signifies that the development of international law is key to the role of the UN and that the work of the ILC will not focus solely on what international law is, but also on what the law has the potential to be.³⁴

The ILC identified a number of international legal issues ready for codification and appointed former Hague Conference Rapporteur J P A François as Special Rapporteur for two regimes, the high seas and territorial waters.³⁵ In addition to materials applicable to the plans of work,³⁶ François was able to draw upon his extensive experience at the Hague Conference. In 1956, the *Report on the Regime of the High Seas*³⁷ was produced, including draft article 47 set out in Appendix B.

But for the flag state notification provision,³⁸ draft article 47 replicates all of the elements of the Hague Conference hot pursuit provision³⁹ while further expanding and clarifying the right in greater detail. For example, article 47(1) introduces the evidential requirement that the authorised coastal state official must have a ‘good reason to believe’ that an offence has been committed before initiating a pursuit. Article 47(1) also authorises the use of hot pursuit from within the contiguous zone.⁴⁰ While this

³¹ ILC Statute art 2(1).

³² ILC members sit as individual members, not as representatives of member states.

³³ *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

³⁴ Article 15 of the Statute defines ‘progressive development of international law’ as the preparation of draft conventions on subjects that are yet to be regulated or are not sufficiently developed by state practice.

³⁵ It was at this time that hot pursuit was more appropriately subsumed as a provision under the regime of the high seas.

³⁶ The ILC is guided by Article 19(2) of the Statute to request copies of laws, judicial decisions, treaties, diplomatic correspondence and other relevant data from states. In the case of these regimes, a questionnaire was also distributed to states that examined, in part, elements of hot pursuit. The ILC is also required by Article 20 to present draft articles that must address precedents, treaties, judicial decisions, doctrine, state practice and other relevant data.

³⁷ ILC, ‘Articles Concerning the Law of the Sea with Commentaries 1956’ adopted at its Eighth Session and submitted as part of its report to the General Assembly. The report is reproduced in the *Yearbook of the International Law Commission, 1956*, vol II.

³⁸ ‘A capture on the high seas shall be notified without delay to the State whose flag the captured vessel flies.’

³⁹ The ILC briefly revisited the issue of initiation of the pursuit by radio. Despite support from some quarters that the signal to stop did not need to be seen and heard, radio was considered an insufficient means of communication, as it has the potential to be subject to abuse. See *Regime of the High Seas*, Second Report, 3rd Session, UN Doc A/CN.4/42 (10 April 1951) 89.

⁴⁰ Where the coastal state has good reason to believe that a foreign vessel has violated the rights for the protection of which the zone was established.

amendment was in keeping with the new inclusion of the contiguous zone in Article 66, it also overcame earlier opposition to the use of hot pursuit in the contiguous zone.⁴¹

Secondly, motherships and auxiliary craft were introduced in article 47(3) to address, among other issues, marine resource exploitation such as fishing and sealing as well as customs offences.⁴² Although auxiliary craft had been a challenge for coastal states throughout the evolution of hot pursuit in customary international law, it was not explored in any detail at the Hague Conference and was omitted from its draft provision. The ILC inclusion of the provision brought hot pursuit into line with customary international law and equipped coastal states to address this challenge.

Thirdly, military aircraft or aircraft on government service were, for the first time, authorised to conduct hot pursuit. This provision reflected the reality that coastal states were employing air assets and vessels other than conventional warships to patrol and conduct surveillance of maritime zones. Accordingly, article 47(4) also clarified the type of vessel authorised to conduct hot pursuit. In addition to warships, ships on government service authorised ‘to that effect’, such as police and customs,⁴³ were also permitted to conduct hot pursuits. By enabling the use of the full range of maritime and air assets, article 47 enabled the coastal state to conduct much more effective enforcement. However, the breadth of the territorial sea remained in dispute.

The ILC submitted the final Report containing draft articles and commentary with a recommendation that the General Assembly convene an international conference of plenipotentiaries to examine the law of the sea—not only the legal, but also the technical, biological, economic and political aspects of the problem and to embody the results in one or more conventions.⁴⁴ This recommendation demonstrated that the codification of the law of the sea, originally envisioned as a universal framework, was multifaceted⁴⁵ and challenging.⁴⁶ Hot pursuit underwent significant development as a

⁴¹ Churchill and Lowe, above n 7, 135. For example, Sir Gerald Fitzmaurice in ‘Regime of the High Seas and Regime of the Territorial Sea, Document A/CN.4/97: Report by JPA François, Special Rapporteur’ in *Yearbook of the International Law Commission, 1956*, vol II, 6. There was considerable opposition to the creation of a contiguous zone from a number of states, including the Netherlands and the UK. See *Regime of the High Seas*, Second Report, 3rd Session, UN Doc A/CN.4/42 (10 April 1951) 90.

⁴² This is examined in Chapter 2.

⁴³ ‘Report of the International Law Commission on the work of its Eighth Session’ (UN Doc A/3159, 4 July 1956) in *Yearbook of the International Law Commission, 1956*, vol II, 285. This would exclude government vessels being employed for a commercial purpose.

⁴⁴ *Official Records of the General Assembly, Eleventh Session, Supplement No 9*, UN Doc A.3159, ch II.

⁴⁵ The Report also recommended that the General Assembly consider that the law of the sea be set out in more than one convention. See ILC, *Regime of the High Seas*, Second Report, 3rd Session, UN Doc A/CN.4/42 (10 April 1951).

⁴⁶ Separate discussion about whether escort after arrest across tracts of the high seas would render the

result of the ILC's work as the core elements set out in customary international law and the Hague Conference provisions were expanded and clarified in more detail. For example, the influence of US practice in relation to anti-smuggling maritime enforcement is evident throughout the codification negotiations.⁴⁷ Although the ILC's Report was not binding and remained in draft form, it would be used as a basis in future negotiations.

3.4 The First United Nations Conference on the Law of the Sea and the Convention on the High Seas, 1958

The General Assembly accepted the recommendation of the ILC and convened the first *United Nations Conference on the Law of the Sea* (UNCLOS I) in 1958 to examine the very broad range of issues arising from the law of the sea.⁴⁸ The breadth of territorial waters would remain a sticking point, delaying formalisation of hot pursuit. Ultimately, UNCLOS I failed to settle the issue of the limits of territorial waters. This issue would not be resolved until the conclusion of UNCLOS III, some 50 years after the Hague Conference. Nonetheless, the work undertaken during UNCLOS I resulted in the adoption of four distinct conventions for application to different maritime zones,⁴⁹ one of which, the *Convention on the High Seas*⁵⁰ (the 'Geneva Convention'), codified the doctrine of hot pursuit.

Article 23 of the Geneva Convention largely reproduced the draft article 47 of the *Report on the Regime of the High Seas 1956* with few amendments and is set out in Appendix C. Commencement of pursuit from contiguous zone of the pursuing state in Article 23(1) is a significant addition. For example, the state representative for Italy submitted that, '[w]e consider that, as far as customs control is concerned, such an interpretation appears excessively restrictive and that the right of hot pursuit should be recognised also in cases where the ship committed the offence in the contiguous

pursuit void was also rejected. This reinforced the exceptional nature of the right and the fundamental notion that the coastal state's power derives from sovereignty (ibid, 91).

⁴⁷ American jurisprudence in relation to anti-smuggling maritime enforcement proved influential: 'La jurisprudence américaine a reconnu également à plusieurs reprises la "présence constructive," surtout à propos de la contrebande de l'alcool (cas du Grace and Ruby)' (ILC, above n 45, 90).

⁴⁸ Prior to UNCLOS I, the law of the sea existed in customary international law.

⁴⁹ UNCLOS I resulted in the adoption of four conventions: the *Convention on the Territorial Sea and the Contiguous Zone*, *Convention on the High Seas*, *Convention on Fishing and Conservation of the Living Resources of the High Seas* and the *Convention on the Continental Shelf*. The fourth Convention and the *Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes* were met with some reluctance due to their introduction of concepts beyond those already established in international customary law.

⁵⁰ Opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

zone'.⁵¹ This view reflected the increasing desire of states to effectively exercise control beyond territorial waters. Alternatively, the UK argued that to allow a hot pursuit from the contiguous zone was to ignore the status of the zone as constituting a part of the high seas.⁵² A number of states, the UK in particular, did not view the contiguous zone as an extension that allowed the exercise of protection (albeit in a limited fashion) over waters adjacent to the territorial sea. Rather, their view was very much focused on the high seas nature of the contiguous zone in which sovereignty was not exercised.⁵³ These conflicting views are representative of the challenges of balancing competing interests on the high seas. There was a consensus that coastal states could enforce their laws well beyond the shoreline, but opinions still diverged in many respects on where the jurisdiction ought to end. Regardless of these comments, the definition was expanded to include commencement from the contiguous zone at a time when the breadth of territorial waters remained unsettled.

Other amendments to draft article 47 included the addition of the phrase 'practicable means' in Article 23(3), reflecting technological advances that would assist in identification of boundaries and geographical positions. The inclusion of the words 'without interruption' in Article 23(5) is an important safeguard, although there is some uncertainty surrounding its application in contemporary circumstances.⁵⁴ Lastly, a significant addition to the right of hot pursuit is the provision instituting compensation for loss or damages in relation to the conduct of an unlawful hot pursuit. The provision in Article 23(7) does not set out procedural aspects of such claims, but is an important addition that would undoubtedly be of assistance as a general principle to plaintiffs in domestic litigation. Regardless of the many and varied unsettled issues, UNCLOS I constituted a huge achievement in terms of advancing the codification of the law of the sea.⁵⁵ For hot pursuit, the doctrine was irrevocably a full-bodied treaty mechanism with

⁵¹ 'A Note Verbale from the Permanent Mission of Italy to the United Nations [7 August 1957]' in *Comments by Governments on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session*, UN Doc A/CONF.13/5 and Add. 1 to 4, Extract from the *Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents)* 92.

⁵² *Ibid*; 'A Note Verbale from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland [20 September 1957]' 104.

⁵³ At the time of the negotiations for the Geneva Conference, the UK, for example, did not claim a contiguous zone. See G G Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea' (1959) 8 *International and Comparative Quarterly* 73, 109.

⁵⁴ This is analysed in more detail in Chapter 5.

⁵⁵ For those states that are party to both the *Geneva Convention on the High Seas* and *UNCLOS*, the law of the latter shall prevail in a dispute, pursuant to Article 311(1). The elements of hot pursuit as detailed in Article 111 of *UNCLOS* have since been the subject of judicial comment, which will be discussed in Chapter 4.

a range of preconditions designed to ensure an appropriate balance between the interests of coastal and flag states.

3.5 The Second United Nations Conference on the Law of the Sea, 1960

The second *United Nations Conference on the Law of the Sea* ('UNCLOS II') was convened in 1960 to further consider the issues of fishing limits and the breadth of the territorial sea.⁵⁶ UNCLOS II was well attended, but proceeded against a challenging background of Cold War tensions and the emerging activism of both land-locked and developing states. The questions of security and access to marine resources were more important than ever, and although the conference was conducted with an abbreviated set of aims, the key issues were ultimately not satisfactorily addressed. Crucially, states remained divided over the breadth of the territorial sea.⁵⁷ Due to the sensitivities regarding the territorial sea, hot pursuit was not examined during UNCLOS II and Article 23 of the Geneva Convention remained unchanged.

3.6 The Third United Nations Conference on the Law of the Sea, 1979

After the disappointing conclusion of UNCLOS II, the mandate for a single comprehensive framework to regulate the oceans became more imperative. In addition to unresolved issues, there were more contemporary problems that required regulation, such as access to deep sea mineral resources and the capacity to protect fish stocks from an increasingly technologically advanced industry.⁵⁸ Developing and newly independent states, along with geographically disadvantaged states such as land-locked and archipelagic nations, also sought recognition within the framework. The third *United Nations Conference on the Law of the Sea* ('UNCLOS III')⁵⁹ was convened in 1973 and the final text of the Convention was adopted in 1982 and relevant provisions are in Appendix D.⁶⁰

⁵⁶ *Convening of a Second UN Conference on the Law of the Sea*, GA Res 1307(XIII), UN GAOR, 738th plen mtg, UN Doc A/RES/1307 (XIII) (10 Dec 1958).

⁵⁷ In this environment, the determination of the breadth of the territorial sea remained central to creating a universal framework. M Shukairy (Saudi Arabia), 'Statement Made in the General Debate in the Committee of the Whole, First Meeting, 21 March 1960' in *Official Records of the Second United Nations Conference on the Law of the Sea (Committee of the Whole—Verbatim Records of the General Debate)*, UN Doc A/CONF.19/9 (17 March–26 April 1960).

⁵⁸ Churchill and Lowe, above n 7, 16.

⁵⁹ More commonly known as 'UNCLOS', 'the Law of the Sea Convention' or 'LOSC'.

⁶⁰ The amendments arising from Article 23 of the Geneva Convention are underlined in Appendix D.

UNCLOS III differed in its preparation;⁶¹ the Sea-Bed Committee⁶², rather than the ILC, was tasked with the preparatory work. In the case of hot pursuit, however, the Second Committee⁶³ reproduced Article 23 of the Geneva Convention with a number of amendments to accommodate newly recognised areas of jurisdiction: the EEZ,⁶⁴ the continental shelf⁶⁵ and archipelagic waters.⁶⁶ While the breadth of the territorial sea had previously thwarted negotiators early in the codification process, it was resolved in a relatively judicious manner at UNCLOS III.⁶⁷

Article 111(1) sets out the core elements of hot pursuit. Hot pursuit may be undertaken against a foreign vessel or one of its boats in the internal waters, territorial waters or archipelagic waters if the vessel violates laws of the state. The coastal state is authorised to conduct a pursuit from the contiguous zone for violations of the rights for the protection of which the zone is established, namely customs, fiscal, immigration and sanitation. Hot pursuit may occur from within the EEZ⁶⁸ or the waters above the continental shelf where a foreign vessel violates the applicable laws (including safety zones around installations).⁶⁹ Article 111(7) was amended to rule out loss of jurisdiction in circumstances where an arrested vessel is escorted across the EEZ of a third state.

⁶¹ Tommy Koh and S Jayakumar, 'An Overview of the Negotiating Process of UNCLOS III' in Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1985) vol 1, 50.

⁶² GAOR 2750 (XXV) 1970. The Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction was established soon after Ambassador Arvid Pardo's celebrated 'common heritage of mankind' speech at UNCLOS II on 1 November 1967. The Ad Hoc Committee became the Committee on the Peaceful Uses of the Sea-Beds and the Ocean Floor Beyond the Limits of National Jurisdiction, which served as the preparatory body for UNCLOS III. See Nordquist, above n 61, xxvi.

⁶³ The First Committee considered the legal regime of the sea bed and ocean floor beyond national jurisdiction. The Second Committee dealt with the regimes of territorial sea, contiguous zone, continental shelf, EEZ and high seas as well as land-locked states, shelf-locked states and states with narrow shelves or short coastlines and the transmission from the high seas. The Third Committee dealt with marine preservation, scientific research and development and transfer of technology. See Third United Nations Conference on the Law of the Sea, *Organization of the Second Session of the Conference and Allocation of Items: Report of the General Committee*, UN Doc A/CONF.62/28 (20 June 1974).

⁶⁴ New Zealand proposed the relevant amendments. See Third United Nations Conference on the Law of the Sea, *Summary Records of Meetings of the Second Committee*, 31st mtg, UN Doc A/CONF.62/C.2/SR.31 (7 August 1974) para 63. See also Honduras, para 41; El Salvador, para 50.

⁶⁵ *Ibid*, para 63.

⁶⁶ Above n 64, para 13; *Report of the Chairman of the Second Committee*, UN Doc A/CONF.62/L.51 (29 March 1980).

⁶⁷ Agreement as to distance of the territorial sea had for a long time divided the negotiators: *Statement by the Chairman of the Second Committee at its 46th Meeting*, UN Doc A/CONF.62/C.2/L.86 (28 August 1974).

⁶⁸ Article 73 sets out the enforcement powers exercisable in the EEZ:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

⁶⁹ Article 111(2) was a new subparagraph and characterised the EEZ and continental shelf.

UNCLOS III reflects the extended jurisdictions that were developed after crystallisation and are evident throughout the framework.

Article 111(6) was amended to clarify the point at which an arrest may take place when a pursuit is conducted by an aircraft. It is not sufficient for an aircraft to merely sight the ship and arrest on the high seas. In accordance with Article 23(5)(b), the aircraft must give the suspected vessel the order to stop and pursue it without interruption. In UNCLOS III, Article 111(6)(b), the amendments reflected the introduction of new outer zones located beyond the territorial sea. Similarly, in Article 111(8), where a ship has been stopped or arrested 'on the high seas' in Article 23(7) of the Geneva Convention, the provision was amended to state 'outside the territorial sea'.

Article 111(5) was amended to reflect a supplementary requirement that coastal state vessels and aircraft be appropriately marked. Hot pursuit may only be exercised by warships, military aircraft, or other ships or aircraft 'clearly marked and identifiable as being on government service'. The inclusion of this safeguard is designed to ensure that hot pursuit is exercised in limited circumstances and prevent abuse of the right.

3.7 Conclusion

Chapter 2 demonstrated that during the inception of hot pursuit into customary international law, a balance was struck between the expansion of coastal state sovereignty and the fundamental freedoms of the law of the sea. In this chapter, an examination of the codification process of the law of the sea in the context of hot pursuit demonstrates that once hot pursuit was established as customary international law, the drafting of articles followed without substantial opposition. Article 111 of UNCLOS III affirmed the elements that were consistently evident during the codification process. For example, the termination of pursuit upon entry to the territorial sea of a third state was adopted from the preceding conferences. While the codification of hot pursuit itself was relatively uncontroversial, it was inextricably linked to the territorial sea, and it was the persistent lack of consensus regarding the breadth of territorial waters that slowed the process of codification.

The formulation of UNCLOS was unprecedented in the development of international law. UNCLOS introduced new regimes, codified existing international customary law and addressed contemporaneous law of the sea challenges. While this required the development of new law, the preparatory groundwork had been conducted for hot

pursuit during the preceding codification attempts. Moreover, hot pursuit was already a part of customary international law. By the time hot pursuit was considered at UNCLOS III, almost all that was required was minor fine-tuning to reflect the introduction of new outer maritime zones.⁷⁰

Since the entry into force of UNCLOS interest in hot pursuit has undergone a resurgence. Some uncertainty surrounds the core elements of hot pursuit and Article 111 does not hold all the solutions to address contemporary circumstances. That being said, UNCLOS is not an exhaustive and immovable account of the law of the sea. On one hand, the conclusion of UNCLOS stabilised the competing interests of flag, port and coastal states rights and was an incredible achievement. Conversely, some aspects have failed to take account of future change, such as industry practices and technological advances in spite of the envisioned longevity of UNCLOS. It was predicted in the closing session of UNCLOS that ‘it is in the nature of all things that they do not remain static, that there will be growth and there will be decay. The march of technology and changing perceptions and aspirations will, in time, place pressures upon the regimes we establish today’.⁷¹ It did not take long to experience the troublesome effects of a number of core elements, chiefly the requirement for the pursuit not to be interrupted and the necessary notification to the pursued vessel. Hot pursuit remains an appealing method of maritime enforcement, but with the passing of time it has become, according to a number of commentators, inadequate for the purposes of contemporary maritime law enforcement.⁷²

A number of states have demonstrated that there is dissatisfaction with the conventional parameters of hot pursuit set out in UNCLOS.⁷³ This is evidenced, for example, by ad hoc cooperative measures and formalised agreements employed as a means to work around UNCLOS. This has occurred alongside an increased desire by states to reinforce

⁷⁰ It is important to note that there are no declarations, statements or objections that specifically relate to the doctrine of hot pursuit attached to ratification of UNCLOS. See generally L D M Nelson, ‘Declarations, Statements and “Disguised Reservations” with Respect to the Law of the Sea Convention’ (2001) 50(4) *International and Comparative Law Quarterly* 767.

⁷¹ Statement of Sri Lanka, 187th meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol 17, 48.

⁷² Recent commentary is analysed in Chapter 6. See, eg, Craig Allen, ‘Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices’ (1989) 20(4) *Ocean Development and International Law* 309; Randall Walker, ‘International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century’ (2011) 17 *Auckland University Law Review* 194.

⁷³ In an effort to conduct more effective enforcement of its territories in the Southern Ocean, Australia has entered into bilateral agreements incorporating hot pursuit powers to target IUU fishing. This is examined in Chapter 7. Other examples of contemporary agreements incorporating hot pursuit are examined in Chapter 6.

sovereign control over maritime zones, although state practice has exposed some functional challenges. The relatively effortless progression of hot pursuit during the codification process strongly suggests that as a result of solid theoretical foundations the demand for effective enforcement mechanisms such as this will persist. While amendment of Article 111 of UNCLOS is unlikely, alternative avenues for states aiming to expand hot pursuit are being tested and implemented. Outside the UNCLOS framework, the development of hot pursuit is left to the vagaries of customary international law—a potentially protracted and unpredictable process. Beyond the limitations of UNCLOS and in the absence of relevant jurisprudence, it is uncertain whether fragmented sources of international law will adequately develop to meet contemporary needs. The following chapter critically analyses the elements of hot pursuit to determine whether hot pursuit, in its fundamental form, can meet the needs of contemporary maritime security. A greater examination of the elements of hot pursuit, both within existing customary international law and the codified parameters of UNCLOS, will indicate whether the right is sufficiently fleshed out to effectively address these challenges.

CHAPTER 4: THE CORE ELEMENTS OF HOT PURSUIT

4.1 Introduction

The previous chapters examined the development of hot pursuit in customary international law and the subsequent codification of hot pursuit in UNCLOS.¹ Ocean-based activity has since transformed and coastal states increasingly contend with an array of practical challenges and maritime security threats.² In the case of hot pursuit, many of these challenges could be overcome with the use of existing and emerging technologies.³ However, the law does not adequately take account of technological developments⁴ and this is just one challenge that coastal states face. The broader environmental and economic repercussions of ocean exploitation⁵ have forced a rethink of maritime enforcement methods⁶ and, without some degree of development, hot pursuit may struggle to address the needs of contemporary maritime security.

The high seas constitute open ocean and encompass all parts of the sea that are not in the EEZ, territorial sea or internal waters or the archipelagic waters of an archipelagic state. As a limited exception to high seas freedoms, safeguards are essential to the application of hot pursuit. The core elements of hot pursuit were settled relatively early in the development process and each component must be satisfied cumulatively to be considered valid.⁷ This underscores a ‘checklist’ of elements and indicates that any future developments will draw upon its theoretical foundations. Even so, for many states the pace of development has been sluggish. In spite of solid theoretical foundations, a number of states consider hot pursuit to be inadequate in its current

¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

² See, eg, Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011).

³ The use of technology in the context of interruption is considered in this chapter and the potential for technology to expand hot pursuit is examined in Chapter 6. See generally Organization for Economic Co-operation and Development (OECD), ‘Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unauthorised Fishing’ (Report, OECD Publishing, 2005).

⁴ Such as more effective surveillance and communications.

⁵ The IUU fishing industry, for example, is swiftly becoming a key threat to global food security. See High Level Panel of Experts (HLPE), ‘The Role of Sustainable Fisheries and Aquaculture for Food Security and Nutrition’ (Report, Global Forum on Food Security and Nutrition, 18 November–20 December 2013).

⁶ States are crafting alternative options to better address IUU fishing, see, eg, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature 22 November 2009, [2016] ATS 21.

⁷ *M/V ‘Saiga’ (No 2) Case (Saint Vincent and the Grenadines v Guinea)* (Admissibility and Merits) (1999) 120 ILR 143, 146.

form.⁸ Before considering hot pursuit in contemporary circumstances in Part III, this chapter will identify shortfalls in the existing regime and determine where the law is in need of further development. This chapter examines the current scope of hot pursuit, as stipulated in customary international law and treaty, and will provide context in which to examine the development of hot pursuit in contemporary circumstances. Evidence of new and emerging elements of hot pursuit resulting from contemporary practice will be examined in Chapter 5 along with following case studies.

4.2 The Violation of Coastal State Laws

4.2.1 'A Good Reason to Believe'

The violation of coastal state laws by a vessel constitutes the first phase of hot pursuit. It is the trigger for a process that can potentially override the exclusive jurisdiction of the flag state on the high seas. The opening sentence of Article 111 of UNCLOS states that '[t]he hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State'. The phrase 'good reason to believe' was first incorporated into the ILC Report in 1956⁹ and was replicated in all forms of codification since.¹⁰ Prior to that, the discussion of hot pursuit at the 1930 Hague Conference focused on how the pursuit may be initiated when the issue of the breadth of the territorial sea was not settled. As a result, any evidentiary requirement was not a significant point of discussion at the Hague Conference. Further, there is no recorded objection to inclusion of the phrase 'good reason to believe' in the codification process. For these reasons, it can be safely assumed that although it is the first inclusion of the phrase 'good reason to believe' in treaty, it is not a radical departure from previous discussions and intent regarding hot pursuit.

⁸ For example, the matter of the Russian-flagged *Volga* arrested on the high seas by Australian authorities and considered by ITLOS in the *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159; Warwick Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgment of the International Tribunal for the Law of the Sea in the "Volga" Case (*Russian Federation v Australia*)' (2003) 31 *Federal Law Review* 395; Tim Stephens and Donald R Rothwell, 'Case Note: Law of the Sea—The "Volga" Case (*Russian Federation v Australia*) ITLOS No 11 (23 December 2002)' (2004) 35 *Journal of Maritime Law and Commerce* 283; Md. Saiful Karim, 'Conflict Over Protection of Marine Living Resources: The *Volga* Case Revisited' (2011) 3(1) *Goettingen Journal of International Law* 101.

⁹ ILC, 'Report of the International Law Commission on the Work of its Eighth Session' (UN Doc A/3159, 4 July 1956) in *Yearbook of the International Law Commission, 1956*, vol II.

¹⁰ ILC, 'Articles Concerning the Law of the Sea with Commentaries', in *Yearbook of the International Law Commission, 1956*, vol II; GA Res 94, UN GAOR (55th mtg), UN Doc A/Res/94 (1946) art 47(1); *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 23(1).

Other than a statement from commentary that ‘there must be some tangible evidence or reason to suspect a violation’,¹¹ there is no further guidance in international law as to the standard of proof. The violation need not be proven in order for a lawful arrest on the high seas. However, a pursuit cannot be initiated on the basis of mere suspicion¹² (briefly addressed in *M/V ‘Saiga’*).¹³ There is additional support for this interpretation in academic writing,¹⁴ domestic legislation¹⁵ and international agreements.¹⁶

Australia claimed in the *Volga* (Prompt Release) case at ITLOS¹⁷ that around the time that the *Lena* was apprehended for IUU fishing, the *Volga* made a quick exit at her maximum speed from the Australian EEZ onto the high seas. This led Australian authorities to conclude that, as Sun Hope Investments owned both vessels and formed part of a syndicate, the *Lena* had warned the *Volga* of authorities in the area.¹⁸ In spite of grounds for challenge, the owners of the *Volga* ultimately did not pursue an argument on this issue and the opportunity for judicial comment did not come to pass.¹⁹

As a result of technological advances since the drafting of UNCLOS III, proof of a ‘good reason to believe’ has been less likely to constitute a source of contention during proceedings after a hot pursuit.²⁰ The ability to locate, track and record shipping movements has greatly improved, as have the development of registries, Vessel Monitoring Systems (VMS) frameworks²¹ and the swift passage of information via

¹¹ Myron Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Kluwer Law International, 1985) vol III, 256.

¹² Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff, 2nd ed, 2002) 157.

¹³ *M/V ‘Saiga’ (No 2)* (1999) 120 ILR 143 (Judge Anderson) 6.

¹⁴ R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 216; Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 896; Poulantzas, above n 12, 157; Daniel Patrick O’Connell, *The International Law of the Sea* (Clarendon Press, 1984) vol 2, 1088; Md. Saiful Karim, above n 8, 117.

¹⁵ See, eg, *Coastguard Model Maritime Service Code* (US) art 3.18; *Marine and Coastal Act 2009* (UK) c 166(4)(d). A number of legislatures have favoured the term ‘reasonable grounds to believe’, for example *Fisheries Act 2014* (Vanuatu) s109(2); *Marine Living Resources Act 1998* (South Africa) s52(a). The inclusion of hot pursuit in the South African legislative framework is discussed further in Chapter 6.

¹⁶ See, eg, *The Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Island*, [2011] ATS 1 (signed and entered into force 8 January 2007) art 2. This treaty is further examined in Chapter 7.

¹⁷ Statement in Response of Australia, para 5, Case No 11, *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159.

¹⁸ *Ibid* 6.

¹⁹ *Olbers Co Ltd v Commonwealth of Australia* [2004] FCA 262. See also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 150.

²⁰ This is discussed further in Chapter 6.

²¹ Mandatory installation of VMS equipment is increasingly common. For example, it must be installed on all EU-flagged vessels over 12 metres in length (*Council Regulation (EC) No 1224/2009 Establishing a Community Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy*

electronic means.²² Such advances in technology facilitate tracking and identification of vessels, making it easier to comply with the ‘good reason to believe’ evidentiary requirement.²³ Media interest has also become another tool to aid enforcement of domestic law at sea. The use of media to highlight violations of coastal state waters allows the rapid broadcast of any audio-visual evidence of reported breaches.²⁴ The Australian government released frequent media updates²⁵ on the progress of the *Viarsa* and the *South Tomi* pursuits—so much so that the average consumer of Australian news became acquainted with the legal concept of hot pursuit—wielding an effective public relations weapon for the government.²⁶ Increased public awareness of these issues²⁷ has been promoted not only by the media,²⁸ but by lobby groups²⁹ and non-government organisations³⁰—for example, Sea Shepherd’s targeting of IUU fishing and Japanese whaling in the Southern Ocean.³¹ By playing a monitoring role in what it terms ‘unenforced’ waters, Sea Shepherd has drawn unwelcome attention to Australia’s quiet withdrawal from the Southern Ocean. Sea Shepherd has unequivocally demonstrated that IUU fishing is occurring in Australia’s EEZ³² and, on at least one occasion, documented an Australian Customs vessel electing not to pursue and arrest in

[2009] OJ L 343, 22).

²² See P Cacaud, ‘Report of a Regional Workshop on Fisheries Monitoring, Control and Surveillance, Kuala Lumpur and Kuala Terengganu, Malaysia, 29 June – 3 July 1998’ (Field Report C–1/Suppl. 2, GCP/INT/648/NOR, Food and Agriculture Organization of the United Nations, 1999).

²³ Churchill and Lowe, above n 14, 216.

²⁴ For example, evidence of crews disposing of evidence and painting over identification. See also Bruce G Knecht, *Hooked: A True Story of Pirates, Poaching and the Perfect Fish* (Allen & Unwin, 2006) 17–18.

²⁵ For example, the online resources and media releases provided by the Customs Marine Unit (Australian Customs and Border Protection Service), Australian Fisheries Management Authority and the Australian Antarctic Division (Department of Sustainability, Environment, Water, Population and Communities).

²⁶ Ian Hayes, ‘Another one that didn’t get away’, *Australian Antarctic Magazine*, Spring 2001 (2) <<http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-2-spring-2001/international/another-one-that-didnt-get-away!>>.

²⁷ While international interest in the resource and energy potential of Antarctica escalates, Australia’s engagement and capability in the area has been limited. The failure to maintain a meaningful strategic and scientific presence has the potential to undermine Australia’s not insignificant claims in the region. See Tony Press, ‘Looking South: Australia’s Strategic Antarctic Interests in the 21st Century’, *Australian Strategic Policy Institute* (online), 10 October 2014 <<https://www.aspistrategist.org.au/looking-south-australias-strategic-antarctic-interests-in-the-21st-century/>>.

²⁸ These examples will be discussed in more detail in Chapter 5. See, eg, ‘Toothfish ‘Pirates’ Held After Chase’, *BBC* (online), 28 August 2003 <<http://news.bbc.co.uk/2/hi/asia-pacific/3186653.stm>>.

²⁹ For example, the Coalition of Legal Toothfish Operators.

³⁰ For example, the Antarctic and Southern Ocean Coalition.

³¹ Sea Shepherd is an international non-profit, marine wildlife conservation organisation that, according to its mission statement, uses ‘innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas’. See, eg, Tim Hume, ‘110-Day Ocean Hunt Ends with Sea Shepherd Rescuing Alleged Poachers’, *CNN* (online), 7 April 2015 <<http://www.cnn.com/2015/04/07/africa/sea-shepherd-rescue-fishing-ship/>>.

³² For example, a photograph by Jeff Wirth shows a GPS with coordinates that show a foreign vessel was fishing within Australia’s EEZ, Paul Watson, ‘The Aussies Came, They Saw, They Did Nothing!’, 27 February 2015 <<http://www.seashepherd.org/commentary-and-editorials/2015/02/27/the-aussies-came-they-saw-they-did-nothing-688>>.

circumstances that warranted apprehension.³³ The Australian pursuits (albeit some years ago) and the somewhat robust monitoring by Sea Shepherd³⁴ has heightened awareness of strategic pressures, geopolitical challenges, marine resource exploitation and the extreme climactic conditions encountered during enforcement. Most relevantly, both the state and the non-government organisation have garnered support for hot pursuit as an effective maritime enforcement tool.

The advances in technology, both from a media and law enforcement perspective, and the orchestrated NGO campaigns such as that of Sea Shepherd, have aided this element of hot pursuit. Although there has been little development in law, the element of ‘good reason to believe’ has become more feasible for coastal states.

4.2.2 Status of Foreign Vessels

Much of the law of the sea is based on the regulation of vessel movement through different maritime zones. Vessels possess transit passage rights in relation to straits³⁵ used for international navigation³⁶ and in archipelagic waters.³⁷ Hot pursuit permits the apprehension of a foreign vessel on the high seas and exists as an exception to the freedom of navigation and freedom of the high seas.³⁸ In the territorial sea, foreign vessels have the right to exercise innocent passage if it is not prejudicial to the peace, good order or security of the coastal state.³⁹ The rights of vessels are also characterised by their status in categories such as foreign civilian vessels, warships and government vessels. In the territorial sea, warships and other government ships operated for non-commercial purposes retain a sovereign immunity from the bulk of UNCLOS provisions.⁴⁰ Accordingly, the immunity attached to warships and government ships precludes them from the application of hot pursuit. Warships and non-commercial

³³ Ibid. Information on the movements of the Australian Customs vessel is unavailable.

³⁴ Sea Shepherd reported IUU fishing vessels to Interpol, which led to an arrest after the crew sank the vessel and were rescued by Sea Shepherd (Sea Shepherd, ‘Thunder Captain and Officers Face Justice in the Wake of Operation Icefish’, 3 July 2015 <<http://www.seashepherd.org/news-and-media/2015/07/03/thunder-captain-and-officers-face-justice-in-the-wake-of-operation-icefish-1716>>).

³⁵ Pursuant to art 83 of UNCLOS, states enjoy the right of transit passage in straits that are located between one part of the high seas, an EEZ and another. For example, the Strait of Hormuz. See James Kraska, ‘Legal Vortex in the Strait of Hormuz’ (2014) 54(2) *Virginia Journal of International Law* 323.

³⁶ UNCLOS art 44. See also *Corfu Channel (United Kingdom v Albania)* [1949] ICJ 244.

³⁷ Art 52 of UNCLOS permits navigation and overflight for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an EEZ and another part of the high seas or an EEZ.

³⁸ UNCLOS art 87 and the case of the *Lotus (France v Turkey)* (Judgment) [1927] PCIJ (ser A) No 10, 25.

³⁹ The right of innocent passage is entrenched in customary international law and in art 17 of UNCLOS. A list of activities contrary to innocent passage are listed in art 19(2).

⁴⁰ UNCLOS art 32. Subject to Subsection A (‘General Provisions’) and arts 30 and 31.

government ships must respect the law of the coastal state, however, the coastal state is limited in the actions when responding to violations.⁴¹ In such instances, it appears that the only action available to coastal state authorities for a violation of its laws is a request to the violating vessel to depart the territorial sea,⁴² with any action beyond that risking the invocation of the laws applicable to naval warfare.⁴³ Accordingly, prior to the execution of a hot pursuit the coastal state must comply with international law that prevents interference with foreign vessels and refrain from limiting the movement of vessels within its maritime zones. The elements relating to foreign vessels are long established and are consistently represented throughout the law of the sea framework.

4.2.3 Attempts to Violate Coastal State Laws

Article 111(1) states that hot pursuit may be undertaken when there is ‘good reason to believe that the ship has violated the laws and regulations’ of the state. The plain meaning of Article 111 suggests a hot pursuit would be unlawful if exercised in response to a vessel *attempting* to commit an offence. Due to the exceptional nature of hot pursuit, an attempt is unlikely to satisfy the evidentiary requirement of Article 111(1). Presumably, the circumstances that give rise to the state manifesting a ‘good reason to believe’ that a violation has occurred would be distinct from evidence of an attempt. Some commentators have suggested that early *travaux préparatoires* implied an intent by state representatives to permit attempted offences.⁴⁴ Poulantzas has also stated that enforcement for an attempted offence is permissible in the case of serious crimes.⁴⁵ In relation to all other relevant offences, he contends that if the municipal framework has criminalised attempted offences then hot pursuit is legally valid.⁴⁶

Although this view is influenced by comments made during the Hague Conference negotiations,⁴⁷ careful examination of the proceedings demonstrates that this did not progress beyond a proposed inclusion. At the Eighth Session, the Delegate for Brazil

⁴¹ See, eg, *Convention on the Territorial Sea and the Contiguous Zone*, arts 22 and 23; *Convention on the High Seas* arts 8 and 9. See also Poulantzas, above n 12, 192, 271n. Conversely, the issue of ‘stateless’ vessels should not present an obstacle to coastal state enforcement.

⁴² Art 30 of UNCLOS, whereby the coastal state may use force to compel departure.

⁴³ Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts* (Cambridge University Press, 1995).

⁴⁴ ‘[A] state may pursue a ship for attempted, as well as actual, violations of local laws or regulations’ (Robert C Reuland, ‘The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention’ (1993) 33 *Virginia Journal of International Law* 557, 570).

⁴⁵ Poulantzas, above n 12, 154.

⁴⁶ *Ibid.*

⁴⁷ ‘One may, therefore validly contend that under the regime of Article 23 of the Geneva Convention on the High Seas, hot pursuit is also permitted, under the conditions previously submitted, in the case of an attempted offence against the laws and regulations of the coastal State’ (*ibid.*, 155).

proposed that ‘it was sufficient for the coastal State to have good reason to believe that an offence against its laws or regulations had been or *was about to be* committed’. What is recorded next in the records of the ILC is curious, as the Special Rapporteur appears at first to accept the proposed amendment in relation to attempted offences: ‘Conclusion: the text could be retained with the amendment(s) proposed by the Government(s) of Brazil, the Netherlands and Yugoslavia’.⁴⁸ In relation to the proposals by the other states, the Rapporteur addressed each individually with the statement, ‘The Rapporteur accepts this addition’, to indicate acceptance of the proposal without amendment or objection. So, in relation to the proposal by Brazil, it is stated instead that:

The Rapporteur is prepared to amend the article accordingly. It might begin as follows: ‘The pursuit of a foreign vessel, where the coastal State has good reason to believe that an offence has been committed against its laws or regulations, commenced etc.’⁴⁹

At first glance, the language of the report suggests that the Brazilian proposal was accepted. However, the proposal as articulated by Brazil was not accepted and the Rapporteur seemingly recorded what is presumed to be the preferred option. This effectively excluded the option of attempted offences.⁵⁰

The principal view that hot pursuit may commence when ‘the ship *has* violated the laws and regulations’, has not changed since first negotiations on the law of the sea. There is no further evidence to suggest that the proposal to amend hot pursuit to be lawfully exercised as a result of an attempted offence was ever seriously discussed beyond the Eighth Session. Like many aspects of the doctrine, this statement was largely unchanged since the Hague Conference and was not amended on later occasions when it was possible to do so. There appears to have been no scholarly or judicial commentary on the issue of attempted offences since that time. Therefore, it is reasonably safe to

⁴⁸ J P A François, *Report on Questions Relating to the Regime of the High Seas and the Territorial Sea*, UN Doc A/CN.4/97 and Corr.1 and Add. 1–3 in *Extract from the Yearbook of the International Law Commission, 1956*, vol II, 166.

⁴⁹ *Ibid* 150.

⁵⁰ Perhaps it was not absolutely necessary to make an explicit statement to that effect, but he was prepared to amend the opening words of the article to read: ‘The pursuit of a foreign vessel, where the coastal State has good reason to believe that an offence has been committed against its laws or regulations ...’ (Summary records of the Eighth Session, 343rd Mtg, 9 May 1956 in ‘Report of the International Law Commission to the General Assembly, Document A/3159: Report of the International Law Commission Covering the Work of its Eighth Session, 23 April – 4 July 1956’ in *Yearbook of the International Law Commission 1956*, 78).

conclude that UNCLOS and customary international law preclude the operation of hot pursuit to target attempts to offend.⁵¹

4.2.4 Violation of Coastal State Laws

The violation of coastal state laws and regulations do not encompass all manner of transgression in the maritime domain. The violation must relate to the operation of the vessel rather than the conduct of the individual crew members or passengers. There are limited circumstances in which the coastal state might try to exercise criminal jurisdiction,⁵² however, the basic premise is that foreign vessels ought not to be subject to interdiction to arrest any person or to conduct any investigation in connection with any crime committed on board the ship, pursuant to Article 27. For example, a foreign vessel could not be pursued under the doctrine of hot pursuit for carriage of a passenger suspected of murder occurring under the jurisdiction of the coastal state. Article 28 additionally prohibits the interdiction or diversion of a foreign vessel for the purpose of exercising civil jurisdiction in relation to a person on board the ship. There are, of course, other means available to coastal state authorities that may allow arrest or the return of individuals (including the master and crew) suspected of criminal activity.⁵³ However, the exercise of hot pursuit must relate to the applicable maritime zone concerned and to the operation of the vessel, rather than the conduct of individuals. Of course, coastal states may draft more robust legislation and enter into international agreements to craft more specific circumstances, but this brings with it the possibility of adjudication. This is examined further in Chapter 5.

4.3 Coastal State Jurisdiction

A fundamental premise of UNCLOS is that the coastal state enjoys a range of powers arising from the adjacent maritime zones. The right of coastal states to exercise sovereignty over internal and territorial waters (subject to appropriate claims in international law) is acknowledged in customary international law and in provisions according to Article 2 of UNCLOS. Foreign vessels may only exercise limited rights within these zones, primarily the right of innocent passage. Article 111 permits pursuit

⁵¹ In *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, Guinea had legislated to prohibit refuelling or attempts to refuel in Article 4 of Law L/94/007 and during submissions indicated that a pursuit was initiated on the basis that the *M/V Saiga* had committed or was about to commit an offence (at 142). The issue of attempt was not addressed as the Tribunal found that Guinea had no more than a suspicion and that the pursuit was also invalid on a number of other grounds (at 147).

⁵² UNCLOS art 27(1).

⁵³ An example is crimes committed on cruise vessels.

when a ‘foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted’. The violation of coastal law in these zones in certain circumstances may give rise to enforcement powers that are ultimately exercisable on the high seas. However, the enforcement of coastal state law is dependent upon the zone in which the violation occurs.⁵⁴ An analysis of these zones is addressed below.

4.3.1 Internal Waters

Vessels in the internal waters of the coastal state are subject to all aspects of jurisdiction of coastal state authorities. Article 8 UNCLOS states that ‘waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State’. Coastal state authorities can also prevent entry of any foreign vessel to its internal waters. Although coastal state authorities have jurisdiction over offences committed on board foreign vessels, it may not always be exercised.⁵⁵ In addition to the application of criminal laws, there are laws applicable to foreign vessels during transit in internal waters regarding customs, quarantine, safety and security. Foreign warships and state authority vessels used for non-commercial purposes remain subject to their sovereign state and are exempt from coastal state jurisdiction.⁵⁶

In short, it is technically permissible for coastal state authorities to initiate a hot pursuit of a foreign vessel onto the high seas, should the vessel have breached coastal state laws in the internal waters and failed to stop in response to appropriate requests. Unlawful action by foreign vessels in internal waters is more likely to be regulated pursuant to coastal state law without recourse to UNCLOS. Hot pursuit from internal waters is not controversial and has remained unchanged since the drafting of Article 11 of the Hague Conference. It would, however, be an uncommon occurrence and the core element serves its purpose as intended.

⁵⁴ UNCLOS art 111(1). In recent times, hot pursuit has been employed to target IUU fishing; however, it is also being used to address irregular migration and drug trafficking. This is discussed further in Chapters 6 and 7.

⁵⁵ Matters relating to the ‘internal economy’ of vessels are often left to authorities of the flag state, see McDougal and Burke, above n 14, 66.

⁵⁶ UNCLOS art 32 provides a sovereign immunity to warships. For sound policy reasons, warships ordinarily comply with coastal states’ law regarding port regulations and the like.

4.3.2 *The Territorial Sea and Archipelagic Waters*

The territorial sea is a narrow maritime zone flanking the coast and internal waters of states. Subject to the right of innocent passage exercisable by foreign vessels, the powers available to the coastal state to enforce law are the same as for the territory and internal waters. According to Article 2(1) of UNCLOS, '[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea'. Archipelagic waters are akin to the status accorded to the territorial sea, whereby coastal state sovereignty is extended to the waters enclosed by the archipelagic baselines pursuant to Article 49(1) of UNCLOS.⁵⁷ Sovereignty over the territorial sea and archipelagic waters also applies to the ocean bed, subsoil and the above airspace. The coastal state retains the rights to exploit marine resources and to conduct marine scientific research in the territorial sea and archipelagic waters. Hot pursuit is permitted in appropriate circumstances from the territorial sea⁵⁸ and archipelagic waters onto the high seas.⁵⁹

The coastal state exercises broad jurisdiction over the territorial sea and archipelagic waters subject to the right of foreign vessels to access the zones in accordance with the conditions of innocent passage.⁶⁰ Innocent passage is expeditious transit to or from internal waters or alternatively through territorial sea or archipelagic waters and is 'innocent so long as it is not prejudicial to the peace, good order or security of the coastal State'.⁶¹ Jurisdiction encompasses the matters that the coastal state may enact laws for in relation to foreign vessels exercising innocent passage. Article 21(1) of UNCLOS lists the activities that a coastal state may make laws for in relation to the innocent passage of vessels through the territorial sea, and is in Appendix E.

A violation of these laws can trigger a hot pursuit from the territorial sea or archipelagic waters onto the high seas. In addition to activities listed in Article 21, there are only two

⁵⁷ A Bernaerts, *Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea: Including the Text of the 1982 UN Convention and Agreement Concerning Part XI of 1994* (Trafford Publishing, 2006).

⁵⁸ See, eg, Constantine John Colombos, *The International Law of the Sea* (Longmans, Green and Co, 6th ed, 1967) 168; Churchill and Lowe, above n 14, 214.

⁵⁹ Hot pursuit is not, however, permitted if initiated from archipelagic sealanes. Archipelagic sealanes permit the continuous and expeditious passage of foreign ships and aircraft through or over archipelagic waters and adjacent territorial sea, pursuant to UNCLOS art 53.

⁶⁰ UNCLOS art 17 provides that 'ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea' and the corresponding right is reflected in art 52 in relation to archipelagic waters.

⁶¹ The list set out in UNCLOS art 19(1) is in Appendix E.

other circumstances in which the coastal state may exercise its powers over foreign vessels in the territorial sea and archipelagic waters, and these are limited by UNCLOS.⁶² Article 27 permits arrest or investigation of crimes on board only if the consequences of the crime extends to the coastal state, it disturbs the peace of the state or good order of the state, the master of the ship requests assistance or, lastly, measures are necessary to suppress trafficking of drugs or psychotropic substances. Conversely, Article 28(1) precludes the exercise of civil jurisdiction over foreign vessels in the territorial sea altogether.⁶³ Likewise, Article 28(2) prohibits levy execution against or arrest of the ship for the purpose of any civil proceedings.⁶⁴ Accordingly, coastal state civil jurisdiction is extremely limited, but this demonstrates that there are other options to conduct enforcement outside Article 111.

When determining whether hot pursuit is permissible it is important to maintain the distinction between non-innocent passage and the violation of coastal states' law within the territorial sea.⁶⁵ Hot pursuit may only be exercised in relation to violations arising from laws set out in Article 21(1). Alternatively, the conduct of non-innocent passage does not in itself permit the employment of hot pursuit to enforce coastal state laws. Under UNCLOS, one of the few practical measures⁶⁶ available to coastal states in relation to the conduct of non-innocent passage is exclusion from the territorial sea.⁶⁷ Although the opportunity to exercise hot pursuit is limited, use of force must be a measure of last resort.⁶⁸

4.3.3 The Contiguous Zone

The contiguous zone adjoins the territorial sea and is an area that may not extend beyond 24 nautical miles from the baselines that the breadth of the territorial sea is measured from. Hot pursuit may be commenced where a foreign vessel is within the

⁶² Ibid 325.

⁶³ Ibid 327.

⁶⁴ Civil proceedings may occur in the event of marine pollution under art 229. However, the wording in art 28 is not absolute: 'should not' by virtue of art 28(1) and 'may not' according to art 28(2) respectfully. The less than exhortatory wording may be sufficient for some states to exercise proceedings.

⁶⁵ Craig H Allen, *International Law for Seagoing Officers* (Naval Institute Press, 6th ed, 2014) 105.

⁶⁶ Other than measures such as giving a direction to leave the maritime zone. Use of force must be avoided where possible. See Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 218; Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35(2) *International and Comparative Law Quarterly* 320, 324.

⁶⁷ UNCLOS art 25 permits coastal states to 'take the necessary steps in its territorial sea to prevent passage which is not innocent'. See Rothwell and Stephens, *The International Law of the Sea*, above n 66, 218; Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', above n 66, 327.

⁶⁸ *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, 155–156; *I'm Alone (Canada v United States)* (1935) 3 RIAA 1609, 1615; *Red Crusader Commission of Inquiry (Denmark–United Kingdom)* (1962) 35 ILR 485, 538.

contiguous zone if the violation relates to the protections for which the zone was established.⁶⁹ The coastal state does not exercise absolute jurisdiction,⁷⁰ but rather may only ‘exercise control’ in relation to the infringement of customs, fiscal, immigration or sanitary issues within its territory or territorial sea. In a separate opinion in *M/V ‘Saiga’*, Judge Laing identified ‘control’ as distinct from ‘jurisdictional exercises of prescription and enforcement’.⁷¹ This is due to the characterisation of the zone as ‘juridically part of the high seas’.⁷² As a result, the coastal state is not authorised to conduct hot pursuit arising from violations committed *within* the contiguous zone.⁷³ Moreover, the coastal state may not arrest vessels within the contiguous zone that are inbound and suspected of an imminent offence.⁷⁴ The issue of bunkering as a violation of customs laws within the contiguous zone was not directly addressed in *M/V ‘Saiga’* other than an acknowledgment that the hot pursuit would still be considered invalid due to the failure to meet a number of the main elements.⁷⁵ Nonetheless, Judge Laing’s conclusion that Article 33 limits hot pursuit⁷⁶ indicates that this is an area that will remain as a limitation in the law and is unlikely to develop further in the near future. As a practical effect of constrained sovereignty in the contiguous zone, coastal states exercise ‘control’ rather than comprehensive enforcement powers.⁷⁷ The prevailing concern is to maintain a balance between the competing interests of coastal state and flag state jurisdiction—a theme echoed throughout UNCLOS—and this is a positive outcome of this core element.

4.3.4 Exclusive Economic Zone

The EEZ is beyond the territorial sea and extends up to 200 nautical miles from the baselines that the breadth of the territorial sea is measured from.⁷⁸ The coastal state has fewer sovereign rights in relation to the EEZ and, consequently, hot pursuit is only

⁶⁹ States are not required to declare or maintain a contiguous zone, per UNCLOS art 33.

⁷⁰ Anne Bardin, ‘Coastal Jurisdiction over Foreign Vessels’ (2002) 14 *Pace International Law Review* 39, 27.

⁷¹ *M/V ‘Saiga’ (No. 2)* (1999) 120 ILR 143 (Judge Laing) 9.

⁷² Ivan Shearer, ‘Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels’, above n 66, 330.

⁷³ *M/V ‘Saiga’ (No. 2)* (1999) 120 ILR 143 (Judge Laing) 14. See also O’Connell, above n 14, 1083.

⁷⁴ Ivan Shearer, ‘The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coastguards in Peacetime’ (1998) *International Law Studies* 429, 434.

⁷⁵ *M/V ‘Saiga’ (No. 2)* (1999) 120 ILR 143, 152.

⁷⁶ ‘The limitations of art 33 are also evident from a comparison of the requirements for hot pursuit in relation to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, summarized in paragraph 14’ (*M/V ‘Saiga’ (No. 2)* (1999) 120 ILR 143 (Judge Laing) 16).

⁷⁷ Shearer, ‘Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels’, above n 66, 330.

⁷⁸ UNCLOS, Part V.

permitted from the EEZ for violations of a limited range of coastal state laws. The coastal state can conduct hot pursuit only in relation to violations of rights for which the zone was created, namely the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.⁷⁹ The coastal state also has exclusive jurisdiction over its structures within the EEZ. For example, Article 60(2) authorises the coastal state to apply customs laws and regulations in respect of artificial islands, installations and structures, but jurisdiction in relation to customs does not extend to the entire EEZ expanse. States operating within the *sui generis* zone are subject to an overriding objective to attempt cooperation in the spirit of marine conservation and management of the EEZ.⁸⁰ This does not prevent coastal states from conducting pursuits and prosecution of foreign flag vessels under domestic law. In spite of the limited nature of the EEZ, there have been a number of contemporary examples of hot pursuits arising from the zone and these will be discussed further in Part III.⁸¹

The coastal state is equipped with enforcement provisions, such as those in Article 73, to promote agreed ideals of resource conservation and management. While these enforcement provisions authorise boarding, inspection, arrest and possible prosecution, they are distinct from hot pursuit operations. Hot pursuit permits action on the high seas as a ‘freedom exception’ and the various conditions of Article 111 must all be satisfied for its operation to be considered lawful.⁸² As a result, the rights and responsibilities of the coastal states and ‘user’ states within the EEZ are quite distinct.⁸³ UNCLOS was intended to achieve a balance in the EEZ between the special sovereign rights accorded to the coastal state in relation to resources and the rights of flag states who wish to utilise the area by virtue of the freedom of navigation, overflight and other permitted means.⁸⁴ The overall focus of Part V is the appropriate management of resources. Consequently, most incidents of hot pursuit arise from violations occurring in the EEZ. With marine stocks in decline as a result of overfishing, the articles applicable to coastal state jurisdiction within the EEZ have become more important. Hot pursuit has been

⁷⁹ The list of matters in the EEZ for which a state has rights, jurisdiction and duties are in UNCLOS art 56(1).

⁸⁰ Set out in UNCLOS art 59.

⁸¹ For example, a number of hot pursuits conducted by Australia in the Southern Ocean will be discussed in Chapters 6 and 7.

⁸² *M/V ‘Saiga’ (No 2)* (1999) 120 ILR 143.

⁸³ Rothwell and Stephens, *The International Law of the Sea*, above n 66, 84.

⁸⁴ Churchill and Lowe, above n 14, 166. In addition to navigation and overflight, flag states have a right to lay submarine cables and pipelines, per UNCLOS art 58(1).

utilised more often to counter IUU fishing in the EEZ and these examples will be further examined in Chapters 6 and 7.

In *M/V 'Saiga'*, ITLOS found that Guinea acted in a manner contrary to the Convention by declaring a 'customs radius' of 250 kilometres inside which it enforced customs law.⁸⁵ The Tribunal also found that UNCLOS does not empower a coastal state to apply its customs laws to areas inside the EEZ, as doing so would 'curtail the rights of other States in the exclusive economic zone' and would therefore 'be incompatible with the provisions of articles 56 and 58 of the Convention regarding the rights of the coastal State in the exclusive economic zone'.⁸⁶ The comments by the Tribunal in *M/V 'Saiga'* confirmed that there are a limited range of enforcement powers available to the coastal state in regards to the EEZ. The Tribunal found that Guinea could not extend existing powers or 'read in' new ones. In the event of international adjudication, this would likely have repercussions for other states, such as the US who has declared 'customs waters'.⁸⁷ In an age of increased maritime threats, it is reasonable for states to seek greater control of their waters, however, it is unlikely to tip the balance achieved during codification in favour of greater enforcement powers in the EEZ. This is a clear indicator that, since the conclusion of UNCLOS III, the law of the sea continues to be resistant to creeping jurisdiction⁸⁸ of coastal states even in the face of maritime security challenges.⁸⁹

4.4 Notification by Coastal State Vessels and Aircraft

Appropriate notification to a suspected vessel is a fundamental precondition of hot pursuit; however, it is also one of the most problematic elements for coastal states. Article 111(4) requires that a 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

⁸⁵ Article 34(2) of the *Customs Code of Guinea* designates the area in kilometres not nautical miles (*M/V 'Saiga' (No 2)* (Judgment) (1999) 120 ILR 143, 114).

⁸⁶ *Ibid* 131.

⁸⁷ The US is not yet a party to UNCLOS, but the US' position is examined in Chapter 7. The legislative reference for the declaration of 'customs waters' is 46 USC §§ 70502(c).

⁸⁸ E J Molenaar, 'Port and Coastal States' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 280, 302.

⁸⁹ A significant number of states have indicated a desire to restrict navigation on the basis of security and '[w]hile such a proportion would not reach the level of support indicated by the International Court of Justice in the North Sea Continental Shelf Cases [1969] ICJ Reports 3 to indicate the presence of customary international law, it still represents a sizeable body that do not accept the Law of the Sea Convention does not restrict freedom of navigation for security, beyond the limited exception in Article 25(3)' (Stuart Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 347).

foreign ship⁹⁰ and the order to stop may also be given by an aircraft. This statement has been largely unchanged since The Hague Codification Conference and it was not amended at later occasions when it was possible to do so. Clearly, at the time of drafting there existed means of communication and navigation were relatively limited. The open-ended phrase ‘visual or auditory signal’ would, at face value, appear to allow for technological advances; however, it is prefaced by the requirement for a pursuing vessel to remain in close proximity to the suspected vessel.

Peculiarly, radio communication was in use at the time of codification, but it was roundly rejected at various stages of doctrine development and the treaty process. The ILC also excluded any type of signal or communication that could be given at a great distance. In particular, ‘[t]o prevent abuse, the Commission declined to admit orders given by wireless, as these could be given at any distance; the words “visual or auditory” exclude signals given at any distance by wireless’.⁹¹ Thus, the pursuing ship must be in the vicinity of the foreign ship ‘such that it is actually able to observe a violation of the coastal state’s law’.⁹² The disinclination to permit wireless as a means of signal was also applied to aircraft.⁹³ In the absence of technological foresight, this approach would appear to meet (perhaps even excessively) the broad intent of states wishing to safeguard hot pursuit. However, this restrictive approach represents a significant shortfall in the law and risks rendering hot pursuit unworkable and outdated in contemporary circumstances.

State practice in this area demonstrates a desire by a number of coastal states⁹⁴ to exceed a narrow meaning of Article 111(4).⁹⁵ For example, the Court in *R v Mills and*

⁹⁰ According to UNCLOS art 111(1), ‘[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’.

⁹¹ United Nations, ‘Report of the International Law Commission to the General Assembly, Document A/3159: Report of the International Law Commission Covering the Work of its Eighth Session, 23 April – 4 July 1956’ in *Yearbook of the International Law Commission, 1956* (United Nations, 1956) vol II, 253.

⁹² Rothwell and Stephens, above n 66, 417.

⁹³ ‘The aircraft must be in a position to give a visible and comprehensible signal to that effect; signals by wireless are barred in the case of aircraft also’ (‘Articles Concerning the Law of the Sea with Commentaries 1956’). Adopted by the ILC at its eighth session in 1956 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para 33). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1956*, vol II, 285.

⁹⁴ For example, under Australian domestic law, a maritime officer is authorised by s 54 of the *Maritime Powers Act 2013* to direct a vessel to stop or manoeuvre or adopt a specific course regardless of whether the person in charge of the vessel understands or is aware of the requirement. Further implications of hot pursuit under this Act are examined in Chapter 7.

⁹⁵ South Africa has legislated provisions permitting hot pursuit and this is examined in Chapter 6.

*Others*⁹⁶ per Devonshire J found that a radio signal was in accordance with the aims of hot pursuit.⁹⁷ There has been some support from a number of commentators including McDougal and Burke who stated that:

The kind of signal given to a suspect directing it to stop and to submit to search seems unimportant as long as it is followed in good time by the actual appearance of the arresting vessel – for this purpose a radio signal from an aircraft or presently unseen surface craft would appear to be satisfactory. What is to be avoided is the imposition of delay because the signal to stop given by a ship or aircraft which cannot within a reasonable time impose an effective control over the alleged violator of local law.⁹⁸

It is preferable that, to satisfy the conditions of Article 111, the suspected vessel is correctly identified at the outset and that the credibility of the pursuit is preserved throughout the pursuit. Technological advancements have undeniably altered the way pursuits can be conducted, however, the condition to properly notify is less likely to benefit from these developments due to the narrow wording in Article 111(4).⁹⁹

There has been little case law to provide further elucidation on the issue of appropriate signals. ITLOS considered the signal claimed to have been given by a Guinean patrol boat in the matter of *M/V 'Saiga'*, but it declined to comment on whether a radio comment alone might satisfy the requirements of Article 111. The Tribunal merely confirmed that the signal must be given prior to the commencement of the pursuit. The Tribunal found that the Guinean vessel's signal by siren and flashing blue light was given as it came upon the flag state vessel rather than prior to the commencement of the pursuit.¹⁰⁰ Equally, the Tribunal considered the issue of whether the crew of the vessel suspected of unlawful conduct actually received the signal. It was suggested that the master and an employed painter were on deck, but did not see the flashing lights or hear the siren. The separate opinion of Judge Anderson considered the possibility of accepting evidence of radio signals:

⁹⁶ (1995) 44 ICLQ 949.

⁹⁷ Discussed in detail in W Gilmore, 'Hot Pursuit: The Case of *R v Mill and Others*' (1995) 44 *International and Comparative Law Quarterly* 949, 954.

⁹⁸ McDougal and Burke, above n 14, 897.

⁹⁹ Additionally, certain variables such as vessel type, weather, sea state, course of vessel and the type of communication devices will all shape the manner by which the signal is transmitted and received.

¹⁰⁰ 'Guinea states that at about 0400 hours on 28 October 1997 the large patrol boat P328 sent out radio messages to the *M/V Saiga* ordering it to stop and that they were ignored. It also claims that the small patrol boat P35 gave auditory and visual signals to the *M/V Saiga* when it came within sight and hearing of the ship. The Guinean officers who arrested the ship testified that the patrol boat sounded its siren and switched on its blue revolving light signals' (*M/V 'Saiga' (No. 2)* (1999) 120 ILR 143).

Even if the Tribunal had been willing in principle (and after due consideration of the point) to consider the possibility of accepting as an auditory signal a radio message sent over a distance of 40 miles or so, the alleged signal from P328 could still not have been deemed to constitute a valid signal in the absence of any evidence of: (1) the sending of the message from P328 (e.g. a recording on board P328 or an entry in its log book setting out the text of the order and the time of its transmission); and (2) more importantly, the receipt of the message by the *Saiga* and the latter's understanding of the message as an order to stop by officials of Guinea (e.g. from the *Saiga*'s tape recordings of its incoming radio traffic or an entry in its log book).

The comments support the logical notion that the communication of an order to stop can, and should be, adequately documented. While the methods suggested would no doubt meet the intent of the Convention—that is, to communicate an order to stop—they do not necessarily satisfy the conditions of proximity, namely, to be given at a distance which enables it to be seen or heard by the foreign ship. It is only if the term 'heard' is given its broadest meaning to 'heed', 'perceive meaning' or 'take notice of', will it encompass the type of signal more likely to be utilised by coastal states when enforcing domestic regimes. The current scope of hot pursuit is inadequate in this respect.

Allen states that, 'where it is clear by the offending vessels' acknowledgement or otherwise that the vessel received and understood a signal to stop given by radio, such a signal meets the underlying policy goal of providing adequate notice to the vessel'.¹⁰¹ Although this conceivably raises a 'chicken or egg' argument, a vessel can simply ignore attempts at communication. This adds a burden to an already onerous range of preconditions for the coastal state.¹⁰² A pursued vessel has much to gain from submitting evidence in litigation that neither the master nor crew heard, saw or received the signal. Neither customary international law nor Article 111 requires evidence that a pursued vessel has received a signal.¹⁰³ The Tribunal in *M/V 'Saiga'* did not examine the point in detail, but it is difficult to see how an argument of this kind could find traction in view of the range of superior technologies available today.¹⁰⁴ It is reasonable

¹⁰¹ Craig H Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20(4) *Ocean Development and International Law* 309, 319.

¹⁰² *R v Mills and Others*, above n 96; *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, 146; McDougal and Burke, above n 14, 897–898.

¹⁰³ In *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, Judge Anderson briefly commented on the problems associated with proving that a signal had been communicated.

¹⁰⁴ *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, 334. Allen, above n 101, refers to the capture of the Polish-flagged fishing vessel *Wlocznik* by the USCG on the high seas of Alaska. Allen states that the *Wlocznik*

to conclude that the conventional view of notification in its current form is no longer settled.¹⁰⁵ In the meantime, more appropriate additions can be made to domestic regimes, international agreements and regional organisations to overcome the challenges of this element. A critical analysis in Chapter 5 considers the emerging views on the use of technology in regards to notification requirements in the context of contemporary hot pursuit operations.¹⁰⁶

4.5 The Definition of Vessels and Aircraft Permitted to Conduct Hot Pursuit

The traditional role of warships is to prepare for, engage in or provide support for naval warfare, but ‘[i]n certain cases, policing rights have been granted to warships in respect of foreign ships’.¹⁰⁷ The function of a vessel exercising hot pursuit is to effectively pursue and arrest a fleeing vessel subject to the conditions of Article 111. In the case of Australia, ice-capable, long-range customs vessels are the most effective for the conduct of hot pursuit operations¹⁰⁸ while elsewhere, in the US for example, Coastguard vessels are prepared for a variety of conditions and missions: counter-narcotics, migrant interdiction, foreign and domestic fisheries enforcement, and search and rescue. Provided that the conditions are met for the conduct of a hot pursuit, it is an enforcement power only exercisable by ‘warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect’.¹⁰⁹ Pursuant to Article 29 of the Convention, the definition of ‘warship’ is:

a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the

was seized even though it had fled the EEZ before a signal could be given; this was considered obviated where the circumstances indicated that the vessel knew it was being pursued. Other US cases, such as *The Newton Bay* 36 F 2d 729 (2d Cir. 1929), found that a signal need not have been given due to the impractical nature of the circumstances. In the matter of *M/V ‘Saiga’*, Guinea sought to rely on these cases and argued that a signal was not necessary in the circumstances. See ‘Counter-Memorial Submitted by the Republic of Guinea’, *M/V ‘Saiga’ (No 2)* (1999) 120 ILR 143, 148.

¹⁰⁵ McDougal and Burke, above n 14, 897, state that ‘the kind of signal given to a suspect directing it to stop and subject to search seems unimportant as long as it is followed in good time by the actual appearance of the arresting vessel—for this purpose a radio signal from an aircraft or presently unseen surface craft would appear to be satisfactory’. See also Colombos, above n 58, 154.

¹⁰⁶ See, eg, Allen, above n 101, 319; Rachel Baird, ‘Arrests in a Cold Climate (Part 2)—Shaping Hot Pursuit Through State Practice’ in Rachel Baird and Denzil Miller (eds), *Antarctic and Southern Ocean Law and Policy Occasional Papers No 13, Special Edition: In Acknowledgement of Dr Denzil Miller* (Law School, University of Tasmania, 2009) 16.

¹⁰⁷ In commentary on UNCLOS art 30 by Sir Arthur Watts, *International Law Commission 1949–1998: The Treaties* (Oxford University Press, 1999) 62.

¹⁰⁸ The problems associated with competing for patrol days is addressed in Chapter 7.

¹⁰⁹ UNCLOS art 111(5).

government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

This definition is sufficiently broad to encompass not only the traditional class of surface combatant, but patrol boats, amphibious platforms and other auxiliary vessels. Although not explicitly stated, Article 111(5) also encompasses customs and police vessels. Post-UNCLOS, the ILC has more recently included ‘police patrol boats’ and ‘customs inspections boats’ as another category of government ship possessing immunity for the purposes of jurisdiction.¹¹⁰ The ILC

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.¹¹¹

The definition appears to appropriately encompass all manner of vessels and technological advances are unlikely to render this core element as unfeasible in the foreseeable future, at least in relation to manned craft. However, as unmanned autonomous vessels are already being utilised by states for maritime law enforcement, further expansion to the law on this element is required. Unmanned capabilities and other technological advances are addressed in Chapter 6.

Military aircraft are not defined in UNCLOS, but are characterised in an analogous manner by the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* as ‘aircraft operated by commissioned units of the armed forces of a State having military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline’.¹¹² Although the definition is for the purposes of the *San Remo Manual*, it is generally accepted as an appropriate characterisation under international law and suitably mirrors the UNCLOS definition of ‘warships’. Further, the *Convention on International Civil Aviation*¹¹³ (the ‘Chicago Convention’) refers to ‘State aircraft’ rather than military aircraft as ‘aircraft used in

¹¹⁰ *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries* in ‘Report of the International Law Commission on the Work of its 43rd Session’ (UN Doc A/46/10) in *Yearbook of the International Law Commission, 1991*, vol II, 52.

¹¹¹ Watts, above n 107, 75.

¹¹² *San Remo Manual*, ‘Section V’ art 13(j).

¹¹³ Opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

military, customs and police services shall be deemed to be State aircraft'.¹¹⁴ Although the Chicago Convention definition refers to state aircraft rather than military aircraft, for the purposes of discussing hot pursuit it is appropriate to keep in mind that Article 111 also permits hot pursuit by other government aircraft suitably authorised and clearly marked and identifiable. Police, naval, customs and coastguard aircraft are other prime examples.

Warships, government ships or aircraft effectively lose the status afforded to them by UNCLOS if the crew has mutinied and taken control of the ship or aircraft and they commit acts of piracy, as defined in Article 101.¹¹⁵ If there is doubt as to ownership, state ownership of vessels may be demonstrated where,

[i]f in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.¹¹⁶

While the crew of government authorised vessels and aircraft are cognisant of responsibility of representing state governments in matters of international law, authorised government vessels and civilian or non-government crew may man aircraft. Other than the requirements for military vessels (and arguably military aircraft under the *San Remo Manual*) to be under command of a commissioned officer and a crew subject to 'regular armed forces discipline', there is no requirement in UNCLOS for specific manning. The outsourcing or subcontracting of maritime law enforcement tasks in its entirety to civilian agencies would appear to be inconsistent with this element. In such cases, it is possible that problems could arise in a post-pursuit dispute regarding the legal status of the crew. One possible way to avoid this issue is to appoint a class of officials in legislation, with relevant powers, on the basis of position and qualifications.¹¹⁷ Another option is to deliver effective command, control and communications¹¹⁸ technology to facilitate rapid and informed briefing.¹¹⁹ The use of

¹¹⁴ Ibid art 3(b). Aircraft other than state aircraft are generally subject to the Chicago Convention.

¹¹⁵ UNCLOS art 102 sets out that the acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated into acts committed by a private ship or aircraft.

¹¹⁶ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature 17 January 2005 – 17 January 2007 (not yet in force) art 16(6).

¹¹⁷ For example, the employment of maritime enforcement powers is triggered by 'authorised officers' under s 29 of the *Maritime Powers Act 2013*. Prior to the introduction of the *Maritime Powers Act 2013*, the authority to conduct hot pursuit was spread across a number of Acts and differed in relation to agency, maritime zone and operational issue. The Act is examined further in Chapter 7.

¹¹⁸ In a military context, this is known as 'C3'.

shipriders, such as those employed by the US, is another option that can shape arrangements with other states.¹²⁰ In short, the research suggests that the characterisation of vessels and aircraft is adequately constructed in this respect and that there is no pressing reason to amend this area of international law.

4.6 Motherships

There is ample historical use of motherships in the fishing and fur-sealing industries and this has undoubtedly contributed to the development of hot pursuit. The law in relation to this element is relatively straightforward and without controversy.¹²¹ Other than being on the high seas, the position of the mothership does not in itself negate the lawful initiation of a hot pursuit; there is no requirement for the mothership to enter the EEZ of a coastal state. That being said, there is an evidentiary burden when forming the belief that the mothership is connected to and supporting a vessel within coastal states waters. Article 111(4) requires that the pursuing ship satisfy itself ‘by such practicable means as may be available’. This statement lacks detail as to the standard of proof, however, the advantage is the broad scope available to the coastal state. For example, ‘practicable means as available’ suggests that there would be no limits on the use of technology to determine the use of motherships. Although the section lacks clarity, perhaps deliberately, this may work in favour of the coastal state. Motherships are still in use throughout the world¹²² and there is additional scope to gather evidence for law enforcement purposes utilising unmanned capabilities and other technologies.¹²³

The earliest cases that resulted in arrest by hot pursuit often made a determination that the minor vessels and mothership were as one for the purposes of enforcing coastal state law, thereby safeguarding the ability to exercise jurisdiction over adjacent waters.¹²⁴ Whether the auxiliary craft were canoes¹²⁵ or rowboats,¹²⁶ they were treated as part of

¹¹⁹ Advances in technology have made this more achievable. The capacity to maintain oversight with federal agencies (and in the case of the offending vessel and the coastal state authority) during a hot pursuit was evident in the Australian matter of *South Tomi* and the *Viarsa*, further discussed in Chapter 7.

¹²⁰ The use of shiprider agreements is examined further in Chapter 7.

¹²¹ *I'm Alone (Canada v United States)* (1935) 3 RIAA 1609.

¹²² Two examples are drug trafficking (see *Pong Su*, below n 128) and piracy off the western coast of Africa.

¹²³ For example, Palau is trialling UAV technology and autonomous sensors to conduct much of its patrolling and this is examined further in Chapter 5. See, eg, Ian Urbina, ‘Palau vs. the Poachers’, *New York Times* (online), 17 February 2016 <http://www.nytimes.com/2016/02/21/magazine/palau-vs-the-poachers.html?smid=tw-nytimes&smtyp=cur&_r=2>.

¹²⁴ *Araunah* (1888) 1 Moore 824.

¹²⁵ The Canadian-flagged *Araunah* deployed canoes to seal in Russian territorial waters while remaining beyond the three-mile limit.

¹²⁶ The Japanese-flagged *Tenyu Maru* deployed dories to seal in US territorial waters while remaining

the mothership. This practice, also known as constructive presence in international customary law, was codified in UNCLOS in Article 111(4) by reference to the pursued ‘or one of its boats or other craft working as a team and using the ship pursued as a mothership 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’. Constructive presence is a practical accessory to hot pursuit arising from state practice and is still relevant in contemporary maritime security operations.¹²⁷ Today, motherships and minor vessels are being employed in drug trafficking,¹²⁸ bunkering,¹²⁹ piracy¹³⁰ and terrorism.¹³¹

4.7 The Pursuit Shall Not Be Interrupted

One of the most challenging elements of hot pursuit is the requirement to ensure it has not been interrupted.¹³² The phrase ‘if pursuit has not been interrupted’, or words to that effect, were consistently applied throughout the codification process.¹³³ This demonstrates that there was significant state support for the element as a safeguard. This occurred at a time when fishing operated on a smaller scale and states were beginning to assert more control over their maritime zones. The reality is much different today: IUU fishing is contributing to the destabilisation of world food security and states are tightening their hold over coastal waters in response to issues such as overfishing, mass irregular migration and WMDs. State support for the earlier, more rudimentary communications has waned and there has been a shift towards the application of more advanced technology.¹³⁴ The advent of advanced technology could address this shortfall

beyond the three-mile limit.

¹²⁷ *R v Mills* (1995) 44 ICLQ 949, Devonshire J discussed in Gilmore, above n 97.

¹²⁸ Motherships are a common method of trafficking. The North Korean-flagged *Pong Su*, for example, was used as a mothership to import heroin and was captured off the east coast of Australia (Australian Federal Police, ‘Extra 75kg of heroin linked to “Pong Su” ’ (Media Release, 27 May 2003) <<http://www.afp.gov.au/media-centre/news/afp/2003/may/extra-75kg-of-heroin-linked-to-pong-su>>). See also, Allyson Bennett, ‘That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act’ (2012) 37(2) *Yale Journal of International Law* 433, 441. The legislative developments in relation to drug trafficking in the US are examined in Chapter 7.

¹²⁹ Freedom C Onuoha, ‘Piracy and Maritime Security in the Gulf of Guinea: Trends, Concerns, and Propositions’ (2013) 4(3) *The Journal of the Middle East and Africa*, 267, 278.

¹³⁰ Sarah Percy and Anja Shortland, ‘The Business of Piracy in Somalia’ (2013) 36(4) *Journal of Strategic Studies* 541, 546.

¹³¹ Rob McLaughlin, ‘“Terrorism” as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2011’ (2011) 14 *Yearbook of International Humanitarian Law* 391, 393.

¹³² The distinct issue of whether multilateral hot pursuit constitutes interruption is discussed in Chapter 5.

¹³³ Poulantzas, above n 12, 210–211.

¹³⁴ See, eg, *Maritime Powers Act 2013* (Cth) s 42(2); ‘Hot pursuit must be continuous, either visually or through electronic means’ (Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, Department of Homeland Security and US Coast Guard, *The Commander’s Handbook on the Law of Naval Operations* (July 2007) 3.11.2.2.1.3).

in the law. This issue is more important than ever as a result of contemporary hot pursuits, particularly those conducted in distant waters and extreme weather conditions.¹³⁵

The ordinary meaning of ‘interruption’ is to stop or break the continuity of a process or an activity. Article 111(1) offers no further amplification and there is no comparable concept within UNCLOS from which to draw guidance.¹³⁶ In heavy seas the momentary loss of sight of a pursued vessel while pitching in the swell would not constitute an interruption.¹³⁷ The break must be ‘significant’ to constitute an interruption for the purposes of international law.¹³⁸ An inability to consistently observe or track a pursued vessel in difficult weather—due to distance and poor visibility—for an extended period would indisputably constitute such a break. However, in the absence of a broad common sense understanding of the definition of ‘without interruption’ the doctrine is clearly open to abuse.

Means other than visual watch can be employed to maintain contact with a pursued vessel; observation is not limited to ‘eyes on’ surveillance. Observation of vessels can be effectively sustained by radar, satellite imagery, synthetic aperture radar (SAR) and other developments in avionics or surface vessel navigational systems, regardless of climate or conditions.¹³⁹ For example, the Australian Customs Vessel (ACV) *Southern Supporter* was at times up to 30 nautical miles from its target due to the treacherous seas conditions of the Southern Ocean¹⁴⁰ and the dangerous heading of the *Viarsa*.¹⁴¹

¹³⁵ Australian authorities conducted a lengthy and arduous hot pursuit of the Uruguayan-flagged *Viarsa*, suspected of conducting IUU fishing in the EEZ of Australia’s external territories of Heard and McDonald Islands (HIMI). The *Viarsa* demonstrates how treacherous sea conditions can hamper the continuity of a hot pursuit. See also, Knecht, above n 24.

¹³⁶ Coastal state legislation often does little more than reproduce the condition in UNCLOS that the pursuit occurs without interruption. See, eg, *Marine and Coastal Access Act 2009* (UK) s 166; *Act on Offences relating to Offshore Petroleum Production Places 1987* (Thailand) s15(3); *Territorial Waters and Contiguous Zone Act 1971* (Malta) s 8(6).

¹³⁷ Randall Walker, ‘International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century’ (2011) 17 *Auckland University Law Review* 194, 212; Baird ‘Arrests in a Cold Climate (Part 2)’ above n 106, 16.

¹³⁸ Reuland, above n 44, 584.

¹³⁹ SAR can track Automatic Identification System (AIS) and VMS transponders even if the data becomes unavailable. The role of technology, particularly in the context of surveillance and unmanned capabilities, is examined in section 6.5.

¹⁴⁰ ‘The waves were so huge that often we couldn’t see the other vessel. Fortunately by using the radar we kept contact the whole time and we kept calling them on the radio’ (Statement by Customs Contingent Leader Stephen Duffy in ‘The Pursuit of the *Viarsa I* (The Longest Maritime Pursuit in Australia’s History)’ (2004) 7(1) *Manifest: Journal of the Australian Customs Service*, 7, 10.

¹⁴¹ It was reported that the *Viarsa I* deliberately headed close to pack ice to evade pursuit by *Southern Supporter* (Senator Chris Ellison (Minister for Justice and Customs), Senator Ian Macdonald (Minister for Fisheries, Forestry and Conservation) and Dr Sharman Stone MP (Parliamentary Secretary to the Minister for the Environment), ‘Australian Patrol Boat Encounters Pack Ice Danger as Hot Pursuit of Fishing Vessel Enters 13th Day’ (Joint Media Release, 20 August 2003

Australian Customs maintained surveillance by ordinary visual means, by attempted radio communication with the *Viarsa* crew and by radar. These technological advances were not necessarily foreseeable during the codification process. However, the capability to effectively observe and track a vessel suspected of violating relevant coastal state laws is not at variance with the aims of UNCLOS.¹⁴² If anything, the capability may provide more certainty in the event of prosecution or litigation. In some cases, the challenges of maintaining a continuous pursuit may be mitigated by the ability to relay the pursuit. This issue has not been significantly addressed by ITLOS or in the Australia prosecutions that arose from hot pursuits.¹⁴³ Nonetheless, commentary strongly suggests that this is the most practical approach to hot pursuit,¹⁴⁴ particularly when IUU fishing enterprises employ technology to avoid detection¹⁴⁵ and attempt evasion.¹⁴⁶ This would achieve the aim of maintaining a balance between coastal state enforcement and exclusive flag state jurisdiction.¹⁴⁷

One practical way to circumvent this problem is for states to legislate or incorporate appropriate guidelines within the domestic framework.¹⁴⁸ Australia, for example, has a specific provision that lists conduct that does not constitute an interruption for the purposes of the Act.¹⁴⁹ Similarly, the US considers that hot pursuit can be continued by

<http://www.thegreatchase.tv/pdf/Operation_Patonga_media_updates.pdf>).

¹⁴² Commentators such as McDougal and Burke have stated that radar is a permissible means to track and therefore maintain a pursuit without interruption and that ‘there seems no good reason for requiring either that the pursuing vessel maintain visual observation of the fleeing ship’ (above n 14, 897).

¹⁴³ Almost 100 tonnes of Patagonian toothfish were found on board *Viarsa* as well as other fish and bait. The Uruguayan master and four others (three from Spain and one from Chile) were charged with illegal fishing offences under ss 100 and 101 of the *Fisheries Management Act 1991* (Cth). After a hung jury in a Perth District Court, all were acquitted at a second trial on 7 December 2005. In closing argument, defence counsel argued that there was insufficient evidence to establish that the *Viarsa* was fishing in the HIMI EEZ. The captain of the Togo-registered *South Tomi* (discussed in Chapter 6) was convicted and fined \$136,000 and the boat and catch were forfeited.

¹⁴⁴ Klein, above n 2, 113; Churchill and Lowe, above n 14, 216; McDougal and Burke, above n 14, 897; Walker, above n 137, 195.

¹⁴⁵ Klein, above n 2.

¹⁴⁶ The crew of the *Viarsa* appeared to take advice from shore during the conduct of the pursuit, at one point claiming that she was under arrest by Uruguayan authorities and had been ordered to return to a Uruguayan port (Knecht, above n 24, 143).

¹⁴⁷ ‘[A]n interpretation of Art 111 which incorporates the notion of a substantial rather than merely transitory interruption seems consistent with the nature of the right. It would give appropriate recognition to the obvious difficulties posed by protracted pursuits across open seas in challenging weather conditions’ (Tim Stephens, ‘Enforcing Australian Fisheries Laws: Testing the Limits of Hot Pursuit in Domestic and International Law’ 15(1) *Public Law Review* (2004) 12, 15).

¹⁴⁸ See, eg, Allen, above n 101, 320 who refers to US practice: ‘as long as the pursuing vessel remains in pursuit and can positively identify the fleeing vessel, short gaps in observation due to horizon distance, weather, darkness, or other intervening causes do not constitute an interruption of hot pursuit’. This is reflected in the *US Coast Guard Maritime Law Enforcement Manual*. For more discussion of multilateral hot pursuit, refer to Chapter 6.

¹⁴⁹ *Maritime Powers Act 2013* (Cth) s 42(2): The chase is not interrupted only because: (a) it is continued by another maritime officer; or (b) it is begun, or taken over, by a vessel or aircraft (including a vessel or aircraft of a foreign country) other than the vessel or aircraft from which the requirement was made; or (c)

electronic means.¹⁵⁰ More strategic provisions are appearing in international agreements¹⁵¹ to shape methods of hot pursuit enforcement—for example, a statement that tracking of the vessel may be conducted ‘by reliable technical means’. A narrow view of what constitutes an interruption will needlessly limit the effectiveness and intent of the doctrine and prevent coastal states from being able to enforce legislation. There has been no judicial comment on pursuit interruption, but it is a point ripe for further discussion in legal proceedings arising from an appropriate fact scenario.¹⁵² In the meantime, state practice has demonstrated that coastal states are willing to work around a strict interpretation of hot pursuit to address the shortfall in the law. These developments are examined further in the context of South African practice in Chapter 6.

4.8 Relay Between a Coastal State’s Vessels

While not explicitly stated in Article 111, it is largely settled that relay of pursuit¹⁵³ between authorised vessels of the same state is permitted.¹⁵⁴ Relay between vessels of the same flag was first sanctioned in the *I’m Alone* case¹⁵⁵ and the concept continued to be upheld as the most practical means of fulfilling the fundamental requirement for pursuit to be continuous. The relay of hot pursuit was first considered in the codification process by the ILC in its Report of 1956¹⁵⁶ when relay was unequivocally endorsed:

With reference to the question whether the same vessel must exercise throughout the right of hot pursuit, although in practice the pursuit would normally be initiated and concluded

if the chase is continued by a vessel or aircraft of a foreign country—there is no maritime officer on board the vessel or aircraft; or (d) the vessel is out of sight of any or all of the maritime officers, or officers of a foreign country, involved in the chase; or (e) the vessel cannot be tracked by remote means, including radio, radar, satellite or sonar. This legislation is discussed in more detail in Chapter 7.

¹⁵⁰ Above n 134.

¹⁵¹ *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, signed 2 November 2012, [2017] ATS 11, art 13(5).

¹⁵² The legal status of a possible resumption of hot pursuit is addressed in Chapter 6 as an emerging element of contemporary practice.

¹⁵³ The term ‘relay’ is used to describe the passing along of a pursuit between vessels of the same state (as in passing the baton between members of the same relay team). In this thesis, ‘transfer’ refers to passing the pursuit to a vessel of another state, although it is acknowledged that ‘relay’ and ‘transfer’ may be used interchangeably elsewhere.

¹⁵⁴ ‘[T]here is no express provision allowing one ship to take over from another subsequently. It would, however, seem reasonable to allow this’ (Churchill and Lowe, above n 14, 215). See also Rothwell and Stephens, *The International Law of the Sea*, above n 66, 417.

¹⁵⁵ The *I’m Alone* case was considered by a commission of experts, pursuant to the bilateral *Anglo-American Liquor Convention* 1924, rather than a court after diplomatic negotiations between Canada and the US faltered. The issue of relay between US Coast Guard vessels, the *Wolcott* and the *Dexter*, was very much secondary to other issues of fact. The only significant finding was that both states agreed that hot pursuit formed part of customary international law. For more detail on this matter see Chapter 2.

¹⁵⁶ *Yearbook of the International Law Commission, 1956*, vol II.

by the same vessel, cases had occurred of the participation of more than one vessel. Provided that there was no break in continuity of pursuit, it would be illogical to regard that practice [of relay] as necessarily illegitimate.¹⁵⁷

Much of the negotiation focused on the limits of jurisdiction, the class of authorised vessels and, to a lesser extent, whether relay ought to occur at all. Ultimately, it was agreed that the concept of relay between authorised coastal state vessels was consistent with the aims of the doctrine.¹⁵⁸ Likewise, contemporary academic scholarship overwhelmingly recognises the use of relay by coastal states, particularly as it supports the requirement for the pursuit to be continuous.¹⁵⁹ The related issue of multilateral hot pursuit—transfer of pursuit from Flag A vessel to Flag B vessel—is examined in Chapter 5.¹⁶⁰

It should be noted that there is a clear limitation in relation to relay involving authorised aircraft. That is, Article 6(b) states that ‘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’. Accordingly, on a plain reading of Article 6, it appears that a pursuing aircraft can only relay pursuit to an authorised vessel or aircraft of its own (coastal) state. There has been no relevant commentary or fact scenarios on this point that would indicate otherwise. This suggests that the issue is somewhat settled and any state seeking to transfer a pursuit from its aircraft to a vessel or aircraft of another state would be precluded by the legal parameters of UNCLOS. Any further attempt to expand the element would only be achieved through the development of customary international law.¹⁶¹

4.9 Use of Force

Article 111 is silent both on the method of arrest and use of force as UNCLOS ‘simply does not specify what action a warship may take if a vessel refuses to comply with its

¹⁵⁷ Sir Gerald Fitzmaurice in International Law Commission, ‘345th meeting, 14 May 1956’ in *Yearbook of the International Law Commission, 1956*, vol I, 55. The issue of ‘combined relay’ (vessels and aircraft or multiple vessels of the coastal state) was discussed at length, though the discussion did not extend to combined pursuit of multiple states.

¹⁵⁸ The proposal was adopted by 10 votes to none with 4 abstentions (ibid, 58).

¹⁵⁹ McDougal and Burke, above n 14, 897. See also Allen, *International Law for Seagoing Officers*, above n 65, 319.

¹⁶⁰ The transfer of pursuit from one coastal state to another as an emerging element of contemporary practice of hot pursuit is examined in Chapter 6.

¹⁶¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 3, 175.

direction'.¹⁶² UNCLOS does contain a prohibition against the use of excessive force in Article 225:

In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

Some commentators have described the omission of guidelines in UNCLOS as a deliberate avoidance of a complex issue.¹⁶³ Even so, the omission does not prohibit the use of force altogether.¹⁶⁴ UNCLOS explicitly authorises enforcement action and, by implication, a degree of force must be permitted to give effect to its provisions.¹⁶⁵ Although there is a palpable lack of guidance on the level of force permitted, particularly in relation to exercising hot pursuit, Article 225 provides general guidance as to the corollary position on excessive force. Further guidance can be found outside the UNCLOS framework. Article 302 of UNCLOS closely mirrors Article 2(4) of the UN Charter¹⁶⁶ that states, '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. While there are broad use of force principles codified in international law, there remain patent gaps on the permissible level of force when invoking enforcement provisions of UNCLOS. This is due in part to discussion of use of force taking place in an armed conflict or self-defence paradigm rather than constabulary enforcement provisions exercisable by coastal states:

This bi-polar view of maritime mobility as *either* a belligerent (UN Charter Chapter VII and armed conflict) *or* a peace-time (LOSC) governed issues has tended to obscure the fact that there is a significant middle ground of overlap between these two extremes.¹⁶⁷

¹⁶² D J Letts, 'The Use of Force in Patrolling Australia's Fishing Zones' (2004) 24(2) *Marine Policy* 149, 154.

¹⁶³ See, eg, Rob McLaughlin: 'the background to UNCLOS III leaves little surprise at the tendency of the LOSC to avoid or obfuscate use of force issues' (*United Nations Naval Operations in the Territorial Sea* (Brill, 2009) 61). '[T]here was a disinclination at UNCLOS III to discuss such distasteful matters' in Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', above n 65, 440.

¹⁶⁴ 'The only sensible construction of Article 225 is to read it subject to the customary law principles of necessity and proportion, and not as a blanket prohibition against the use of force in any circumstances' (Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', above n 65, 342).

¹⁶⁵ A broad protection can be found in UNCLOS art 300: 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'

¹⁶⁶ *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

¹⁶⁷ McLaughlin, *United Nations Naval Operations in the Territorial Sea*, above n 163, 60 (author's

The two situations differ markedly and it must be said that codified guidance is decidedly lacking.¹⁶⁸ Therefore, it is necessary to look beyond UNCLOS and examine customary international law.¹⁶⁹

Excessive use of force was considered in the *I'm Alone* case.¹⁷⁰ It is reported that over the course of the pursuit an order to stop was given and warning shots were fired across the bow and into the rigging. Eventually, the USCG vessel *Dexter* fired shots into the hull of the *I'm Alone* causing her to sink 200 nautical miles from the US coast. Although the Coastguard rescued the crew, boatswain Leon Mainguy drowned and all of the cargo was lost. The convoluted non-binding proceedings that followed ultimately found that excessive force had been used and that the sinking was unlawful. Hot pursuit was not yet codified at this time and the matter was subject to a bilateral anti-smuggling treaty that permitted enforcement without further detail as to permissible use of force. Based on these factors, the Commissioners found that coastal state enforcing vessels were permitted to

use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless.¹⁷¹

As all evidence pointed to deliberate sinking of the vessel, the Commissioners found the use of force to be unlawful. The case remains as authority for the use of force when affecting an arrest at sea¹⁷² and the deliberate sinking of a vessel continues to be prohibited. This is addressed below in the *Red Crusader* and *M/V 'Saiga'* matters.

In addition to the *I'm Alone*, the arbitration of the *Red Crusader* similarly found that a series of warning shots across the bow followed by a shot into the hull was excessive.¹⁷³ The *Red Crusader* was pursued by a Danish frigate, the *Niels Ebbesen*, on the suspicion

original emphasis).

¹⁶⁸ Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', above n 66, 341.

¹⁶⁹ Prior to UNCLOS III, two key cases had resulted in findings that directly addressed the use of force: *I'm Alone* (1935) 3 RIAA 1609 and *Red Crusader Commission of Inquiry (Denmark–United Kingdom)* (1962) 35 ILR 485. Shearer observes that during UNCLOS negotiations, '[i]t was assumed that customary international law already governed the exercise of force—including force in a peace time police role—at sea and that the customary rules would, for the most part, be sufficient' (ibid).

¹⁷⁰ For a further discussion of the circumstances see Chapter 2 at p 16.

¹⁷¹ 'Joint Interim Report of the Commissioners of 30 June 1933' (1935) 29 *American Journal International Law* 327, 328.

¹⁷² *I'm Alone* (1935) 3 RIAA 1609 is authority for all arrests, not just those conducted as a result of hot pursuit. See, eg, Churchill and Lowe, above n 14, 461.

¹⁷³ *Red Crusader Commission of Inquiry (Denmark–United Kingdom)* (1962) 35 ILR 485.

of illegally fishing in the vicinity of the Faroe Islands. The *Red Crusader* fled and the *Niels Ebbesen* fired warning shots fore and aft accompanied by stop signals from the ship's steam whistle. After these warnings went unheeded, the *Niels Ebbesen* used direct fire that resulted in damage to the *Red Crusader*.¹⁷⁴ The Commission found that the *Niels Ebbesen* ought to have given a warning prior to firing solid shot and that firing at the vessel without warning constituted excessive force. Further, the circumstances did not warrant endangering human life and that other means may have been exercised to compel the *Red Crusader* to stop.¹⁷⁵ Although prohibition against the possibility of endangering life appears to be the most useful position to adopt, use of force was not of itself ruled unlawful.

In *M/V 'Saiga'*, the Tribunal determined that it is permissible to use force only as a last resort: '[i]t is only after appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, the appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered'.¹⁷⁶ From these judicial or semi-judicial sources it can be concluded that use of force may be used after appropriate actions including adequate warnings are first exercised. If force is resorted to, human life must not be put in danger,

[e]xcept when required in self-defence or for the defence of others, deliberately attempting to sink a fishing vessel would be an example of the excessive use of force. Firing at a fishing vessel in an attempt to disable it would be legally acceptable provided that the commanding officer, after honestly assessing the situation, determines that gunfire is unlikely to cause death or grievous bodily harm to any member of the fishing vessel's crew.¹⁷⁷

These parameters highlight the difference between the use of force in armed conflict and the use of force in enforcement operations. Enforcement of coastal state laws, while an inherent part of sovereignty, do not contribute to the survival of the state. Use of force in constabulary operations to enforce law must adhere to the confines of Articles 225 and 300. There is also the practical fall-out from excessive use of force, including possible loss of human life, the capacity to rescue and restitution awarded for lost cargo and the vessel herself:

¹⁷⁴ The ship's log is reproduced in W J Fenrick, 'Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement' (1980) 18 *Canadian Yearbook of International Law* 113, 132.

¹⁷⁵ *Red Crusader Commission of Inquiry (Denmark-United Kingdom)* (1962) 35 ILR 485. A two-man Danish boarding party were onboard the *Red Crusader* when she fled.

¹⁷⁶ *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, 156.

¹⁷⁷ Fenrick, above n 174, 144.

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. 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.¹⁷⁸

Patrolling warships must be properly qualified and equipped with weapons and safety equipment to conduct constabulary enforcement operations of this nature, not just naval warfare. Some states have legislated to permit use of force in exercising hot pursuit in adjacent waters.¹⁷⁹ Provided that these provisions reflect international norms attached to the doctrine of hot pursuit without expanding upon them, they are likely to assist in the practical enforcement of the relevant coastal state law.¹⁸⁰

4.10 Compensation

The obligation to pay compensation for loss or damage incurred as a result of a wrongful pursuit is well established in customary international law.¹⁸¹ Accordingly, there was no opposition to its inclusion in treaty. During negotiations for UNCLOS, the Delegate for Pakistan proposed a mechanism for dispute settlement for unlawful hot pursuit:

If article 57 provided for the settlement of disputes regarding fishing rights and article 73 for the settlement of disputes regarding continental shelves, the article under discussion should provide for the settlement of disputes arising out of cases of unsuccessful hot pursuit. International recognition of a wrong suffered by a State was virtually futile unless sanctions were provided for redressing that wrong.¹⁸²

The proposal was ultimately not adopted and all that remained was a generic right to compensation that lacked guidelines. In the absence of further guidance, Article 111(8) constitutes a broad starting point for the determination of compensation. There are a number of practical difficulties that arise from this. Although Article 111(8) does not preclude litigation in domestic courts or international tribunals, UNCLOS does not give

¹⁷⁸ Reuland, above n 44, 585; Churchill and Lowe, above n 14, 153.

¹⁷⁹ For example, South Africa (examined in Chapter 6) and Australia (examined further in Chapter 7).

¹⁸⁰ An example of excessive force involved the sinking of the Japanese-flagged fishing vessel *Shikoku* off the coast of Alaska (Poulantzas, above n 12, XL). It is otherwise unreported.

¹⁸¹ See, eg, *Marianna Flora* 24 US (11 Wheaton) 1 (1826) and the *I'm Alone* (1935) 3 RIAA 1609. In the *I'm Alone* matter, a recommendation was made in the non-binding process for pecuniary damages to be paid to the Canadian government that does not accord with the modern doctrine as it relates to payment of compensation pursuant to UNCLOS art 111(8).

¹⁸² From 28th mtg (9 April 1958) in 'Summary Records of the 26th to 30th Meetings of the Second Committee' UN Doc (A/CONF.13/C.2/SR.26-30), Extract from the *Official Records of the United Nations Conference on the Law of The Sea, vol IV (Second Committee (High Seas: General Regime))* 80.

natural or juridical persons the ability to institute proceedings against states.¹⁸³ Any dispute between states in relation to the Convention must be first exhausted via local remedies. This means that most disputes arising from hot pursuit will be adjudicated in the domestic framework. Failing that, flag states may commence inter-state proceedings on behalf of citizens, as was the case with the *Volga*.¹⁸⁴

ITLOS briefly considered compensation for wrongful hot pursuit in the matter of *M/V 'Saiga'*. Guinea argued that the compensation claim made by Saint Vincent and the Grenadines was invalid, as local remedies had not been exhausted. However, ITLOS found that the rule did not apply as there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims.¹⁸⁵ In a separate opinion, Judge Chandrasekhara Rao provided further comment on the extent of compensation,

When article 111, paragraph 8, states that it is the ship which is to be compensated, the expression 'ship' here is a symbolic reference to everything on the ship and every person involved or interested in the operations of the ship. In short, all interests directly affected by the wrongful arrest of a ship are entitled to be compensated for any loss or damage that may have been sustained by such arrest.¹⁸⁶

The financial rewards for IUU fishing are substantial and many operations are funded by corporate groups that own multiple vessels.¹⁸⁷ Accordingly, costs arising from arrest after unlawful hot pursuit (as a result of determinations made by military or government authorised crew) will be quite considerable.¹⁸⁸ While there is little guidance in UNCLOS regarding the assessment of appropriate compensation, Article 111(8) constitutes a safeguard for commercial shipping to have some recourse against overzealous or unlawful misconduct by coastal state authorities. This contributes to maintaining the balance between coastal state jurisdiction and the interests of foreign flag vessels and is consistent with the aims of the law of the sea.

¹⁸³ UNCLOS art 225.

¹⁸⁴ (*Russian Federation v Australia*) (Prompt Release) (2003) 42 ILM 159. This case focussed on whether the conditions of release of the vessel were in accordance with UNCLOS; the case was not concerned with a determination of appropriate compensation for wrongful hot pursuit.

¹⁸⁵ *M/V 'Saiga' (No 2)* (1999) 120 ILR 143, 100.

¹⁸⁶ *Ibid* (Judge Chandrasekhara Rao) 15.

¹⁸⁷ The *Volga* was believed to be part of a fleet of IUU fishing vessels. See 'Statement in Response of Australia', *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159, 5.

¹⁸⁸ For further discussion of recovery of costs incurred during hot pursuit see Rachel Baird, *Aspects of Illegal, Unreported, and Unregulated Fishing in the Southern Ocean* (Springer, 2006) 286.

4.11 Aircraft

The unique capabilities of aircraft demand special consideration under the international law of hot pursuit.¹⁸⁹ Although Article 111 permits hot pursuit by aircraft, and specifically refers to it in sub-article (6), the law of the sea as it relates to transit is quite distinct to the law of airspace as it relates to navigation and overflight. The applicable law concerns navigation of government authorised or military aircraft in peacetime operations. Aircraft can conduct hot pursuit in international airspace, but aircraft are prohibited from entering the national airspace of another state. In keeping with Article 111(3), there is no right of overflight for aircraft over the territorial sea, archipelagic waters and internal waters, though it is possible to waive standard overflight prohibitions in bilateral agreements. Such an agreement has been signed between the US and the Dominican Republic, for example. The agreement specifically permits US hot pursuit of suspected aircraft into Dominican airspace.¹⁹⁰ A number of bilateral agreements that go beyond the conventional parameters of hot pursuit are examined in Chapter 7.

4.12 Conclusion

This chapter has evaluated the criteria in customary international law and UNCLOS to determine in Part II whether hot pursuit, in its fundamental form, can meet the needs of contemporary maritime security. As a result of hot pursuit's relatively uneventful codification and unhurried inception into customary international law, the elements reflect secure theoretical foundations. If hot pursuit is to be employed as a method of maritime enforcement more development is necessary to effectively counter contemporary circumstances. This may be achieved in a number of ways—state practice, judicial discourse, the application of technology, by maximising municipal frameworks and engagement in bilateral or institutional agreements. Without development of this kind, the current framework reflected in the theoretical foundations will fall short.

¹⁸⁹ As a distinguishable area of law, the issue of hot pursuit by air is not examined in this dissertation.

¹⁹⁰ Art 7(2)(b) *Agreement between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Interdiction* (the 'Dominican Migrant Agreement') (signed and entered into force 20 May 2003). See also *US Model Maritime Shiprider Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea* in Joseph E Kramek, 'Bilateral Maritime Agreements Counter-Drug and Immigrant Interdiction: Is This the World of the Future?' (2000) 31(1) *Inter-American Law Review* 121, 141 (reproduced in Annex B). The model agreement is based on art 17 of the *United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances*, opened for signature 20 December 1988, 28 ILM 493 (entered into force 11 November 1990).

There is recognition that hot pursuit has utility as a maritime enforcement tool¹⁹¹ and, as an existing legal device, the potential to address a range of maritime security challenges confronting coastal states. However, an examination of the elements of hot pursuit in this thesis demonstrates that while many of the core elements address the needs of coastal states, a number do not. This is particularly true in relation to technology and emerging law of the sea challenges. There are radically different external factors shaping the contemporary maritime domain and the changing nature of maritime security is demanding more and more of the coastal state. The current scope of hot pursuit's elements maintains a balance between flag and coastal rights and this need not be undermined by further development. Any response must operate within the framework of the law of the sea as well as preserve the common interest of inclusive and exclusive uses.¹⁹² Part III of this thesis will examine the contemporary development of hot pursuit beyond its theoretical foundations. A critical analysis of the emerging elements of hot pursuit in Chapter 5 will identify the doctrine's position in current maritime governance and consider the challenges arising from contemporary use of hot pursuit.

¹⁹¹ Churchill and Lowe, above n 14, 216; Walker, above n 137, 201; Klein, above n 2, 113; Reuland, above n 44, 588; Rothwell and Stephens, *The International Law of the Sea*, above n 66, 416.

¹⁹² The common interests of states involve a balance between inclusive use (all states having an interest in or access to ocean space) and exclusive use (individual states being able to control use of its maritime zones). 'The oceans which admit of economic sharing, have manifestly been made to serve the peoples of the world as a great common resource...Both the inclusive interests of all states and the exclusive interests of coastal states have been successfully accommodated through the historic, inherited public order of the oceans' (McDougal and Burke, above n 14, 51–52).

PART III

DEVELOPMENT

Having examined the historical foundations of hot pursuit, Part III analyses the development of hot pursuit in contemporary circumstances. Chapter 5 explores the challenges arising from the contemporary use of hot pursuit and identifies and assesses emerging hot pursuit practices. As a part of this examination, the scholarly commentary in this area is critically analysed. Chapter 6 analyses other approaches that are arising in the context of contemporary practice as alternatives to the conventional application of hot pursuit. In Chapter 7, a comparative analysis of state practice by the US and Australia examines the implications of differing approaches to hot pursuit. While there are distinct strategic imperatives and foundational sources of law, both Australia and the US seek to employ an enhanced application of the doctrine of hot pursuit to effectively target persistent contemporary law enforcement challenges.

CHAPTER 5: CONTEMPORARY USE OF HOT PURSUIT

5.1 Introduction

During the examination of the theoretical foundations of hot pursuit Chapter 4 analysed the individual preconditions of hot pursuit, thereby paving the way for more in-depth exploration of the contemporary use of hot pursuit. Contemporary hot pursuit refers to more recent employment operations and is focused on the developments arising from the late 1990s to the present day. This chapter evaluates the developments in light of increased maritime security challenges, which most commonly arise in relation to resource protection and state practice. Consequently, the chapter begins with an overview of the doctrine's position in contemporary governance, addressing legal development and challenges.

While hot pursuit has been largely unchanged since becoming part of customary international law and later being incorporated into UNCLOS (as determined in Part II), in recent times the doctrine has been employed more often, in new ways and in collaboration with third party states. Thus, hot pursuit has undergone a resurgence of sorts. Although this has been largely in response to contemporary maritime challenges, chiefly the rise of IUU fishing, this resurgence has resulted in greater scope of application. Coastal states are developing increasingly innovative and cooperative methods, such as multilateral hot pursuit, to effectively exercise sovereign policing rights over adjacent maritime zones.

At a time when states struggle to effectively respond to maritime security challenges, hot pursuit is an established device capable of flexible application. As an effective mechanism to counter these challenges, hot pursuit can not only address IUU fishing, but also other transnational crimes and security threats.¹ The high commercial value attributed to decreasing fish stocks has meant that states have invoked the right of hot pursuit under international law to prosecute domestic law violations. It has become imperative that more efforts are made to address the overfishing of the world's marine

¹ It has been reported by the United Nations Office on Drugs and Crime that IUU fishing may also involve forced labour and indenture, human trafficking, drug trafficking, shipping illegal weapons and terrorist acts. See United Nations Office on Drugs and Crime, *Transnational Organized Crime in the Fishing Industry. Focus On: Trafficking in Persons, Smuggling of Migrants and Illicit Drug Trafficking* (2011).

stocks and the grim consequences for world food security.² International and regional organisations can take measures to help achieve this.³

Prized stocks such as the Patagonian toothfish⁴ are worth millions of dollars to commercial fishing entities and the total estimated value of all IUU fishing is between \$US15 billion and \$US25 billion a year.⁵ As a result, IUU fishing vessels are likely to flee a patrolling state vessel and risk inclement weather and other maritime hazards to avoid arrest and forfeiture of the vessel and catch.⁶ For example, the fishing trawler *Thunder* was reportedly scuttled by its own crew after being pursued by a non-government organisation for over 10,000 nautical miles.⁷ These drastic measures demonstrate the challenges faced by states in managing maritime zones. In this respect, Australia's vast geographical layout, remote offshore territories⁸ and close proximity to the Southern Ocean and all make for an unwieldy area of operations.⁹ Additionally, competing political imperatives in Australia have diverted the allocation of patrolling days from the Southern Ocean to elsewhere.¹⁰ This is indicative of the complex

² High Level Panel of Experts (HLPE), 'The Role of Sustainable Fisheries and Aquaculture for Food Security and Nutrition' (Report, Global Forum on Food Security and Nutrition, 18 November–20 December 2013).

³ 'From the point of view of the development of the law of the sea, the major issues in 2003-2006 have been 1) the regulation of high sea fisheries, including addressing illegal, unregulated and unreported fishing, and 2) the conservation and sustainable use of marine biodiversity beyond national jurisdiction' (Louise de La Fayette, 'The Role of the United Nations in International Oceans Governance' in David Freestone, Richard Barnes and David Ong (eds), *Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 73).

⁴ *Dissostichus eleginoides*. Also known as Chilean Sea Bass, Merluza Negra and Mero.

⁵ Committee on Fisheries, 'FAO's Programme of Work in Fisheries and Aquaculture Under the Reviewed Strategic Framework' (Report COFI/2014/18, Food and Agriculture Organization of the United Nations (FAO), Thirty-first session, 9–13 June 2014) para 25.

⁶ The fishing vessel, the Uruguayan-flagged *Viarsa*, fled from Australian authorities and transited through pack ice and iceberg-laden seas in an effort to evade capture. Neither the *Viarsa* nor its pursuer, the *Southern Supporter*, were fitted out for icy conditions. See Andrew Darby, 'Chase Around the World for White Gold', *Sydney Morning Herald* (online), 23 August 2003 <<http://www.smh.com.au/articles/2003/08/22/1061529336367.html>>.

⁷ The NGO vessel the *Bob Barker* is the property of the Sea Shepherd Conservation Society. Intended to draw attention to IUU fishing and pass any relevant evidence to Interpol, the *Bob Barker* had no power to conduct an arrest of any kind. The *Thunder* had been de-registered by Nigeria and was thus amenable to boarding and arrest by any state authority. See Ian Urbina, 'A Renegade Trawler, Chased by Eco-Vigilantes', *The New York Times* (online), 28 July 2015. The role of Sea Shepherd influencing public opinion is evaluated in Chapter 7.

⁸ There are seven Australian external territories: Norfolk Island, Ashmore and Cartier Island, Christmas Island, Coco (Keeling) Islands, Coral Sea Islands, HIMI and a claimed Australian Antarctic Territory.

⁹ Australia has the third-largest EEZ in the world, made up of approximately 8.2 million square nautical miles around the continent and offshore territories. See M Alcock, M J McGregor, A Hatfield and N J Taffs, 'Treaties—Australian Maritime Boundaries 2014a—Geodatabase' (Dataset, Geoscience Australia (Cth), 2014).

¹⁰ The current Australian government was elected on a variety of election policies including a pledge to 'turn back the boats', whereby asylum seekers travelling by sea to Australia are reportedly towed from Australian waters to the high seas or Indonesian waters. This is examined in more detail in Chapter 7. The ACV *Ocean Protector* is a dedicated vessel able to conduct year-round patrols in sub-Antarctic weather conditions that has been diverted to conduct migration patrolling and transport tasks in the warmer waters

challenges governments must overcome when forecasting for future operations and the funding of defence acquisitions to support these missions. Nonetheless, the Australian pursuits of fishing vessels demonstrated, at least at the time, that the government has been willing to contribute significant funding to patrolling and enforcement in Australian waters.¹¹

In this chapter, evidence of state practice as well as jurisprudence and commentary are evaluated to properly assess whether hot pursuit has undergone tangible development. The two compelling examples of the multilateral hot pursuits, the *South Tomi* and the *Viarsa*, are examined in detail throughout this chapter. Whether the innovative or enhanced methods employed by states engaging in hot pursuit potentially exceed a strict interpretation of the right envisaged at Geneva is a critical issue to be examined in this chapter. Although international law of the sea is amenable to development in appropriate circumstances, any variation to the parameters of hot pursuit must preserve the tenuous equilibrium between the rights of coastal states and that of flag states. As a limited exception to the high seas freedoms, that equilibrium is central to the order of the oceans.

5.2 Balancing Flag and Coastal State Interests

The exercise of hot pursuit, by ultimately arresting a non-flag state vessel on the high seas, is incumbent upon a delicate balance between the freedom of navigation and coastal state sovereignty. On the high seas the flag state exercises a broad jurisdiction, including enforcement powers, over its flagged vessels.¹² But for crimes of universal jurisdiction, such as slavery and piracy,¹³ the flag state exercises almost exclusive control over its vessels. Exclusive flag state jurisdiction is an ancient, fundamental principle of the law of the sea and, as a result, any exceptions to flag state jurisdiction

to the north west of Australia (Australian Customs and Border Protection Service (Cth), *Annual Report 2012–2013*, 42). The formal political pledge is in the Coalition's '*Operation Sovereign Borders Policy*' (July 2013) <<http://www.liberal.org.au/our-plan>>.

¹¹ Chapter 7 analyses the current circumstances in which Australia conducts hot pursuit and border enforcement operations.

¹² UNCLOS art 94.

¹³ While drug trafficking is mentioned in Article 108 of UNCLOS, it does not constitute a crime of universal jurisdiction. Crimes of universal jurisdiction are those categories of most heinous crimes under customary international law for which any state may exercise jurisdiction and there is no requirement for a nexus between the enforcing state and the accused. According to the 'Princeton Project on Universal Jurisdiction', edited and chaired by Stephen Macedo (Princeton University, 2001), the categories are: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. For further discussion on universal jurisdiction see William Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal Law* (Taylor and Francis, 2010) 337–350.

are limited in nature. However, as uses of the sea multiply, so may the freedoms become more flexible:

Precisely because the State cannot in principle control the activities of other States on the high seas, so that users of the seas remain at liberty to do as they please apart from a few restrictive rules, and also because new ocean technology is constantly developing, the freedoms of the high seas cannot be exhaustively listed.¹⁴

There are a range of laws that affect the operation of vessels on the high seas, such as those promoting safety at sea¹⁵ and protections afforded to submarine cables,¹⁶ but very few of these permit interference by a foreign-flagged vessel.¹⁷ The exclusivity of flag state jurisdiction is one key issue targeted by international agreements between states.¹⁸ Even in circumstances where the coastal state suspects unlawful conduct will occur once a foreign-flagged vessel reaches its territory or territorial sea, the coastal state has no recourse upon identifying a suspicious vessel outside its respective maritime zones.¹⁹ Flag states are often unwilling or, more likely, unable to exercise effective regulatory control in this instance. Conversely, joint operations may extend jurisdiction by combining a variety of capabilities based on a shared political will. This empowers coastal states to better conduct law enforcement in adjacent maritime zones. As will be discussed in Chapter 6, shiprider agreements are another initiative of coastal states that seek to facilitate lawful interdiction. These agreements aim to abbreviate the process for consent from the flag state to allow the timely and lawful boarding of foreign vessels suspected of domestic violations. By incorporating permissive or cooperative provisions on hot pursuit, states are also seeking to maximise the scope of their enforcement powers and respective capabilities.

¹⁴ R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 205.

¹⁵ Such as UNCLOS arts 94 and 98 and the *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 3 (entered into force 25 May 1980).

¹⁶ Such as UNCLOS art 113 and the *International Convention for the Protection of Submarine Cables*, opened for signature 14 March 1884, TS 380 (entered into force 1 May 1888). See also Lionel Carter et al, 'Submarine Cables and the Oceans: Connecting the World' (Report, UNEP-WCMC Biodiversity Series No 30, United Nations Environment Program's World Conservation Monitoring Centre and the International Cable Protection Committee, 2009), ch 4.

¹⁷ For further analysis on shipping interdiction see Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009).

¹⁸ Bilateral agreements refer generally to formal arrangements between two states that aim to address defined issues. As a subset of these agreements, shiprider agreements permit the exercise of flag state jurisdiction by embarkation of authorised state officials on a coastal state vessel. Other than forward-embarkation of officials, there is no exhaustive list of requirements (there are in fact many variations) as other provisions may confer additional powers on the signatories. See, eg, Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing, 2013) 226.

¹⁹ Unless the vessel is accompanied by auxiliary craft, thus making the vessel a mothership pursuant to Article 111(1).

Hot pursuit is well established as a unique and limited exception to the primacy of the high seas. Putting aside the issue of universal jurisdiction, as a means to counter piracy for example, the authority to arrest on the high seas is extraterritorial—an extension of jurisdiction from adjacent maritime zones. This power can only be exercised in limited circumstances and is dependent upon the manner and location of an offence. There has been no impetus to construct an exhaustive list of offences that hot pursuit may be employed for, which may limit its exercise. In his discussion, Poulantzas states that his ‘review of authors’ opinions, treaties and municipal laws shows that the trend—so far as the description of offences giving a right to hot pursuit is concerned—has been towards general norms and not towards enumeration of specific offences’.²⁰ This permits the development of legal notions not foreseen by drafters of UNCLOS.

The location of the offence is, in effect, the initial trigger that permits the coastal state to enforce domestic law.²¹ Any legislation that prescribes enforcement action must be in accordance with international law of the sea and the relevant maritime zone in which the offence is alleged to have occurred. So, in spite of recent practice that has attempted to address WMDs, human trafficking and piracy by regional and multilateral cooperation and agreement, the primacy of the flag state remains intact.²²

Many states have demonstrated an increasing readiness to respond to foreign vessel’s violation of domestic law by employing hot pursuit. In doing so, there has essentially been an effort to employ long-established enforcement tools to counter new offences or, at least, new forms of criminal enterprise. For example, hot pursuit has been employed in multilateral agreements to address piracy off the African coast.²³ In the Pacific, states are committing to cooperative surveillance and enforcement in robust terms that include continuation of pursuit into territorial seas.²⁴ Nonetheless, where sovereignty is waived or compromised, particular attention must be paid to the fundamental notions of flag

²⁰ Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff, 2nd ed, 2002) 134.

²¹ The applicable maritime zones are evaluated in Chapter 4.

²² In the *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits) (1999) 120 ILR 143, 148 the Tribunal had to determine whether the laws applied or the measures taken by a coastal state against the foreign vessel were compatible with UNCLOS.

²³ Article 4(5) of the *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden* (signed and entered into force 29 January 2009) (the ‘*Djibouti Code of Conduct*’) explicitly confirms the limitation of entry to the territorial sea when exercising hot pursuit and this is similarly stated in Article 7(1) of the *Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa*, signed 25 June 2013 (the ‘*West and Central African Code of Conduct*’).

²⁴ *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* (‘*Niue Treaty Agreement*’), signed 2 November 2012, [2017] ATS 11, art 13(2).

and coastal state interests that underpin the law of the sea. The recent emergence of maritime security challenges has also contributed to tensions between flag and coastal states.²⁵ Maintaining the balance between these competing interests, particularly in the face of emerging maritime security challenges, should be the prevailing aim of any collaboration between states that furthers development of hot pursuit.

5.3 Post-UNCLOS Challenges

Chapter 3 concluded that hot pursuit was codified in a relatively straightforward manner. The negotiating parties largely focused efforts on resolving the sensitive and complex issues relating to the breadth of maritime zones. The negotiation of a 12-nautical-mile territorial sea was determined during the early negotiations of UNCLOS III, thus intrinsically shaping the operation of hot pursuit. Additionally, the inclusion in Part V of UNCLOS of the option for states to declare an EEZ constituted a significant step in the development of coastal state jurisdiction.

The legal character of the EEZ is a unique balance between coastal state economic and scientific rights to natural resources and those rights available to all other flag states to traverse and utilise the EEZ (as remnants of high sea freedoms). High seas primacy is an age-old norm that continues to be fiercely defended. In an era of unprecedented maritime security threats, states are even more likely to be protective of rights affecting sovereignty under international law of the sea. The crimes being committed within coastal state jurisdiction invariably involve the movement of products (or people) and vast sums of money. IUU fishing is a particular concern that has prompted unprecedented international and domestic collaboration of key stakeholders.²⁶ Conventional measures used to tackle IUU fishing were ineffective or insufficient.²⁷ In a dissenting opinion, Judge Shearer spoke of the need to employ a modern perspective to the problem of IUU fishing,

²⁵ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 23.

²⁶ In addition to the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU) in 2001 and the Food and Agriculture Organization of the United Nations Code of Conduct for Responsible Fisheries of 31 October 1995, this matter has been discussed extensively elsewhere. See, eg, Bertrand Le Gallic and Anthony Cox, 'An Economic Analysis of Illegal, Unreported and Unregulated (IUU) Fishing: Key Drivers and Possible Solutions' (2006) 30(6) *Marine Policy* 689; Kevin W Riddle, 'Illegal, Unreported and Unregulated Fishing: Is International Cooperation Contagious' (2006) 37(3-4) *Ocean Development and International Law* 265.

²⁷ See, eg, Organisation for Economic Co-operation and Development (OECD), 'Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unauthorised Fishing' (Report, OECD Publishing, 2005); Tony Pitcher et al, 'Not Honouring the Code' (February 2009) 457(5) *Nature* 658; Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30(2) *Marine Policy* 173.

Few fishing vessels are state-owned. The problems today arise from privately owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalised and efficient, and some of them, are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels...A new balance has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other hand.²⁸

The challenges presented by flags of convenience are not new for coastal states.²⁹ Indeed, flags of convenience, or the open registries from which licences can be purchased with few conditions, in many cases effectively block coastal state efforts to enforce responsibilities normally associated with flag state regulation. These flag states are unwilling or bureaucratically unable to divulge details of ownership.³⁰ Often, a crew of varying nationalities willing to engage in risky ventures operate the vessels. Unprecedented advances in technology have also facilitated IUU fishing operations³¹ while the owners of vessels remain obscured by a corporate veil.³² One example is the family-operated Ribeiro Vidal Armadores, a Spanish corporation that has owned the *Viarsa*, the *Thunder* and the *Kunlun*, along with many other vessels suspected of conducting IUU fishing on a massive scale. The continued operation of vessels regulated by registries of convenience is a bitter pill for coastal states to swallow.³³

²⁸ Dissenting Opinion in *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159, 19 ('Volga').

²⁹ For an early discussion of the development of flags of convenience, see Rodney Carlisle, *Sovereignty for Sale: the Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (Naval Institute Press, 1981).

³⁰ See, eg, Matthew Giani and Walt Simpson, 'The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing' (Report, Australian Government Department of Agriculture, Fisheries and Forestry, 2005); Eric Powell, 'Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience' (2013) 19(1) *Annual Survey of International and Comparative Law* 263.

³¹ IUU fishing vessels utilise sonar and satellite data to locate fish, while advances in processing and refrigeration has allowed IUU fishing vessels to become factory trawlers with fewer calls to port. Increasingly sophisticated communications also assists IUU fishing vessels to avoid detection (OECD, above n 27, 14).

³² It has been suggested that IUU fishing operations may constitute organised criminal enterprises, see Henrik Österblom, Andrew Constable and Sayaka Fukumi, 'Illegal Fishing and the Organized Crime Analogy' (2011) 26(6) *Trends in Ecology and Evolution* 261.

³³ State impetus to challenge states with lax registries has recently compelled the European Commission (EC) to declare Belize, Cambodia and Guinea as non-cooperating third countries ('EU Takes Concrete Action Against Illegal Fishing' (EC Press Release IP/14/304, Brussels, 24 March 2014), pursuant to *Council Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* [2008] OJ L 286/1). The Philippines and Papua New Guinea received warnings on 10 June 2014 that they may be declared non-cooperative ('Fighting Illegal Fishing to Preserve Sustainability in the Western Pacific' (EC Statement/14/187, Brussels)), while Fiji, Panama, Sri Lanka, Togo and Vanuatu have also received warnings ('Commission Warns Third Countries Over Insufficient Action to Fight Illegal Fishing' (EC Press Release IP/12/1215, Brussels, 15 November 2012)), as have Ghana, Curacao and Korea ('European Commission Intensifies the Fight

Thus, in spite of the increased collaboration of states and the introduction of new measures to address IUU fishing, illegal activity has flourished.³⁴

The thorny issue of flags of convenience is but one practical challenge to the effective enforcement of coastal state law. IUU fishing vessels are increasingly well resourced with not only vessel registration subject to change, but also that of owners, master and crew. The speed at which this occurs greatly exceeds the rate at which coastal states negotiate and pass on information after a vessel is observed or identified.³⁵ The negotiation occurring on a diplomatic level and, for example, within RFMOs represents the desire of states to cooperatively tackle the problem of IUU fishing and to employ hot pursuit to do so. Negotiating and engaging in multilateral pursuit operations with like-minded states is a means to achieving practical results. The fundamental elements of hot pursuit as enforcement instruments of coastal states are firmly established. Meaningful and effective state collaboration that reflect shared aims has the potential to enhance capability and reduce transnational crime. However, reliance on conventional means coupled within the absence of collaborative measures will see perpetrators of IUU fishing continue to trounce state enforcement efforts.

Beyond strategic naval utility and territorial disputes arising from lingering questions of boundary delimitation, there are a range of emerging maritime issues that threaten to subvert coastal state jurisdiction. In addition to IUU fishing, under the law of the sea the coastal state retains jurisdiction over contemporary security threats including but not limited to drug trafficking, people smuggling, shipment of WMDs and bioprospecting.³⁶ This begs the question, what is the scope for innovative use of hot pursuit where

Against Illegal Fishing' (EC Statement IP/13/1162, Brussels, 26 November 2013)). The Solomon Islands, Tuvalu, Saint Kitts and Nevis and Saint Vincent and the Grenadines received pre-identification 'yellow card' warnings in December 2014, while Thailand was notified in early 2015. Any state declared non-cooperative is subject to a ban on imports of fisheries products into the EU, while EU vessels will not be allowed to fish in a 'non-cooperative' country's waters. It is the first time that measures of this type have been adopted at such a level.

³⁴ The continued scourge of IUU fishing has prompted labelling of such operators as, potentially misleadingly, 'fishing pirates' (see, eg, OECD, above n 27 and K Cochrane and R Willmann, 'Eco-Labeling in Fisheries Management' in Myron H Nordquist and John Norton Moore (ed), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Martinus Nijhoff, 2000) 583–615; Jann Martinsohn, 'Deterring Illegal Activities in the Fisheries Sector—Genetics, Genomics, Chemistry and Forensics to Fight IUU Fishing and in Support of Fish Product Traceability' (Report EUR 24394, European Commission—Joint Research Centre, 2011).

³⁵ INTERPOL is developing better methods for real-time sharing of information to tackle fisheries crime. See *INTERPOL Environmental Compliance and Security Meeting*, 2nd Meeting of the INTERPOL Fisheries Crime Working Group (Nairobi, Kenya 4, 5 and 7 November 2013). Additionally, the EC introduced an alert system to share information between custom authorities about suspected cases of illegal practices by *Council Regulation (EC) No 1005/2008* (above n 33).

³⁶ Despite a preference by some states for unilateral operations, the effectiveness of such an approach has diminished in the face of contemporary maritime challenges and states are now beginning to favour a common interest approach (Klein, above n 25, 1).

transnational maritime offences of this nature demand collaboration and legal innovation? Prior to the flurry of IUU fishing, hot pursuit was rarely invoked and was aimed primarily at marine resource conservation. Indeed,

[s]ubject only to the expansion of the right of hot pursuit to take into account violations by the foreign ships of laws and regulations of the coastal state within the EEZ and continental shelf, hot pursuit as codified under the law has essentially remained the same since the ILC's attempts at codification in the 1950's.³⁷

Since that time, maritime security has come to the fore as an arena of contending territorial threats, particularly as a result of increased piracy and post-9/11 terrorism concerns. Maritime security not only encompasses the carriage of WMDs and piracy, but also transnational crimes such as people smuggling, terrorism, drug trafficking, marine pollution and illegal resource exploitation.³⁸ The range and frequency of measures adopted by states (individually or multilaterally) when responding to these threats is reactive, inconsistent and self-interested in their application.

Other than observations on the elements of hot pursuit being cumulative,³⁹ ITLOS has, on the very few occasions that hot pursuit has been raised in proceedings,⁴⁰ refrained from making particular comments on its further development. Yet, recent state practice has played a tangible role in shaping the development of hot pursuit. One example is the increasingly widespread use of bilateral agreements.⁴¹ IUU fishing is a persistent maritime challenge for coastal states that international organisations also seek to deal with.⁴² Further analysis of state practice is necessary to determine whether hot pursuit can effectively address these contemporary challenges.

³⁷ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 415.

³⁸ Klein, above n 25, 9.

³⁹ *M/V 'Saiga'* (No 2) 146.

⁴⁰ Hot pursuit was a factor in arrests of the *M/V Saiga* and the *Volga*, though it was not central to the issues considered by ITLOS. More recently, ITLOS issued an advisory opinion in *Request for an Advisory Opinion by the Sub-Regional Fisheries Commission (SRFC)* (Case No 21, 2 April 2015). ITLOS affirmed its jurisdiction to provide advisory opinions and addressed questions relating to the obligations of flag states for IUU fishing. It is worth noting that the SRFC is subject to the *Convention on Sub-Regional Cooperation in the Exercise of Maritime Hot Pursuit*, signed 1 September 1993, that permits hot pursuit into territorial seas.

⁴¹ This is examined further in Chapter 6.

⁴² The IMO could potentially play a role in the development of enforcement measures (including hot pursuit) to address ongoing transnational crimes such as IUU fishing. The IMO has contributed to a framework to tackle piracy and armed robbery at sea by adopting measures that include capacity building, information sharing, training and national legislation. The *Djibouti Code of Conduct* and the *West and Central African Code of Conduct* are examples discussed earlier in this chapter and again in Chapter 6.

5.4 Evidence of Developing Customary International Law

While it is conceivable to re-formulate an aspect of UNCLOS,⁴³ this thesis focuses on state practice to determine how and to what extent hot pursuit has developed under customary international law. Although UNCLOS is regarded as a constitution for the oceans,⁴⁴ it has long been recognised that emerging state practice within customary international law goes hand in hand with the treaty.⁴⁵ Due to the breadth of the coverage by UNCLOS and the protracted periods of negotiation, any new or emerging rules developed after the Convention's entry into force have targeted gaps in the framework. Other post-UNCLOS developments have formed supplementary guidance. As a consequence, in spite of the 'constitutional' nature of UNCLOS, it does not cover the field.

The 1982 Convention and the Statute of the Tribunal are 'living instruments'. This means that they 'grow' and adapt to changing circumstances. An act/statute is always 'speaking'. The law of the sea is not static. It is dynamic and, therefore, through interpretation and construction of the relevant articles a court or tribunal can adhere and give positive effect to this dynamism. Since 1982, technology has advanced and therefore in my view judges must take a robust approach and apply the law in a legal but pragmatic way.⁴⁶

As a narrow subset of the law of the sea, hot pursuit in customary international law is evolving at a glacial pace. Differing views on fundamental issues of the law of the sea persist, not least in relation to boundary delimitation, but also in relation to preserving the freedoms of the high seas. Any tangible development must preserve the balance between coastal and flag state interests in the context of emerging maritime security challenges. There is evidence that a number of states regard the current scope of hot pursuit as inadequate, although the resurgence of hot pursuit demonstrates its continuing relevance as a maritime enforcement method. A number of states are working in novel ways to advancing the parameters of hot pursuit and better address shifting maritime threats. The current scope of hot pursuit (analysed in Part II) provides a historical perspective from which to assess contemporary use (examined in Part III). Effectual

⁴³ Articles 313–316 permit state parties to propose amendment to the Convention.

⁴⁴ Ambassador Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, referred to UNCLOS as 'a constitution for the oceans' in the final session on 11 December 1982 (*The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index: Final Act of the Third United Nations Conference on the Law of the Sea: Introductory Material on the Convention and the Conference* (Palgrave Macmillan, 1983), xxxiii). See also *Advisory Opinion (SRFC)*, above n 40, Separate Opinion of Judge Lucky, 9.

⁴⁵ Churchill and Lowe, above n 14, 24.

⁴⁶ *Advisory Opinion (SRFC)*, above n 40, Separate Opinion of Judge Lucky, 9.

rules of international customary law, including hot pursuit, have struggled to keep pace and develop in meaningful ways to address contemporary maritime security.⁴⁷

In order to address contemporary maritime security challenges, a number of states have developed innovative enforcement methods to work around the conventional limits of international law. Australia and the US for example, have joined with other states to conduct cooperative methods of enforcement, even though Article 111 is silent on the issue of multilateral pursuit. Multilateral hot pursuit is neither prohibited, explicitly permitted or even defined in UNCLOS. It is apparent from an examination of the negotiations that took place prior to codification⁴⁸ that the possibility of states combining resources to conduct law enforcement was not discussed. Given the status of technology at the time of drafting it is reasonable to surmise that states may not have foreseen multilateral hot pursuit.⁴⁹ The issue is similarly absent from international jurisprudence. Accordingly, in this chapter it is necessary to consider and evaluate state practice and *opinio juris* to determine the legal status of multilateral hot pursuit operations.

The *South Tomi* and the *Viarsa* are the most notable contemporary examples of multilateral hot pursuit due to the distance, length and combined nature of both pursuits.⁵⁰ In both cases, Australian authorities initiated pursuits after sighting fishing vessels in the vicinity of the EEZ of HIMI. In the case of the Togo-flagged *South Tomi*, the fishing vessel was directed to stop for boarding by the ACV the *Southern Supporter*. The crew of the *South Tomi* refused, stating that it was on the high seas and that any attempt to board would be considered an act of piracy and a distress call would be placed as a result.⁵¹ The *South Tomi* steamed in a westerly direction away from HIMI

⁴⁷ The Permanent Court of Arbitration commented that although ‘international law is not static’, the threshold for modification of a treaty provision requires the passage of time to establish beyond doubt the existence of both the right and general acquiescence other states. See *The South China Sea Arbitration (The Philippines v The People’s Republic of China)* (Award) PCA Case No 2013-19, ICGJ 495 (12 July 2016) 274–275.

⁴⁸ This is evaluated in Chapter 2. The focus of these negotiations was on naval warfare and the identification of general principles of international law of the sea. See also Constantine John Colombos, *The International Law of the Sea* (Longmans, Green and Co, 6th ed, 1967) 169–73.

⁴⁹ Although in the case of the *Itata*, a contingent of US, UK and German navies conducted a pursuit of the vessel. The issue was not taken up in subsequent proceedings. See, eg, Osgood Hardy ‘The *Itata* Incident’ 1922 5(2) *The Hispanic American Historic Review* 195.

⁵⁰ The *South Tomi* was detained on 12 April 2001 some 320 nautical miles south of Cape Town 14 days after it was first challenged by the *Southern Supporter*. A distance of 3,300 nautical miles was travelled from the point that it was first identified in the HIMI EEZ. The *Viarsa* was apprehended on 28 August 2003, 2,000 nautical miles south west of Capetown after a 21-day pursuit, having travelled 3,900 nautical miles from the HIMI EEZ after a challenge from *Southern Supporter*.

⁵¹ ABC, ‘The Toothfish Pirates’, *Four Corners*, 30 September 2002 (Tom Morris interviewed by Chris Masters) <<http://www.abc.net.au/4corners/stories/s689740.htm>>.

(and the west Australian coastline). Although it was unclear where the *South Tomi* was ultimately headed, best estimates suggested towards the Atlantic Ocean and possibly beyond that to her home port in Uruguay. The vessel tracked northwest from the HIMI, effectively south of the South African coastline. The *Southern Supporter*, lacking a boarding party, effectively unarmed and hampered by severe weather, was unable to effect an arrest without the assistance offered by South Africa. As the *South Tomi* edged closer towards the southernmost point of the African continent, the Australian government sought assistance from the government of South Africa who responded positively to the short-notice request. As a result, Australian Special Air Service Regiment (SASR) personnel⁵² and Australian Fisheries Management Authority (AFMA) officials flew from Perth to Johannesburg by commercial air and subsequently travelled to Simonstown Naval Base.⁵³ From Simonstown the *SAS (South African Ship) Galeshewe*⁵⁴ and *SAS Protea*⁵⁵, with Australian personnel on board, intercepted the *South Tomi* as she persisted in her efforts to evade the *Southern Supporter*. A boarding party—made up of an SASR troop (armed with standard personal weapons), AFMA representatives and approximately six SAN clearance divers (also armed)—deployed from *SAS Galeshewe* in SAN Rigid Hull Inflatable Boats (RHIBs). At the moment that this boarding party drew alongside the vessel, the *South Tomi*'s crew stopped the vessel and dropped ladders in response to a request from the boarding party. The *South Tomi* was apprehended on the high seas, approximately 2,000 nautical miles southwest of Cape Town.

The Uruguayan-flagged *Viarsa* was arrested in very similar circumstances with the support of the South African and UK governments. However, the arrest of the *Viarsa* was conducted by AFMA officials from the chartered commercial ocean-going tug *John Ross*. The request for assistance was made by Australia via its 'network' of Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)⁵⁶ signatories, ultimately resulting in positive responses from at least nine states.⁵⁷ Ultimately, South

⁵² The SASR personnel were armed with weapons brought from their unit in Perth, Western Australia.

⁵³ Simonstown is the home port of the South African Navy (SAN), located on the eastern Cape Peninsula approximately 40 kilometres from Capetown.

⁵⁴ *SAS Galashewe* was, at the time of the pursuit, one of three Warrior-class strike craft in the SAN.

⁵⁵ A survey ship with helicopter capabilities.

⁵⁶ CCAMLR was established in 1980 by the *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1320 UNTS 47 (entered into force 7 April 1982). Article XI requires that CCAMLR co-operate with the State Parties that exercise jurisdiction in marine areas adjacent to the CCAMLR area. In this case, Australia sought assistance from South Africa and the UK, see E J Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*' (2004) 19(1) *International Journal of Marine and Coastal Law* 19, 21.

⁵⁷ Offers of assistance were made by South Africa, the UK, the European Union, France, New Zealand,

Africa provided the South African Department of Environmental Affairs polar research vessel *SA Agulhas* and the salvage tug *John Ross*, while the UK provided the Department of Fisheries vessel *Dorada* from its base in the Falkland Islands. All of the vessels joined the ultimately successful and record-breaking pursuit of 21 days and 3,900 nautical miles. The *John Ross* effectively apprehended the *Viarsa*, deploying unarmed Fisheries Department personnel to effect an arrest. Although Article 111(5) dictates that, other than military vessels and aircraft, hot pursuit may only be exercised by clearly marked and identifiable authorised vessels and aircraft on government service, no objection was recorded in relation to the status of the *John Ross*.

In both of the above cases, the authorised Australian personnel conducting the arrests did not board from an Australian government vessel, but Australia explicitly invoked Article 111 as a legal basis for the pursuits. The *Southern Supporter* was largely present during both pursuits and attended at the point of arrest; however, the vessel did not actually effect an arrest in either case. The arrests were formally conducted by authorised Australian personnel (aboard South African RHIBs in the case of the *South Tomi*, and deployed from the South African commercial tug *John Ross* in the case of the *Viarsa*) in accordance with domestic legislation,⁵⁸ but neither of the fleeing vessels could have been apprehended without the assistance of third party states. The incidents brought global attention to IUU ‘pirate’ fishing and the employment of hot pursuit. The renewed operation of the doctrine garnered popular support and prompted fresh examination of enforcement methods. However, neither the *South Tomi* nor *Viarsa* arrests were subject to significant judicial analysis regarding the legality of conduct pursuant to hot pursuit under international law. The subsequent legal proceedings conducted in Western Australian courts focused on the prosecution of various members of the crew for illegal fishing⁵⁹ under domestic law and the automatic forfeiture provisions of the *Fisheries Management Act 1991* (Cth).

It is essential to recognise that the respective flag states of Togo and Uruguay did not make a formal protest to the multilateral nature of the hot pursuit arrest either by diplomatic or media channels, or via subsequent international organisational meetings.⁶⁰

Japan, India, Germany and the US. The assistance offered ranged from direct operational support to refusing market access to the cargo of the *Viarsa*.

⁵⁸ Fisheries Management Act 1991 (Cth).

⁵⁹ The crew of the *Viarsa* were found not guilty on 7 November 2005.

⁶⁰ Australia raised the issue of IUU fishing by the *South Tomi* at a meeting of a CCAMLR Committee in the period 22–26 October 2001. The crew were identified as including the Spanish master and a crew of various nationalities from both Contracting Parties and Non-Contracting Parties. The owner, reportedly a

In the matter of the *Volga*, litigation between Russia and Australia focused on the issue of prompt release rather than the execution of the hot pursuit.⁶¹ Russian authorities threatened further action on the pivotal issue of the hot pursuit, but ultimately this was not forthcoming.⁶² The failure of the Russian Federation, Togo and Uruguay (or any state) to formally challenge or object to aspects of these pursuits is evidence of an emerging acceptance of multilateral hot pursuit.⁶³ Recent customary international law has demonstrated that hot pursuit has been used in innovative ways to enforce coastal state law. In the absence of formal challenge, particularly without relevant jurisprudence, the development of hot pursuit as a contemporary enhanced tool that could be employed multilaterally finds substantiation in state practice. Before conclusive parameters of hot pursuit are settled, it is essential to evaluate academic commentary on the recent development of hot pursuit.

5.5 Commentary on Contemporary Hot Pursuit

Although hot pursuit has always been employed to target unlawful fishing, IUU fishing has more recently played a more significant role in the development of hot pursuit. The matters of the *The Ship 'North' v the King* and *Ernest and Prosper Everaert*⁶⁴ are early examples of fishing cases that contributed to the early development of hot pursuit in customary international law.⁶⁵ The significant changes since these cases have been in the scale of fishing operations, the multi-layered corporate veil and the entrenched role of flags of convenience.⁶⁶ As new methods to target IUU fishing and other maritime

Korean national residing in Spain, was believed to have taken citizenship in Togo after the apprehension of the *South Tomi*. See CCAMLR, 'Report of the Standing Committee on Observation and Inspection' (SCOI, 2001) paras 2.4, 2.5, 2.16–2.22 and 3.10.

⁶¹ Prompt release will not be discussed here. For detailed consideration of these issues see, eg, CCAMLR, *ibid*; Warwick Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgment of the International Tribunal for the Law of the Sea in the "Volga" Case (*Russian Federation v Australia*)' (2003) 31 *Federal Law Review* 395; Tim Stephens and Donald R Rothwell, 'Case Note: Law of the Sea—The "Volga" (*Russian Federation v Australia*) ITLOS No 11 (23 December 2002)' (2004) 35 *Journal of Maritime Law and Commerce* 283–291; Md. Saiful Karim, 'Conflict Over Protection of Marine Living Resources: The "Volga Case" Revisited' (2011) 3(1) *Goettingen Journal of International Law* 101.

⁶² The reasons for this remain unclear, however, Saiful Karim (*ibid*) considers a number of options.

⁶³ 'The existence of customary international law obligations between particular States is ultimately a question of opposability' (Churchill and Lowe, above n 14, 10).

⁶⁴ Annual Digest 1935–37, Case No 112 (*Tribunal correctional de Dunkerque*). Also see the analysis of the matters in Chapter 2.

⁶⁵ This is examined in Chapter 2.

⁶⁶ Overfishing not only depletes marine stocks, but also undermines food security and destabilises the livelihood of coastal communities: 'IUU fishing is a hidden activity that benefits from loopholes in the current systems that were designed to mitigate it. IUU operators are constantly adapting to changing enforcement and market initiatives and devising strategies that eventually diminish these initiatives' (Pew Environment Group, 'Port State Performance Project' (Report, 25 May 2010) <<http://www.portstateperformance.org>>).

security issues are discussed, coastal states look for effective enforcement tools that can overcome complex corporate operations. Even with advanced capabilities, well-resourced coastal states still struggle to address IUU fishing and other forms of criminal offences arising from adjacent maritime zones.⁶⁷ Developing nations with under-resourced maritime enforcement capabilities suffer even more detrimental effects as local artisanal fishing industries are decimated by large-scale commercial operations.⁶⁸

It is relevant to note that the scourge of IUU fishing in particular finds governments, environmentalists, NGOs, lobbyists and industry all on the same page.⁶⁹ There are overlapping themes between these disparate groups that result in the common aim of preventing or reducing IUU fishing. As a result, there is a conspicuous near-total absence of detractors of idea of enhanced or multilateral hot pursuit. Marissen,⁷⁰ for example, is essentially a lone voice in arguing that a third party state taking over a pursuit (even one that up until that point was properly executed) constitutes an interruption.⁷¹ In the absence of significant judicial comment regarding multilateral pursuit, both domestically and internationally, the assessment by academics and commentators must be considered next. Commentary of this nature can assist with the identification of new or emerging customary law.⁷² Recent academic commentary has linked hot pursuit as a potential method of enforcement to current and emerging maritime security challenges.⁷³ Walker distinguishes ‘multilateral hot pursuit’ from what should be termed ‘other expansive methods of hot pursuit’.⁷⁴ According to

⁶⁷ In spite of a large and well-resourced enforcement capability, the US has experienced difficulties enforcing drug trafficking laws off its coastline. This is examined in Chapter 7.

⁶⁸ Developing countries are considered to be most at risk from the effects of IUU fishing, not only in relation to loss of income, but also food security and nutrition: ‘Poverty and food insecurity in developing countries are often the result of economic and social marginalization and the use of sustainable employed by IUU fishing’ (Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture 2014: Opportunities and Challenges* (Report, 6 May 2014) 130).

⁶⁹ For environmental groups (and NGOs), marine resource protection and sustainability are key objectives, with fishing lobbyists or representatives also often relying on the latter goal to protect the longevity of the industry. For a discussion of collaboration by groups in the context of the Southern Ocean, see Henrik Österblom and Örjan Bodin, ‘Global Cooperation Between Diverse Organizations to Reduce Illegal Fishing in the Southern Ocean’ (2012) 26(4) *Society for Conservation Biology* 638.

⁷⁰ James Marissen, ‘Hot Pursuit or No Pursuit? The F.V. South Tomi Arrest in 2001’ (2002) 16 *Australian and New Zealand Maritime Law Journal* 66.

⁷¹ Marissen (ibid) states that the arrest of the *South Tomi* was unlawful. In particular, Marissen refers to the failure to initiate the pursuit from a relevant maritime zone as a breach of s 86 of the *Fisheries Management Act 1991* (Cth). The failure to initiate the pursuit from within the Australian Fisheries Zone equates with the EEZ in accordance with Art 111(2).

⁷² Ibid 13.

⁷³ For example, Craig H Allen, ‘Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices’ (1989) 20(4) *Ocean Development and International Law* 309; Randall Walker, ‘International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century’ (2011) 17 *Auckland University Law Review* 194.

⁷⁴ Walker, ibid, 213.

Walker, the former involves third party states while the latter exhibits the liberal or ‘functional’ interpretation that contemporary commentators favour. This approach to the interpretation of hot pursuit is evident from an examination of recent legal commentary. Walker, whose publication is most recent, argues that current state practice already reflects a modern and ‘enhanced’ hot pursuit.

Over 25 years ago, Allen advocated a ‘functional approach’ that facilitates enforcement while maintaining the balance between coastal states and navigating vessels.⁷⁵ A functional approach relies on adherence to established policy goals so that practicality reigns over procedural intricacies. The exercise of hot pursuit may thus encompass unconventional means (such as multilateral pursuit) so long as policy goals are addressed. In light of state practice, Allen signalled what would emerge as a trend several years after the time of writing, that enhanced hot pursuit is permissible under clear policy guidelines that do not jeopardise high seas freedoms.⁷⁶ In 1992, Reuland posited that the parameters of hot pursuit were uncertain in terms of expansive methods of hot pursuit, or at least beyond ‘the black letter’ law of UNCLOS.⁷⁷ Reuland concluded that the dearth of practical examples and jurisprudence impeded the development of hot pursuit.⁷⁸ Since that time, there has been increasing evidence of innovative state practice that goes beyond the conventional black letter statements of UNCLOS.

Although there was potential for the development of multilateral hot pursuit as early as the *Itata*,⁷⁹ Molenaar was the first to term the phrase ‘multilateral hot pursuit’ in 2004 after the *South Tomi* and *Viarsa* arrests.⁸⁰ Molenaar recognised the innovative nature of the Australian pursuits and opined that multilateral hot pursuit was not yet ‘an existing concept’.⁸¹ However, it has been 12 years since the publication of the article and state cooperation has continued to increase.⁸² Molenaar also stated that, in spite of the

⁷⁵ Allen, above n 73, 321.

⁷⁶ Ibid 325.

⁷⁷ For example, whether a pursuit that terminates upon entry to a third state’s territorial sea may be resumed once outside the territorial sea. See Robert C Reuland, ‘The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention’ (1993) 33 *Virginia Journal of International Law* 557.

⁷⁸ Reuland suggested resolutions that may address ambiguities in the law based on state practice, commentary and ‘common sense’ (ibid, 588). These are appraised in Chapter 4.

⁷⁹ Hardy, above n 49.

⁸⁰ Molenaar, above n 56.

⁸¹ Molenaar, above n 56, 32.

⁸² For example, on 24 September 2014, pursuant to Frontex, a cooperative pursuit between the French navy and Spanish Guardia Civil apprehended a UK-flagged yacht carrying hashish on the high seas (Frontex, ‘Frontex Deployed Assets Involved in the Interception of a Drug Boat in the Alboran Sea’, 30 September 2014 <<http://frontex.europa.eu/news/frontex-deployed-assets-involved-in-the-interception-of->

multilateral nature of operations, he considered the *South Tomi* and *Viarsa* pursuits to have been validly executed under Article 111. Gullett and Schofield were also persuaded by the validity of these pursuits, provided that the formal requirements of hot pursuit were met and that the coastal state maintained involvement with the pursuit.⁸³

Similar to Allen, Rayfuse defers to the fundamental nature of high seas freedoms and argues that any development of customary international law, particularly one that opens the door to non-flag state enforcement on the high seas, must be evaluated in light of state practice and jurisprudence.⁸⁴ Rayfuse further states that the needs and desires of the international community are a determining factor in the formation of any exception to high seas freedoms.⁸⁵ She argues that, in relation to RFMOs, there is an expectation for the flag state to grant consent to non-flag interdiction within the respective regional jurisdiction.⁸⁶ Of course, under international law the flag state retains primacy of jurisdiction over its registered vessels and this policy expectation does not equate to a legal obligation. Rayfuse points out that the general obligation of RFMO parties to permit boarding is increasing.⁸⁷ This expectation exists on a spectrum between policy and law—considerable pressure is exerted to consent to boardings within the RFMO framework, but by law flag states may refuse.⁸⁸ Bilateral agreements are also influenced

a-drug-boat-in-the-alboran-sea-1ax4We>). See, also the development of a second treaty between Australia and France: *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Island*, [2011] ATS 1 (entered into force 8 January 2007) ('*Cooperative Enforcement Treaty*') and the *Niue Treaty Agreement* in 2012.

⁸³ Warwick Gullett and Clive Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22(4) *International Journal of Marine and Coastal Law* 545, 569.

⁸⁴ Rosemary Rayfuse, 'Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-Flag State Enforcement in the High Seas Fisheries and Disarmament Contexts' (2005) 24 *Australian Yearbook of International Law* 181, 200.

⁸⁵ Even with widespread state support, interference on the high seas must be carefully considered: 'While exceptions to the general rule of flag state enforcement on the high seas may arise as a result of the development of customary international law, acceptance of a new rule allowing for non-flag state enforcement in particular cases should be carefully weighed against the needs and desires of the international community and the underlying notion of legitimacy in international law' (ibid 182).

⁸⁶ Ibid 188.

⁸⁷ Rayfuse, above n 84, 195. This is particularly true in relation to the Proliferation Security Initiative. See, eg, Klein above n 25, 193–208; Rob McLaughlin, "'Terrorism" as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2001' (2011) 14 *Yearbook of International Humanitarian Law* 391; Mark J Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (Adelphi Papers Series No 376, International Institute for Strategic Studies, 2005).

⁸⁸ There are other RFMO agreements such as the *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean* (entered into force 18 February 2013) that explicitly permit non-flag state parties to conduct boarding, inspection and seizure in response to violations within the relevant Convention area. In addition to Rayfuse's article, above n 84, there is further discussion in her book *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004). See also Walker, above n 73; David Garfield Wilson, 'Interdiction on the High Seas: The Role and Authority of the Master in the Boarding and Searching of his Ship by Foreign Warships' (2008) 55 *Naval Law Review* 157.

by policy⁸⁹ and, more specifically, diplomatic, economic and political factors may shape hot pursuit provisions. For example, a number of bilateral agreements contain non-reciprocal pursuit provisions that give effect to policy considerations.⁹⁰ Additionally, there is evidence of state practice of contemporary hot pursuit that has authorised non-flag state interdiction not just on the high seas, but also within coastal state zones.⁹¹ This suggests that states are increasingly implementing hot pursuit in new ways to better enforce domestic law. As Rayfuse points out, a range of agreements subsequent to UNCLOS promote state cooperation beyond areas of national jurisdiction⁹² and this supports the burgeoning state practice of cooperative enforcement. As the trend towards agreements that permit non-flag state interdiction on the high seas⁹³ remains linked to sound policy reasons, it would appear that flag state primacy will continue to prevail as a fundamental principle in this area of law.

While there is an increased motivation for non-flag state interdiction in circumstances where a flag state is unwilling or unable to undertake its flag state responsibilities, in Rayfuse's RFMO scenario (and indeed in any high seas scenario), the flag state retains primacy over its registered vessels. The recently negotiated *Voluntary Guidelines for Flag State Performance*⁹⁴ compels state parties to take all practicable steps to manage registered vessels including (but not limited to) effective operation of enforcement jurisdiction. Preserving the balance between coastal state interests and flag state freedoms is crucial to the effective contemporary application of hot pursuit when addressing maritime security challenges. The trend towards facilitating flag state responsibility has a direct correlation to the operation of hot pursuit and the arrest of the *Viarsa* is a prime example. The Uruguayan and Australian governments conducted

⁸⁹ Suzette A Haughton, 'Bilateral Diplomacy: Rethinking the Jamaica-US Shiprider Agreements' (2008) 3(3) *The Hague Journal of Diplomacy* 253. See also Anthony Maingot, *The United States and the Caribbean: Challenges of an Asymmetric Relationship* (Westview Press, 1994); Ivelaw Griffith, *Drugs and Security in the Caribbean: Sovereignty Under Siege* (Penn State University Press, 1997).

⁹⁰ Bilateral agreements that incorporate hot pursuit provisions will be examined further in Chapters 6 and, in the context of the US, Chapter 7. An example of non-reciprocal pursuit provisions can be found in the *Agreement relating to the continuance of United States military rights in the Bahamas as well as existing maritime practices*, Exchange of notes at Nassau July 10 and 20, 1973, entered into force July 20, 1973; effective July 10, 1973, 24 UST 1783, TIAS 7688.

⁹¹ This is evaluated in Chapter 7.

⁹² Rayfuse, above n 84, 58. For example, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988 to 28 February 1989, 28 ILM 493 (entered into force 11 November 1990) art 17; *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001) (the 'FSA') art 20.

⁹³ To a lesser extent within coastal zones.

⁹⁴ Fisheries and Aquaculture Department, *Voluntary Guidelines for Flag State Performance* (Food and Agriculture Organization of the United Nations, 8 February 2013).

negotiations in Canberra and concurrently maintained communications with the crews of their respective vessels underway in the Southern Ocean.⁹⁵ During the pursuit, the *Viarsa* crew made a doubtful claim to the crew of the *Southern Supporter* that Uruguay had ordered its continued evasion⁹⁶ and it was later revealed that the crew had in fact been expecting assistance from the Uruguayan Navy.⁹⁷ Without confirmation of the claim, the only options available to *Southern Supporter* were to continue or cease the pursuit. Whatever the nature of the diplomatic-in-confidence negotiations that followed, the *Viarsa* case demonstrated that vessels may have direct and genuine links to the applicable flag state and that effective flag state control has the potential to successfully end hot pursuits.⁹⁸ Further, greater attention to flag state compliance may reveal flag state condonation or direct support of IUU fishing or other violations of coastal state law.⁹⁹ Greater awareness of flag state responsibilities and ongoing reinforcement of the balance between flag and coastal states are important underlying themes that have been broadly contemplated by commentators in relation to IUU fishing.¹⁰⁰ As discussed in Part II, these themes are also vital to consider when evaluating the contemporary development of hot pursuit.

In 1999, Churchill and Lowe accurately predicted that a flexible interpretation of hot pursuit was desirable, but also inevitable.¹⁰¹ Walker and Warner rightly point out that any legally ambiguous enforcement action that explicitly goes beyond the conventional wisdom of UNCLOS, such as pursuit into the territorial waters of a third state, could be subject to challenge.¹⁰² Nonetheless, recent publications appear to support wider application of hot pursuit and a willingness¹⁰³ to adapt to modern circumstances. This willingness is not limited to adaptation to technological advances, but also includes

⁹⁵ Australian Government, Department of the Environment and Energy, Australian Antarctic Division, 'Poachers Pursued Over 7,000 Kilometres', *Australian Antarctic Magazine*, Autumn 2004 (6) <<http://www.antarctica.gov.au/magazine/2001-2005/issue-6-autumn-2004/feature/poachers-pursued-over-7-000-kilometers>>.

⁹⁶ G Bruce Knecht, *Hooked: A True Story of Pirates, Poaching and the Perfect Fish* (Allen & Unwin, 2006) 140.

⁹⁷ It was reported that that at least one crew member believed a Uruguayan Navy vessel was deploying to 750 nautical miles from the Uruguayan coastline (ibid 144). See also Clinton Porteous, 'Diplomatic Row Erupts Over Renegade Trawler', *ABC News* (online), 28 August 2003 <<http://www.abc.net.au/news/2003-08-29/diplomatic-row-erupts-over-renegade-trawler/1471104>>.

⁹⁸ In terms of safely intercepting the vessel to arrest and escort her to a port of the coastal state.

⁹⁹ In accordance with CCAMLR regulations, a Fisheries Observer was on board the *Viarsa*. See Knecht, above n 96, 166.

¹⁰⁰ Such as Rayfuse, above n 84.

¹⁰¹ Churchill and Lowe, above n 14, 216.

¹⁰² Walker, above n 73, 215; Robin Warner, 'Australia's Maritime Challenges and Priorities: Recent Developments and Future Prospects' in J Ho and S Bateman (eds), *Maritime Challenges and Priorities in Asia: Implications for Regional Security* (Routledge, 2012) 12.

¹⁰³ Churchill and Lowe, above n 14, 216.

increased multilateral enforcement activities. Both Warner¹⁰⁴ and Klein¹⁰⁵ identify the range of emerging maritime security challenges such as climate change, terrorist acts and resource protection that have added pressure to coastal states enforcement capability. Warner uses the Australia–France arrangements as an example¹⁰⁶ of regional cooperative enforcement that has resulted in the successful deterrence of IUU fishing in vicinity of the HIMI EEZ.¹⁰⁷

Putting aside the obvious practical advantages of enhanced hot pursuit operations to address IUU fishing, it is necessary to determine whether the commentary does in fact identify that hot pursuit has evolved to address contemporary challenges. The employment of multilateral hot pursuit is one method that has developed in response to IUU fishing. Many commentators, such as Allen and Churchill and Lowe,¹⁰⁸ recognise the need for the flexible interpretation of hot pursuit. However, there is some disagreement as to whether existing international law already permits multilateral hot pursuit or if hot pursuit has more recently evolved to encompass multilateral hot pursuit. Molenaar¹⁰⁹ and Baird¹¹⁰ conclude that the multilateral pursuits of *South Tomi* and the *Viarsa* were permitted within the conventional parameters of Article 111, whereas Walker¹¹¹ and Klein¹¹² suggest that a more flexible interpretation is currently at work. Moreover, Klein argues that the parameters of hot pursuit have already undergone a small shift that promotes maritime security while maintaining exclusive state authority.¹¹³ Walker's most recent analysis of hot pursuit in the twenty-first century posited that only a liberal interpretation of hot pursuit will ensure its continued efficacy, particularly in light of technological advancements.¹¹⁴ The commentators favour a view that hot pursuit in its entirety has in fact developed in response to contemporary maritime challenges and that, in the context of the current legal framework, hot pursuit

¹⁰⁴ Warner, 'Australia's Maritime Challenges and Priorities', above n 102, 21.

¹⁰⁵ Klein, above n 25, 23.

¹⁰⁶ Warner, 'Australia's Maritime Challenges and Priorities', above n 102, 10–12. This example of a cooperative regime that formally authorises innovative uses of hot pursuit is analysed in Chapter 7.

¹⁰⁷ *Ibid* 12.

¹⁰⁸ Allen, above n 73, 325; Churchill and Lowe; above n 14, 216.

¹⁰⁹ Molenaar, above n 56, 40.

¹¹⁰ Although Baird considers that the *Viarsa* and *South Tomi* pursuits were permitted by Article 111, she advocates the application of a more flexible approach in relation to communication of Article 111(4) signals. See Rachel Baird, 'Arrests in a Cold Climate (Part 2)—Shaping Hot Pursuit Through State Practice' in Rachel Baird and Denzil Miller (eds), *Antarctic and Southern Ocean Law and Policy Occasional Papers No 13, Special Edition: In Acknowledgement of Dr Denzil Miller* (Law School, University of Tasmania, 2009) 16.

¹¹¹ Walker, above n 73, 217.

¹¹² Klein, above n 25, 113.

¹¹³ *Ibid* 114.

¹¹⁴ Walker, above n 73, 194.

is being used in a manner that does not offend Article 111—including the practice of multilateral hot pursuit.¹¹⁵ A more flexible and cooperative application to contemporary circumstances to protect coastal state interests need not undermine the framework of high seas freedoms. As a limited exception, the commentary suggests that, in spite of these legal and policy developments, the balance between coastal state interests and flag state transit rights will be preserved. If that is the case, the development of hot pursuit is a positive step, particularly when tackling the legal uncertainties surrounding the contemporary scope of maritime law enforcement. Evidently, there is support for a more practical application of hot pursuit in the post-UNCLOS era, reflecting the view that conventional methods can be inadequate. The following section examines multilateral hot pursuit as an unconventional method of maritime enforcement in more detail.

5.6 Multilateral Hot Pursuit

Although the phrase ‘multilateral hot pursuit’ now forms a part of common parlance in the law of the sea, its limitations are not well defined.¹¹⁶ It is essential at the outset to properly class the conduct of a third party state, because there must be a legal basis to exercise arrest of a fleeing non-flag vessel. In its widely understood meaning, ‘assistance’ by a third state may be as minimal as basic diplomatic confirmation of information relating to citizenship and multilateral hot pursuit must constitute more than this.¹¹⁷ This thesis is concerned with the actions of a third state that may constitute a substantial connection with or contribution to a hot pursuit operation.¹¹⁸ This may indeed contemplate relay, but recent events have shown that multilateral hot pursuit goes well beyond this single issue.¹¹⁹ Both the *South Tomi* and the *Viarsa* were only arrested as a consequence of third state participation; the latter was in fact boarded by a South African private security team before Australian officials came aboard. As previously discussed, the *South Tomi* was formally arrested by the Australian personnel

¹¹⁵ See, eg, Walker, above n 73, 214; Molenaar, above n 56, 40; Baird, above n 110, 15.

¹¹⁶ Molenaar’s, above n 56, article is the first and most-quoted commentary on the emerging concept of multilateral hot pursuit.

¹¹⁷ Stuart B Kaye classes cooperation in maritime enforcement into three general categories: data exchange and observers, boarding and referral to the flag state, and boarding and arrest by a third state (‘Enforcement Cooperation in Combating Illegal and Unauthorized Fishing: An Assessment of Contemporary Practice’ (2014) 32(2) *Berkeley Journal of International Law* 316, 317).

¹¹⁸ Poulantzas above n 20, 225, ‘interception, in a general sense, means to meet, make contact, or interrupt the course of a moving vessel, aircraft, etc.’ and ‘merely spotting the foreign vessels or making contact with it without, however, ordering it to stop, or pursuing it’ as was suggested by Article 23(5b) of the Convention on the High Seas as a result of ILC agreement to permit relay.

¹¹⁹ Relay is examined in Chapter 4.

of an armed, mixed-nationality boarding party that deployed from a SAN vessel. Neither incident drew specific criticism on this point and the pursuing Australian vessel was largely present for the duration of both pursuits and at the point of arrest. Regardless, it was these particular examples of hot pursuits that first gave rise to the term ‘multilateral pursuits’. Putting aside the issue of authorised aircraft conducting hot pursuit, the following section will consider whether the transfer of pursuit from one state’s authorised vessel to another state’s authorised vessel is lawful in accordance with the doctrine of hot pursuit. Conversely, it is pertinent to consider thereafter whether such a transfer constitutes a break in or interruption to a hot pursuit.

At first glance, the language of the phrase ‘multilateral hot pursuit’ may immediately invoke reservations that it operates outside the Article 111 of UNCLOS provisions. The most well-known proponent of multilateral pursuit, Molenaar, defined the concept as one that inherently requires compliance with Article 111. In particular, he states that:

Multilateral hot pursuit can be defined as a multilateral exercise of a coastal State right that involves pursuing vessels, aircraft or officials with different nationalities, that is authorized by the relevant coastal State where necessary and is consistent with the main substantive and procedural conditions in Article 111 of the LOS Convention.¹²⁰

The cogency of an expanded concept of multilateral pursuit is strengthened, it is argued, as long as it reflects the core principles of Article 111:

Provided the pursuit is carried out in accordance with the procedural requirements of Article 111 and the enforcement craft of the coastal State whose laws or regulations were breached remains part of the pursuit, it is arguable that there is no policy reason why these multinational or cooperative hot pursuits should be unlawful.¹²¹

In 2007, Gullett and Schofield characterised Molenaar’s analysis of multilateral hot pursuit as ‘persuasive, although untested’, although since that time the element has continued to emerge as a principle of customary international law.¹²² A number of other commentators characterise multilateral hot pursuit as being consistent with the aims of Article 111. As a result, multilateral hot pursuit has garnered more support as a legitimate enforcement tool for coastal state enforcement.¹²³ Multilateral hot pursuit has

¹²⁰ Ibid 41.

¹²¹ Walker, above n 73, 214.

¹²² Gullett and Schofield, above n 83, 569.

¹²³ For example Walker, above n 73, 217; Molenaar, above n 56, 40; Klein, above n 25, 113; Baird, above n 110, 16.

since been modelled in Africa to address piracy,¹²⁴ in the Pacific to address IUU fishing¹²⁵ and in Europe and the US to address transnational crimes.¹²⁶ That being said, the provisions lack detail on the manner that multilateral hot pursuit may be operated and as a result the law is somewhat uncertain.

Although the issue of relay was discussed in some detail during the negotiations that led to the codification of hot pursuit,¹²⁷ the issue of transfer of pursuit to a third state was not a point of discussion. The opening statement of Article 111 specifies that ‘[t]he hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State’. An examination of the negotiations strongly suggests that it was not at all under consideration at the time of drafting and Article 111 therefore does not explicitly exclude the transfer of hot pursuit to a third party state.¹²⁸ That being said, the authorisation in Article 111(5)—‘[t]he 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’—does not restrict the right of pursuit to the authorised vessels of the coastal state alone.

Not only has the issue of third party state involvement not been formally considered, no flag state objection has been recorded.¹²⁹ Neither of the flag states of the *South Tomi* or the *Viarsa* raised the issue. Hypothetically, an objection by the flag state would likely claim that an arrest by a third party state constitutes a violation of the freedom of navigation (assuming the other conditions of hot pursuit are met).¹³⁰ That being said, if sovereignty is at the heart of the authority for the power, then it follows that the coastal state may consent to a third party state exercising a law enforcement power on its

¹²⁴ See, eg, the *Djibouti Code of Conduct*; the *West and Central African Code of Conduct*.

¹²⁵ See, eg, the *Niue Treaty Agreement*.

¹²⁶ Frontex was discussed previously in Chapter 5 and analysis of US bilateral agreements is included the case studies in Chapter 7.

¹²⁷ It was specifically adopted by 10 votes to 4 abstentions during the 345th meeting, *Yearbook of the International Law Commission, 1956*, vol 1. The development of relay is examined in Chapter 2 and was upheld in the matter of *I'm Alone* (analysed in Chapter 4), see ‘S. S. “I’m Alone” (Canada, United States) in Reports of International Arbitral Awards (30 June 1933 and 5 January 1935) vol 3, 1609 <http://legal.un.org/riaa/cases/vol_III/1609-1618.pdf>.

¹²⁸ Report of the International Law Commission, *Yearbook of the International Law Commission, 1956*, vol II, 6, 40 and 82.

¹²⁹ The pursuits were examined during the Standing Committee on Implementation and Compliance CCAMLR proceedings of 27–31 October 2003. Pursuant to Article XXII, Australia presented evidence of IUU fishing by the *Viarsa* and other Uruguayan-flagged vessels. While Uruguay reiterated its respect for CCAMLR and for international law, para 2.2.9 states that ‘Most Members were not convinced by the arguments offered by Uruguay’. See generally Molenaar, above n 56.

¹³⁰ One of the defence counsel in the Western Australian criminal proceedings against the crew of the *Viarsa* suggested that the vessel was intercepted by South African ‘mercenaries’ and later formally arrested by Australian government officials. See Knecht, above n 96, 211.

behalf. Just as a state may consent to the presence of military forces in its territory to conduct peacekeeping or enforcement operations, a state can conceivably request assistance for law enforcement purposes. In the case of the *South Tomi* and the *Viarsa*, the Australian government requested assistance from several states with government assets in the isolated and challenging maritime environment of the Southern Ocean.¹³¹ Although hot pursuit is obviously quite distinct from the use of force in self-defence, Article 51 of the UN Charter is a prime example of a prerogative that permits the exercise of sovereign power (albeit for self-defence) by a ‘collective’ or body other than the claimant state.¹³² Moreover, there is nothing in international law that prohibits a coastal state permitting entry by warships either by ad hoc means or pre-arranged agreement. Where the warship adheres to the conditions of entry, namely transit without engaging in a prejudicial activity, it certainly does not constitute the type of conduct that threatens the peace, good order or security of the coastal state. In practice, of course, hot pursuit is a law enforcement activity that is just as likely to be engaged in by coastguard, fisheries or customs as it is by naval assets. It is reasonable to infer then that counterpart officials may conduct maritime law enforcement on behalf of another state.

Recent state practice has demonstrated that transfer to a third state is sufficiently accepted as being a part of customary international law. The practice does not offend the provisions of Article 111 and constitutes a practical application of the law on hot pursuit. Transfer to a third state is permitted by bilateral or multilateral agreements. Alternatively, it may occur in an ad hoc arrangement, as was the case in *Viarsa*. The *Viarsa* goes one step further than interim carriage of a pursuit; the case demonstrates that the physical act of boarding may be conducted by other third state officials. Provided that the conditions for hot pursuit are met, such as location and manner of offence, it is entirely feasible that an authorised coastal state vessel may transfer the pursuit not only to other coastal state authorised vessels, but to an authorised vessel of a third party state. As transfer has been central to the acceptance of multilateral hot pursuit, much of the commentary discussed in Chapter 5 can be drawn upon to demonstrate the broad support of scholars. Particular proponents include Molenaar, Walker, Baird and Klein. By engaging in criminal behaviour within a coastal state’s maritime zones and fleeing authorities, it would be difficult, though technically feasible, for the flag state to justify recourse to high seas freedoms without consequence. Having

¹³¹ Australia eventually received offers of assistance from South Africa, the UK, the US and France. See Commonwealth of Australia, Australian Customs Service (Cth), *Annual Report 2003–04*, 11.

¹³² *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

failed to stop in response to an appropriate signalled request, the vessel is on notice that it is suspected of a criminal offence committed in the coastal state's jurisdiction.¹³³ The vessel's interaction with or by an interested third state should not differ so greatly as to warrant a claim to a complete freedom. After all, the fleeing vessel has recourse to compensation pursuant to Article 111(8) should interaction with the coastal state or third party state be unwarranted or ultimately illegal and result in loss or damage. Although the response to the Australian examples of multilateral hot pursuit has largely been positive, opposing views cannot be ruled out and will be examined alongside the issue of whether a transfer constitutes an interruption to pursuit.

5.6.1 Challenges to the Development of Multilateral Hot Pursuit

In spite of a number of successful arrests as a result of hot pursuits, the judicial treatment of the doctrine has been very limited. In fact, it is accurate to say that the role of third party states in multilateral hot pursuits has not been considered in jurisprudence. What is most remarkable in the matter of expanded hot pursuit is the absence of formal opposition by the relevant flag states, or indeed any other states.¹³⁴ For example, the flag states of vessels subject to the new wave of multilateral hot pursuits, namely Togo, Uruguay and Russia,¹³⁵ remained relatively acquiescent in the face of what amounts to an obvious legal challenge.¹³⁶ The ICJ considered the standard of acquiescence in the *Fisheries (UK v Norway)* case, indicating that general tolerance, aided by the passage of time, constitutes an historical consolidation that is enforceable against other states.¹³⁷ However, the case was concerned with historical rights and the status of acquiescence is less clear in relation to the development of other customary laws. In the case of hot pursuit, flag states, for whatever reason, have discounted the opportunity to argue that

¹³³ The *Viarsa* captain, Ricardo Cabrera, refused to stop the vessel, claiming that the flag State Uruguay had placed him under arrest and had ordered him to return to his home port. Knecht, above n 96, 140.

¹³⁴ See, eg, I C MacGibbon, 'Customary International Law and Acquiescence' 33 *British Yearbook of International Law* 115 (1957).

¹³⁵ See Henrick Österblom et al, 'Adapting to Regional Enforcement: Fishing Down the Governance Index' (2010) 5(9) *PLoS ONE* 6. Evidence gathered by the group suggested that IUU fishing vessel operators tend to favour the registries of stable flag states with limited governance capacity. The analysis refers to the Russian IUU fishing fleet of the *Lena* and the *Volga* and other vessels operating in the Southern Ocean and also as a preferred registry for IUU fishing vessel operators.

¹³⁶ The Russian Federation did initially argue during proceedings at ITLOS that the rights of navigation of its vessel on the high seas had been violated in the absence of a properly exercised right of hot pursuit, but the point was ultimately not pursued. In fact, the Russian Federation explicitly stated that it did not seek a finding or declaration on the issue of hot pursuit. The Tribunal additionally declared at para 83 of the judgment that the circumstances of the seizure as described by the applicant were not relevant to the proceedings for prompt release under Article 292 of the Convention. Either way, the divergent views concerned the initiating location of the pursuit and were not at all concerned with multilateral assistance. See *Volga (Russian Federation v Australia)* (Prompt Release) (2003) 42 ILM 159, 9.

¹³⁷ *Fisheries (United Kingdom v Norway)* [1951] ICJ Reports 116, 138.

third party state involvement infringed a flag vessel's freedom of the high seas. This is either a patent omission or a reflection of what may be considered a deliberate decision.¹³⁸ As evidence of state practice, the failure or refusal to challenge is significant in terms of giving support to the emerging concept of multilateral pursuit. While the passage of time does not equate with the issues under consideration by the ICJ in *Fisheries*, it is over 10 years since the notable hot pursuits took place. In this time, no state has consistently opposed multilateral hot pursuit.

Those commentators who oppose the concept of multilateral pursuit, and there are very few that explicitly do,¹³⁹ seek to rely on the fundamental premises of high seas freedoms. It is patent that as an exception to the freedom of the high seas, albeit a narrow and limited one, the conditions set out in Article 111 must be observed. Additionally, as outlined in *M/V 'Saiga'*, these conditions are cumulative. On one hand, it has been said that 'under these circumstances, multilateral hot pursuit does not erode the freedom of the high seas and leaves [the UNCLOS] jurisdictional balance unaffected'.¹⁴⁰ Some commentators are content to question or discuss the validity of the *South Tomi* and *Viarsa* pursuits as evidence of multilateral hot pursuit¹⁴¹ while others are explicit in their recognition of the emerged right, stating, for example, that they 'were not at variance with Article 111 of LOSC'.¹⁴² In the *Viarsa* matter, the courts focused efforts on legislative compliance and the criminal liability of the respective crews under the applicable federal *Fisheries Management Act 1991* (Cth).¹⁴³

The persistent theme among commentators has been that as long as the fundamental conditions of Article 111 are met, such as the provision of an appropriate warning and continuity of pursuit, multilateral hot pursuit ought to be considered evidence of

¹³⁸ Recent commentary has advocated for 'tacit acceptance' of emerging norms, 'so long as the privileged place of the persistent objector is recognized'. See David Bederman, 'Acquiescence, Objection and the Death of Customary International Law' (2010) 21 *Duke Journal of Comparative and International Law* 31.

¹³⁹ See, eg, Marissen, above n 70. Other commentators have pointed out the grounds on which challenges by flag states may occur, but overall, commentary has been favourable towards multilateral hot pursuit. See, eg, Reuland above n 77.

¹⁴⁰ Molenaar, above n 56, 32; Marissen, above n 70, 78 considers multilateral hot pursuit as it occurred in the pursuit of the *South Tomi* as unlawful.

¹⁴¹ Marissen, above n 70, 78; Gullet and Schofield, above n 83, 574; Robin Warner, 'Joining Forces to Combat Crime in the Maritime Domain: Cooperative Maritime Surveillance and Enforcement in the South Pacific Region' (2008) 8 *New Zealand Armed Forces Law Review* 1, 8.

¹⁴² Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 165. See also Baird, above n 110, 15; Walker, above n 73, 215.

¹⁴³ The relevant legislation has been substantially amended since the execution of the new wave of hot pursuits and is examined in Chapter 7.

consistent practice.¹⁴⁴ However, at the other end of the spectrum, one commentator considered the involvement of the SAN vessels as constituting an interruption for the purposes of the domestic legislation and an unwarranted interference with a fishing vessel on the high seas. Marissen stated,

[T]he actions of the South African naval vessels, such vessels being the sovereign territory of the Republic of South Africa, in approaching the *South Tomi* at speed and taking up station alongside her 100 meters off can be construed as an implied threat of the use of force by the Republic of South Africa ... Furthermore, although a pursuit can be maintained by combinations of ships and aircraft in relay under international law, the Republic of South Africa had no right under international law to take over the pursuit of the *South Tomi* on behalf of the Commonwealth of Australia because the *South Tomi* had not breached any South African laws and [she] was located in international waters.¹⁴⁵

Under Australian law, the exercise of law enforcement powers by naval assets has long been settled, and ‘[t]here is no constitutional reason why an officer of the naval forces should not assist in the enforcement of a law of the Commonwealth such as the *Fisheries Act*’.¹⁴⁶ The serious allegations outlined above not only claim that third party state involvement constitutes the exercise of military force rather than law enforcement, but also unambiguously rules out the existence of a concept of multilateral hot pursuit. While some commentators have certainly expressed reservations about an expansive hot pursuit that, for example, permits continuation of pursuit into third state territorial waters,¹⁴⁷ Marissen’s views constitute the most restrictive interpretation of the doctrine.

At the time that the new wave of hot pursuits gave rise to the term ‘multilateral hot pursuit’ the parameters were unclear. The involvement of third states, while a consequence of extreme environmental and logistical challenges, has demonstrated an innovative use of almost an outdated enforcement tool. Some reservations were to be expected. The commentary that is in support of enhanced hot pursuit tends to categorise the recent development in the application of hot pursuit as relatively minor adjustments

¹⁴⁴ For example, Walker, above n 73, 217; Molenaar, above n 56, 40; Klein, above n 25, 113; Baird, above n 110, 16.

¹⁴⁵ Marissen, above n 70, 78.

¹⁴⁶ *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 195. The role of the Royal Australian Navy (RAN) in Australian maritime law enforcement is discussed further in Chapter 7.

¹⁴⁷ See, eg, Gullett and Schofield, above n 83, 573.

to the overall hot pursuit framework and therefore permissible.¹⁴⁸ After all, the gamut of high seas freedoms is not, by any stretch, absolute and inviolable.

Regardless of the nature of recent developments, it is now clear that there are minimal (if any) objections to multilateral hot pursuit in the commentary or institutional frameworks. While a number of challenges arising from the contemporary hot pursuit have been examined in this chapter, the recognition of multilateral hot pursuit has been a positive development arising from contemporary practice. In the diplomatic and prosecutorial aftermath of *South Tomi*, *Viarsa* and *Volga*, the multilateral nature of the pursuits was effectively not an issue of contention.¹⁴⁹ While not contemplated in treaty—nor explicitly rejected in *travaux préparatoires*—as long as the fundamental elements of hot pursuit are adhered to multilateral hot pursuit is consistent with the aims of UNCLOS and customary international law.

It is important to note that the development of hot pursuit has not been limited to cooperative enforcement; there are other emerging characteristics that may expand upon the practice of hot pursuit in addition to multilateral operations. Further, there are also other alternative approaches that can support the coastal state to better achieve enforcement aims within the maritime domain and these are examined in Chapter 6. The issue of emerging elements is examined next as part of the exploration of the contemporary development of hot pursuit.

5.7 Other Emerging Elements of Hot Pursuit

5.7.1 Pursuit into the Territorial Sea of a Third State

Coastal states enjoy sovereign rights over the territorial sea¹⁵⁰ while vessels transiting through the zone must do so in accordance with the innocent passage regime.¹⁵¹ On the face of it, entry to the territorial waters of a third state appears to terminate a hot pursuit, rendering the pursued vessel safe from interdiction by coastal state officials. The ‘constitutional’ source of hot pursuit could hardly be clearer in its treatment of the issue in Article 111(3): ‘[t]he right of hot pursuit ceases as soon as the ship pursued enters the

¹⁴⁸ Klein has stated that that ‘small shifts in interpretation do not jeopardize the overall framework, nor the rather precise requirements, for the right of hot pursuit and therefore should be acceptable’ (above n 25, 113).

¹⁴⁹ As well as in the regional framework of CCAMLR.

¹⁵⁰ *Djibouti Code of Conduct* art 4(5) explicitly confirms the limitation of entry to the territorial sea when exercising hot pursuit and this is similarly stated in the *West and Central African Code of Conduct* art 7(1).

¹⁵¹ UNCLOS art 45.

territorial sea of its own State or of a third State'. Article 111(3) is a plain elucidation of one of the essential elements of hot pursuit and there is little room for alternative interpretations. The not insignificant foundation of the continuity of pursuit reinforces the incontrovertible link to coastal state jurisdiction—for without that jurisdictional link, there is no justification for invoking an exception to high sea freedoms.¹⁵²

To continue a pursuit into the territorial sea without consent is to violate the sovereignty of the third state. Accordingly, any suggestion that entry by suspect vessel into the territorial sea of a third state may be permissible is a contentious aspect of contemporary enhanced hot pursuit.¹⁵³ While this aspect of hot pursuit is frequently included in bilateral and multilateral arrangements, these agreements only create obligations between the state parties. A number of the agreements do go beyond the hot pursuit provisions of both customary international and Article 111 of UNCLOS to best give effect to the shared objectives of the parties.¹⁵⁴ States may enter into agreements that waive the requirement of innocent passage and thereby permit the continuation of a hot pursuit, but these instances are not without problems should the flag state initiate litigation. These types of agreements are examined in Chapter 6 and, in the context of Australia and the US, in Chapter 7.

It is important to acknowledge at the outset that there are few examples of state practice that have permitted entry to the territorial sea, whether by agreement¹⁵⁵ or ad hoc arrangements.¹⁵⁶ While there are very practical and desirable advantages to permitting the continuation of hot pursuit into or through the territorial sea of a third state, and there is some limited support for this,¹⁵⁷ the law as set out in UNCLOS is very clear on this point. The sovereign rights arising from the territorial sea are immutable and this

¹⁵² Walker, above n 73, 212.

¹⁵³ Allen above n 73, 320 suggests that a state may authorise continuation of pursuit in its territorial waters.

¹⁵⁴ It is important to note that the *Djibouti Code of Conduct*, while non-binding, gives effect to the extant prohibition of entry into territorial waters in Articles 4(3) and 5(2) in relation to repressing piracy and armed robbery of ships at sea respectively.

¹⁵⁵ See Article VI(1) *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, 1974 UNTS 45 (signed and entered into force 9 July 1992). Commentary on Article VI(1) reaffirms international law as it is set out in Article 111 of UNCLOS, that 'hot pursuit may not continue into the territorial sea and archipelagic waters of a third State'. See Fred Amoa, 'The Niue Treaty, and Its Operational and Legal Requirements (Prepared for the Micronesian Maritime Surveillance Cooperation Conference, Koror, Palau, 31 March–3 April 1999)' (Pacific Islands Forum Fisheries Agency Report 99/04, 1999).

¹⁵⁶ As an example of ad hoc authorisation, France granted Australia entry to the territorial waters surrounding the Kerguelen Island in December 2001. Australia was in hot pursuit of the Russian-flagged *Lena*. See Delegation of Australia, 'Vessel Sighting CCAMLR Statistical Area 58.5.2' (Doc No CCAMLR-XXII/BG/48) presented on 5 November 2003 at CCAMLR, Twenty-Second Meeting (27 October–7 November 2003).

¹⁵⁷ See, eg, Reuland, above n 77, 577; Baird, above n 110, 13.

notion is reflected in commentary.¹⁵⁸ If anything, states have become more likely to exercise powers over the territorial sea in light of emerging maritime security challenges.¹⁵⁹ In spite of increased state practice and a willingness to adapt to changing times, hot pursuit remains fixed, at least in this area of law. There is insufficient evidence of state practice and commentary to demonstrate that entry into the territorial sea of a third state is now permitted under customary international law.

5.7.2 Third State Enforcement Action on Behalf of a Coastal State

Under the law of the sea, entry by a fleeing vessel to the territorial sea marks a considerable adjustment in the exercise of respective rights and responsibilities afforded to both foreign vessel and coastal state. The pursuit ends by reference to Article 111(3) (discussed above) and the sovereignty of a third state comes into play. On the face of it, when the pursuing vessel (of the state initiating a pursuit) is no longer in pursuit, a third party state has no legal basis for interference unless another is established independently.¹⁶⁰ The third state has no jurisdiction over a foreign vessel that is suspected of committing an offence in another state's maritime zone. Article 27(5) is further authority that the flag state's jurisdiction over foreign vessels in its territorial sea is in no way inviolable,

a coastal state (*or for our purposes, the 'third State'*) may not take steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Consequently, the flag state is well placed to challenge the enforcement action. There are but a few limited options available to the coastal state as initiator of the hot pursuit that are all very much dependent on external factors such as the diplomatic relationships, internal governance and municipal law.¹⁶¹

¹⁵⁸ See, eg, Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 897–898; Churchill and Lowe, above n 14, 215; Rothwell and Stephens, *The International Law of the Sea*, above n 37, 424; Walker, above n 73, 194.

¹⁵⁹ Klein, above n 25, 83–4; Rothwell and Stephens, *The International Law of the Sea*, above n 37, 74.

¹⁶⁰ A vessel no longer being pursued presumably reverts to its original state prior to the initiation of the pursuit and exercises rights and responsibilities ordinarily available to it under UNCLOS.

¹⁶¹ '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' (Reuland, above n 77, 571). There is also the option of extradition, but this is very much dependent on existing bilateral relations, internal governance and the nature of the offence. An obligation to endeavour

This issue has been optimistically incorporated into various bilateral and multilateral agreements.¹⁶² The relevant provisions, with varying conditions, ostensibly permit the third state whose territorial waters the suspect vessel has entered to conduct enforcement action. Most significantly, where the transiting vessel is under suspicion for conduct committed beyond its jurisdiction and the third state cannot be said to have direct knowledge of the unlawful acts. As far as the third state is concerned, the vessel has not committed any infringements that correlate with the third state's domestic laws. The basis for the enforcement action is purportedly derived from the bilateral agreement itself and states may waive their rights accordingly. Clearly, there are problems with this type of provision as it assumes flag state authorisation or, alternatively, overlooks the fundamental position of flag state jurisdiction pursuant to Article 94.¹⁶³

The legal obstacles to third state enforcement of this nature are echoed in the relevant commentary. The only option available to a third state is to claim that a pursued vessel has contravened the applicable innocent passage regime, rather than, for example, committed IUU fishing.¹⁶⁴ Other commentators have omitted to address the issue of third state enforcement even when they have considered other possible options such as multilateral operations.¹⁶⁵ This suggests that third party enforcement as a result of hot pursuit arising from another coastal state maritime zone has not emerged as a new concept under customary international law. Moreover, it is unlikely to develop in this direction in the near future.

to extradite subject to national laws has been incorporated into the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* ('ReCAAP'), 2398 UNTS 199 (entered into force 4 September 2006). Although this Agreement does not explicitly refer to hot pursuit, it is an example of a provision that may overcome this limitation under general international law.

¹⁶² Examples include *Agreement between the Government of the United States of America and the Government of Nicaragua*, TIAS 13153 (entered into force 15 November 2001); *Agreement between the Government of the United States of America and the Government of the Republic of the Gambia concerning Cooperation to Suppress Illicit Transnational Maritime Activity*, TIAS 11-1010 (signed and entered into force 10 October 2011); *Agreement between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands*, [2007] ATS 6 (entered into force 8 January 2007) ('the Cooperative Enforcement Agreement'). This issue is analysed in Chapter 7.

¹⁶³ This issue, as it pertains to agreements to which the US and Australia party, is examined in Chapter 7.

¹⁶⁴ Gullet and Schofield, above n 83, 568.

¹⁶⁵ A number of relevant commentators have not addressed the possibility that a third state may, in effect, 'take over' the enforcement of a hot pursuit arising from another coastal state's zone, presumably due its very contentious nature. See Walker, above n 73, 215; Molenaar, above n 56; Allen, above n 73; Baird, above n 110.

5.7.3 Resumption of Hot Pursuit

As discussed in Chapter 4, the issue of resumption was considered for possible inclusion during The Hague Codification Conference in 1930 and again during the Geneva Codification Conference in 1958. Ultimately, the issue failed to attract significant support and no agreement was reached on the inclusion of a relevant provision. However, since that time there has been a considerable amount of comment on resumption of hot pursuit, and not purely as a result of the new wave of pursuits. This suggests two things. First, that a clear division persists among commentators and, secondly, that evidence of state practice is either lacking or of an inconsistent nature. Either way, resumption is likely to continue to be considered as a potential development of conventional hot pursuit.

Colombos opposed resumption in the context of a pursuing coastal state vessel lying in wait for a pursued vessel to leave territorial waters.¹⁶⁶ He points out that entry to the territorial waters of a third state or of the flag state results in cessation, not suspension, of the pursuit. This is a fair assumption given the unequivocal terms of Article 111(3) that had been largely unchanged since the earliest codification efforts.¹⁶⁷ Colombos referred to earlier case of the *Itata* in which US entry into Chilean waters to apprehend a vessel without consent of the coastal state was found to be unlawful.¹⁶⁸ The limited and exceptional nature of the right, Colombos argued, can only be interpreted in a narrow sense in this instance.¹⁶⁹ This view reflects the intention of drafters¹⁷⁰ and earlier jurisprudence on entry to territorial waters for the conduct of apprehension.¹⁷¹ Colombos considered that, as a limited exception to the high seas freedoms, the rationale for hot pursuit was not intended to substantiate prolonged interference.¹⁷² This

¹⁶⁶ Colombos, above n 48, 169.

¹⁶⁷ The statement in Article 111(3), 'the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State', was replicated from earlier drafts of hot pursuit provisions including Article 23(2) *Convention on the High Seas 1958* (the *Geneva Convention*), entered into force 30 September 1962; Article 47(2) of the *Report on the Regime of the High Seas 1956* in *Yearbook of the International Law Commission, 1956*, vol II; Article 11 of the *Hague Codification Conference* in 1930. The codification of hot pursuit is evaluated in Chapter 2.

¹⁶⁸ (1892) 3 Moore 3067. This case is examined in Chapter 2.

¹⁶⁹ Colombos, above n 48, 170. Colombos also relied upon Jessup and G L Williams.

¹⁷⁰ See, eg, Reuland, above n 77, 577; Baird, above n 110, 13. This is supported by the comments in Chapter 2.

¹⁷¹ For example, the *Apollon* [1824] US (9 Wheat) 362, 370:

It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations.

¹⁷² Colombos above n 47, 169.

is a key tenet of hot pursuit and it underscores the notion that use of the oceans is prefaced on a balance between coastal and flag state interests. Any exception to the fundamental freedoms of states that give effect to these interests must be clearly defined.

At the outset, Poulantzas points out that entry into the territorial sea as outlined in Article 111(3) (and earlier in Article 23(2) of the *Geneva Convention*) is a clear interruption to the jurisdictional link with the coastal state.¹⁷³ This undoubtedly makes it difficult to construct an argument justifying resumption.¹⁷⁴ On this many commentators agree. McDougal and Burke, for example, state that entry to the territorial waters of a third state by a pursuing vessel intent on enforcing coastal state laws contravenes the peaceful uses of oceans.¹⁷⁵ By the same token, there is significant support in the commentary, but not necessarily a great deal of authority, for an appropriate resolution to address suspect vessels' escape. Poulantzas goes on to say that, in spite of the loss of jurisdictional link, resumption ought to be permitted in 'special circumstances'.¹⁷⁶ Special circumstances would essentially rely upon the duration of suspect vessel transit in territorial waters. Like Poulantzas, McDougal and Burke consider that there is no sound reason for considering that the pursuit cannot be commenced again on the high seas.¹⁷⁷ Although it should be noted that Poulantzas disagreed with the views of McDougal and Burke in their broad endorsement of resumption,¹⁷⁸ he also (somewhat curiously) considered an alternate perspective that may better explain his overall assessment of resumption. Namely, that the fleeting or brief entry to and exit from third state territorial waters does not constitute an effective termination and that consequently 'a short stay or passage of the pursued vessel through the territorial waters of a State, obviously with the intention of evading the law, does not preclude the resumption of hot pursuit'.¹⁷⁹ No time period has been proposed that may constitute a suitable resolution to the problem of fleeing vessels dipping into third state territorial sea to escape a pursuit. While certainly not uniform, the views of a number of commentators could be summarised as follows. First, the resumption of hot pursuit is supported in

¹⁷³ Poulantzas, above n 20, 231.

¹⁷⁴ Poulantzas also refers to Gidel and Scelle as sharing the same opinion (ibid 230).

¹⁷⁵ McDougal and Burke state that, '[w]ith respect to interruption of the pursuit because a vessel seeks sanctuary in the waters of another state, the overriding general interest in peaceful oceans would appear to outweigh the interest in effective law enforcement' (above n 158, 897). See also Reuland, above n 77, 578.

¹⁷⁶ Poulantzas, above n 20, 231.

¹⁷⁷ McDougal and Burke, above n 158, 898.

¹⁷⁸ Ibid 231.

¹⁷⁹ Poulantzas, above n 20, 231.

circumstances where the coastal state has refrained from entry to the territorial sea of a third state in an attempt to maintain the pursuit (thereby violating innocent passage). Secondly, the pursued vessel entered the territorial sea for the purposes of evading arrest and the duration of transit is sufficiently short-lived.¹⁸⁰ So, in spite of the obvious advantages of resumption and the nature of its appeal as a fair and reasonable resolution, there is no uniform agreement among commentators or judicial consideration of resumption as a potential development.

Reuland appears to be another proponent of resumption and he acknowledges the genuine motivation for seeking a resolution to instances where pursued vessels may use third states territorial waters as a sanctuary, stating that '[i]nternational order would undoubtedly suffer if this were true'.¹⁸¹ However, Reuland ultimately seeks to maintain the balance between flag and coastal state interests and cautions against the expansion of the exception.¹⁸² More recently, Baird is another strong proponent of resumption, relying on the earlier statements of Reuland and Poulantzas.¹⁸³ Baird states that, 'it would [also] be contrary to innocent passage for the pursued vessel to loiter within the territorial seas of a third State, for the LOSC requires passage to be continuous and expeditious'.¹⁸⁴ In short, Baird classes the conduct of the pursued vessel—seemingly attempting to avoid arrest by transiting through the territorial sea of a third state—as violating the innocent passage requirements of Article 17, particularly in light of modern IUU fishing.¹⁸⁵ Fishing in the territorial sea of another state certainly constitutes non-innocent passage, but that is not at issue here. The only requirements of the innocent passage regime of Part 2, Section III of UNCLOS are that the transit be continuous, expeditious and not prejudicial to the peace, good order or security of the relevant coastal state, or for our purposes a third state. Article 19(2) lists activities that are classed as prejudicial, such as weapons practice (at subsection b), research activities (j) or (l) any other activity not having a direct bearing on passage. Entry into territorial waters by a suspect vessel that is subject to a lawful hot pursuit cannot be considered prejudicial as its transit does not have an effect on the coastal (or third) state. So long as

¹⁸⁰ Baird, above n 110, 13–14; Poulantzas, above n 20, 231; Walker, above n 73, 215.

¹⁸¹ Reuland, above n 77, 581.

¹⁸² The balance of competing interests is at the core of hot pursuit:

The right of hot pursuit, therefore, strikes a balance between the need for effective law enforcement and the rule of exclusive jurisdiction. 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' (ibid).

¹⁸³ Baird acknowledges Colombos' rationale that resumption is akin to suspension of the right of hot pursuit, but argues that it 'holds less weight in the modern era of illegal fishing' (above n 110, 14).

¹⁸⁴ Ibid 13.

¹⁸⁵ Ibid 30.

the vessel complies with the Part 2, Section III requirements, there are no grounds for challenging the transit, at least in terms of the innocent passage regime.

Article 301 states that

‘[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

There is insufficient evidence to demonstrate that states’ views of sovereignty have changed markedly to permit a resumption exception. If anything, state practice has demonstrated that where the doctrine of hot pursuit varies from Article 111, at least in terms of entry to third party state territorial waters, it will only occur subject to bilateral agreements. For example, in an agreement between France and Australia (discussed further in Chapter 7 and in Appendix F), the authorised government and military vessels of both states are permitted to ‘continue through the territorial sea of the other Party, provided that the other Party is informed, and without taking physical law enforcement or other coercive action against the vessel pursued during this phase of the hot pursuit’.¹⁸⁶ Allen, Gullett and Schofield consider that continued pursuit is only permissible where the third state consents and that there is insufficient state practice or indeed justification for hot pursuit to be continued through the territorial sea of another state.¹⁸⁷ There appears to be no sound legal basis for an exception where a third party state is unwilling or unable to deal with suspect vessels and there are no known cases outside the US where resumption has been considered.¹⁸⁸

The ability of the coastal state to pursue a suspect vessel upon that vessel exiting the territorial sea of a third state would certainly constitute a most advantageous and practical legal device. Certainly, some commentators do support the notion that pursuits can be recommenced and Reuland aptly writes ‘[i]f international law does not permit resumption of pursuit, the pursued vessel is seemingly washed clean of its sins by the territorial waters of a third state’.¹⁸⁹ The opportunity for a suspect vessel to be ‘washed

¹⁸⁶ The Cooperative Enforcement Agreement art 4.

¹⁸⁷ Allen, above n 73, 320; Gullett and Schofield, above n 83, 567.

¹⁸⁸ The US case *United States v Conroy* 589 F 2d 1258 (23 February 1979) found that the arrest of a US-flagged vessel by the USCG in the territorial sea of Haiti was permissible on the basis that the coastal state had given consent to arrest. However, the court also found that consent was not required as 14 USC § 89(a) authorised the USCG to board and search US-flagged vessels on the high seas and in foreign territorial waters (at 28). US jurisdiction is examined in Chapter 7.

¹⁸⁹ Reuland, above n 77, 580.

clean' of wrongdoing by transit through the territorial sea of a third state does seem manifestly unjust. In effect, the provisions relating to cessation of hot pursuit constitute a 'get out of jail free' card by allowing the suspect vessel to obviate enforcement action by simply entering the territorial sea of a third state. This was certainly the aim of the respective captains commanding the *South Tomi* and *Viarsa*. The *South Tomi* was arrested 320 nautical miles south of Capetown while the *Viarsa* was arrested 2,000 nautical miles southwest of the same port steaming towards its flag state of Uruguay.¹⁹⁰

Evidently, there are fundamental elements of the law of the sea at play that cannot be overlooked in the quest for enhanced enforcement action. It has already been highlighted that the jurisdictional link with the coastal state would be broken, thereby permanently interrupting the hot pursuit—per the unambiguous Article 111(3). Another point of consideration involves the sovereign rights of the third state over its territorial sea. Although the outcome may be deemed unjust for the coastal state, it cannot be a basis for the resumption of hot pursuit when the options of ad hoc and formal arrangements are relatively easy to coordinate beforehand. A third state may waive its jurisdiction so far as it constitutes consent to conduct pursuit in its waters.¹⁹¹ Nonetheless, consent cannot be presumed in every case and to enter the waters in its absence is to violate the innocent passage requirements of Part 2, Section III of UNCLOS. There have been examples of bilateral agreements that permit pursuit in territorial seas, however, there is insufficient evidence that resumption is likely to emerge of its own accord in the foreseeable future. Although there is support from a number of commentators, it is difficult to sustain an argument that would expand the application of Article 111(3) to intrude upon third party state territorial waters when its very purpose is to preserve state sovereignty. Given the strong views on resumption during treaty negotiations and the lack of contrary state practice since that time, it appears that resumption remains an unsubstantiated notion.

5.8 Conclusion

Although a limited exception to the high seas freedoms, the parameters of hot pursuit were set out in fairly uncontroversial circumstances during codification and inception into customary international law. In the intervening period between early development

¹⁹⁰ It was reported that the *Viarsa* was intent on entering Uruguayan jurisdiction either by being met by a Uruguayan naval vessel on the high seas or by entering Montevideo port. See Knecht, above n 96, 145.

¹⁹¹ States may enter agreements that permit this, though these are not without problems. These problems will be addressed in Chapters 6 and 7.

and recent increased application, evidence of state practice has been limited and somewhat inconsistent.¹⁹² *M/V 'Saiga'* is an obvious example of this; ITLOS was clear in its treatment of this issue, ruling that regardless of prevailing sovereign rights, the coastal state cannot create jurisdiction where it does not exist.¹⁹³ By the same token, Poulantzas quite rightly rejected the artificial distinction of 'real hot pursuit' and 'non-real hot pursuit'—either hot pursuit is conducted in accordance with international law or it is not.¹⁹⁴ This should be acutely apparent given that hot pursuit is a limited exception to fundamental high seas freedoms. The multifarious consequences of IUU fishing and the emergence of new maritime security challenges demand a more robust enforcement response by coastal states. It is clear that conventional measures are proving to be inadequate and states are acting more decisively. Spurred on by the persistence of flags of convenience, IUU fishing and linked criminal enterprises, coastal states are seeking more effective means of sovereign control over maritime zones that will not economically burden the existing security framework. Outside of bilateral agreements, any response must conform to the international framework and also preserve the balance between coastal and flag state interests. While these interests are competing, they are fundamental to the law of the sea. Post-UNCLOS developments have indicated that there is support for new approaches to enforcement. States have begun to act more decisively and cooperatively when confronting challenges in the maritime domain. This direct action also encompasses a new level of engagement, not just with other states, but also with regional and international institutional frameworks. Australia is a prime example of this.¹⁹⁵

It has been demonstrated in this chapter how hot pursuit underwent rapid development in a relatively short period after being effectively stagnant since its inception. Although the resurgence of hot pursuit is directly attributable to the prevalence of IUU fishing, the right is utilised in fighting other transnational crimes such as drug trafficking and people smuggling. Increased cooperation between states by targeting these shared law enforcement aims are also reinforcing hot pursuit as an effective modern maritime law enforcement tool. State practice has demonstrated that the parameters of hot pursuit

¹⁹² In analysing municipal treatment of hot pursuit in 1969, Poulantzas found that the manner of incorporation by domestic legislatures was inconsistent and sometimes beyond the parameters of the doctrine under international law (above n 20, 93).

¹⁹³ In *M/V 'Saiga' Case (No 2)*, the Tribunal considered the arguments of Guinea regarding a claimed 'customs radius' applicable to the EEZ. Guinea claimed this jurisdiction on the basis of 'public interest' or 'state of necessity', but the Tribunal rejected both grounds. For further discussion see sections 5.6.1–6.5 of this thesis.

¹⁹⁴ Poulantzas, above n 20, 63.

¹⁹⁵ This is examined in Chapter 7.

have discernibly shifted and this appears to be supported by commentary. Given that a number of aspects lack consensus, the challenge has been to identify those elements that have emerged as evidence of new customary international law. In order to analyse these emerging elements, the following chapter will consider alternative approaches to the conventional application of hot pursuit that occur in response to contemporary maritime security challenges.

CHAPTER 6: ALTERNATIVE APPROACHES

6.1 Introduction

More than ever, coastal states are bolstering domestic law and entering into international agreements to address transnational crimes and maintain security. The safeguarding of sovereignty has not diminished over time; instead, it has intensified in response to emerging maritime security concerns.¹ This has prompted the re-evaluation of existing legal mechanisms² and the potential for the development of new legal devices.³ Chapter 5 examined emerging hot pursuit practices and the challenges arising from the contemporary use of hot pursuit. In this chapter, alternative approaches to the orthodox application of hot pursuit are examined. These include measures that are supplemental to the conventional unilateral application of hot pursuit.

UNCLOS is the foundation document for the law of the sea and, in addition to international customary law, constitutes the authority for the conduct of hot pursuit. Nevertheless, states are free to enter into agreements incorporating hot pursuit in a manner that is not constrained by customary international law or UNCLOS. States may waive certain sovereign rights (so far as they survive flag state objection) and act in a manner that exceeds the established parameters of rights and responsibilities. These types of unconventional arrangements can enhance capabilities to target agreed objectives and promote more effective enforcement. This is particularly useful in challenging environments, such as the Southern Ocean where maritime zones are isolated and subject to extreme climactic conditions. Likewise, these arrangements may assist authorities in the Caribbean where a patchwork of maritime zones meet in a

¹ Sovereignty remains paramount even in the face of increasing maritime security threats: ‘there has still been a limit on the extent of change in the law of the sea, even in the face of the inclusive interests at stake, because of the endurance of states’ sovereign interests over their maritime domain and over vessels. This resistance to change has been strong’ (Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 325).

² IUU fishing continues to be a global challenge and ITLOS recently considered a related issue in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Case No 21, 2 April 2015). For a more recent example of initiatives to ensure seafood’s continued contribution to food security, see *Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea at its Fifteenth Meeting*, UN GAOR, 69th sess, UN Doc A/69/90 (6 June 2014).

³ The increasing number of maritime challenges has forced a rethink: ‘[i]t is clear that what is changing is not only the policies of States or the positions of courts. A host of other factors and forces are at work: New concerns, new technological possibilities, in particular, new contexts and functions of established rules’ (Argyris A Fatouros, ‘Concluding Remarks’ in Anastasia Strati, Maria Gavouneli and Nikolaos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (Martinus Nijhoff, 2006) 273).

relatively small area and effective overwatch of criminal conduct is largely unachievable.⁴ These arrangements are also particularly effective where limited capability exists.

A number of alternative approaches will be evaluated in this chapter: multilateral regimes, bilateral shiprider agreements, innovative use of domestic frameworks and the role of technology. It is these progressive applications of hot pursuit that can assist developing states, states subject to geopolitical challenges or those with limited maritime enforcement capabilities to achieve greater control of the maritime domain. These measures will be examined in the context of contributions towards developing hot pursuit practice.

6.2 Multilateral Regimes

Although it is considered the constitution for the oceans,⁵ UNCLOS provides in Article 311(3) an option for flexibility between state parties, subject to the object and purpose of the Convention. This may be either bilaterally or multilaterally to address common issues of concern that demand special attention. The agreements range in purpose and practical effect; they may range from the aspirational, such as an acknowledgement to work towards a common objective,⁶ to one that authorises reciprocal law enforcement powers exercisable within the territorial sea.⁷ Bilateral and multilateral agreements give effect to cooperative efforts to address criminal conduct that may otherwise go unpunished.⁸ It is also important to note that diplomatic and political considerations and respective resources intrinsically shape the agreements. While these external factors contribute to the final outlook of an individual agreement, the ability to conduct effective enforcement of respective coastal state's law is the overriding concern.

⁴ In the Caribbean region, cooperative efforts have been promoted as early as 1991, see, eg, *Agreement Establishing Common Fisheries Surveillance Zones of Participating Member States of the Organisation of Eastern Caribbean States* (signed and entered into force 1 February 1991) art 8.

⁵ Ambassador Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, referred to UNCLOS as 'a constitution for the oceans' in the final session on 11 December 1982 (*The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index: Final Act of the Third United Nations Conference on the Law of the Sea: Introductory Material on the Convention and the Conference* (Palgrave Macmillan, 1983) xxxiii).

⁶ See, eg, *Agreement between the Government of the United States of America and the Government of the Republic of Malta Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea*, signed 16 June 2004, TIAS 08-110 (entered into force 10 January 2010).

⁷ See, eg, *Agreement between the Government of the United States of America and the Government of the Republic of the Gambia concerning Cooperation to Suppress Illicit Transnational Maritime Activity*, TIAS 11-1010 (signed and entered into force 10 October 2011).

⁸ See, eg, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* ('Port State Measures Agreement'), opened for signature 22 November 2009, [2009] ANTIF 41 (entered into force on 5 June 2016).

In the years that have followed the new wave of hot pursuits, largely taking place in the Southern and Indian Oceans in relation to IUU fishing vessels, there has been increased cooperation between states to contend with the threat to fish stocks. As parties to multilateral regimes, states are obliged to meet international obligations—not only in ensuring vessel compliance, but also promoting responsible ocean management—and are somewhat accountable by the requirement for annual reporting.⁹ The combined efforts of states to generate world standards of resource management through international agreements under the watch of CCAMLR, for example, have resulted in a decrease in IUU fishing in the respective area of ocean. A range of other agreements have emerged purporting to give effect to anti-IUU fishing and marine conservation measures.¹⁰ While the agreements do not necessarily refer to hot pursuit in explicit terms, there are clear opportunities to employ the doctrine as an enforcement measure under the guise of regional or multilateral collaboration. Examples of these will be explored below.

Despite the opportunities for employment of hot pursuit, regional or multilateral agreements are often open-ended and aspirational in terms of the mechanisms for enforcement. Any expansion of hot pursuit is reliant upon individual state imperative:

The traditional freedoms of the high seas, set out in Article 87 of the 1982 United Nations Law of the Sea Convention, are now overlaid with a network of conventional international law provisions which seek to regulate a wide range of criminal activity, the taking of resources and environmental despoliation occurring on the high seas. Many of the high seas regimes negotiated since the adoption of the LOS Convention in December 1982 impose enforcement obligations on states parties but contain scant detail as to the practical mechanisms for enforcement.¹¹

That said, the provisions contained in the agreements are often expressed in robust terms and the obligations are not insignificant. The opportunity to expand hot pursuit in

⁹ See, eg, CCAMLR, established in 1980 by the *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1320 UNTS 47 (entered into force 7 April 1982); the Western Central Atlantic Fishery Commission, established in 1973 by Resolution 4/61 of the FAO Council under Article VI (1) of the FAO Constitution; the Southwest Indian Ocean Fisheries Commission, established in 2004 by Resolution 1/127 of the FAO Council under Article VI of the FAO Constitution; the International Commission for the Conservation of Atlantic Tunas, established by the *International Convention for the Conservation of Atlantic Tunas*, opened for signature 14 May 1966, 673 UNTS 63 (entered into force 1969). For a complete list see <<http://www.fao.org/fishery/rfb/en>>.

¹⁰ See, eg, *Port State Measures Agreement*.

¹¹ Robin Warner, 'Jurisdictional Issues for Navies Involved in Enforcing Multilateral Regimes Beyond National Jurisdiction' (1999) 14(3) *International Journal of Marine and Coastal Law* 321.

support of coastal state law is obvious.¹² In this context, states can elect to employ hot pursuit to meet contemporary law enforcement challenges as a tool of sovereign power, as its origins are not only anchored in UNCLOS and customary international law, but also in subsequent multilateral regimes.¹³ Recent inclusion of shiprider provisions in the fight against piracy in West and East Africa and the Gulf of Aden is further evidence that the practice is becoming more widespread.¹⁴ This has given new legitimacy to the use of shipriders as an enforcement tool.¹⁵ Joint hot pursuit operations have long been promoted in the Caribbean¹⁶ and Pacific regions.¹⁷ Conversely, the Southeast Asian example of counter-piracy and anti-IUU fishing measures has steered away from hot pursuit¹⁸ and shiprider provisions and there has been comparatively less success in

¹² Another example is Article 118 of UNCLOS:

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

¹³ See, eg, *Convention on Sub-Regional Cooperation in the Exercise of Maritime Hot Pursuit*, signed 1 September 1993 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_sur_le_droit_de_poursuite_ENG.pdf>. ITLOS considered this agreement, among others, in ITLOS, above n 2. The SRFC submitted a request pursuant to Article 33 of the *Convention on the Definition of the Minimum Access Conditions and Exploitations of Fisheries Resources within the Maritime Zones under the Jurisdiction of SRFC Member States*. The matter focussed on the responsibilities of flag and coastal states in relation to IUU fishing and the confirmation of ITLOS advisory jurisdiction. Hot pursuit was not a matter for consideration.

¹⁴ See, eg, earlier discussion in Chapter 5 regarding the *Djibouti Code of Conduct* <<http://www.imo.org/en/OurWork/Security/PIU/Documents/DCoC%20English.pdf>>; the *West and Central African Code of Conduct* <http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf>.

¹⁵ UNSCR 1851 contained a provision promoting the use of shiprider agreements to better address the complex problem of piracy off the coast of Somalia. However, it is important to note that the Security Council had previously placed a limitation on the expansion of flag state powers by stating unequivocally that the operations do not create new obligations under customary international law, see SC Res 1816, UN SCOR, 5902th mtg, UN Doc S/RES/1816 (2 June 2008) 9. Although the piracy arising from Somalia would not give rise to new law, this suggests that there is certainly merit in utilising or adapting the full range of maritime enforcement tools to address a complex maritime threat.

¹⁶ See, eg, *Agreement Establishing Common Fisheries Surveillance Zones of Participating Member States of the Organisation of Eastern Caribbean States* (signed and entered into force 1 February 1991).

¹⁷ *Cooperation Arrangement between The Ministry of Marine Resources of the Cook Islands, The Ministry of Fisheries of New Zealand, The Department of Agriculture, Forestry and Fisheries of Niue, The Ministry of Agriculture and Fisheries of Samoa, The Ministry of Agriculture & Food, Forestry and Fisheries of Tonga, and Department of Economic Development Natural Resources and Environment of Tokelau* (signed and entered into force 1 January 2010) art 124(5)(b). In this agreement, state partners have pledged to conduct enhanced joint operations of hot pursuit.

¹⁸ Due to sensitivities regarding the possibility of hot pursuit ‘incursions’ into maritime zones, Indonesia and Malaysia have resisted inclusive anti-piracy measures. Both states have distinguished between the types of piracy occurring in the Malacca Straits and in Somalia, and, in spite of a cooperative regional effort to address piracy in Southeast Asia, Indonesia and Malaysia have failed to join ReCAAP, opened for signature 11 November 2004, 2398 UNTS 199 (entered into force 4 September 2006). Both states have also opposed a number of US-sponsored maritime security codes, including the *Regional Maritime Security Initiative*, *PSI* and *Container Security Initiative*. See P V Rao, ‘Indian Ocean Security Maritime Cooperation: The Employment of Navies and Other Maritime Forces’ (2010) 6(1) *Journal of the Indian Ocean Region* 129, 132; Carolin Liss, ‘Assessing Contemporary Maritime Piracy in Southeast Asia:

apprehending pirates.¹⁹ With respect to IUU fishing, Indonesia has garnered popular support with an aggressive approach to foreign fishing vessels caught in the EEZ²⁰—using dynamite to destroy them and inviting the media to publicise the events.²¹ Indonesia’s steadfast adherence to unilateral measures is a reflection of Indonesia’s neo-nationalism under President Joko Widodo’s administration.²² Nevertheless, the publicised destruction of mainly Chinese, Malaysian, Philippino, Thai and Vietnamese vessels has undermined Indonesia’s regional relations.

For a concept to be accepted as customary international law, consideration is given to state practice²³ and, in particular, to evidence of multilateral agreements.²⁴ Collaboration and engagement of states pursuant to regional security or other form of construct can achieve this aim. Recent interest in the prevention of IUU fishing has resulted in a number of RFMOs whose state parties have bound themselves to far-reaching obligations to aid in conservation of marine resources. It is said that ‘[m]ultilateral hot pursuit is in fact fully consistent with the objectives of the IPOA on IUU Fishing, in particular with its call for a comprehensive and integrated approach and the need to strengthen this by inter-state co-operation’.²⁵ For example, state parties may be obliged to take measures to prevent or eliminate overfishing²⁶ or to enforce measures

Trends, Hotspots and Responses’ (Peace Research Institute Frankfurt Report No 125, 2014) 25.

¹⁹ This may be attributed, in part, to a failure by key players Indonesia and Malaysia to engage on the threat of piracy in Southeast Asia:

‘[a]t present, there is only a “hands-off” protocol in hot pursuit situations between Indonesia and Malaysia. Thus while these cooperative efforts are to be commended, and are credited with constraining the growth of piracy during much of the 1990’s, they also highlight the continuing difficulties of pursuing criminals across international maritime borders. Ultimately, such hot pursuit of pirates across borders will be necessary to fully address the problem’ (Derek Johnson and Mark Valencia (eds), *Piracy in Southeast Asia* (Institute of Southeast Asian Studies, 2005) 94–95).

Fortunately, the threat level from piracy in Southeast Asia is on a much smaller scale: ‘The criminal activities perpetrated by pirates in Asian waters are far less in number, lethality and area of operations’ (ibid, 133).

²⁰ *Law No 45 of 2009*, an amendment to *Law No 31 of 2004* (Republic of Indonesia) art 69(4) permits an authorised officer ‘to take special actions in the form of burning and/or sinking a fishing ship flying a foreign flag based on sufficient initial proof’.

²¹ Channel News Asia, ‘EP21—Susi Pudjiastuti’, *Conversation with S11*, 30 May 2016 (Minister Susi Pudjiastuti, Indonesian Minister for Marine Affairs and Fisheries interviewed on *Conversation with S11*) <<http://www.channelnewsasia.com/tv/tvshows/conversation-with-s11/susi-pudjiastuti/2171096.html>>.

²² Edward Aspinall, ‘The New Nationalism in Indonesia’ (2016) 3(1) *Asia and the Pacific Policy Studies* 72.

²³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(b).

²⁴ Ibid.

²⁵ E J Molenaar, ‘Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*’ (2004) 19(1) *International Journal of Marine and Coastal Law* 19, 32. The IPOA-IUU adopted by the Food and Agriculture Organization of the United Nations in 2001 is a voluntary agreement to address IUU fishing that sets out comprehensive measures to be implemented by states nationally, regionally and internationally.

²⁶ See, eg, *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (the ‘Fish Stocks Agreement’), opened for

against domestic vessels irrespective of where violations occur.²⁷ This agreement-based approach is a positive step, but is not necessarily an accessible model for developing states. States with weak governance or with limited capability are unlikely to achieve these aims regardless of strategic intent. Alternative approaches are useful for developing states to achieve the momentum that is required to affect meaningful enforcement in their maritime spaces. Palau is making particular strides in this respect and is examined in section 6.5.

Incorporating multilateral hot pursuit into an agreement that reflects the elements of Article 111 is certainly a valid device for coastal states. In the absence of ITLOS endorsement, it is preferable to codify multilateral hot pursuit in international agreement to ensure its efficacy and contribution to the development of state practice. International agreements set limits and conditions and their further use will contribute to consolidating the notion under customary international law. Although not a formal agreement, the shared interest in preventing the movement of WMDs by sea is an example of this. As one of the gravest challenges to maritime security, the issue of WMD shipping prompted the rapid development of the PSI scheme, the success of which can be attributed to the unprecedented coordination of states.²⁸ While hot pursuit and the PSI are quite distinct interdiction measures, the latter serves as a compelling point of reference for the collaboration of states within existing legal frameworks when strategic will is shared. This device has been replicated by regional frameworks on the eastern and western coasts of Africa by incorporating expansive hot pursuit provisions to conduct counter-piracy operations.²⁹ This demonstrates that hot pursuit is finding utility in unconventional arrangements to enhance capabilities and target agreed objectives.

6.3 Bilateral Shiprider Agreements

Although not explicitly contemplated by Article 111, nor discussed in *travaux préparatoires*, the practice of forward embarkation of government officials (or ‘shipriders’) onto state vessels is frequently included in bilateral agreements.³⁰ Shiprider agreements formalise shared law enforcement efforts to target certain maritime challenges such as drug trafficking and IUU fishing and may contemplate provisions

signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001) art 5(h).

²⁷ Ibid art 19(1).

²⁸ For a detailed analysis of the PSI scheme see, eg, Klein, above n 1, 193.

²⁹ See the *Djibouti Code of Conduct* and the *West and Central African Code of Conduct*.

³⁰ The Australia-France Agreements are examined in Chapter 7.

that go beyond the conventional elements of hot pursuit. A plain interpretation of Article 111 does not explicitly require the coastal state to employ its own coastal state assets to conduct a hot pursuit. Rather, the provision merely requires that the ‘competent authorities of the Coastal State’ possess the requisite suspicion.³¹ A suitably empowered government official, whether customs, coastguard or naval, may be aboard a vessel that is not a coastal state warship, military vessel or government authorised vessel and form the requisite view.

In practice, shipriders are vested with various law enforcement powers by their domestic regime to conduct, among other things, boarding and arrests. In this way, the deployed officers authorise the respective state vessel to conduct a hot pursuit by virtue of their powers under domestic law and the bilateral agreement between the two states. This practice has a potential force multiplier effect, particularly where states have differing resources and capabilities. While these agreements merely formalise arrangements between two states, the US has developed a network of analogous agreements. Some, for example, address regional drug trafficking³² while others address marine resource protection on the high seas.³³ A relatively recent example is the deployment of Chinese naval officers, authorised under municipal law to pursue and arrest Chinese nationals on the high seas, aboard USCG or naval vessels.³⁴ In recent years, although remaining a non-signatory to UNCLOS, the US has developed a network of shiprider agreements aimed at expanding influence in varying regions.³⁵ Some are aimed at capacity building but all shiprider agreements target transnational crimes or security challenges. The US took a similar agreement-based approach in the era of prohibition to target liquor smuggling occurring on a transnational basis. This

³¹ Article 111(1) states that

‘The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State ...’.

³² See, eg, *Agreement between the Government of Barbados and the Government of the United States concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking*, signed 25 June 1997, TIAS 12872 (entered into force 11 October 1998).

³³ See, eg, *Agreement concerning fisheries off the coasts of the United States, with annexes and agreed minutes*, signed 23 July 1985, TIAS 12002; 1443 UNTS 151 (entered into force 19 November 1985). Amendments and extensions: 14 and 22 March 1990 (TIAS 11893) and 12 May and 6 July 1992 (TIAS 11907).

³⁴ *Memorandum of Understanding Between the Government of the United States of America and the Government of the People’s Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991*, signed 3 December 1993. The MOU was extended on 31 December 2014 for another 5 years. See generally, Kevin W Riddle, ‘Illegal, Unreported and Unregulated Fishing: Is International Cooperation Contagious?’ (2006) 37(3–4) *Ocean Development and International Law* 265; Rachel Canty, ‘Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas’ (1998–1999) 23 *Tulane Maritime Law Journal* 123, 134–6.

³⁵ Bilateral agreements in the context of US employment of hot pursuit are examined further in Chapter 7.

approach contributed significantly to the progression of hot pursuit into customary international law.³⁶

Shiprider agreements are not only practiced by the US. A significant number of states have incorporated shiprider provisions to combat piracy and armed robbery in West Africa, the West Indian Ocean and the Gulf of Aden.³⁷ The expansion of shiprider agreements signals an alternative approach to unilateral hot pursuit enforcement provisions. Many states lack the capacity and governance to utilise standard methods. Crafting appropriate international agreements to target shared objectives is one alternative approach worthy of consideration. Other approaches will be considered in the following chapters.

6.4 Strengthening Municipal Frameworks: South Africa

In considering viable alternative approaches to the ad hoc application of hot pursuit to contemporary maritime challenges, it is useful to examine efforts made to consolidate its core elements within domestic jurisdictions. It is particularly constructive to consider how an appropriately strengthened municipal framework may operate to support the strategic aim of the coastal state. In the following chapter, the inclusion of hot pursuit into the US and Australian domestic regimes will be critically evaluated. In this section, the example of South Africa³⁸ is briefly examined on the basis that hot pursuit (as it appears in Article 111) is explicitly incorporated into municipal legislation.³⁹ South Africa has also embraced hot pursuit in international agreements that utilise unconventional entry into territorial waters.⁴⁰ As a maritime-dependent economy, South Africa requires a capability that can adapt to diverse maritime roles and affect operational overwatch over significant ocean areas.⁴¹ However, recent events have stretched the South African National Defence Forces (SANDF) to breaking point and it has become clear that the state will be unable to fulfil all operational tasks without

³⁶ Examined in Chapter 2; the US entered into a treaty with the UK and enacted supplementary legislation to conduct hot pursuit operations targeting smugglers.

³⁷ Shipriders are employed to exercise hot pursuit under Article 9 of the *West and Central African Code of Conduct* and Article 7 of the *Djibouti Code of Conduct*.

³⁸ For a detailed analysis of the law of the sea in South Africa, see P H G Vrancken, *South Africa and the Law of the Sea* (Martinus Nijhoff, 2011).

³⁹ In its region, South Africa leads the way in marine conservation and on 1 February 2016 South Africa became a signatory to *Port State Measures Agreement*.

⁴⁰ South Africa is a party to the *Djibouti Code of Conduct* and a *Memorandum of Understanding on Maritime Security Cooperation with Tanzania and Mozambique*, signed 7 February 2012.

⁴¹ Republic of South Africa, 'South African Defence Review 2014' (Department of Defence, Defence Review Committee, April 2014) 10–13, para 81.

restructure and the commitment of significant resources.⁴² Accordingly, more cooperative and resource-effective methods are being implemented to address this fundamental shortfall. Defence-specific agreements are specifically named in SANDF's wishlist, including hot pursuit, bilateral enforcement operations and bilateral military exercises.⁴³ Like Australia, South Africa has addressed IUU fishing through criminal justice means in an effort to strengthen enforcement measures as a collaborative effort.⁴⁴ It also appears that the Department of Agriculture, Forestry and Fisheries is the primary enforcement agency with jurisdiction over IUU fishing in the EEZ, although the assistance of the SAN is requested from time to time.⁴⁵

Although South Africa provided assistance to Australia in the notable pursuits of the *South Tomi* and the *Viarsa*, South Africa had already taken the initiative to provide for the exercise of hot pursuit for the purposes of law enforcement in a number of Acts.⁴⁶ Moreover, South Africa had specifically legislated the authorisation for members of the SANDF to conduct multilateral hot pursuit. In the legislation set out below there is reference to the Article 111, so the practical exercise of the power is relatively straightforward. This is particularly constructive when applied or interpreted by domestic courts. South African authorised personnel are permitted by legislation to engage in hot pursuit as a means of maritime law enforcement as set out in Appendix G.

⁴² In addition to its core defence tasks, South Africa has taken a leadership role in contributing to peace operations in Africa, such as in the Democratic Republic of the Congo and Sudan, and additional commitments in the form of border operations in the Southern African Development Community (SADC) and stability operations with the African Union. Regional and continental instability directly affects South African security and the emerging multi-role obligations have been acknowledged as being beyond the current capabilities of the SANDF (Ibid, v-viii).

⁴³ See generally Nick Sendall 'Maritime Implications of the South African Defence Review 2014' (2016) 12(1) *Journal of the Indian Ocean Region* 75.

⁴⁴ In 2001, South Africa seized a large quantity of illegally obtained Patagonian toothfish and rock lobster and notified the US that more containers of the cargo were being shipped to Maine. South Africa later declined to prosecute the matter as a violation of the *Marine Living Resources Act 1998* (South Africa) on jurisdictional grounds, however, the government cooperated in a parallel investigation conducted by the US. The US obtained guilty pleas and convictions for violations of the *Lacey Act*, 18 USC § 545 and 18 USC § 371. On appeal by the US on behalf of South Africa, the court found that South Africa had a proprietary interest in the catch and ordered the defendants to pay \$22.5 million in restitution to the South African government, the largest *Lacey Act* restitution order ever obtained, see *United States v Bengis* (2d Cir, 2015). More recently, the South African High Court rejected Bengis' claim that by assisting the US, South Africa had violated an alleged plea bargain, *Bengis v South Africa; In re: Bengis v South Africa* (16884/2013, 2199/2014) [2016] ZAWCHC 14 (24 February 2016).

⁴⁵ A spokesman for the Navy, Captain Zamo Sithole stated, 'The South African Navy does not have a jurisdiction over illegal fishing within the exclusive economic zone. This is the responsibility of the Department of Agriculture, Forestry and Fisheries. The South African National Defence Force is, however, always ready to provide support to (the department), if so requested' (defenceWeb, 'SAMSA Investigating Seized Chinese Trawler', 17 May 2016 <http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=43522:samsa-investigating-seized-chinese-trawler&catid=108:maritime-security&Itemid=233>).

⁴⁶ South Africa became a signatory to UNCLOS on 23 December 1997.

The amendments in Chapter 4, ‘Law Enforcement Powers of Defence Force at Sea’, took effect as part of the *Defence Act 2002* (South Africa) on 23 May 2003. Section 27 of *Defence Act 2002* empowers military aircraft and vessels to conduct hot pursuit on behalf of South Africa or another state. Section 29(2) contemplates a pre-existing bilateral agreement with a foreign state that authorises cooperation in law enforcement at sea.⁴⁷ Section 29(1) confers a broad range of enforcement powers to authorised defence members to fulfil the aims of enforcement action under the remainder of the Section.⁴⁸ At the time of the *South Tomi* pursuit, neither South Africa nor Australia had domestic legislation authorising multilateral hot pursuit.⁴⁹ Consequently, the *Defence Act* amendments relating to hot pursuit were clearly motivated by the *South Tomi* arrest. Although there were no objections raised in relation to South African involvement, the arrest prompted the incorporation of appropriately robust legislative arrangements. South Africa has effectively codified multilateral hot pursuit in its domestic regime. Soon after the *South Tomi* pursuit, South Africa was involved in the arrest of the *Viarsa*. Once again, the actions of the third state did not draw adverse comment. In fact, in all of the discussion that followed the record-breaking pursuits there was little opposition to the involvement of third party states insofar as it occurred in the pursuits of the *South Tomi* and the *Viarsa*. In the absence of criticism by the flag state (or indeed any state), South African participation in another state’s hot pursuit appeared to be accepted.⁵⁰

Like Australia, South Africa is geographically isolated, has external territories that require extensive patrolling and has limited capability to do so. Additional tasking and a reduced defence budget have caused the South African defence capability to enter into a steady decline.⁵¹ Nonetheless, South Africa has considerable security obligations on the

⁴⁷ Fishery officers are empowered to take certain enforcement action pursuant to s 52 of the *Marine Living Resources Act 1998* (South Africa) as a result of conducting a hot pursuit in accordance with Article 111, but are not authorised to take on hot pursuits of other states as SANDF authorised vessels and aircraft are permitted to.

⁴⁸ By the same token, s 25 authorises enforcement powers in relation to piracy as replicated in Articles 105 and 107 of UNCLOS.

⁴⁹ Prior to legislative amendment in the *Maritime Powers Act 2013* (Cth), s 87 of the *Fisheries Management Act 1991* (Cth) empowered a member or special member of the Australian Federal Police or a member of the police force of a State or Territory, members of the ADF or other persons appointed under s 83 by AFMA to be an officer for the purposes of the Act.

⁵⁰ South Africa and the UK are also party to *Convention on the Conservation of Antarctic Marine Living Resources* and share a common interest in the conservation of marine life in the area adjacent to their respective EEZs. South Africa, France and Australia have all experienced IUU fishing the detriment of marine conservation and the legitimate fishing industries. Parties to the Convention are bound by a number of conservation measures that are reviewed annually, see CCAMLR, *Conservation Measures*, 29 November 2016 <<https://www.ccamlr.org/en/conservation-and-management/conservation-measures>>.

⁵¹ Like many militaries tackling a range of strategic priorities with increasing budgetary constraints: ‘These and other shortcomings must be addressed to prevent the steady decline of the SANDF and the potentially disastrous consequences that could follow’ (Minister of Defence Nosiviwe Mapisa-Nqakula in

African continent⁵² as well as being a member of a number of regional organisations.⁵³ While Australia took an aggressive approach to IUU fishing by conducting hot pursuits over incredible distances, the consequential arrests could not have been achieved without the participation of the South African government and military. In 2007, South Africa and Australia exchanged a Letter of Intent on the future of cooperative surveillance and enforcement in fisheries of their respective EEZs in the Southern Ocean.⁵⁴ However, there has been no further progression towards a more comprehensive cooperative agreement (such as the treaties between Australia and France) in respect to the Southern Ocean external territories. More recent analysis points to the continuing utility of robust bilateral agreement that make allowances for hot pursuit.⁵⁵

Faced with a wider range of immediate maritime security concerns, South Africa has strengthened its domestic regime with provisions that, among other things, give effect to multilateral hot pursuit. This is due in part to the successful multilateral apprehensions with Australia and the wider implications of streamlining and restructuring the SANDF. The authorisation of multilateral hot pursuit in legislation could hardly be a clearer recognition of these developments and it is an example of an innovative approach aimed at addressing capability challenges and geopolitical realities.

6.5 The Role of Technology

It is not surprising that technology developed as a strike capability for warfighting has found application in maritime security. It is clear that advances in technology have the potential to improve ocean overwatch and employed in a dual-use purpose to meet more than one strategic objective.⁵⁶ Equally, new technologies can aid in the violation of coastal state law, requiring an appropriate readjustment by maritime law enforcement to

‘Ailing SANDF needs urgent resuscitation—Mapisa-Nqakula’, *City Express* (online), 23 April 2014 <<http://www.citypress.co.za/news/ailing-sandf-needs-urgent-resuscitation-mapisa-nqakula>>.

⁵² Vrancken, above n 38.

⁵³ The primary examples are the African Union, SADC and the Indian Ocean Rim Association.

⁵⁴ South Africa has also entered into various bilateral defence cooperation agreements under the auspices of the SADC that require various commitments of military assets and manpower, such as the *Protocol on Politics, Defence and Security Co-operation*, signed 14 August 2001 (entered into force 2 March 2004) and the *Memorandum Amongst the Southern African Development Community Member States on the Establishment of a Southern African Development Community Standby Brigade*, signed 16 August 2008.

⁵⁵ Sendall, above n 43, 95.

⁵⁶ For example, information received via satellite that is used for weather and shipping may also be used for suspected border protection violations. Australian Geoscience provides earth observation imagery data captured by satellites Landsat-5 and Landsat-7 to the US Geological Survey, who in turn uses scientific information to predict and analyse natural disasters and human effects on the environment. Geoscience also employs a satellite surveillance system to evaluate the viability of monitoring sections of the nation’s vast EEZ using satellites.

counter this. With respect to the contemporary application of hot pursuit, consideration must be given to the status of technology within the international legal framework. As a limited exception to the freedom of the high seas, the conditions attached to the exercise of hot pursuit cannot be easily overlooked. As an alternative approach to conventional methods of maritime law enforcement, the influence of technology on hot pursuit will be examined here.

As discussed in Chapter 4, the issue of communicating a valid signal to a suspected vessel is a particular barrier to the contemporary use of available technology. The precondition to signal a suspected vessel to stop is a fundamental step in the construction of a legitimate hot pursuit. Confining communication to a distance close enough to be seen or heard seems archaic in an age where positional data is provided by satellites and wave-riding robots. After all, there is no requirement to provide evidence that the suspected vessel received the signal. Other than the failure to strictly adhere to the meanings of the words contained in treaty, it is difficult to grasp how a broader interpretation of the method of communication would unfairly effect vessels. Unfortunately, ITLOS discounted an ideal opportunity to address this point in *M/V 'Saiga'*.⁵⁷ In a separate opinion, Judge Anderson made remarks suggesting that any consideration of a signal made over a long distance⁵⁸ (consideration of the issue did not occur in this matter) would be assisted by evidence that the signal had been received. While it seems self-defeating to pin one's hopes on the suspect vessel making a record of the signal to stop when it is likely steaming towards the high seas, it appears that commentators have also supported evidence of receipt as a useful method of establishing the validity of the signal.⁵⁹ Recent commentary has supported a broader or more modern interpretation of Article 111 so that states may exercise the power effectively.⁶⁰

⁵⁷ The lawfulness of a communication by the coastal state to a suspected vessel was a key aspect of challenge in the only case considered by ITLOS in *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits) (1999) 120 ILR 143, 148 (*'M/V Saiga (No 2)'*). The Tribunal demurred from clarification of this issue, declining to comment on whether a radio communication alone may satisfy the requirements of Article 111. The Tribunal merely confirmed that a signal must be given prior to the commencement of the pursuit, although this is already stated in Article 111(1). The Tribunal heard conflicting accounts from the parties about the factual circumstances and resisted the opportunity to provide guidance on the status of huge technological advancements that go to the crux of hot pursuit.

⁵⁸ Judge Anderson refers to 40 nautical miles.

⁵⁹ Craig H Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20(4) *Ocean Development and International Law* 309, 319.

⁶⁰ See, eg, Allen, above n 59; Rachel Baird, 'Arrests in a Cold Climate (Part 2)—Shaping Hot Pursuit Through State Practice' in Rachel Baird and Denzil Miller (eds), *Antarctic and Southern Ocean Law and Policy Occasional Papers No 13, Special Edition: In Acknowledgement of Dr Denzil Miller* (Law School,

Putting aside the issue of valid and proximate signals, the ability to locate, track and record shipping movements has dramatically improved since the negotiations at UNCLOS III. The development of more accountable flag registries,⁶¹ increased state and regional cooperation,⁶² information sharing⁶³ and more expeditious passage of information⁶⁴ have all contributed to an enhanced situational awareness at sea. As a non-strike capability, unmanned aerial systems also have the ability to record video evidence of vessels and relay to a base on a sea platform or on land.⁶⁵ Although this means that the standard of evidence required of Article 111(1) is more accessible,⁶⁶ it remains a potential source of contention at any proceedings challenging a hot pursuit. Given the high stakes of drug trafficking, people smuggling and IUU fishing,⁶⁷ the operators of these ventures will seize upon any error, point of doubt or connectivity failure to attempt to escape prosecution. As a number of cases have shown, the well-resourced corporate backers who support transnational crime (or indeed the flag state)⁶⁸ may instigate litigation or a robust defence to prosecution.⁶⁹ The best-practice use of tested technology must support rather than undermine a coastal state's efforts to effectively exercise sovereign control over its maritime zones.

On the face of it, customary international law and UNCLOS do not exhaustively list permitted methods of vessel identification. In contrast to the issue of signal, a deliberate

University of Tasmania, 2009) 16; Randall Walker, 'International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century' (2011) 17 *Auckland University Law Review* 194, 217; Vasilios Tasikas, 'Unmanned Aerial Vehicles and the Doctrine of Hot Pursuit: A New Era of Coast Guard Maritime Law Enforcement Operations' (2004) 29 *Tulane Maritime Law Journal* 59, 75.

⁶¹ The FAO has been working towards improved flag registries for a number of years. See, eg, Terje Lobach, 'Port State Control of Foreign Fishing Vessels' (FAO Fisheries Circular No 987, 2003) <ftp://ftp.fao.org/fi/document/Ec-OpenRegistries/FAOFisheriesCircularNo987_e.pdf>. A more recent example is Ariella D'Andrea, 'The "Genuine Link" Concept in Responsible Fisheries: Legal Aspects and Recent Developments' (FAO Legal Papers Online No 61, 2006) <http://www.fao.org/fileadmin/user_upload/legal/docs/lpo61.pdf>.

⁶² For example, in relation to WMDs and IUU fishing.

⁶³ See, eg, Klein, above n 1, 241.

⁶⁴ Based on advances in information technology and the global positioning system. The use of biometrics to identify seafarers is also a part of this development in technology. See, eg, *International Labor Organization Seafarers' Identity Documents Convention* (Revised), 2003 (No 185) adopted by the Governing Body at its 289th Session (March 2004) and amended at its 294th Session (November 2005).

⁶⁵ This kind of development is particularly promising for maritime law enforcement.

⁶⁶ The standard is 'a good reason to believe'.

⁶⁷ It was estimated that the two apprehended vessels, the *Lena* and the *Volga*, had approximately 200 tonnes of Patagonian toothfish catch with an estimated value of around \$2.5 million. Senator Robert Hill, Minister for Defence, Leader of the Government in the Senate, 'Navy Apprehends Second Suspected Illegal Fishing Vessel' (Press Release 48/02, 12 February 2002).

⁶⁸ *Olbers Co Ltd v The Commonwealth of Australia* [2004] FCAFC 262 ('*Olbers on appeal*').

⁶⁹ *Ibid.* See also *Navalmar SA v the Commonwealth and AFMA* [2003] (P)WAD253/2003 (7 November 2005). In this matter, the owners successfully obtained a dismissal with costs when the applicant withdrew the application. See, eg, Laurence Blakely, 'The End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegally Fishing in its Exclusive Economic Zone' (2008) 17(3) *Pacific Rim Law and Policy Journal* 677, 701.

attempt was made during negotiations to draft a general provision that did not limit methods of detection.⁷⁰ As a result, Article 111(4) broadly states that the pursuing ship must satisfy itself ‘by such practicable means as may be available’. This means that unmanned capabilities, for example, would not be precluded from providing evidence of positional data. The location of a suspected vessel certainly has historically been an evidential sticking point, as seen in the cases of the *M/V ‘Saiga’*,⁷¹ *Volga*⁷² and *South Tomi*.⁷³ In spite of technological advances and the reduced likelihood of error, navigational miscalculation as a result of human fallibility can never be conclusively ruled out.⁷⁴

Any uncertainty about the position of vessels at the time of detection may also deter coastal state authorities from initiating a costly pursuit to enforce domestic law. Technological developments in obtaining positional data will advance the coastal state’s ability to conduct hot pursuit and meet the conditions contained therein.⁷⁵ Additionally, the standard of evidence required in Article 111 of UNCLOS merely requires ‘a good

⁷⁰ *UN Conference on the Law of the Sea, Vol IV, 2nd Comm (High Seas: General Régime)*, UN Doc A/CONF13/40 (24 February – 27 April 1958). India proposed a broader definition for technology to detect suspect vessels by substituting ‘such practicable means as may be available’ for the initial provision of ‘bearings, sextant angles or other like means’ (UN Doc A/CONF/C2/95). Similarly, the German delegation, at UN Doc A/CONF/C2/115, favoured a more comprehensive phrase of ‘appropriate means’, while the US proposed ‘an accepted means of piloting or navigation’ (UN Doc A/CONF/C2/125). More recently, Tasikas endorsed a corresponding perspective: ‘This provision is intended to be read broadly and includes every technical or traditional navigational device at the disposal of enforcing states for the detection and establishment of the position of the suspect vessel’ (above n 60, 75). In spite of recent technological advances, however, the accurate detection of suspect vessels has been a point of contention in contemporary cases such as the *Volga* and *Viarsa* (both discussed below).

⁷¹ *M/V Saiga (No 2)* 140.

⁷² The *Volga*, was detected on 7 February approximately 30 nautical miles inside the Australian EEZ. An RAN frigate, HMAS *Canberra*, detected the *Volga* by radar (beyond visual range) and launched a helicopter to investigate. By the time the helicopter was in range of the *Volga*, the vessel was on the high seas. The owner of the *Volga* argued that HMAS *Canberra* failed to give a warning to stop. The Federal Court found that the *Volga* had been illegally fishing pursuant to the *Fisheries Management Act 1991* and was forfeited to the Commonwealth, irrespective of hot pursuit requirements. See *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, per French, J, para 96 (*‘Olbers at trial’*).

⁷³ The court found that the communications between the coastal state vessel of Australia and suspected vessel the *South Tomi* were insufficient under s 36 of the *Fisheries Management Act 1991* (Cth). See *O’Dea v Aviles* (Unreported, Court of Petty Sessions of Western Australia, Cicchini SM, 18 September 2001).

⁷⁴ In 2014, the RAN entered the Indonesian EEZ on no less than 6 occasions when attempting to turn back refugees that were intending to land in Australia. ‘The incursions happened because personnel had not properly calculated where the 12-nautical-mile boundary to Indonesian territory lay’ (David Wroe and Judith Ireland, ‘Mistakes by Sailors Blamed for Breach of Indonesian Waters’, *Sydney Morning Herald* (online), 20 February 2014 <<http://www.smh.com.au/federal-politics/political-news/mistakes-by-sailors-blamed-for-breach-of-indonesian-water-20140219-3315j.html>>). The *Volga* pursuit is another example of indeterminate location. The Tribunal found that Australian authorities did not signal the vessel until it was outside the Australian EEZ as ‘more detailed recalculations indicated that at the time of the first communication the vessel was a few hundred metres outside the zone’ (*Volga (Russian Federation v Australia)* (Prompt Release) 42 ILM 159, para 33 (Judgment)).

⁷⁵ Although there are limitations at this juncture, technology can assist in the identification of the origin of fish, see Rob Ogden, ‘Fisheries Forensics: The Use of DNA Tools for Improving Compliance, Traceability and Enforcement in the Fishing Industry’ (2008) 9(4) *Fish and Fisheries* 462.

reason to believe' that that the ship has violated the laws and regulations of the state.⁷⁶ There was little opposition or discussion in the treaty negotiations regarding this point⁷⁷ and the commentary simply concludes that 'there must be some tangible evidence or reason to suspect a violation'.⁷⁸ In spite of the lingering concerns about evidential standards raised during legal proceedings, it must be acknowledged that technological developments make an overwhelmingly positive contribution to the employment of hot pursuit as a means of maritime law enforcement.

An exciting project, Project Eyes on the Seas, is currently under development that could conceivably eliminate many of the challenges associated with maritime enforcement of IUU fishing. A Virtual Watch Room is being trialled in the UK to monitor the real-time movement of fishing vessels in marine reserves.⁷⁹ The technology has the capacity to track vessels globally,⁸⁰ including vessel speeds (to detect fishing that occurs when vessels slow or stop altogether), and identify contact with factory ships, trawlers and motherships. The ultimate aim is to develop the system further so it that can expedite rapid deployments of enforcement vessels. Although the system has a number of details that must be resolved, it has the potential to be an extraordinary resource should consensus on its use be achieved among states.

The ability to employ innovative technology promotes significantly better situational awareness at sea and bolsters sovereign control over maritime zones. Faster and lighter capabilities, whether manned or autonomous, are necessary to conduct maritime law enforcement within the framework of hot pursuit. Technology is already being used to assist states with limited capability and infrastructure to meet maritime law enforcement demands.⁸¹ Unmanned capabilities in particular have the potential to make maritime law

⁷⁶ The standard is that 'an enforcing vessel is merely obliged to have reasonable grounds for suspecting a violation of local law' (Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 896).

⁷⁷ There was no recorded opposition or indeed any significant discussion on this point at the 1930 Geneva Conference.

⁷⁸ Myron Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 2002) vol III, 256.

⁷⁹ Similar to an air-traffic control system, the Watch Room is a project sponsored by Satellite Applications Catapult and Pew Charitable Trusts (Pew Charitable Trusts, *Virtual Watch Room Infographic* (January 2015) <http://www.pewtrusts.org/~media/assets/2015/01/virtual_watch_room_infographic_print.pdf>).

⁸⁰ Based on the use of satellite-based surveillance, VMS, SAR, AIS, optical satellite sensors, signals emitted from vessel responders and other methods.

⁸¹ For example, Palau is currently considering deploying autonomous sensor technology to assist with EEZ surveillance after recently banning commercial fishing in its EEZ. As a nation without a conventional military force, Palau has one patrol boat and one Cessna Skymaster to patrol its large EEZ. UAV capability was also trialled in Palau as a more cost-effective means of EEZ surveillance while autonomous sensors (powered by wave motion) can provide data on ships at a distance of up to 15 to 20

enforcement more affordable and more achievable. Failure to exploit emerging technologies in support of hot pursuit operations makes for a missed opportunity to safeguard maritime security, particularly as capabilities continue to rapidly develop.

6.6 Conclusion

Despite significant efforts by international institutions to facilitate greater enforcement measures by flag states, lack of flag state cooperation and compliance measures continue to undermine coastal state enforcement. The manner in which hot pursuit has been utilised varies between jurisdictions and is shaped by external factors such as internal governance, strategic outlook and the nature of the transnational crime being targeted. What is clear is that cooperative enforcement measures (including multilateral action) between states have the potential to be effective force multipliers, dramatically increasing the likelihood that enforcement will succeed. Evidence indicates that a reluctance to embrace these types of alternative arrangements can undermine maritime enforcement efforts, even for states with sufficient capability to address contemporary challenges.⁸² Alternative approaches can accommodate these concerns and give effect to shared objectives.⁸³

Contemporary maritime security challenges have prompted states to strengthen sovereign control over adjacent maritime zones. However, since Poulantzas' analysis of state practice, there has been a demonstrable burgeoning acceptance of expanded hot pursuit, largely in response to IUU fishing. States such as South Africa have incorporated hot pursuit, as set out in Article 111, directly into key legislation while states such as the US have utilised hot pursuit in innovative ways through the execution of bilateral agreements.⁸⁴ These agreements also provide a maritime enforcement capability to states lacking the requisite enforcement tools. In the case of Australia and France, two states have formalised shared maritime enforcement aims and created

nautical miles, see Sean Dorney, 'Palau Ends Drone Patrol Tests to Deter Illegal Fishing', *ABC News* (online), 5 October 2013 <<http://www.abc.net.au/news/2013-10-04/an-palau-drone-patrol-tests-to-deter-illegal-fishing-ends/4999344>>; 'Wave-Riding Robots Help Track Illegal Fishing, Weather', *ABC News* (online), 28 July 2014 <www.radioaustralia.net.au/international/radio/program/pacific-beat/palau-uses-a-high-tech-approach-to-monitoring-illegal-and-over-fishing/1349246>.

⁸² Efforts to address piracy have not met expectations in the Malacca Straits, in part because Indonesia and Malaysia have refused to join ReCAAP and have been resistant to more cooperative measures that may permit entry into their respective territorial waters (Liss, above n 18, 25).

⁸³ Commentators increasingly favour more flexible and alternative approaches to maritime enforcement: '[t]he many bilateral, regional, and multilateral agreements and arrangements that have been adopted in the last 10 years are evidence that states are recognizing that there is an inclusive interest when it comes to matters of maritime security' (Klein, above n 1, 324).

⁸⁴ The US' employment of hot pursuit is analysed in more detail in Chapter 7.

unprecedented hot pursuit provisions that permit pursuit into territorial waters.⁸⁵ All of these examples of hot pursuit demonstrate the political and strategic will to better enforce coastal state laws in the maritime domain.

The unique elements of hot pursuit make it attractive to a range of states, not least to developing states, states with limited maritime enforcement capabilities or subject to extreme geographical challenges.⁸⁶ There is little doubt that hot pursuit can be an effective enforcement tool in varying regions and for a diverse range of maritime security challenges. In addition to the existing international legal framework, it is clear that hot pursuit may be implemented in a number of ways, such as bilateral or multilateral agreement or incorporation into domestic regimes. Conversely, it is apparent that the law on hot pursuit contains a number of shortfalls, but this is due in part to the lengthy ‘package deal’ development of UNCLOS. By comparing US and Australian contributions to the development of hot pursuit, the following chapter examines how each state has implemented hot pursuit to varying success. Should more states seek to do the same, by constructing an effective enforcement response in accordance with international law, hot pursuit can contribute not only to the achievement of strategic aims, but to maintaining the difficult balance between coastal state and flag state interests.

⁸⁵ The bilateral arrangements between France and Australia concerning their respective Southern Ocean territories are examined in Chapter 7.

⁸⁶ Australia and France are examples of this, as are other states with a large or isolated EEZ.

CHAPTER 7: COMPARATIVE ANALYSIS: HOT PURSUIT OPERATIONS OF THE UNITED STATES AND AUSTRALIA

7.1 Introduction

In an area of law that is slow to develop, states are seeking best-practice enforcement methods to address a diverse range of issues—not only IUU fishing, but also other transnational crimes and security threats. The desire for greater situational awareness in the maritime domain and increased capability to control or monitor movement therein has been part of the impetus to re-assess hot pursuit as a means of maritime law enforcement. When confronting similar maritime security challenges, the US and Australia have both employed increasingly novel and cooperative methods of hot pursuit to counter transnational crime. Although this has been achieved in different ways, the resulting state practice has strengthened coastal state jurisdiction and ultimately contributed to the contemporary development of hot pursuit under customary international law.

State practice has shaped hot pursuit by incorporating flexible provisions into municipal law, bilateral regimes, or by elementary operation of the doctrine as it is set out in international law. Chapter 2 concluded that US state practice in relation to prohibition played a significant role in the early inception of hot pursuit into customary international law. While the US did not support the developing concept of hot pursuit prior to prohibition, the administration seized upon the legal device as a convenient method to give effect to its policy objective. Today, the US operates an extensive network of bilateral agreements that incorporate hot pursuit provisions to achieve the contemporary goals set by the core homeland security missions,¹ reflecting a whole-of-government approach to tackling contemporary maritime security challenges.

¹ In response to the events of 9/11, the US consolidated 22 agencies to create the Department of Homeland Security to ‘build a new homeland security enterprise to better mitigate and defend against dynamic threats, minimize risks, and maximize the ability to respond and recover from attacks and disasters of all kinds’ (US Department of Homeland Security, *Implementing 9/11 Commission Recommendations. Progress Report 2011* <<http://www.dhs.gov/implementing-911-commission-recommendations>>). Among others, this security framework encompasses counterterrorism, border protection, transport security, information and infrastructure protection. The legislative framework is contained in the *Department of Homeland Security Act 2002*, 6 USC §§ 101 (2002).

Where conventional approaches are failing to address contemporary maritime challenges, more innovative enforcement methods have been developed. Bilateral agreements, for example (explored in the previous chapter), can facilitate more effective lawful maritime interdiction in circumstances in which unilateral enforcement is inadequate or unachievable. This was also examined in Chapter 5 when the role of Australian hot pursuit practice demonstrated evidence of development of hot pursuit under customary international law. Capability-challenged and geographically isolated, Australia has employed hot pursuit as a means of projecting its jurisdiction further and giving effect to its policy objectives.

Although Australia and the US have taken differing approaches to UNCLOS, they share a common interest in effective ocean governance.² The US exercises a broad maritime dominance financed by a robust defence budget expended to give effect to an array of foreign policy goals.³ As most militaries are undergoing budgetary restrictions as a long-term effect of the global financial crisis, the US continues to rank (by a large margin) as the world's biggest military spender.⁴ Being one of the world's major military powers, the US also exercises influence in a number of areas beyond its shores⁵ and has most recently expanded its role by a 'pivot to Asia'⁶ or 'Asia-Pacific Rebalance',⁷ consolidating its influence in the Pacific.⁸

² The US is not a signatory to UNCLOS and this is addressed in section 7.2.3 of this chapter.

³ According to the Stockholm International Peace Research Institute, US military expenditure was US\$610 billion in 2014—a 6.5 per cent decrease compared to 2013, due in part to the staggered withdrawal from Afghanistan (*SIPRI Yearbook 2015: Armaments, Disarmament and International Security* (Oxford University Press, 2015), ch 9).

⁴ A significant portion of US military spending over the last decade has been in response to the events of 9/11 while more recent spending has focused on post-conflict reconstruction and ground operations (US Department of State Assistant Secretary Kurt Campbell, 'The Obama Administration's Pivot to Asia' (Session held at Foreign Policy Initiative Forum: Maintaining America's Global Responsibility in an Age of Austerity, 13 December 2011) <<http://www.foreignpolicy.org/content/obama-administrations-pivot-asia>>).

⁵ The US also operates a robust Freedom of Navigation Program that aims to challenge excessive maritime claims. See US Department of Defense, *DOD Annual Freedom of Navigation Reports*, 2016 <<http://policy.defense.gov/OUSDPOffices/FON.aspx>>.

⁶ US President Barack Obama signalled a shift towards the Asia Pacific region during a visit to Australia in 2011:

I'd like to address the larger purpose of my visit to this region—our efforts to advance security, prosperity and human dignity across the Asia Pacific. For the United States, this reflects a broader shift. After a decade in which we fought two wars that cost us dearly, in blood and treasure, the United States is turning our attention to the vast potential of the Asia Pacific region' ('Remarks by President Obama to the Australian Parliament' (Speech delivered at Parliament House, Canberra, 17 November 2011) <<https://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>>).

As Secretary of State, Hillary Clinton coined the term 'pivot' in relation to the US' shift of focus to the Pacific in an article ('America's Pacific Century', *Foreign Policy* (online), 11 October 2011 <http://www.foreignpolicy.com/articles/2011/10/11/americas_pacific_century>).

⁷ For the US Department of Defense, the 'Asia-Pacific Rebalance' is one of five 'Top Issues' (<http://www.defense.gov/News/Special-Reports/0415_Asia-Pacific-Rebalance>).

⁸ The US Pacific Command (USPACOM) covers approximately half of the earth's surface (US PACOM,

As the world's smallest continent and largest island, Australia's maritime boundaries⁹ are considerably complex.¹⁰ Both the US and Australia have large EEZs that require vast resources to effectively monitor and protect.¹¹ Like the US, Australia has a number of offshore territories that necessitate costly surveillance and management.¹² Although it is said that Australia 'punches above its weight',¹³ Australia is a minor military player on the world stage¹⁴ in comparison to the US.¹⁵ Both the US and Australia share a Pacific outlook and also seek to wield influence in the polar regions; Antarctica to the south of Australia and, more comprehensively, the US extends its area of responsibility¹⁶ over parts of the waters of both Antarctica and the Arctic.¹⁷ With substantial coastlines and isolated external territories, but in possession of differing capabilities, Australia and the US have had to resort to innovative means and methods

About USPACOM (2017) <<http://www.pacom.mil/AboutUSPACOM.aspx>>).

⁹ Commonwealth and state jurisdiction over waters to the edge of the territorial sea was determined in the Offshore Constitutional Settlement as a result of the High Court's finding in the *Seas and Submerged Lands Case* (1975) 135 CLR 337. States have responsibility for 'coastal waters' up to three nautical miles from the territorial sea baseline. The settlement also includes arrangements on managing oil, gas and other seabed minerals, the Great Barrier Reef Marine Park, other marine parks, historic shipwrecks, shipping, marine pollution and fishing. The legislative arrangements are replicated in legislation: *Sea and Submerged Lands Act 1973* (Cth), *Coastal Waters (State Powers) Act 1980* (Cth), *Coastal Waters (State Title) Act 1980* (Cth), *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) and *Coastal Waters (Northern Territory Title) Act 1980* (Cth).

¹⁰ Australia's claim to approximately 42 per cent of the Antarctic includes an EEZ of 2.2 million square kilometres. However, all sovereignty claims have been effectively suspended pursuant to the Antarctic Treaty System.

¹¹ The US has the largest EEZ in the world at just under 12 million square kilometres (including its external territories).

¹² Australia's strategic focus for Antarctica is geared towards scientific research, environmental protection and international engagement. See A J Press, '20 Year Australian Antarctic Strategic Plan' (July 2014).

¹³ This term is used in the national media to describe Australian influence on global issues of concern. See, eg, Mark Thomson, 'Punching Above Our Weight?: Australia as a Middle Power' (Strategic Paper, Australian Strategic Policy Institute, August 2005).

¹⁴ Among others, Australia is a former member of the United Nations Security Council, President of the Group of Twenty (an international economic forum for cooperation and decision making), chair of the Indian Ocean Rim Association and co-chair (with Indonesia) of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime ('the Bali Process'). Both the US and Australia are 'Dialogue Partners' of the Association of Southeast Asian Nations (ASEAN) and are members of the Asia-Pacific Economic Cooperation forum.

¹⁵ Australia ranks thirteenth overall in global military expenditure, while the US ranks first. Australia's military expenditure amounted to 1.8 per cent of GDP (equivalent to \$US25.4 billion) in 2014 (Sam Perlo-Freeman, Aude Fleurant, Pieter D Wezeman and Siemon T Wezeman, 'Trends in World Military Expenditure, 2014' (Stockholm International Peace Research Institute Fact Sheet, 13 April 2015) <http://books.sipri.org/product_info?c_product_id=496>).

¹⁶ The President is empowered by 10 USC § 161 to establish Unified Combatant Commands with the advice of the Chairman of the Joint Chiefs of Staff. These encompass the military missions, geographic responsibilities and the force structure of the armed forces. USPACOM is one of six Commands and its area of responsibility includes half the world's surface, 'from the west coast of the US to the west coast of India and from Antarctica to the North Pole'.

¹⁷ Antarctica came under USPACOM's area of responsibility in 2002 as a result of that year's Defense Unified Command Plan (Andrew Feickert, 'The Unified Command Plan and Combatant Commands: Background and Issues for Congress' (Congressional Research Service, R42077, 3 January 2013) 48).

of maritime law enforcement to meet their respective strategic imperatives. The doctrine of hot pursuit has played a meaningful role in this.

In order to better address emerging maritime security issues and strategic objectives, Australia has re-examined its domestic law pertaining to maritime enforcement powers within the last decade.¹⁸ Australia has undertaken an overhaul of maritime operations by introducing a new legislative regime,¹⁹ transforming bureaucratic infrastructure²⁰ and by entering into agreements that facilitate better maritime enforcement.²¹ In these challenging geopolitical circumstances, successive Australian governments have allocated significant resources to the country's 'border protection' program.²² Even so, for both Australia and the US, securing effective ocean overwatch over large areas of EEZ continues to be difficult to achieve. Although the US has used its extraordinary enforcement resources to target transnational crimes in its adjacent maritime zones, innovative methods have been necessary to gain momentum.

¹⁸ It has been suggested that Australia has failed to adequately develop its maritime strategic policy: '[i]n the past, Australia's approach to securing the maritime approaches has generally been one of "muddling through". Managing the civil dimension of securing Australia's maritime approaches has over the years been reactive, lacking in strategic vision and generally uncoordinated' (Sam Bateman, 'Securing Australia's Maritime Approaches' (2007) 3(3) *Security Challenges Journal* 109, 111). Along with co-author Quentin Haich, Bateman reiterated this point recently in 'Maritime Security Issues in an Arc of Instability and Opportunity' (2013) 9(4) *Security Challenges Journal* 87, 105.

¹⁹ The changes introduced by the *Maritime Powers Act 2013* (Cth) are examined later in this chapter.

²⁰ Chris Berg, 'Beware the Border Force Fetish', *The Drum* (online), 13 May 2014 <<http://www.abc.net.au/news/2014-05-13/berg-beware-the-border-force-fetish/5448680>>. For media portrayal of border protection in Australia, see Tim Leslie and Mark Corcoran, 'Operation Sovereign Borders: The First Six Months', *ABC News* (online), 26 March 2014 <<http://www.abc.net.au/news/interactives/operation-sovereign-borders-the-first-6-months/>>.

²¹ Australia has signed international agreements that incorporate innovative hot pursuit provisions, such as the *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, signed 2 November 2012, [2017] ATS 11. This treaty is a subsidiary agreement of the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* ('Niue Treaty'), 1974 UNTS 45 (signed and entered into force 9 July 1992). Australia also has two bilateral agreements with France in relation to countering IUU fishing in vicinity of their respective external territories in the Southern Ocean and these are examined later in this chapter: *Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands* ('Cooperative Surveillance Treaty'), opened for signature 24 November 2003, [2005] ATS 6 (entered into force 1 February 2016) and the *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Island* ('Cooperative Enforcement Treaty'), [2011] ATS 1 (signed and entered into force 8 January 2007). These types of agreements are currently limited in number. It is evident that these type of agreements require political willpower and dedicated resources to make them effective. See generally, Stuart B Kaye, 'Enforcement Cooperation in Combating Unauthorized Fishing: An Assessment of Contemporary Practice' (2014) 32(2) *Berkeley Journal of International Law* 316, 329.

²² While Australia has a comparatively smaller military force, a strong alliance persists between the two countries. See, eg, Barack Obama, 'Remarks by President Obama to the Australian Parliament' (Speech delivered at Parliament House, Canberra, 17 November 2011) <<http://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>>.

Although the development of customary international law can be a protracted process, Australia and the US have played a leading role in the contemporary development of hot pursuit.²³ For instance, Australia has employed hot pursuit to address IUU fishing in its lucrative external territories in the southern Indian Ocean. At the same time, the US has crafted a network of bilateral agreements with hot pursuit provisions to address transnational crime such as drug trafficking and migrant interdiction. As a means to project temporal jurisdiction onto the high seas, hot pursuit is a primed operational tool in the coastal state's law enforcement armoury.

7.2 Case Study: The United States

7.2.1 Historical Framework

While many foundational provisions in the US legislative framework are comparatively broad concepts, the employment of the military to conduct law enforcement has been deliberately constrained and limited.²⁴ At the time of Reconstruction, the *Posse Comitatus Act*²⁵ introduced a prohibition barring the Federal Government from deploying the military to enforce domestic law. In essence, US military forces cannot be authorised to conduct law enforcement tasks²⁶ or be employed 'to execute the laws'.²⁷ As a consequence, the role of maritime law enforcement has traditionally fallen to the USCG²⁸ while the Navy is focused on conventional warfighting and other non-constabulary roles.²⁹

²³ This is examined in Chapter 5.

²⁴ The *Constitution of the United States of America* ('US Constitution') is supplemented by the 10 amendments in the Bill of Rights and contains a number of complex provisions that explicitly constrain or sanction various executive acts. This is due in part to the sentiments expressed in the Declaration of Independence and the events arising after the conclusion of the Civil War.

²⁵ 18 USC § 1385 (1878).

²⁶ The *Insurrection Act*, 10 USC §§ 331–335 (1807) authorises the President to use the military to suppress an insurrection at the request of a state government.

²⁷ As a result of the events of 9/11 in 2001 and Hurricane Katrina in 2005, the *Insurrection Act* was amended to permit wider employment of military forces for domestic purposes. On 28 January 2008, however, the amendments were repealed by the *National Defense Authorization Act for Fiscal Year 2008*, s 1068.

²⁸ The USCG was established in 1915 and is categorised by 14 USC as a military service and a branch of the armed forces of the US. The USCG, once an organ of the Treasury, then Transportation and now the Department of Homeland Security, is the lead federal agency for maritime interdiction and the co-lead with Customs in relation to air interdiction.

²⁹ The US Navy may provide logistical and technical support (such as use of facilities, vessels and aircraft, intelligence support and technological aid), but is prohibited from direct participation in law enforcement (such as interdiction, search, arrest, apprehension, seizure, stop and frisk or similar activities). See, eg, Joint Chiefs of Staff, *Interorganizational Coordination During Joint Operations* (Joint Publication 3-08, 24 June 2011).

Although the US government had previously been a staunch opponent to the developing concept of hot pursuit, the US employed hot pursuit during the prohibition era to address the thriving illegal liquor trade.³⁰ The US enacted legislation authorising hot pursuit³¹ and entered into a series of bilateral agreements permitting boarding and search within one hour's sailing distance of the US coastline.³² The transition of hot pursuit into customary international law was also greatly boosted by US legislative action and subsequent judicial endorsement.³³ Recent interest in the prevention of IUU fishing and other illegal conducted has resulted in the proliferation of bilateral agreements aimed at more contemporary responses to problems of a shared nature.

7.2.2 The United States Legislative Framework

The artificial distinction between the constabulary role of the USCG and the conventional defence of the nation by the military has caused confusion for some time.³⁴ This is in stark contrast to the case of Australia, where the constabulary role of the RAN is firmly established.³⁵ Conversely, when the US Navy is employed to conduct

³⁰ Examined in more detail in Chapter 2.

³¹ The *Tariff Act of 1922*, 19 USC § 1581 was amended by 19 USC § 1581 of the *Tariff Act of 1930*. The power to pursue was upheld in cases such as *Newtown Bay* 36 F 2d 729 (1929).

³² A treaty between the US and the UK allowed for the hot pursuit of vessels that were suspected of violating US domestic prohibition law: the *Convention Between the United States of America and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States*, signed 23 January 1924 (entered into force 22 May 1924). Others include the *Convention Between the United States of America and Denmark for the Prevention of Smuggling of Intoxicating Liquors*, signed 29 May 1924 (entered into force 25 July 1924); *Convention Between the United States of America and Norway for the Prevention of Smuggling of Intoxicating Liquors*, signed 24 May 1924 (entered into force 2 July 1924); *Convention Between the United States and Panama to Prevent the Smuggling of Intoxicating Liquors*, signed 6 June 1924 (entered into force 19 January 1925); *Convention Between the United States and the Netherlands to Prevent the Smuggling of Intoxicating Liquors*, signed 21 August 1924 (entered into force 8 April 1925); *Convention Between the United States and Germany For the Prevention of the Smuggling of Intoxicating Liquors*, signed 19 May 1924 (entered into force 11 August 1924); *Convention Between the United States and Italy for the Prevention of the Smuggling of Intoxicating Liquors*, signed 3 June 1924 (entered into force 22 October 1924); *Convention Between the United States and Cuba For the Prevention of Smuggling Operations*, signed 4 March 1926 (entered into force 19 June 1926); *Convention Between the United States and France to Prevent the Smuggling of Intoxicating Liquors*, signed 29 May 1924 (entered into force 25 July 1924); *Convention Between the United States and Spain to Prevent the Smuggling of Intoxicating Liquors*, signed 10 February 1926 (entered into force 17 November 1926); *Convention Between the United States and Belgium to Prevent the Smuggling of Alcoholic Liquors*, signed 9 December 1925 (entered into force 11 January 1928); *Convention to Prevent Smuggling of Intoxicating Liquors Between the United States and Greece*, signed 25 April 1928 (entered into force 18 February 1928).

³³ Discussed in further detail in Chapter 2.

³⁴ For a detailed analysis of the historical application of the *Posse Comitatus Act*, see Gary Felicetti and John Luce, 'The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done' (2003) 175 *Military Law Review* 86; Sean McGrane, 'Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act' (2010) 108(7) *Michigan Law Review* 1309.

³⁵ The employment of the ADF to conduct law enforcement is entrenched in the *Australian Constitution*; s 51(vi) authorises Parliament to make laws with respect to the 'naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws

maritime law enforcement, USCG personnel must be on board to effect boarding and arrests. According to US legislation, USCG Law Enforcement Detachments must be assigned to every surface naval vessel operating at sea in a drug interdiction area.³⁶ This unconventional construct means that the US effectively deploys USCG shipriders on its own naval assets to overcome the impediments arising from the *Posse Comitatus Act*.³⁷ Although all navies are authorised to conduct hot pursuit under UNCLOS and customary international law, the US Navy is in fact prohibited from doing so by domestic legislation.³⁸

7.2.3 *The United States and the Law of the Sea: Working Around UNCLOS*

Despite being a prolific force on the oceans, the US has famously declined to become party to UNCLOS.³⁹ Ratification or accession of a treaty requires two-thirds support of

of the Commonwealth'. More recently, a 2006 amendment to *Defence Act (1903)* (Cth) Part IIIAAA authorises military enforcement operations against a national security threat. As Barwick CJ noted in *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 192, 'There is no constitutional objection to the employment of a member of the defence forces in the performance of acts in furtherance of the provisions of the *Fisheries Act*'.

³⁶ See 10 USC § 379(b) Assignment of Coast Guard personnel to naval vessels for law enforcement purposes:

(a) The Secretary of Defense and the Secretary of Homeland Security shall provide that there be assigned on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures.

(b) Members of the Coast Guard assigned to duty on board naval vessels under this section shall perform such law enforcement functions (including drug-interdiction functions)—

- (1) as may be agreed upon by the Secretary of Defense and the Secretary of Homeland Security; and
- (2) as are otherwise within the jurisdiction of the Coast Guard.

...

(d) In this section, the term "drug-interdiction area" means an area outside the land area of the United States (as defined in section 374(b)(4)(B) of this title) in which the Secretary of Defense (in consultation with the Attorney General) determines that activities involving smuggling of drugs into the United States are ongoing.

³⁷ The USCG may be directly employed by the US Navy if required, see §191(a) Transfer of Secretary of Transportation's powers to Secretary of Navy when Coast Guard operates as part of Navy: 'When the Coast Guard operates as a part of the Navy pursuant to section 3 of title 14, the powers conferred on the Secretary of Transportation by section 191 of this title, shall vest in and be exercised by the Secretary of the Navy'.

³⁸ Upon the declaration of war or when the President directs, the USCG operates under the authority of the Department of the Navy.

³⁹ Although there continue to be impediments to the US becoming a party to UNCLOS, the US was one of the original signatories to the *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) (the 'Geneva Convention'). The government of the day objected to Part XI which introduced the regime to govern resource development of the deep seabed beyond areas of national jurisdiction. The passage of international treaties has faced strong opposition within the Senate, even those most widely ratified with compelling humanitarian aims. For example, the US signed the *Convention on the Rights of Persons with Disabilities* (opened for signature 13 December 2007, entered into force 3 May 2008) on 30 July 2009, but on 4 December 2013 the treaty failed to receive the support of the required majority of the Senate. The US also signed the *Convention on the Elimination of All Forms of Discrimination Against Women* (opened for signature 1 March 1980, 2515 UNTS 3 (entered into force 3 September 1981)) on 17 July 1980 and the Convention has been voted on favourably twice by the Senate Foreign Relations Committee, but it is yet to be presented to the Senate for a vote. On 8 October 2008, the failure to ratify the *Convention for the Rights of the Child* (opened for signature 20 November 1989, entered into force 2 September 1990 and signed by the US on 16 February 1995) prompted US President Barack Obama to state 'It's embarrassing to find ourselves in the company

the Senate and a number of significant treaties have been rejected.⁴⁰ The persistent opposition to UNCLOS is based on magnified conservative suspicion of international agreements generally and, more specifically, perceptions that it will undermine US sovereignty and impinge on defence capability.⁴¹ Unfortunately, this failure to effectively engage with the primary instrument on the law of the sea has prevented the US from meaningfully contributing to its further development.⁴² Instead, the US has focused its efforts on the development of customary international law⁴³ as a method that works around UNCLOS (most often by the implementation of bilateral agreements) while also attempting to exercise influence from the sidelines.⁴⁴

In the absence of the codified reliability afforded by UNCLOS, it is essential to determine whether any aspects of the law of the sea are not available to the US insofar as they may affect the right of hot pursuit. The basic elements of hot pursuit in Article 111 were largely unchanged from those of Article 23 of the Geneva Convention. The one key difference that particularly affects hot pursuit was the adoption of the EEZ in UNCLOS.⁴⁵ So far as this addition effects US operation of maritime law enforcement, the administration has made clear statements that it considers significant parts of UNCLOS to in fact constitute customary international law. That is, the US has

[a]greed to accept the substantive provisions of the Convention, other than those dealing with deep sea-bed mining, in relation to all states that do so with respect to the United States. Thus, by express or tacit agreement accompanied by consistent practice, the

of Somalia, a lawless land' (Presidential Youth Debate, 20 October 2008 <<http://www.youthdebate2008.org/video/question-12/#content>>). Somalia has since ratified the agreement on 1 October 2015 and the US remains the only state party that has failed to ratify the Convention.

⁴⁰ Ibid.

⁴¹ Additionally, opponents to UNCLOS ratification have made much of the potential for environmental litigation and the imposition of royalties to the Deep Seabed Authority. See, eg, *Statement of Donald Rumsfeld, The Law of the Sea Convention: Hearings before the US Senate Committee on Foreign Relations* (112th Cong, 14 June 2012).

⁴² Similarly, the state of affairs between the US and UNCLOS would not qualify for ancillary obligations arising from Article 18 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁴³ US Naval doctrine dictates adherence to a legal framework of diverse sources: 'The effectiveness of maritime security relies on strong international law that includes the law of the sea (LOS); regional, multinational, and bilateral agreements; domestic laws and regulations; and private-sector practice and procedure' (Department of the Navy, *Naval Doctrine Publication 1: Naval Warfare* (March 2010) 37).

⁴⁴ Particularly in relation to the renegotiation of the 1994 *Agreement Relating to the Implementation of Part XI of the UNCLOS* and since that time the US has been relegated to observer status at the International Seabed Authority.

⁴⁵ Article 111 states that hot pursuit may occur from within the EEZ or the waters above the continental shelf where the triggering violation of coastal state law relates to the permitted subjects to which the zones relate (including safety zones around installations).

United States, and states generally, have accepted the substantive provisions of the Convention...as statements of customary law binding upon them.⁴⁶

In 1983, President Ronald Reagan proclaimed an EEZ of 200 nautical miles. He stated in broad terms that the government would accept and act in accordance with the balance of interests relating to traditional uses of the oceans.⁴⁷ The EEZ was deemed part of customary international law⁴⁸ very shortly afterwards.⁴⁹ Putting aside the lingering issue of the seabed regime,⁵⁰ it is apparent that the US recognises and has no residual objections to hot pursuit as it is understood in Article 111 and customary international law.⁵¹ Accordingly, there is a reasonable expectation that any hot pursuit operations undertaken by US warships and authorised vessels in maritime zones will be conducted in accordance with international law.

7.2.4 Relevant United States Legislation and Policy

7.2.4.1 Maritime Law Enforcement

US Federal law is largely encompassed in the US Code at Appendix H and remains the source of duties and powers bestowed upon the USCG.⁵² In Title 14, Part 1 of Chapter 5, the powers of the USCG are set out very broadly⁵³ and are also subject to the USCG Model Maritime Service Code at Appendix I. The parameters, as they apply to waters ‘over which the United States has jurisdiction’, are set out in various pieces of

⁴⁶ American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (1987) vol 2, part V, 5.

⁴⁷ At this time, the primary objection to UNCLOS arose from the treatment of the seabed mining regime in Part XI. See President Ronald Reagan, *Statement on United States Oceans Policy* (10 March 1983).

⁴⁸ *Delimitation of the Maritime Boundary of the Gulf of Maine (Canada/United States)* [1984] ICJ Rep 246, 94.

⁴⁹ The US underwent the onerous task of individually amending relevant pieces of legislation rather than introducing a single EEZ-specific act, see Ambassador John Negroponte, Assistant Secretary for Oceans and International Environmental, and Scientific Affairs, Speech delivered at 10th Annual Seminar sponsored by the Center for Ocean Law and Policy, Southampton, Bermuda, 14 March 1986. For a discussion on the challenges encountered during Congressional consideration of the implementing legislation, see James E Bailey III, ‘The Exclusive Economic Zone: Its Development and Future in International and Domestic Law’ (1985) 45 *Louisiana Law Review* 1269, 1286.

⁵⁰ In 1990, the UN Secretary-General convened discussions to promote universal acceptance of UNCLOS in response to issues raised by a number of states relating to the seabed mining provisions contained in Part XI of the Convention. The US became a signatory to the resulting *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 41 (entered into force on 28 July 1996).

⁵¹ Although the US is not a party to the Convention, it considers the navigation and overflight provisions therein reflective of customary international law and acts in accordance with the treaty.

⁵² 14 USC § 2 is in Appendix H.

⁵³ 14 USC § 89 is in Appendix H.

legislation establishing those transnational crimes that the administration wishes to target. These are discussed in the following subsections.⁵⁴

7.2.4.2 IUU Fishing

The US has often been either the driving force or an original signatory to many contemporary agreements or regimes that seek to protect the marine environment and promote safety at sea.⁵⁵ As the US imports up to 90 per cent of its seafood, there have been considerable efforts made to promote sustainable fishing practices through science-based management and capacity building.⁵⁶ Rather than engaging in bilateral agreements, as with other transnational maritime issues such as drug trafficking, the US operates as an assertive regional and global advocate for development by promoting compliance and best-practice sustainability.⁵⁷ Given the focus on the protection of a range of species, the US administration favours the umbrella term ‘Living Marine Resources’ (LMR), a term found in UNCLOS, rather than IUU fishing.⁵⁸ Conversely, Australia only uses the term ‘LMR’ in relation to its obligations under the *Convention on the Conservation of Antarctic Marine Living Resources*. In US terms, LMR contemplates a greater range of marine resources and is not just prefaced on issues arising from EEZ and high seas violations.

Although the relevant US authorities⁵⁹ are empowered by a number of statutes to exercise broad enforcement powers conferred by 16 USC § 38,⁶⁰ hot pursuit is not

⁵⁴ The USCG produced a *Coastguard Model Maritime Service Code* ‘to provide clear authority for the men and women of a Maritime Force to effectively protect and serve their country’. Hot pursuit provisions were incorporated into the Code and are in Appendix I.

⁵⁵ The US is party to a considerable number of regional and global organisations and cooperative enforcement regimes that arise from bilateral agreements. The full list and a description of each can be found in Emma Htun (ed), ‘International Agreements Concerning Living Marine Resources of Interest to NOAA Fisheries’ (Report, National Oceanic and Atmospheric Administration, National Marine Services Office of International Affairs, 2014) <http://www.nmfs.noaa.gov/ia/resources/2014_international_agreements_book.pdf>.

⁵⁶ The US engages with representatives of the fishing industry to promote sustainable fishing and alternatives practices. The US also works with states that have weak governance to promote improved fisheries management and enforcement measures. See, eg, National Oceanic and Atmospheric Administration, ‘Improving International Fisheries Management —Report to Congress Pursuant to section 403(a) of the Magnus-Stevens Fisheries Conservation and Management Reauthorization Act of 2006’ (US Department of Commerce, January 2013) 84.

⁵⁷ Ibid.

⁵⁸ Used by the National Oceanic and Atmospheric Administration, the USCG and other agencies and departments. LMR is listed as a pillar of Maritime Stewardship, one of the three missions of the USCG. USCG responsibility for the protection of natural resources began as early as the 1820s when Congress ordered the protection of Florida live oak as a source of material for ship building and therefore vital to security at that time.

⁵⁹ Although other agencies manage IUU fishing issues, the USCG is tasked with the enforcement of legislation. The *Magnuson-Stevens Fishery Conservation and Management Act of 1976*, 16 USC § 1801 and the *Marine Mammal Protection Act of 1972*, 16 USC § 1361 are prime examples of this arrangement.

mentioned in any of the relevant conservation legislation.⁶¹ In the absence of legislative detail on the exercise of hot pursuit for the purposes of protection of LMR under domestic law, the USCG would be subject to customary international law when exercising the right.⁶² While the US has focused on capacity building and promotion of sustainable practices, there are an increasing number of bilateral agreements that incorporate hot pursuit and shipriders provisions in relation to marine resources.⁶³

7.2.4.3 Irregular Migration⁶⁴

The US is an example of those states⁶⁵ that have increasingly sought to strengthen control over irregular migrants.⁶⁶ 14 USC 89 empowers the USCG to conduct law enforcement in relation to irregular migration (or as it is described in US administration terminology, migrant interdiction).⁶⁷ Hot pursuit has been a part of this approach. In response to internal political strife in Haiti in 2003 and a resulting increased influx of Haitian citizens, President George Bush suspended all entry of undocumented aliens by sea and directed the repatriation of all aliens interdicted beyond the territorial sea.⁶⁸

Both statutes grant jurisdiction out to 200 nautical miles—the US-declared EEZ. Accordingly, the USCG draws its authority from the USC while the detail that sets out the parameters of powers is supplemented by USCG boarding policy.

⁶⁰ For example, 16 USC 38(III) § 1826(g) confers power on the President as follows,

The President shall utilize appropriate assets of the Department of Defense, the USCG, and other Federal agencies to detect, monitor, and prevent violations of the United Nations moratorium on large-scale driftnet fishing on the high seas for all fisheries under the jurisdiction of the United States and, in the case of fisheries not under the jurisdiction of the United States, to the fullest extent permitted under international law.

⁶¹ See, eg, *High Seas Fishing Compliance Act of 1995*, 16 USC § 5501; *Oceans Act of 1992*, 16 USC § 1431; *Fisheries Conservation and Management Act of 1976*, 16 USC § 5501.

⁶² The US Navy operates a ‘Living Marine Resources Program’ to develop information and technology solutions to protect LMR by minimising the environmental impact of Naval training and exercises (see Department of the Navy, *Living Resource Management* (2017) <<http://www.lmr.navy.mil>>).

⁶³ See, eg, *Agreement between the Government of the United States and the Government of the Republic of the Marshall Islands Concerning Cooperation in Maritime Surveillance and Interdiction Activities*, 08-805 UST (signed and entered into force 5 August 2008). Later supplemented by the *Protocol Between the Government of the United States of America and the Republic of the Marshall Islands to the Agreement of August 5, 2008*, UST 13-319 (signed and entered into force 19 March 2013).

⁶⁴ The International Organization for Migration defines irregular migration as, ‘Movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations’. See also, UNHCR, *Protecting Refugees and the Role of UNHCR* (2014) <<http://www.unhcr.org/509a836e9.html>>.

⁶⁵ Such as Italy and Australia, see also Efthymios Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law’ (2009) 36(2) *Syracuse Journal of International Law and Commerce* 145, 147; G Loescher, ‘Refugee Protection and State Security: Towards a Greater Convergence’ in R M Price and M W Zacker (eds), *The United Nations and Global Security* (Palgrave Macmillan, 2004) 161.

⁶⁶ Electoral promises of Donald Trump included construction of a wall separating the US from Mexico, see Philip Elliott and Alex Altman, ‘The Republican 2016 Field Takes a Hard Right on Immigration’, *Time* (online), 21 August 2015 <<http://time.com/4005245/republican-president-immigration/>>.

⁶⁷ US Coastguard, *Doctrine for the US Coast Guard* (USCG Publication 1, February 2014) 12.

⁶⁸ Executive Order 12807, 24 May 1992, 7 Fed Reg 23133 <<http://www.presidency.ucsb.edu/ws/?pid=23627>>. For further discussion see Bill Frelick, ‘Abundantly

Subsequent administrations have not repealed the order and it remains in effect today.⁶⁹ As a result of the order and subsequent case law, the US considers that the *Convention Relating to the Status of Refugees* ('*Refugee Convention*')⁷⁰ does not apply at sea. Although Australia is party to the *Refugee Convention* and acknowledges the application of the treaty at sea, details about the activities occurring 'on-water', formally known as 'Operation Sovereign Borders', are not publicly disclosed.⁷¹ This lack of transparency has prevented informed analysis in the public domain⁷² and has also contributed to a deterioration of Australia-Indonesia relations.⁷³ Conversely, the US has maintained a proactive and open approach with its neighbouring states, entering into bilateral agreements with most, if not all of those in proximity to best manage transnational issues of concern.⁷⁴

Another important distinction from Australian practice is that the US returns irregular migrants intercepted at sea and this ordinarily occurs pursuant to bilateral agreements. In the absence of an agreement, ad hoc consent is requested. The US administration has treated migrant interdiction based on what it states are humanitarian grounds—by removing persons from unsafe vessels at sea in accordance with the duty to render assistance under Article 98 UNCLOS and returning them to their country of origin. This complies with the limitations of Article 56 powers applicable to the contiguous zone.⁷⁵

Clear: Refoulement' (2005) 19 *Georgetown Immigration Law Journal* 245; Lory Diana Rosenberg 'The Courts and Interception: The United States' Interdiction Experience and its Impact on Refugees and Asylum Seekers' (2003) 17 *Georgetown Immigration Law Journal* 199.

⁶⁹ The order has been amended to reflect the introduction of the new appointment 'Director of Homeland Security', but the effect of the order is largely the same.

⁷⁰ Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

⁷¹ The Australian government recently enacted secrecy provisions that make the disclosure or recording of protected information an offence pursuant to *Border Force Act 2015* (Cth) Part 6. This is applicable to all Immigration and Border Protection employees, including any health and welfare professionals. Although there is one exception in s 48 that permits disclosure if there is a reasonable belief that it is necessary to prevent or lessen a serious threat to the life or health of an individual, this is yet to be tested.

⁷² David Wroe, 'Secrecy Over Asylum Seeker Boat Turn-Backs Puts Navy in a Bind', *Sydney Morning Herald* (online), 25 January 2014 <<http://www.smh.com.au/federal-politics/political-news/secrecy-over-asylum-seeker-boat-turnbacks-puts-navy-in-a-bind-20140124-31e3h.html#ixzz3Djyvc100>>.

⁷³ In the absence of operational transparency, a number of media agencies and non-government organisations have indicated that the vessels of asylum seekers are being towed away from Australian waters to the high seas or the Indonesian EEZ. See, eg, Ben Doherty and Calla Wahlquist, 'Australia Among 30 Countries Illegally Forcing Return of Refugees, Amnesty Says', *The Guardian* (online), 23 February 2016 <<http://www.theguardian.com/law/2016/feb/24/australia-among-30-countries-illegally-forcing-return-of-refugees-amnesty-says>>. This is discussed further in section 7.3.4.

⁷⁴ The European Union is experiencing its biggest refugee crisis since World War II, with over 1 million arrivals in 2015 and 162,000 from January to March 2016. Member nations have negotiated to achieve a collective resolution, albeit one that has drawn the ire of humanitarian organisations. See, eg, William Spindler and Jonathon Clayton (eds), 'UNHCR Expresses Concern Over EU-Turkey Plan', *Office of the United Nations High Commissioner for Refugees*, 11 March 2016 <<http://www.unhcr.org/56dee1546.html>>.

⁷⁵ The coastal state can conduct pursuits where there has been a violation of the rights for the protection of which the zone was established. In the case of immigration in the contiguous zone, the coastal state

Conversely, Australian authorities' course of action has been to tow interdicted vessels to the outer edge of the Australian EEZ.⁷⁶

The US has specific policy aims to restrict the entry of undocumented or irregular migrants entering its territory.⁷⁷ To achieve these aims, the US has entered into a number of bilateral agreements with geographically proximate states to reduce migrant entry by sea. For example, the Dominican Republic lacks the sufficient resources and internal governance to reduce numbers of irregular migrants departing its shores to enter the US.⁷⁸ Leaving aside the obvious legal difficulties arising from non-refoulement (dealt with most ably elsewhere⁷⁹), the Dominican Republic and the US have overcome the challenges of asymmetrical circumstances by entering into a mutually beneficial enforcement agreement.⁸⁰ The incorporation of innovative hot pursuit provisions in this bilateral agreement aims to counter irregular migration and promote the strategic aims that arise from the bilateral relationship.

may only exercise powers to *prevent* infringement of immigration laws pursuant to Article 33. Hence, the coastal state may only utilise hot pursuit to apprehend vessels suspected of having committed immigration violations in its territorial waters. Where suspect vessels are otherwise encountered transiting in the contiguous zone and are suspected of committing immigration offences, the coastal state may only exercise 'prevention' powers, not conventional enforcement powers. This differs from the powers exercisable in the EEZ, where the coastal state may conduct hot pursuit from the EEZ onto the high seas in relation to offences arising from protection and preservation of the marine environment pursuant to Article 56.

⁷⁶ There have been numerous reports of transporting asylum seekers in single-use orange lifeboats, see 'Asylum Seekers Towed Back in Lifeboat: New Video Emerges as Defence Minister Criticises ABC', *ABC News* (online), 17 March 2014 <<http://www.abc.net.au/news/2014-02-07/video-emerges-of-lifeboat-towback-operation/5245280>>. The policy also permitted 'enhanced screening' of asylum seekers at sea and offshore processing in third countries (Jared Owens, 'Asylum-Seekers Returned to Sri Lanka, Scott Morrison Says', *The Australian* (online), 7 July 2014 <<http://www.theaustralian.com.au/national-affairs/immigration/asylumseekers-returned-to-sri-lanka-scott-morrison-says/story-fn9hm1gu-1226979966747>>).

⁷⁷ US Immigration and Customs Enforcement receives an annual appropriation from Congress to remove a limited number of the more than 10 million individuals estimated to unlawfully be in the US. Accordingly, individuals are grouped into priority enforcement categories: fugitives, recent illegal arrivals, repeat customs offender or other criminal offender. In the 2013 financial year, 368,644 individuals were deported, 98 per cent of whom fell into one of the priority categories; 74,159 of these were Level 1 criminal offenders (aliens convicted of crimes such as homicide, rape, and kidnapping). See *Written Testimony of ICE Deputy Director Daniel Ragsdale for a House Committee on Appropriations, Subcommittee on Homeland Security Hearing on ICE's FY 2015 Budget Request*, 13 March 2014.

⁷⁸ The Dominican Republic signed UNCLOS and the *Agreement relating to the implementation of Part XI of the Convention of 10 December 1982* on 10 July 2009.

⁷⁹ See, eg, Niels Frenzen, 'US Migrant Interdiction Practices' in Bernhard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill, 2010) 375; Office of the United Nations High Commissioner for Refugees, *The State of World's Refugees: Human Displacement in the New Millennium* (2006). In relation to Australia, see Michelle Foster, 'Reflections on a Decade of International Law: International Legal Theory: Snapshots From a Decade of International Legal Life: The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing At International Law' 13 (2012) *Melbourne Journal of International Law* 395.

⁸⁰ *Agreement between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Interdiction* (the 'Dominican Migrant Agreement') (signed and entered into force 20 May 2003).

The Dominican Migrant Agreement not only provides for the exercise of broad enforcement powers by the US, it also permits the exercise of jurisdiction in Dominican waters. Dominican Republic shipriders may authorise the US to conduct a range of enforcement powers, including hot pursuit into Dominican waters and hot pursuit from Dominican waters onto the high seas.⁸¹ US shipriders are authorised to enforce US law seaward of the Dominican territorial sea.⁸² The US is authorised to conduct overflight in Dominican airspace if in pursuit of a suspect aircraft during unplanned operations.⁸³ In the absence of a Dominican Republic shiprider or a Dominican Republic vessel, the US is authorised to conduct hot pursuit into Dominican Republic territorial waters.⁸⁴ Conversely, there is a narrow range of reciprocal powers as the Dominican Republic is not authorised to conduct pursuits beyond the conventional parameters of hot pursuit. In this case, the US purports to assist a developing state with limited capability and infrastructure while expanding its jurisdictional influence extra-territorially. While there may be challenges should a third state object to interference with a flag vessel, the agreement is another example of the US' novel reliance on hot pursuit employed to meet a strategic imperative.⁸⁵

7.2.4.4 Drug Trafficking

Unlike irregular migration, where the policy aim is to return rather than process individuals, reduction of drug trafficking has been a major objective for successive US administrations.⁸⁶ Located north of several prolific drug-producing states in South America, the US requires a robust municipal system to facilitate effective maritime interdiction. In contrast to Australia, the US is vulnerable to drug traffickers entering maritime zones in lighter, faster vessels, submersibles and short-range semi-submersibles.⁸⁷ In addition to geographical proximity to the US, a number of regional states lack the sufficient infrastructure and constabulary capability to address the

⁸¹ Art 4(2)(b).

⁸² Arte 2(3)(b).

⁸³ Art 7(2)(b).

⁸⁴ Arts 5(2)(a) and (b). The US must notify Dominican authorities of the operation—consent is not required, only notification.

⁸⁵ Executive Order 12807, 24 May 1992.

⁸⁶ See, eg, the Presidential Decision Directive 14 of 3 November 1993, which describes international drug syndicates as a 'serious national security threat' (Clinton, William J, US President, 'Presidential Decision Directive 14, US Policy on International Counternarcotics in the Western Hemisphere' (PPD/NSC 14, 3 November 1993).

⁸⁷ More than 80 per cent of cocaine arriving from or via Mexico is transported from Latin American states by non-commercial maritime conveyance (Peter Chalk, *The Latin American Drug Trade: Scope, Dimensions, Impact, and Response* (RAND, 2013) 33).

organised criminal elements behind drug production.⁸⁸ To best counter drug importation originating from its regional neighbours, the US has entered into a number of bilateral drug interdiction treaties, many of which include hot pursuit provisions.⁸⁹ The US reliance on hot pursuit in bilateral agreements reflects the far-reaching enforcement provisions of municipal legislation drafted to address drug trafficking.⁹⁰ However, a more faithful representation of hot pursuit under international law would ostensibly limit the US exercise of maritime enforcement in relation to drug trafficking.⁹¹

The powers available to the USCG to exercise hot pursuit pursuant to municipal legislation go beyond those conferred by UNCLOS, the Geneva Convention and customary international law.⁹² Under international law, coastal states may conduct hot pursuit to enforce domestic drug law for offences committed in the territorial sea. Like irregular migration, a state's authority to exercise enforcement powers over drug offences occurring in the contiguous zone is restricted.⁹³ Coastal states only have prevention power in relation to suspected drug offences entering the contiguous zone and have no power at all under international law to legislate in relation to drugs in their EEZ. Consequently, the US has crafted legislation to counter this limitation as part of its 'war on drugs' policy—for example, by purporting to exercise jurisdiction over vessels

⁸⁸ See, eg, Anthony T Bryan 'Democracy and Security: Observations from Mexico, Central America, and the Caribbean' (2012) 3 *Latin American Policy* 88; Clare Ribando Seelk (ed), 'Latin America and the Caribbean: Illicit Drug Trafficking and US Counterdrug Programs' (Congressional Research Service, 30 April 2010) 2.

⁸⁹ Bilateral agreements are discussed further in sections 7.2.5 and 7.3.5.

⁹⁰ The Department of Defense is the lead agency of the Federal government for the detection and monitoring of aerial and maritime transit of drug shipments into the US, requesting \$1,189.7 million in the recent National Drug Control Policy (Office of National Drug Control Policy, 'FY 2016 Budget and Performance Summary' (Report, Executive Office of the President, November 2015) 47).

⁹¹ In a recent Federal Court of Appeals decision, the court overturned the drug trafficking convictions of four men who were arrested by Panamanian authorities and released to the US for prosecution in *US v Bellaizac-Hurtado* 700 F 3d 1245 (11th Cir, 2012) ('*Bellaizac-Hurtado*'). Insofar as asserting jurisdiction extraterritorially, *Bellaizac-Hurtado* has been a departure from previous findings, see, eg, *US v Romero-Galue* 757 F 2d 1147 (11th Cir, 1985) ('*Romero-Galue*'); *US v Gonzales* 776 F 2d 931 (11th Cir, 1985). This suggests that formal third state consent is sufficient for the exercise of US interdiction and it may be that *Bellaizac-Hurtado* is an anomaly within US jurisprudence. More recently, *US v Ballestas* 795 F 3d 138 (DC Cir, 2015) distinguished *Bellaizac-Hurtado* as a constitutional 'Law of Nations' matter, rather than one that addressed the 'Felony on the High Seas' power. See also, *US v Carvajal* 924 F Supp 2d 219 (DC Cir, 2013); in a conspiracy to distribute drugs matter the District Court ruled that US jurisdiction could be exercised over defendants residing in—and never leaving—a foreign territory.

⁹² There are a range of agencies with jurisdiction over drug trafficking, but for the purposes of maritime crimes it is the USCG that possesses the pertinent law enforcement powers that encompass hot pursuit. The USCG's powers are contained in 14 USC 2 and 89. While pursuit is incorporated into customs legislation of 19 USC chs 4 (§ 1581 *Tariff Act*) and 5 (§ 1701 *Anti-smuggling Act*), the limitations on the ordinary exercise of the right are not present.

⁹³ UNCLOS art 33.

in the contiguous zone entering the US⁹⁴ in contrast to the prevention-only powers of Article 33 of UNCLOS.

To better address the influx of drugs by sea,⁹⁵ the US has progressively increased the powers of its enforcement agencies via several incarnations of anti-smuggling legislation,⁹⁶ ultimately introducing the *Maritime Drug Law Enforcement Act* (2007).⁹⁷ In terms of exercising lawful maritime jurisdiction under international law, there are two categories that potentially exceed the parameters of hot pursuit.⁹⁸ First, the authority for US enforcement over a foreign flag vessel in a third state territorial sea arising from a pursuit is ordinarily terminated by virtue of Article 111(3)⁹⁹ (as coastal state sovereignty comes into play). Should the third state waive the requirement for innocent passage and jurisdiction over potential offences committed in its territorial

⁹⁴ 46 USC § 70502 (C)(F):

a vessel in the contiguous zone of the US, as defined in Presidential Proclamation 7219 of 2 September 1999 (43 USC 1331 note), that—
(i) is entering the United States.

Presidential Proclamation 7219 states that the US declared a distance of 24 nautical miles as the contiguous zone (William J Clinton, ‘Proclamation 7219—Contiguous Zone of the United States’ (2 September 1999)).

⁹⁵ According to the Acting Deputy Administrator of Drug Enforcement Administration, Donnie Marshal, Today’s international crime syndicates have at their disposal an arsenal of technology, weapons and allies—corrupted law enforcement and government officials—enabling them to dominate the illegal drug market in ways we never thought possible. These modern day drug syndicate leaders oversee a multi-billion dollar cocaine and heroin industry which affects every aspect of American life (Statement of Acting Deputy Administrator Drug Enforcement Administration before the House Government Reform and Oversight Committee Subcommittee on National Security, International Affairs, and Criminal Justice’ (12 March 1998)).

⁹⁶ The *Comprehensive Drug Abuse Prevention Act of 1970*, 84 Stat 1236 (1970) criminalised possession of drugs in the territorial sea. The *Marijuana on the High Seas Act of 1980*, 21 USC §§ 955a–955d (1982) introduced extra-territorial application and additionally required proof of a nexus between a suspect vessel and the US.

⁹⁷ 46 USC §§ 70501–70508 (2000). UNCLOS had come into effect prior to the introduction of the Act and the US released a statement on its refusal to sign the treaty, see Reagan, above n 47. The Act categorises vessels as either flag vessels (46 USC §§ 70502(b)) or ‘vessels subject to US jurisdiction (46 USC §§ 70502(c)). The latter is further broken down into stateless vessels set out in Article 6 of the Geneva Convention, those vessels whose flag state have waived jurisdiction, vessels in coastal state territorial waters where the relevant state consents to US law, vessels in the contiguous waters of the US and vessels in the ‘customs waters’ of the US. The issue of US maritime enforcement over stateless vessels is dealt with in more detail elsewhere. See, eg, Anne Marie Brodarick, ‘High Seas, High Stakes: Jurisdiction Over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act’ (2012) 67 *University of Miami Law Review* 255; Allyson Bennett, ‘That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act’ (2012) 37(2) *Yale Journal of International Law* 433.

⁹⁸ 46 USC §§ 70502 (c)(1)(D) and (F)(iii). The current legislation also captures hovering vessels in a device similar to Article 111(4) by permitting enforcement over motherships present in adjacent waters pursuant to 46 USC §§ 70502 (c)(1)(F)(iii). The legislation authorises jurisdiction over vessels ‘found or kept off the coast of the United States within or without the customs waters’, while Article 111(4) permits enforcement over motherships within the contiguous zone, EEZ or above the continental shelf. Customs waters are defined in 19 USC § 1401 (j) (in Appendix H). The distinction effectively permits US enforcement on the high seas over foreign vessels where a suspicion as to importation or attempted importation exists, subject to an agreement with the flag state. This provision, as an agreement between two states without repercussions affecting third states, does not of itself offend the doctrine of hot pursuit.

⁹⁹ This is examined in Chapter 5, section 5.7.1.

waters,¹⁰⁰ US enforcement action remains susceptible to flag state opposition.¹⁰¹ Secondly, the Act expressly provides for the arrest of vessels suspected of drug trafficking departing the contiguous zone¹⁰² in contravention of Article 33 of UNCLOS. The provision is aimed at facilitating extraterritorial reach, thereby exceeding the conventional parameters of hot pursuit to meet policy objectives. The ability of the US President to declare ‘customs enforcement areas’¹⁰³ on the high seas underwrites this exercise of extraterritorial jurisdiction.¹⁰⁴ In successive challenges to the Act, US courts have upheld the concepts of customs waters and a customs enforcement zone,¹⁰⁵ going so far as to condone non-consensual interdiction of foreign vessels on the high seas, albeit in few cases.¹⁰⁶

In addition to the most recent legislative amendments,¹⁰⁷ the US also pursued more robust extraterritorial means in the form of bilateral agreements to counter maritime drug trafficking. In relation to counter-narcotics operations, the requirement to request consent on a case-by-case basis was time consuming and remained couched with the possibility of refusal.¹⁰⁸ Bilateral agreements formalise the intentions of the states and abbreviate the process of consent. As halting drug trafficking continues to be a major objective of the US administration, particularly as more evidence of ‘narco-terrorism’ emerges,¹⁰⁹ the US continues to pursue agreements that benefit its geopolitical position

¹⁰⁰ This consent is crucial to the success of US bilateral agreements.

¹⁰¹ Less likely is a decision of US courts that finds interdiction in foreign territorial waters—even with consent—to be beyond jurisdiction, see *Bellaizac-Hurtado*, 700 F 3d 1245 (11th Cir, 2012).

¹⁰² 46 USC §§ 70502 (c)(1)(F)(ii).

¹⁰³ Defined in 19 USC § 1701 (in Appendix H).

¹⁰⁴ The customs enforcement area can extend up to 50 nautical miles from the outer limit of the customs waters. The declaration of customs waters on the high seas permits the exercise of US jurisdiction over foreign vessels with the consent of the flag state.

¹⁰⁵ See, eg, *Romero-Galue*, 757 F 2d 1147 (11th Cir, 1985) 1152; *US v Robinson*, 843 F 2d 1 (1st Cir, 1988) 2.

¹⁰⁶ In *US v Gonzalez*, 776 F 2d 931 (11th Cir, 1985), the Court found that ‘We now hold that designating “customs waters” around a specific vessel on the high seas, thereby subjecting persons on board to United States prosecution, does not violate due process’, and at 38,

Even absent consent, however, the United States could prosecute foreign nationals on foreign vessels under the ‘protective principle’ of international law, *id.*, which permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security or could potentially interfere with the operation of its governmental functions.

¹⁰⁷ The *Drug Trafficking Vessel Interdiction Act of 2008*, 18 USC § 2285 (2008) removed jurisdiction as an element of drug offences. In relation to operators of submersible or semi-submersible vessels, the provisions further deem that a failure to comply with international law does not divest a court of jurisdiction and is not a defence to a proceeding under this chapter. The legislative device appears to grant the power to pursue suspect vessels extra-territorially and certainly beyond the parameters agreed to in UNCLOS.

¹⁰⁸ Joseph E Kramek, ‘Bilateral Maritime Agreements Counter-Drug and Immigrant Interdiction: Is This the World of the Future?’ (2000) 31(1) *Inter-American Law Review* 121, 141.

¹⁰⁹ The US has taken a layered approach to the multifaceted challenges of border security, as evidence presented to Congress has indicated: ‘The mission to counter transnational organized crime and illicit trafficking cannot be viewed in isolation from our efforts to combat terrorism, because the patterns, tactics, and techniques employed by traffickers are the same as the methodologies used by anyone

and formalisation of arrangements with nearby states of limited capability and infrastructure.¹¹⁰

7.2.5 US Bilateral Agreements

After experiencing a persistent influx of illegal narcotics in the 1980s and struggling with inadequate domestic legislation, the US government sought to expand its enforcement powers by forward-locating individual officials onto state party assets to conduct investigations, boardings and arrests.¹¹¹ The US employs bilateral agreements as a fast-track solution to meet its enforcement needs by not only abbreviating consent requests, but by extending jurisdiction. In this way, ‘shipriders’ are a convenient and economical force multiplier.¹¹² While many bilateral agreements simply address a basic commitment to engage in information sharing and cooperative surveillance, there are many US agreements that contain hot pursuit provisions.¹¹³ When used as a force multiplier, hot pursuit systematically projects jurisdiction beyond conventional parameters.

The *US Model Maritime Shiprider Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea* (the ‘Model Agreement’ at Appendix J)¹¹⁴ was developed by the US as a basis for enforcement operations in the Caribbean region.¹¹⁵ The Model

wanting to move illicit people or cargo—including terrorists’ (Charles Michel, Director Joint Interagency Task Force South, ‘Border Security Threats to the Homeland: DHS’s Response to Innovative Tactics and Techniques, Hearing before the Subcommittee on Border and Maritime Security of the Committee on Homeland Security’ (112 Congress 2, 19 June 2012)). See also Terrance G Lichtenwald, Mara H Steinhour and Frank S Perri, ‘A Maritime Assessment of Sea Based Criminal Organizations and Terrorist Operations’ (2012) 8(13) *Homeland Security Affairs* 1.

¹¹⁰ By entering into a range of international agreements, the US attains influence and oversight over a number of non-flag entities even on the high seas: ‘[W]ith respect to drug smuggling, the United States chose to work with, rather than against, the requirement of flag state consent when addressing a problem that necessitated an enhanced legal capacity to engage in high seas interdictions’ (Michael Byers, ‘Policing the High Seas: The Proliferation Security Initiative’ (2004) 98(3) *American Journal of International Law* 526, 539.

¹¹¹ The US first concluded shiprider agreements with various states in South America and the Caribbean region and thereafter states in Europe and the Pacific region.

¹¹² The term ‘embarked law enforcement official’ or ‘ELO’ is used in many bilateral agreements to refer to deployments of ‘shiprider’ personnel.

¹¹³ In order to cast the widest net, the US has entered into agreements outside its network of developing states in need of aid, infrastructure or capacity building. For example, the US has partnered with the People’s Republic of China under a shiprider agreement that has enabled USCG arrests of Chinese-flagged fishing vessels conducting IUU fishing with high sea drift nets in the Western, Central and Northern Pacific oceans.

¹¹⁴ Available as Annex B to Kramek, above n 108, 152. The model agreement is based on the *Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances*, opened for signature 20 December 1988, 28 ILM 493 (entered into force 11 November 1990) art 17.

¹¹⁵ Linden Lewis (ed), *Caribbean Sovereignty, Development and Democracy in an Age of Globalization* (Routledge, 2013) 73. For further discussion on the effect of shiprider agreements on sovereignty in the Caribbean region, see, eg, Holger W Henke ‘The “Shiprider” Controversy and the Question of Sovereignty’ (2001) 64 *European Review of Latin American and Caribbean Studies* 27.

Agreement authorises US vessels carrying shiprider officials of the coastal state ('State A') to pursue vessels suspected of drug- trafficking into the territorial sea and internal waters of State A¹¹⁶ while explicitly stating that enforcement operations must comply with hot pursuit as it is known in international law.¹¹⁷ As long as consent is provided and suspect vessels that are being subject to enforcement are flagged to either state party, this is an entirely proper and lawful use of a bilateral agreement under international law. However, Article 8 goes even further by authorising US vessels—without State A shipriders or the consent of State A—to follow suspected vessels or aircraft from the contiguous zone into State A's territorial waters to investigate, and board and search the vessel.¹¹⁸ In the absence of agreement, this provision is incompatible with international law of the sea and, more specifically, with Article 111(3) that explicitly prohibits pursuit into the territorial sea.¹¹⁹ While a provision claiming compliance with hot pursuit under international law is a laudable inclusion, it is evident that a more progressive interpretation is at play. In the case of the Model Agreement, parties can agree to a range of provisions that go beyond hot pursuit parameters¹²⁰ to give effect to bilateral arrangements that enhance capability strengths and weaknesses.¹²¹ More recent US shiprider agreements with developing states also incorporate capacity building as well as hot pursuit, forming part of the broader US strategic 'pivot to Asia'¹²² and ongoing Pacific presence.¹²³ This suggests that hot

¹¹⁶ This includes the authority to stop, board and search pursued vessels.

¹¹⁷ Art 5 sets out the role of shipriders (in Appendix J).

¹¹⁸ It should be noted that Art 8(b) omits the word 'pursue', instead using 'follow', but the effect is practically the same if a US vessel suspects a vessel seaward of the territorial sea. Art 8(b) is in Appendix J.

¹¹⁹ Art 8(c) permits entry into State A's territorial seas in the absence of shipriders or a State A enforcement vessel to conduct enforcement over vessels and aircraft therein.

¹²⁰ Watson, above n 115, 232 where it is argued that this, in effect, 'gives the US primary jurisdiction on the high seas and contingent jurisdiction in a country's territorial waters'.

¹²¹ It should be noted that the exceptional benefit of hot pursuit is the act of authorised arrest of suspect foreign vessels on the high seas. Hot pursuit is discussed in relation to US shiprider agreements based on the provisions that claim compliance with hot pursuit under international law. The legal obstacles that exist in relation to pursuit into territorial seas, sometimes referred to as 'reverse hot pursuit', are discussed in Chapter 5, section 5.7.1.

¹²² 'Pivot' has become a buzzword since coined by Hillary Clinton in an article during her appointment as Secretary of State: 'As the war in Iraq winds down and America begins to withdraw its forces from Afghanistan, the United States stands at a pivot point', 'As those wars wind down, we will need to accelerate efforts to pivot to new global realities', and 'This kind of pivot is not easy, but we have paved the way for it over the past two-and-a-half years, and we are committed to seeing it through as among the most important diplomatic efforts of our time' (Hillary Rodham Clinton, 'America's Pacific Century', *Foreign Policy* (online), 11 October 2011 <<http://foreignpolicy.com/2011/10/11/americas-pacific-century/>>).

¹²³ USPACOM lists the task 'Counter Transnational Threats' as one of its five focus areas in the Pacific Command Area of Responsibility. According to extant USPACOM Strategy, under the heading 'Homeland Defense in the Asia-Pacific', Commander, USPACOM, Admiral Samuel J Locklear III has stated that 'The United States is and will continue to be a Pacific power. US territory in the USPACOM AOR includes the states of Alaska and Hawaii, and the territories of Guam, American Samoa, and the

pursuit is a fundamental building block for the US administration in achieving the most effective maritime enforcement regime.

7.3 Case Study: Australia

7.3.1 Historical Framework

Federalism is central to the *Constitution of the Commonwealth of Australia* (the ‘*Australian Constitution*’) and the sovereign powers exercisable by the Commonwealth as a state¹²⁴ over defence¹²⁵ and security matters¹²⁶ are entrenched therein.¹²⁷ Australia has a number of maritime boundary delimitation agreements, Memoranda of Understanding and agreements concerning LMR and traditional uses of the sea.¹²⁸ Other than bilateral agreements with France that incorporate unconventional hot pursuit provisions in relation to IUU fishing in the Southern Ocean,¹²⁹ there are few (if any) bilateral agreements that are comparable to those of the US. Rather, the innovative employment of hot pursuit on an ad hoc basis has chiefly been in relation to IUU fishing.¹³⁰ This is due in part to geopolitical limitations where Australian capabilities struggle to monitor its vast maritime zones. The pursuits of the *South Tomi* and the *Viarsa* (discussed in detail in Chapter 5) garnered a great deal of media attention by demonstrating the effectiveness of hot pursuit as an enforcement tool against ‘toothfish piracy’ and employing multilateral assistance as a force multiplier.¹³¹ Such was the

Commonwealth of the Northern Mariana Islands. We have protectorate obligations with the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau’ (USPACOM, *USPACOM Strategy* (2017) <<http://www.pacom.mil/about-uspacom/2013-uspacom-strategy.shtml>>).

¹²⁴ The Federal government of Australia is commonly referred to as ‘the Commonwealth’. While signifying the nature of the constitutional monarchy, it additionally distinguishes the nation-state from the federated states or self-governing territories of Australia.

¹²⁵ Section 51 of the *Australian Constitution* states that ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth’.

¹²⁶ Section 119 states that ‘The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence’.

¹²⁷ While federal control of military assets is similarly reflected in the *US Constitution*, the utilisation of the ADF for law enforcement purposes is not circumscribed in the same manner. As discussed in Chapter 6, the US military is prohibited from conducting law enforcement operations in domestic affairs pursuant to the *Posse Comitatus Act*. The military may only be utilised in very limited circumstances, such as the provision of training and logistical support pursuant to 10 USC § 373, and in support of civilian federal agencies in the event of war, insurrection (15 USC § 10), or other serious emergency in accordance with 6 USC § 466. Counter-drug interdiction is another limited exception to the *Posse Comitatus Act*.

¹²⁸ See, eg, *Memorandum of Understanding Between the Government of Australia and the Government of the Republic of Indonesia regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Fishing Zone and Continental Shelf*, signed 7 November 1974.

¹²⁹ Both the *Cooperative Surveillance Treaty* and the *Cooperative Enforcement Treaty* are examined in section 7.3.5.

¹³⁰ Examined in Chapter 5.

¹³¹ Remarkable for the distance and time devoted to the exercise, the pursuits garnered bipartisan support

success of hot pursuit in targeting IUU fishing of Patagonian toothfish that the government announced that it was ‘working towards [developing] a 21st century definition of “hot pursuit”’.¹³² Although this overlooked the underlying reason for enforcement on a multilateral basis—Australia’s lack of capability to pursue and effect an arrest¹³³—this statement also signalled Australia’s intention to contribute to the development of hot pursuit under international law.¹³⁴ Hot pursuit has been an indispensable tool in achieving this strategic intent, at least as it relates to preventing exploitation of LMR. In addition to a re-focus on hot pursuit, Australia also made significant gains in effecting regional change in relation to IUU fishing.¹³⁵

7.3.2 Legislative Framework

The utilisation of the ADF, in particular the RAN, to conduct law enforcement in the maritime space (as distinct from naval warfare) is long established.¹³⁶ In contrast to the US, the RAN has long been employed in both conventional warfare and constabulary roles in the absence of a coastguard or equivalent paramilitary service.¹³⁷ Likewise, elements from the Australian Army and to a lesser extent the Royal Australian Air Force also have limited enforcement powers applicable to operations in the maritime space.¹³⁸ The Australian Border Force has carriage of maritime security and related

and the endorsement of industry bodies, environmental groups and even other states such as France, South Africa and the US. The lack of formal objection by other states is also pertinent.

¹³² Foreign Minister Alexander Downer, ‘The United Nations Convention on the Law of the Sea: Ten Years of Benefits for Australia’ (Speech delivered at the symposium ‘Strategic Directions for Australia and the Law of the Sea’, Canberra, 16 November 2004) <http://www.foreignminister.gov.au/speeches/2004/041116_unclos.html>.

¹³³ Bateman, above n 18: ‘It sent a ship that, due to its lack of capability for boarding other vessels in the likely sea conditions, was unable to perform its mission effectively; and permitted the pursuit to continue despite obvious risks to the ships and their crews’.

¹³⁴ In short, Australia has sought to ‘push the envelope’ on the development of hot pursuit, ‘So we are contributing here through this treaty with the French to the progressive development of international law in a way which helps tip the balance in favour of conservation over the criminals and we are working to seek to expand this 21st century definition of hot pursuit with other partners in the region and beyond’ (Greg French, Department of Foreign Affairs and Trade, *Transcript of Evidence to Joint Standing Committee on Treaties* (Parliament of Australia, Canberra, 15 March 2010) 18).

¹³⁵ The examples of record-setting Australian hot pursuits, such as the *South Tomi* and the *Viarsa*, have been discussed in Chapter 5. In May 2007, Australia also entered into a *Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region* promoting best practice, information sharing, the provision of consistent training and, more recently, denial to port for IUU fishing vessels.

¹³⁶ *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 195. The ADF and Customs are empowered by the *Australian Constitution* to conduct maritime law enforcement pursuant to the s 51(x) Fisheries power and s 51(xxix) External Affairs power.

¹³⁷ For example, Andrew Forbes ‘Protecting the National Interest: Naval Constabulary Operations in Australia’s Exclusive Economic Zone’ (Sea Power Centre Working Paper No 11, RAN, 2004); Commander M H Millen ‘The Impact on the Law of the Sea Convention on the Roles and Activities of the RAN in Meeting Australian Government Requirements’ (Geddes Papers, Australian Command and Staff College, 2005).

¹³⁸ For example, Army elements have been deployed as part of Operation Relex I and II while the RAAF

border issues,¹³⁹ while the Australian Federal Police also possess a range of maritime enforcement powers.¹⁴⁰ More recent legislative changes reflect the reality of operational tasks in Australia whereby the Minister¹⁴¹ can now award any individual, including civilians not employed by the government, enforcement powers equal to those of Customs or ADF members.¹⁴² This is in stark contrast to the US, where only members of the USCG can exercise maritime law enforcement powers. The advantages of the whole-of-government strategy favoured by Australia are obvious; the fostering of inter-agency cooperation and a recognition that a significant portion of transnational crime cuts across jurisdictional and criminal lines strengthens the ability of the state to exercise control over maritime zones. The view that transnational crime is inextricably linked to maritime security is shaping Australian policy.¹⁴³ As a result, Australia is enacting further legislative amendments to give effect to the first national security framework.¹⁴⁴

The authority to conduct hot pursuit has previously been incorporated into five principle Acts: the *Defence Act 1903* (Cth), *Fisheries Management Act 1991* (Cth), *Torres Strait Fisheries Act 1984* (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Customs Act 1901* (Cth).¹⁴⁵ The previous legislation applied to different operational issues and differed between government officials, military officers and even maritime zones, making for a disparate jumble of varying enforcement and investigative powers for Australian Customs officers and members of the ADF.¹⁴⁶ The power to

provides AP-3C Orion maritime patrol aircraft to Operation Solania to provide intelligence, surveillance and reconnaissance support to detect and deter IUU fishing activity in the Pacific region. See generally, Department of Defence, *Global Operations* (2017) <<http://www.defence.gov.au/Operations>>.

¹³⁹ The ABF is the operational arm of the Department of Immigration and Border Protection.

¹⁴⁰ The *Maritime Powers Act 2013* (Cth) bestows maritime enforcement powers to ‘Maritime Officers’ who are defined in s 16 as ADF members, officers of Customs and Border Protection Service, members or special members of the Australian Federal Police, or other person appointed by the Minister for the purposes of particular domestic laws or international agreements.

¹⁴¹ Although the *Maritime Powers Act 2013* refers to the ‘Minister’ without definition, the legislation resides with the Attorney-General’s portfolio and so it would be the Attorney-General.

¹⁴² *Maritime Powers Act 2013* (Cth) ss 104(1)(d) and (2).

¹⁴³ Australia has not only reconfigured its maritime enforcement powers, ‘Australia has unashamedly sought to contribute to the development of the international law of the sea by developing its implementation legislation and practice in a manner that seeks to “modernise” the interpretation of the LOSC so that it can be used most effectively to address current maritime exigencies’ (Warwick Gullett ‘Legislative Implementation of the Law of the Sea Convention in Australia’ (2013) 32(2) *University of Tasmania Law Review* 184, 205).

¹⁴⁴ Australia introduced its first national security strategy in January 2013: ‘Strong and Secure: A Strategy for Australia’s National Security’.

¹⁴⁵ The major hot pursuits conducted in the Southern Ocean, such the arrests of the *South Tomi* and the *Viarsa*, were conducted pursuant to the *Fisheries Management Act 1991* (Cth) (*‘Fisheries Management Act’*).

¹⁴⁶ Cameron Moore, *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the Australian Defence Force* (Ocean Publications, 2004).

conduct hot pursuit is now incorporated into one Act, the recently introduced *Maritime Powers Act 2013* (Cth)¹⁴⁷ at Appendix K. The Act was intended to consolidate the enforcement powers contained in the principle Acts into a single maritime enforcement regime. The *Maritime Powers Act* recently amended the *Fisheries Management Act* and the three other Acts that provide for the right of hot pursuit and it is examined in further detail in 3.4.

7.3.3 *Australia and the Law of the Sea: Working With UNCLOS*

Australia attended all of the international law of the sea conferences and became party to UNCLOS III in 1994.¹⁴⁸ Australia has proactively targeted IUU fishing¹⁴⁹ and this is reflected in the spectrum of applicable environmental agreements.¹⁵⁰ Australia has also been proactive through its regional organisation membership¹⁵¹ and in assisting its Pacific neighbours¹⁵² to reduce IUU fishing. In spite of Australia's early contribution to the codification of the law of the sea, there are few references in the maritime

¹⁴⁷ Australian maritime enforcement powers are now wholly contained in the *Maritime Powers Act 2013* (Cth) ('*Maritime Powers Act*') and the principle Acts remain intact.

¹⁴⁸ Australia made its first declaration on 22 March 2002 excluding arbitral panels as a method of dispute resolution under s 287(1),

pursuant to paragraph 1 (a) of art 298(1)(a) UNCLOS that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect of disputes concerning the interpretation or application of arts 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.

Australia made a parallel declaration limiting Australia's acceptance of ICJ jurisdiction pursuant to the *Statute of the International Court of Justice 1945*, opened for signature 26 June 1945, 1 UNTS xvi (entered into force 24 October 1945) art 36(2). In both cases, Australia indicated that in the case of maritime delimitation consent would not be given to utilise dispute resolution mechanisms.

¹⁴⁹ In 1999, the Australian Government passed legislation requiring all Australian fishing vessels to obtain appropriate authorisation to operate on the high seas. In 2003, Australia launched a multifaceted strategy to address IUU fishing in the Southern Ocean territories and a ministerially-led task force on 'Illegal, Unreported and Unregulated Fishing on the High Seas'. Australia is also party to a range of conventions that establish global, regional and sub-regional management organisations that manage highly migratory, straddling, pelagic and demersal fish stocks. These agreements include the *Convention on the Conservation of Southern Bluefin Tuna*, signed 10 May 1993, 1819 UNTS 360 (entered into force 20 May 1994) that establishes the Commission for the Conservation of Southern Bluefin Tuna, and the *Convention on the Conservation of Antarctic Marine Living Resources*, signed 20 May 1980, 1320 UNTS 47 (entered into force 7 April 1982) that established CCAMLR. Australia plays an active role in these organisations.

¹⁵⁰ For example, Australia is also signatory to the *Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, signed 4 August 1995, 34 ILM 1542 (entered into force 11 December 2001).

¹⁵¹ In addition to CCAMLR, Australia contributed to the first Regional Plan of Action against IUU fishing in South East Asia ('Regional Ministerial Meeting on Promoting Responsible Fishing Practices including Combating Illegal, Unreported, Unregulated (IUU) Fishing in the Region' (Joint Ministerial Statement, Bali, Indonesia, 4 May 2007)).

¹⁵² The Pacific Patrol Boat Program is an important pillar of the Australian government's commitment to working with its regional partners to enable cohesive security co-operation on maritime surveillance, including in fisheries protection and transnational crime (replacing the current fleet of 22 patrol boats gifted from 1987 to 1997), see Christian Le Miere 'All at Sea: Illicit Activity Thrives in Ungoverned Maritime Areas' (2013) 25(11) *Jane's Intelligence Review* 30.

enforcement legal regime to the intrinsic values contained in UNCLOS. The question might then be asked; what was Parliament's intention towards aligning hot pursuit in domestic law with that of international law? According to Australian law, treaties are not automatically incorporated into domestic law and cannot operate as an independent source of law within the legislative framework.¹⁵³ The law adopted for the purpose of implementing treaty obligations does not displace the intention of the Parliament as it is expressed in legislation. Australia has explicitly stated that the pursuit powers contained in the *Maritime Powers Act* are based on 'Article 111 and other international laws'.¹⁵⁴ However, upon closer inspection it appears that legislation has been shaped by hot pursuit experiences in the Southern Ocean.¹⁵⁵ This means that Australia has left 'room to move' when exercising hot pursuit powers under domestic law and there may be circumstances when its innovative interpretation of the law will come into play.¹⁵⁶ That has been the case with hot pursuits conducted in the southern Indian Ocean¹⁵⁷ and, in the absence of formal state objections or challenges, Australia will continue to conduct maritime operations to meet strategic imperatives while claiming an engagement with the UNCLOS framework.

7.3.4 Relevant Australian Legislation and Policy

7.3.4.1 Maritime Law Enforcement

It should be noted that the language used has changed from 'pursuit' under the previous *Fisheries Management Act* to 'chase' under s 41 of the *Maritime Powers Act*. This appears to bring the legislation into line with existing Australian legislation on border protection¹⁵⁸ where the term 'chase' has been employed for much longer.¹⁵⁹ It may

¹⁵³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–287 (Mason CJ and Deane J).

¹⁵⁴ Commonwealth, *Explanatory Memorandum, Maritime Powers Bill (Consequential Amendments) Bill 2012*, House of Representatives, 20 August 2012, 38. Other methods of reference to treaty include attaching the text as a schedule to the Act or regulation.

¹⁵⁵ Commonwealth, *Parliamentary Debates*, Senate, 12 March 2013, 1471 (Ronald Boswell) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2Faa257c64-8320-4cab-964d-8f041853ad36%2F0117;query=Id%3A%22chamber%2Fhansards%2Faa257c64-8320-4cab-964d-8f041853ad36%2F0000%22>>

¹⁵⁶ The Federal Court, rejected an argument in *Volga* that the hot pursuit was unlawful. French J found that the vessel had already been forfeited and the Commonwealth had merely followed and boarded its own vessel as a result. See *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 per French J, para 77.

¹⁵⁷ This is examined in Chapter 5.

¹⁵⁸ When referring to the definition of 'border protection', the Minister for Immigration and Border Protection, Scott Morrison, stated 'Maintaining our border as a secure platform for legitimate trade, travel and migration is what border protection is all about' ('A New Force Protecting Australia's Borders' (Address to the Lowy Institute for International Policy, Sydney, 9 May 2014)).

reasonably be inferred that this slight adjustment to rhetoric reflects Parliament’s aim to ultimately prevent landing of vessels carrying asylum seekers, particularly as the term is not employed in other jurisdictions.¹⁶⁰ To ‘pursue’ a suspicious vessel implies that it may be subject to boarding, apprehension and escort to an Australian port for prosecution—a notion that is in direct conflict with federal immigration policy to ‘turn back the boats’.¹⁶¹ Although the reasoning for the variation in terminology is not specified, the explanatory memorandum explicitly links the term ‘chased without interruption’ to the requirements for conducting a hot pursuit of a foreign vessel under UNCLOS and ‘other international law’.¹⁶² Without doubt, ‘other international law’ contemplates any developments in customary international law such as those examined in Chapter 5. As the protagonist in a number of these developments, Australia will likely continue to exercise the right where applicable to the operational circumstances in keeping with a ‘21st century definition’.¹⁶³

Maritime enforcement powers are effectively triggered by an ‘authorised officer’¹⁶⁴ if they reasonably suspect that a vessel, installation, land or person is or are involved¹⁶⁵ in a contravention of an Australian law.¹⁶⁶ Once an authorisation¹⁶⁷ is in force, maritime officers¹⁶⁸ may exercise the broad enforcement powers under Part 3, including ‘to chase’,¹⁶⁹ for the purpose of the matter as well as a range of other purposes.¹⁷⁰ Foreign

¹⁵⁹ Parliament of Australia, House of Representatives (Cth), *Border Protection Legislation Amendment Bill 1999*.

¹⁶⁰ For example, Parliament of Australia, House of Representatives (Cth), *Bills Digest No 70 of 1999–2000*, 22 September 1999, Border Protection Legislation Amendment Bill 1999.

¹⁶¹ See Liberal Part of Australia, ‘*Operation Sovereign Borders Policy*’ (July 2013) <<http://www.liberal.org.au/our-plan>>.

¹⁶² *Ibid.*

¹⁶³ This phrase was used as early as 2004 (Downer, above n 132) and later during the legislative process, see, eg, Greg French, Department of Foreign Affairs and Trade, *Transcript of Evidence to Joint Standing Committee on Treaties* (Parliament of Australia, Canberra, 15 March 2010) 18.

¹⁶⁴ *Maritime Powers Act* s 23.

¹⁶⁵ ‘Involved’ is broadly defined in s 9 *Involved* in a contravention:

Vessels, installations, aircraft and protected land areas

(1) A vessel, installation, aircraft or protected land area is **involved** in a contravention of a law, if:

(a) the law has been, is being, or is intended to be, contravened on, or in the vicinity of, the vessel, installation, aircraft or land; or

(b) there is some other connection between the vessel, installation, aircraft or land and a contravention, or intended contravention, of the law.

Vessels, installations and aircraft

(2) A vessel, installation or aircraft is **involved** in a contravention of a law, if the vessel, installation or aircraft has been, is being, or is intended to be, used in contravention of the law.

¹⁶⁶ *Maritime Powers Act* s 17.

¹⁶⁷ By an authorised officer pursuant to Part 2, Division 3.

¹⁶⁸ A maritime officer is defined as a member of the ADF, Customs and Border Protection Service or the Australian Federal Police, or other person appointed by the Minister for the purposes of enforcing particular domestic laws or international agreements. This may also include officers of other countries subject to international agreements and a very limited number of private contractors (such as commanders of contracted aircraft) who were already authorised to exercise powers under the *Customs Act 1901*.

¹⁶⁹ s 41(1)(i).

vessels may be arrested on the high seas or ‘in a place between countries’ as a result of a chase without interruption.¹⁷¹ Section 42(2) addresses the vexed question of an uninterrupted pursuit in light of legal and technological developments.¹⁷² According to international law, pursuit of a suspected vessel may only be continued outside the territorial sea or the contiguous zone of the coastal state if the pursuit has not been interrupted.¹⁷³ Customary international law has undergone sufficient development in recent years to permit continuation of a pursuit by another requisite officer of the state¹⁷⁴ or by another vessel or aircraft (including that of another country).¹⁷⁵ However, the *Maritime Powers Act* permits continuation of the pursuit by another state where there is no Australian maritime officer on board.¹⁷⁶ In this instance, Australia has endorsed hot pursuit on its behalf without the need for an officer with the requisite appointment on board. Although there have been few cases in which a hot pursuit has been genuinely transferred to another state without a shiprider present, recent state practice has demonstrated that multilateral hot pursuit has indeed crystallised as customary international law.¹⁷⁷ The practice does not offend the provisions of Article 111 and it constitutes a practical application of the law on hot pursuit. Transfer to a third state is permitted by bilateral or multilateral agreements. Alternatively, it may occur in an ad hoc arrangement, as in the pursuit of the *Viarsa*. While an authorisation need not be in writing¹⁷⁸ and is time-bound, it can conceivably be extended to encompass pursuits lasting for weeks or even months.¹⁷⁹ This flexible approach to regulated powers reflects Australia’s experience with hot pursuits in the Southern Ocean and the nature of hot pursuit as a limited exception. Moreover, the maritime powers legislative regime is readily applicable to comparably challenging circumstances of previous pursuits.

¹⁷⁰ Enforcement powers are additionally distinguished by geographical factors in Part 2, Division 5: Subdivision (A) An offence may occur in another country, Subdivision (B) between countries, Subdivision (C) in Australia and Subdivision (D) requests from or by agreement with other States.

¹⁷¹ s 41(1)(i).

¹⁷² s 42(2) lists the circumstances in which a chase is not interrupted and is in Appendix K.

¹⁷³ UNCLOS art 111(1).

¹⁷⁴ s 42(2)(a).

¹⁷⁵ The requirement for the pursuit not to be interrupted is discussed further in Chapter 4. Emerging developments of customary international law pertaining to hot pursuit are examined in Chapter 5.

¹⁷⁶ s 42(2)(c).

¹⁷⁷ Discussed in more detail in Chapter 5. See also E J Molenaar, ‘Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*’ (2004) 19(1) *International Journal of Marine and Coastal Law* 19.

¹⁷⁸ *Maritime Powers Act* s 25(1).

¹⁷⁹ *Explanatory Memorandum Maritime Powers (Consequential Amendments) Bill 2012*, House of Representatives, 20 August 2012, 30; *Replacement Explanatory Memorandum, Maritime Powers (Consequential Amendments) Bill, 2012*, Senate, 12 March 2012, 30.

In the past, Australia has taken the view that momentary loss of sight of a pursued vessel in heavy seas would not constitute an interruption in a lawfully initiated hot pursuit.¹⁸⁰ The hot pursuit of the *Viarsa* in the extreme weather conditions of the Southern Ocean is a case in point.¹⁸¹ Section 42(2)(d) formalises this position by stating that the chase is not interrupted if the vessel is out of sight of any or all of the maritime officers. While maintaining visual watch of a suspected vessel during hot pursuits would be ideal in the circumstances, there are other means that can be successfully employed to maintain contact with a pursued vessel. In the case of the *Viarsa*, it was via frequent contact with the crew by radio and monitoring of the vessel by radar.¹⁸² Section 42(2)(e) goes one step further by stating that a chase is not interrupted if the suspected vessel cannot be tracked by remote means, including AIS, radar, satellite or sonar.¹⁸³ This would also appear to be consistent with treaty and customary international law as long as another method of contact was in use.¹⁸⁴

Similarly, the issue of use of force in relation to non-compliance with an order to stop is set out in s 54(3).¹⁸⁵ This largely accords with the doctrine of hot pursuit. Although Article 111 is itself silent on the use of force,¹⁸⁶ it is generally understood that any use of force should only be necessary and reasonable without endangering human life or deliberately aiming to sink a vessel.¹⁸⁷ Customary international law appears to indicate that it is only after appropriate actions fail that the pursuing vessel may, as a last resort, use force.¹⁸⁸ Even then, the appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered. It appears that the use of force power in the Act has been marginally broadened to provide for additional non-

¹⁸⁰ This was also the case with the *Fisheries Management Act* s 87(2) prior to the repeal of these provisions by the *Maritime Powers Act*.

¹⁸¹ Australian Government, Department of the Environment and Energy, Australian Antarctic Division, *Australian Antarctic Magazine*, Autumn 2004 (6) <<http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-6-autumn-2004>>.

¹⁸² Contingent Leader Steve Duffy stated that ‘The waves were so huge that often we couldn’t see the other vessel. Fortunately by using the radar we kept contact the whole time and we kept calling them on the radio’ (Statement by Customs Contingent Leader as quoted in ‘The Pursuit of the *Viarsa I* (The Longest Maritime Pursuit in Australia’s History)’ (2004) 7(1) *Manifest: Journal of the Australian Customs Service* 7, 10).

¹⁸³ An equivalent provision existed in s 87(3) of the repealed *Fisheries Management Act*.

¹⁸⁴ This is examined in more detail in Chapter 5. See also, safety provisions for restricted visibility in the *Convention on the International Regulations for Preventing Collisions at Sea*, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 15 July 1977) rule 19.

¹⁸⁵ s 54(3) is in Appendix K.

¹⁸⁶ ‘[T]he background to UNCLOS III leaves little surprise at the tendency of the LOSC to avoid or obfuscate use of force issues’ (Rob McLaughlin in *United Nations Naval Operations in the Territorial Sea* (Brill, 2009) 61).

¹⁸⁷ Use of force is examined in detail in Chapter 4.

¹⁸⁸ *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits) (1999) 120 ILR 143, 126; *Red Crusader Commission of Inquiry (Denmark–United Kingdom)* (1962) 35 ILR 485; *I’m Alone (Canada v United States)* (1935) 3 RIAA 1609.

lethal methods of force to compel a vessel to stop.¹⁸⁹ The most serious level of graduated force, firing into a vessel, remains unchanged from previous legislation and ultimately these provisions largely reflect international norms on hot pursuit.¹⁹⁰

7.3.4.2 IUU Fishing

IUU fishing is the area in which Australia has contributed the most to the development of hot pursuit in customary international law (examined in Chapter 5). Australia's contribution not only encompasses multilateral hot pursuit as a force multiplier, but also international activism in the area of multilateral organisations,¹⁹¹ capacity building¹⁹² and the creation of a robust bilateral agreement. Although Australia has led this charge in relation to the protection of marine resources, there has been a discernible shift in focus regarding competing transnational maritime issues. While the *South Tomi* and *Viarsa* hot pursuits garnered popular support at the time, it is border protection rather than conservation that has taken priority in the current strategic climate. So much so that the dedicated Southern Ocean patrol vessel, the icebreaker ACV *Ocean Protector*, has been diverted to operate as a transporter in the warmer waters northwest of Australia.¹⁹³ Although Australia has been called an 'environmental superpower'¹⁹⁴ due to its abundance of marine resources, a limited Australian capability cannot effectively achieve ocean overwatch across such a vast area.¹⁹⁵ In fact, Australia ceased surface

¹⁸⁹ *Fisheries Management Act* s 84(1)(aa)(ii) permitted the use any reasonable means consistent with international law to stop a vessel (including firing at or into the boat after firing a warning shot, and using a device to prevent or impede use of the system for propelling the boat).

¹⁹⁰ As examined in Chapter 5.

¹⁹¹ For example, on 2 July 2014 Australia signed the *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, signed 2 November 2012, [2017] ATS 11. CCAMLR is another example.

¹⁹² 'The Government has chosen to look north to a faux threat, rather than look south to a real one. Asylum seekers do not impinge on our sovereignty. But the entire world's view of whether parts of the Southern Ocean are ours depends on maintaining our presence there, not abandoning it' (Peter Whish-Wilson, 'The Real Reason Behind the Whaling Backflip', *The Drum* (online), 10 January 2014 <<http://www.abc.net.au/news/2014-01-10/whish-wilson-whaling/5193554>>).

¹⁹³ According to the Australian Customs and Border Protection Service, '[t]he Southern Ocean Maritime Patrol and Response (SOMPR) program provides a dedicated vessel, the ACV *Ocean Protector*, which is able to conduct year-round patrols in sub-Antarctic weather conditions'. In 2013, the Australian Customs and Border Protection Service reported that although '[t]he Southern Ocean vessel conducted 229 patrol days in total, [a]ll of these were in northern waters'. See Australian Customs and Border Protection Service (Cth), *Annual Report 2012–2013* (2013) 42.

¹⁹⁴ 'Australia actually lays some jurisdictional claim to a larger area of the Earth's surface than any other country in the world. That makes us really quite a significant environmental superpower and yet we just simply just don't have the on-water capabilities to demonstrate that we are looking after that particular area' (ABC, 'Fisheries Open to Plunder', *Lateline*, 30 July 2014 (Sam Bateman interviewed by Jason Om on *Lateline*), <<http://www.abc.net.au/lateline/content/2014/s4057584.htm>>).

¹⁹⁵ It was recently confirmed that 'Defence is not currently structured to carry out sub-Antarctic tasks' and this is unlikely to change (Department of Defence, Opening Statement at Public Hearing held in Canberra for Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's Future Activities and Responsibilities in the Southern Ocean and Antarctic Waters*, 26 September 2014

patrols in the Southern Ocean between February 2012¹⁹⁶ and April 2015.¹⁹⁷ Instead, only limited air surveillance (lacking enforcement capability) was employed and, for the first time, Australian shipriders¹⁹⁸ were deployed on French and New Zealand vessels.¹⁹⁹ This means that in spite of hot pursuit's success in countering IUU fishing, should the current strategic focus on border protection continue,²⁰⁰ Australia risks losing the gains made in addressing IUU fishing.²⁰¹

7.3.4.3 Irregular Migration

When addressing the issue of asylum seekers in the maritime space, Australia has not enjoyed the same success it has had with IUU fishing. Rather than engaging in formal bilateral agreements or ad hoc cooperative enforcement with regional partners, Australia has focused its efforts inward to its municipal legal framework by drafting more robust legislation and re-structuring Commonwealth enforcement agencies.²⁰² Forging ahead on an election promise to 'turn back the boats',²⁰³ appears to have come at the cost of diplomatic relations with Australia's largest neighbour Indonesia. While this may be in part due to Indonesia's reluctance to enter into agreements that compromise sovereign rights,²⁰⁴ Australia's 'turn back the boats' policy has incontrovertibly damaged an

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Southern_Ocean_and_Antarctic_waters/Submissions>).

¹⁹⁶ Australian Customs and Border Protection Service, Submission to the Senate Committee on Foreign Affairs, Defence and Trade, *Australia's Future Activities and Responsibilities in the Southern Ocean and Antarctic Waters*, 26 September 2014.

¹⁹⁷ Australian Customs and Border Protection Service (Cth), *Annual Report 2014–2015* (2015) 50.

¹⁹⁸ Officers from AFMA.

¹⁹⁹ 'Response to Question Taken on Notice Supplementary Budget Estimates Hearing: 19 November 2013 Immigration And Border Protection Portfolio' (Item No SE13/0407, Legal and Constitutional Affairs Legislation Committee, 3 December 2013).

²⁰⁰ The allocation of customs and military resources demonstrates the shift to 'border protection' in the north. The roll-out of the new Cape-class patrol boats was delayed by the requirement to select additional crew members, to re-train the crew on the vessels and a number of minor defects. These issues resulted in 'a substantial decrease in the number of patrol days' (Australian Customs and Border Protection Service, above n 197, 48). In any event, Cape-class patrol boats will be dedicated to Operation Resolute which is focused on the northern approaches.

²⁰¹ With only one ice-capable vessel allocated government-wide, the Australian Border Force Cutter *Ocean Shield* first patrolled the Southern Ocean in April 2015 and '[t]his was the Service's first Southern Ocean maritime patrol since 2012' (Australian Customs and Border Protection Service, above n 197, 50). The *Ocean Shield* has also assisted in the search for Malaysia flight MH370.

²⁰² From 1 July 2015, the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service were consolidated into a single government body known as the Department of Immigration and Border Protection of which Australian Border Force is a part.

²⁰³ See, eg, Andreas Schloenhardt and Colin Craig, '“Turning Back the Boats”: Australia's Interdiction of Irregular Migrants at Sea' (2015) 27(4) *International Journal of Refugee Law* 536.

²⁰⁴ Indonesia has so far refused to join the 19 other signatories to the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* and has been reluctant to work cooperatively to address maritime security issues due to concerns over loss of sovereignty. See, eg, Miha Hribernik, 'Countering Maritime Piracy and Robbery in Southeast Asia: The Role of the ReCAAP Agreement' (Briefing Paper 2013/2, European Institute for Asian Studies, March 2013) 9.

already precarious diplomatic relationship²⁰⁵ with Indonesia.²⁰⁶ No less than six unauthorised incursions into Indonesia's EEZ resulted in the summoning of the Australian ambassador to Jakarta²⁰⁷ and a number of issues have gone before the High Court of Australia.²⁰⁸ By way of contrast, the US has not experienced this level of diplomatic discord or polarised politico-legal commentary.²⁰⁹

Despite the obligations conferred as a result of ratifying the *Refugee Convention*, the authority to investigate or prevent contraventions of customs, fiscal, immigration and sanitary laws in the coastal zone under Australian law²¹⁰ is largely consistent with Article 33 of UNCLOS. Border protection operations involve the transfer of asylum seekers found at sea to a third state for processing²¹¹ or vessels are 'turned back'.²¹² The result has been an ongoing forceful debate that is not evident in the US, even during the lengthy presidential nominee selection process.²¹³ The current Australian government

²⁰⁵ The EEZ incursions occurred only months after media revelations that Australia wire-tapped the phone of President Susilo Bambang Yudhoyono. See 'Indonesia Condemns Australian Navy Waters Violations', *BBC News* (online), 17 January 2014 <<http://www.bbc.com/news/world-asia-25772063>>; 'Press Conference: Operation Sovereign Borders Update' (Joint Press Conference with Scott Morrison, Minister for Immigration and Border Protection and Lieutenant-General Angus Campbell, Department of Defence, 17 January 2014).

²⁰⁶ 'Evidence in the public domain appears to support the view that Australian Navy and Customs ships have towed vessels, which may include lifeboats, into Indonesian waters and at some point that activity is discontinued with the expectation that the towed vessel make its way towards the Indonesian coast and eventual landfall. Such an activity cannot be characterised as Australia exercising the freedom of navigation but rather bringing another vessel into Indonesian waters without consent' (Don Rothwell, 'Border Policy Strays Into Uncharted Territory', *The Drum* (online), 6 March 2014 <<http://www.abc.net.au/news/2014-02-17/rothwell---borders/5263394>>).

²⁰⁷ The Indonesian government also indicated that the issue would be raised in a private meeting with the US Secretary of State John Kerry, see David Wroe and Judith Ireland, 'Mistakes by Sailors Blamed for Breach of Indonesian Waters', *Sydney Morning Herald* (online), 20 February 2014 <<http://www.smh.com.au/federal-politics/political-news/mistakes-by-sailors-blamed-for-breach-of-indonesian-water-20140219-3315j.html>>.

²⁰⁸ For example, the High Court of Australia found that the Migration Act does not authorise unconstrained detention of asylum seekers, see *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 (11 September 2014).

²⁰⁹ For example, *Statement by Legal Scholars Regarding the Situation Concerning Sri Lankan Asylum Seekers of 7 July 2014 at the 25th Session of the UN Human Rights Council* (21 March 2014).

²¹⁰ s 41(1)(c).

²¹¹ On 3 February 2016, the High Court ruled that a Memorandum of Understanding with Nauru to conduct offshore processing was authorised by s 61 of the Constitution and given effect by s 198AHA of the *Migration Act 1958* (Cth), a constitutionally valid law. See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1. This was seen as an endorsement of Australia's hardline bipartisan approach to asylum seekers, one that effectively circumvents the principle of non-refoulement. See, eg, Noel Pratt, 'Spin and Secrecy Surrounds Australia's Approach to Asylum Seekers', *The Age* (online), 13 February 2016 <<http://www.theage.com.au/comment/spin-and-secrecy-surrounds-australias-approach-to-asylum-seekers-20160212-gmssff.html>>.

²¹² Between 2012 and 2013, 68 per cent of asylum seekers who reached Australia by sea were determined to be refugees at first instance (Department of Immigration and Border Protection (Cth), *Asylum Trends—Australia: 2012–13 Annual Publication*, November 2013 <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-trends-aus-2012-13.pdf#search=asylum%20trends>>).

²¹³ Although immigration is a primary domestic policy in the US, the issue has not invoked the amount of controversy that it has in Australian politico-legal discussion. Democrats candidate Senator Bernie

did concede the influence of the US approach to irregular migration when the Prime Minister Tony Abbott stated in response to criticism, ‘Let’s not forget that the US Coast Guard has been turning boats around in the Caribbean for years’.²¹⁴ In practice, however, the policies of the two states are quite different.²¹⁵ As discussed in Section 3, the US returns asylum seekers to their country of origin by virtue of bilateral agreements with the view that the *Refugee Convention* does not apply at sea.²¹⁶ Many US bilateral agreements contain hot pursuit provisions to expand jurisdictional influence, often to overcome infrastructure or capability deficiencies in countries of origin. Conversely, Australia is yet to enter into bilateral agreements that incorporate hot pursuit provisions relating to migrant interdiction. Even so, both states risk inconsistencies with the *Refugee Convention*.

7.3.4.4 Drug Trafficking

Due in part to its relative isolation and lack of land boundaries, Australia does not contend with the same type or level of drug trafficking as the US.²¹⁷ Although hot pursuit is available as a means of maritime law enforcement to address drug trafficking pursuant to the *Maritime Powers Act*, it appears that the manner in which the offence is committed does not warrant the exercise of hot pursuit. The majority of bulk quantities of heroin importations for example, were detected in the maritime cargo sector rather than in smaller vessel traffic. Further, these bulk detections are few²¹⁸ and data suggests that importation by smaller vessels (external to the cargo sector) is infrequent. Accordingly, maritime drug enforcement efforts are aimed at the cargo sector and organised crime elements. Unlike the US, Australia does not engage with other states

Sanders called illegal immigration in the US ‘a trumped up and exaggerated problem’ (Mary Alice Parks, ‘Bernie Sanders on the Border: “We Don’t Need a Wall”’, *ABC (American Broadcasting Company) News* (online), 19 March 2016 <<http://abcnews.go.com/Politics/bernie-sanders-border-dont-wall/story?id=37779082>>).

²¹⁴ ABC, ‘Tony Abbott Will Take Responsibility for Asylum Seeker Deaths as a Result of Coalition Policy’, *7:30 Report*, 9 July 2013 (Tony Abbott interviewed on the *7.30 Report*) <<http://www.abc.net.au/news/2013-07-08/abbott-will-take-responsibility-for-asylum-seeker-deaths/4806586>>.

²¹⁵ As discussed in Chapter 5.

²¹⁶ Executive Order 12807, 24 May 1992, § 2, upheld in *Sale v Haitian Centers Council* 509 US 155 (1993).

²¹⁷ The US conducts regional capacity building and counter-narcotics initiatives in Mexico, West Africa and the Caribbean and conducts extra-territorial patrols, including in the West Caribbean and East Pacific. Drugs entering by maritime means ordinarily enter Australia via cargo transport and is distributed via organised crime, see Australian Crime Commission (Cth), *Illicit Drug Data Report 2012–2013* (April 2014) 64.

²¹⁸ Parcel post was the most commonly detected method of heroin importation, accounting for 69.6 per cent of detections. While only 3 detections of heroin were in the sea cargo stream in 2012 to 2013, they accounted for 73.9 per cent of the total weight of heroin detected at the Australian border (Ibid 63).

via drug interdiction bilateral agreements and enforcement outside the cargo sector is conducted reactively, one example being the arrest of the *Pong Su*.²¹⁹ However, steps are being taken to engage more effectively with regional states to address relevant transnational issues of concern.²²⁰

7.3.5 Australian Bilateral Agreements

The areas in the vicinity of the French and Australian external territories in the Indian Ocean²²¹ are lucrative fishing grounds for IUU fishing vessels. In the early 2000s, IUU fishing vessels were employing increasingly inventive tactics to avoid detection and were able to stay a step ahead of coastal state authorities with the use of modern technological capabilities.²²² For example, coastal state authorities reported observing vessel names and other identifying marks being painted or covered over while the vessel was underway.²²³ Although France and Australia possess comparable capabilities, both states are impeded by the location of the isolated territories and the extreme weather conditions. Australia had employed hot pursuit to great effect in the area, in some cases while in concert with other regional neighbours. In an effort to better address IUU fishing in the southern Indian Ocean, bilateral operations were formalised in agreements

²¹⁹ The North Korean-owned and Tuvalu-flagged *Pong Su* was observed in Australian territorial waters off the coast of Lorne, Victoria and was suspected of importing heroin after two men were arrested onshore. The vessel was directed to stop and the resulting pursuit (albeit not a hot pursuit under international law) was effectively transferred from Victoria (state police) to New South Wales (state police) to the ADF. SASR personnel ultimately boarded the *Pong Su* and arrested its crew while the Australian Federal Police commenced criminal charges. The *Pong Su* is a good example of cooperative enforcement within Australia's domestic framework. See Department of Defence, Transcript of Joint Media Conference, 'Navy, Customs, AFP, NSW Police Seizure of a Ship allegedly at the Centre of Victoria's Biggest Heroin Bust', 20 April 2003 <<http://www.defence.gov.au/media/departementaltp1.cfm?currentid=2644>>. See also, *R v Ta Song Wong* [2006] VSC 126 (6 April 2006).

²²⁰ For example, the Pakistan-Australia Joint Working Group on Border Management and Transnational Crime met in September 2012 to discuss cooperation and capacity-building activities, including continued engagement on border control, money laundering and the financing of terrorism. The Sri Lanka-Australia Joint Working Group on People Smuggling and Transnational Crime and the Malaysia-Australia Joint Working Group on People Smuggling and Trafficking in Persons met separately in late 2012 to discuss a range of issues relating to cooperation, information sharing and capacity-building activities.

²²¹ The French Southern and Antarctic territories (*Terres australes et antarctiques françaises*, or 'TAAF') are a group of islands in the Southern and Indian Oceans administered by the French government. The islands are dispersed throughout the southern Indian Ocean, some near Madagascar and others about equidistant between Africa, Antarctica, and Australia. HIMI are Australian territories in the Southern Indian Ocean approximately 4,000 kilometres southeast of Perth.

²²² Many flag states have been unwilling or unable to engage with registered vessels conducting IUU fishing in the southern Indian Ocean, as evidenced by the analysis of the *Viarsa* in Chapter 5.

²²³ On 23 August 2003, Australian Customs personnel observed the *Viarsa* crew painting over its name and number. Senator Chris Ellison (Minister for Justice and Customs), Senator Ian Macdonald (Minister for Fisheries, Forestry and Conservation) and Dr Sharman Stone MP (Parliamentary Secretary to the Minister for the Environment), 'The *Viarsa* Has Admitted Who It Is' (Joint Media Release, 24 August 2003) <<http://www.customs.gov.au/site/content3785.asp>>).

between France²²⁴ and Australia,²²⁵ the first being the *Cooperative Surveillance Treaty*.²²⁶ As a result of the *Viarsa* incident and in response to the increasingly prevalent IUU fishing of that era, France and Australia allocated vessels with the necessary patrol, surveillance and enforcement capabilities. Australia had only conducted one multilateral hot pursuit prior to the *Cooperative Surveillance Treaty*.²²⁷ The *Cooperative Surveillance Treaty* was already in draft form by the time the second major multilateral hot pursuit was underway.²²⁸ At the time of signature,²²⁹ the *Viarsa* had been brought to Fremantle harbour only four weeks prior. This suggests that at the time, multilateral hot pursuit was still under development and the drafters took a conservative approach to multilateral hot pursuit. In any case, the *Cooperative Surveillance Treaty* was not intended to be an exhaustive statement of the cooperative measures between France and Australia.²³⁰

As IUU fishing vessels continued to operate almost unabated and Australia conducted another major ad hoc multilateral hot pursuit, a second bilateral agreement formalised the expanded enforcement regime between France and Australia, the *Cooperative Enforcement Agreement*.²³¹ Together these agreements represent the combined political will of both states to conduct enforcement operations against IUU fishing operators in the difficult environment adjacent to their respective territories.²³²

The *Cooperative Surveillance Treaty* contains a number of provisions that expand on the basic premise of hot pursuit, but left room for the development of wider powers to better counter IUU fishing in the region.²³³ The *Cooperative Surveillance Treaty* appeared to rule out—at least at that stage—a form of multilateral hot pursuit that

²²⁴ The French-administered Kerguelen Islands and Australian external territory HIMI share a maritime boundary that, by agreement on 4 January 1982, gives effect to a strict equidistance line between the territories. See the *Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic*.

²²⁵ Industrial and recreational fishing is essentially illegal in the HIMI territory in the absence of permits to approved commercial fishing bodies (with Australian-flagged vessels).

²²⁶ Signed 24 November 2003 (entered into force 1 February 2005).

²²⁷ Two years prior, Australia had apprehended the *South Tomi* after a hot pursuit with the assistance of a third party state. SAN assets assisted ADF and AFMA personnel to arrest the *South Tomi* in the southern Indian Ocean.

²²⁸ The pursuit of the *Viarsa* is discussed in Chapter 5.

²²⁹ 24 November 2003.

²³⁰ The treaty forecast options for joint law enforcement operations, see Annex III, art 2.

²³¹ [2011] ATS 1.

²³² HIMI is uninhabited and subject to permanent glaciers and occasional volcanic activity. The HIMI territory is subject to the *Convention on the Conservation of Antarctic Marine Living Resources* and its fisheries are managed in accordance with the Convention's provisions and relevant legislation, the *Fisheries Management Act 1991* (Cth) and the *Heard Island and McDonald Islands Fishery Management Plan 2002* (Cth).

²³³ The bilateral agreements between France and Australia are, as international agreements, prescribed by *Maritime Powers Regulation 2014* (Cth) s 7 for the purposes of sub-para 12(b)(i) of the Act.

contemplated a genuine transfer of pursuit to another state authorised vessel. This was only incorporated in the later *Cooperative Enforcement Agreement* at Article 4(4). Article 4(1) of the *Cooperative Enforcement Agreement* also permits the initiation of hot pursuit on behalf of the other respective state. While transfer of hot pursuit to another state as a form of multilateral pursuit is largely consistent with current norms of international law, the initiation of a pursuit is very much new.²³⁴ With sufficient state practice and wide acceptance of this aspect of hot pursuit, initiation could conceivably become a part of customary international law. However, there are no recorded hot pursuits of this nature outside bilateral agreements, meaning that this provision is inconsistent with international law and remains vulnerable to challenge by flag states.

Most significantly, the *Cooperative Surveillance Treaty* permits continuation of hot pursuit through the territorial sea of the other state.²³⁵ Article 4 contains a further condition that the other state must be informed of the pursuit in its territorial waters and the pursuit must effectively be ‘innocent’ for it to comply. That is, no attempts at arrest or boarding can be made, no use of force employed and presumably only physical presence and communications may occur in the circumstances. This effectively creates a consent regime between two states that applies to the aptly named ‘Area of Cooperation’. No doubt building upon the occasion that France permitted Australia to continue the hot pursuit of the *Lena* into the French territorial sea, provision for the formalised continuation of hot pursuit was incorporated into the *Cooperative Surveillance Treaty*. The provision is based upon the Australian position that international agreements can in fact circumvent the Article 111(3) model.²³⁶

The authority to continue hot pursuit in the territorial sea of another state has been examined in Chapter 5. The practical effect of Article 111(3) is that any pursued vessel can effectively end the pursuit and avoid prosecution by entry to the territorial sea of a third state. If the rule in Article 111(3) is aimed at preventing non-innocent passage²³⁷ and preserving the sovereign rights of third party states, then it follows that states

²³⁴ The *Cooperative Enforcement Treaty* contemplates a shiprider solution to effective overwatch of the respective EEZ by authorising a ‘controller’ as an authorised officer of the state to conduct enforcement on the other state’s vessel (*Cooperative Enforcement Treaty* art 3).

²³⁵ *Cooperative Surveillance Treaty* art 4.

²³⁶ ‘Under the law of the sea convention, if a vessel enters into the territorial sea of a third country while conducting hot pursuit, that hot pursuit must be broken off unless the consent of the coastal state is received. So this treaty actually provides for an automatic mechanism for such consent to be received to ensure that hot pursuit may be maintained’ (Greg French, Department of Foreign Affairs and Trade, *Transcript of Evidence* (26 July 2004)).

²³⁷ Molenaar, above n 177, 29 stated that ‘The rationale for this rule appears to be that enforcement activities by a foreign warship or other government vessel would render its passage in the territorial sea non-innocent’.

(particularly those in positions of equality with respective treaty partners) can opt to permit, in limited circumstances, continuation of a hot pursuit provided it occurs in this ‘innocent’ fashion. There are obvious policy benefits to extending pursuit jurisdiction with the consent of the state and states are free to enter into agreements waiving jurisdiction.²³⁸ However, this discounts the rights and responsibilities of the flag state. A provision such as this, also common to US bilateral agreements, is incompatible with Article 111(3). The case of the French and Australian territories, where EEZs meet and the territorial seas are relatively proximate, is a condition of international law that IUU fishing operators would certainly seek to exploit. Even if the both states affirm that pursuit through their respective territorial sea does not threaten their sovereign rights, a flag state would be well placed to challenge an arrest made in the territorial sea.²³⁹

The bilateral agreements between France and Australia, and the US and others, were developed specifically to incorporate innovative methods of employing hot pursuit to address a contemporary maritime problem.²⁴⁰ As discussed in Chapter 5, there is a degree of acceptance of multilateral hot pursuit as a cooperative enforcement measure and correspondingly there is a lack of opposition by states at the present time. For example, the *Cooperative Enforcement Treaty* was tabled during CCAMLR proceedings several times and no objections were raised in the meetings.²⁴¹ However, an adverse finding by ITLOS on the matter still has the potential to render multilateral pursuit unlawful, regardless of state practice.²⁴² In addition to state practice, Australia has incorporated hot pursuit in an innovative way in bilateral agreements and could clearly do so in areas other than IUU fishing.

²³⁸ UNCLOS art 311.

²³⁹ ‘These treaties rely on questionable assumptions about the manner in which hot pursuits may be conducted in accordance with the United Nations Law of the Sea Convention (LOSC). While the treaties evince a commendable commitment by Australia and France to deter illegal fishing in the sub-Antarctic, there is concern about the development of bilateral legal measures which rely on untested, novel interpretations of paramount provisions in LOSC’ (Warwick Gullett and Clive Schofield, ‘Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean’ (2007) 22(4) *The International Journal of Marine and Coastal Law* 545, 546).

²⁴⁰ It was forecast that South Africa would also enter into similar agreements with regional states, but this is yet to occur. As discussed in Chapter 5, South Africa has given effect to hot pursuit by incorporating provisions consistent with Article 111 of UNCLOS into its *Defence Act*.

²⁴¹ Australian National Interest Analysis [2010] ATNIA 3, para 30.

²⁴² Multilateral hot pursuit has yet to be considered in an issue before ITLOS. ‘Much will depend, however, upon the resolve and foresight of the ITLOS judges who will be required to adjudicate on such questions. It is hoped that they will allow the law to evolve to permit the exercise of the right of hot pursuit in the 21st century’ (Randall Walker, ‘International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century’ (2011) 17 *Auckland University Law Review* 194, 218).

7.4 Lessons Learned

A number of conclusions can be drawn from the examples of the US and Australia. First, the development of multilateral hot pursuit has considerable benefits for geographically challenged states, whether they border a number of states, as the US does, or whether isolation restricts long-range operations in difficult conditions, as is the case for Australia. Multilateral hot pursuit significantly increases the potential for states with limited capability to secure maritime zones. As a force multiplier, this is particularly important in an era where marine resources are being subject to depletion by IUU fishing.²⁴³ States are increasingly seeking means to strengthen sovereign control over maritime zones²⁴⁴ and hot pursuit is capable of flexible application, particularly in light of recent technological advances.²⁴⁵

The US and Australia confront a number of significant maritime law enforcement challenges arising from their respective geopolitical circumstances. With a limited (sometimes over-stretched) capability,²⁴⁶ Australia has had to develop more efficient means to counter transnational activities in its vast but relatively isolated maritime zones. By employing ad hoc multilateral hot pursuit and formalising arrangements with France, Australia has had some success addressing IUU fishing in the Southern Ocean. More recently, the introduction of more robust maritime law enforcement regime has

²⁴³ For example, it was reported in 2014 that the Pacific bluefin tuna population is at 4 per cent of historic levels. Amanda Nickson, 'Scientists Say Outlook For Pacific Bluefin Is Worse Than Previously Thought', *The Pew Charitable Trusts*, 27 July 2015 <<http://www.pewtrusts.org/en/research-and-analysis/analysis/2015/07/27/scientists-say-outlook-for-pacific-bluefin-is-worse-than-previously-thought>>.

²⁴⁴ For example, Palau is engaging in unprecedented monitoring and enforcement methods to address IUU fishing in its largely uncontrolled EEZ. Pursuant to the *Palau National Marine Sanctuary Act 2015*, over a 5 year transition period 80 per cent of Palau's EEZ will become a no-fish zone and the remaining 20 per cent a domestic fishing zone (traditional fishing is permitted on submerged reefs).

²⁴⁵ The application of unmanned capabilities and other smart technology is only beginning to make advances for ocean management. The Secretary for the Department of Homeland Security announced the inclusion of smarter technology to achieve its aims: 'what the border security experts say is we need more technology, more surveillance equipment, investing in a risk-based strategy towards border security and that's what we would like to do and that's what is reflected in this year's budget submission for FY 2016' (Jeh C Johnson, 'Remarks by Secretary of Homeland Security on "Security Challenges Confronting The Homeland"' at the Commonwealth Club of California' (Press Release, US Department of Homeland Security, 15 September 2015) <<http://www.dhs.gov/news/2015/09/15/remarks-secretary-homeland-security-jeh-c-johnson-'security-challenges-confronting>>). The role of technology is examined in Chapter 6.

²⁴⁶ In 2013, Rear Admiral David Johnston informed a Senate Estimates Committee that there no vessels patrolling southern maritime zones and that air surveillance had also been terminated. See Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Australian Customs and Border Service* (2013) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2Fa4ee839b-a2e5-4342-b5a0-48cded711a79%2F0002;query=Id%3A%22committees%2Festimate%2Fa4ee839b-a2e5-4342-b5a0-48cded711a79%2F0002%22>>.

overcome those areas of law considered problematic by Australia. Although ‘toothfish piracy’ is back on the agenda for environmental groups,²⁴⁷ Australia has downgraded its contribution to patrolling in the Southern Ocean and risks the appearance of shirking its responsibilities under the bilateral regime with France.²⁴⁸ While Australia has effectively become a shiprider participant rather than an enforcement power in the Southern Ocean, political forces have shifted attention towards enhanced ‘border protection’.²⁴⁹ In the absence of operational transparency, Australia’s approach to irregular migration has been beset by legal uncertainty²⁵⁰ and has drawn criticism from international non-government organisations.²⁵¹

Given the geopolitical circumstances and limited capability of some of Australia’s neighbours, it may be questioned why Australia has not followed the example of the US of entering into bilateral agreements to increase efforts to address transnational crime. This is particularly relevant as the US is now entering into bilateral agreements to manage marine resource protection, not just drug trafficking and irregular migration.²⁵² Australia’s ‘turn back the boats’ policy dominated discussion in the election of two consecutive governments²⁵³ and although details of operations since that time have been cloaked in secrecy,²⁵⁴ a number of important conclusions can be drawn. Having put the

²⁴⁷ Sea Shepherd is conducting its 12th ‘Southern Ocean Defense’ campaign.

²⁴⁸ See, eg, Anthony Bergin and Sam Bateman, Institute for Marine and Antarctic Studies, University of Tasmania Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia’s Future Activities and Responsibilities in the Southern Ocean and Antarctic Waters*, 2 May 2014.

²⁴⁹ The Senate Standing Committee recommended that Australia commit to re-commencing patrolling of the Southern Ocean for a minimum of 40 days twice every financial year. The government’s response stated that *Ocean Shield* has 300 patrol days annually and any decision to undertake a patrol will be based upon operational priorities at the time (The Senate Committees Government Response to Report Speech, 4 February 2016, 492). This suggests that, if the pattern of irregular migration continues, *Ocean Shield* will likely be used in the northern waters.

²⁵⁰ See, eg, Lisa Jane Archbold, ‘Offshore Processing of Asylum Seekers—Is Australia Complying with its International Legal Obligations?’ (2015) 15(1) *Queensland University of Technology Law Review* 137

²⁵¹ ‘Australia’s policy of off-shore processing for asylum seekers arriving by sea, and its interception and turning back of vessels, is leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries’ (Opening Statement by Zeid Ra’ad Al Hussein [United Nations High Commissioner for Human Rights at the Human Rights Council]’ (Speech delivered at the Human Rights Council 27th Session, Geneva, 8 September 2014)). This statement followed on from the Opening Statement by Ms. Navi Pillay [United Nations High Commissioner for Human Rights] (Speech delivered at the Human Rights Council 24th Session, 9 September 2013).

²⁵² See, eg, Andrew Norris, ‘Bilateral Agreements: They’re Not Just for Drugs Anymore’ (2009) 66(2) *The Coast Guard Journal of Safety & Security at Sea* 70.

²⁵³ See, eg, Natalie Klein, ‘Assessing Australia’s Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants’ (2014) 15(2) *Melbourne Journal of International Law* 414.

²⁵⁴ David Wroe, ‘Veil of Silence Descends on Asylum Boat Arrivals’, *Sydney Morning Herald* (online), 20 September 2013 <<http://www.smh.com.au/federal-politics/political-news/veil-of-silence-descends-on-asylum-boat-arrivals-20130920-2u5t5.html#ixzz3Dj6qM22Y>>.

region on notice by pre-election promises and subsequent policy,²⁵⁵ it seems strategically irresponsible for the Australian government to act without meaningful regional consultation.²⁵⁶ Further, the legitimacy of the ‘turn back’ policy has been undermined when regional parties such as India, Sri Lanka, Malaysia, Thailand and Indonesia are not parties to the *Refugee Convention*. This suggests that formalisation of rights and responsibilities over respective maritime zones in a bilateral agreement could conceivably consolidate the parameters of interdiction operations and mend the diplomatic rift.²⁵⁷

In Australia’s case, a failure to meaningfully engage with potentially affected states has undermined the status of its border protection operations.²⁵⁸ The US has deftly sidestepped this problem by entering into a series of bilateral agreements. Although the contribution of bilateral agreements to emerging customary law is limited—the arrangements only reflect binding obligations between the parties—US practice demonstrates how hot pursuit can be an effective tool for states, particularly those impeded by environmental, economic and other constraining circumstances.²⁵⁹ There is

²⁵⁵ Despite a change in leadership, the government has maintained a consistent approach to the issue of asylum seekers, see Stephanie Anderson, ‘Australia’s Immigration Policies Violating International Law, Amnesty International Says’, *ABC News* (online), 23 February 2016 <<http://www.abc.net.au/news/2016-02-24/australias-immigration-policies-violating-international-law/7195432>>.

²⁵⁶ The Australian government has suggested that meaningful engagement has occurred with Indonesia as a result of the Bali Process, but this has been overshadowed by handling of asylum seekers. See, eg, Michael Bachelard, ‘Tony Abbott’s Asylum Seeker Policies “Offensive”, Says Senior Indonesian Politician’, *Sydney Morning Herald* (online), 19 September 2013 <<http://www.smh.com.au/federal-politics/political-news/tony-abbotts-asylum-seeker-policies-offensive-says-senior-indonesian-politician-20130919-2u082.html>>; David Wroe, ‘We Will Reject Abbott’s Policy on Asylum Seekers: Indonesia Foreign Minister Marty Natalegawa’, *The Brisbane Times* (online), 12 September 2013 <<http://www.smh.com.au/federal-politics/political-news/we-will-reject-abbotts-policy-on-asylum-seekers-indonesia-foreign-minister-marty-natalegawa-20130912-2tmkw.html#ixzz3Dj9ivNHf>>.

²⁵⁷ The existing *Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation* (the ‘Lombok Treaty’) of 13 November 2006 contains a number of undertakings to cooperate on security issues, including people trafficking and people smuggling at 7(a), but not asylum seekers. See Abdul Khalik, ‘RI-Australia Agreement Will Not Prevent Asylum Disputes’, *Jakarta Post* (online), 10 November 2006 <<http://www.thejakartapost.com/news/2006/11/10/riaustralia-agreement-will-not-prevent-asylum-disputes.html>>. The treaty was negotiated to fill the vacuum in Indonesia-Australia relations after the East Timor peacekeeping deployment led by Australia and Australia awarding 43 temporary protection visas to West Papuan activists who landed in North Queensland. The Deputy Head of the Indonesian Parliamentary Committee on Foreign Affairs, Amris Hassan, stated that, ‘[i]n future, if there is an asylum-seeker problem, we will now have a legally binding agreement so there can be no more fooling around’ (Stephen Fitzpatrick and Patrick Walters, ‘Downer Signs New Jakarta Treaty’, *The Australian* (online), 14 November 2006 <<http://www.theaustralian.com.au/news/nation/downer-signs-new-jakarta-treaty/story-e6frg6nf-111112518044>>).

²⁵⁸ Australia’s failure to engage with Indonesia on migrant interdiction has resulted in significant diplomatic setbacks that may have been avoided by the negotiation of a bilateral agreement—an approach that may also assist Australian relations with India and Sri Lanka.

²⁵⁹ Shipriders have also been used to good effect in joint efforts to counter piracy and armed robbery at sea. The arrangement, strongly encouraged by the UN Security Council, required the consent of the coastal state (in that case, the Transitional Federal Government of Somalia). In SC Res 1851, UN SCOR, 6046th mtg, UN Doc SC/RES/1851 (16 December 2008), the Security Council stated that it

also potential to extend the terms of bilateral agreements to develop regional frameworks. Piracy,²⁶⁰ WMDs²⁶¹ and IUU fishing²⁶² are prime examples of issues provoking state efforts to strengthen the legal foundations of maritime security through shared objectives and combined political will.²⁶³ Curiously, the US has employed hot pursuit in very few bilateral arrangements relating to the protection of LMR.

The US reliance on a network of bilateral agreements incorporating hot pursuit is a method of working around UNCLOS. Only in an agreement—bilateral or multilateral—can states permit pursuits into the territorial sea and other conditions for the continuation of hot pursuit. While agreements may guarantee predictability between two parties, many of these agreements already reflect an asymmetrical relationship and the US cannot contract out of its obligations under international law.²⁶⁴ Bilateral agreements do not bind a flag state and the actions of the US remain susceptible to challenge by third states. No doubt ancillary issues arising from bilateral arrangements, such as aid, logistical support and capacity building, go a long way to ensuring that the

Invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ('shipriders') from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention.

It is important to note that SC Res 1816, UN SCOR, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008) para 9 states that the enforcement operations do not create a right of reverse hot pursuit under customary international law.

²⁶⁰ For example, in its earliest days ASEAN agreed to promote cooperative efforts among its members to address piracy. See, eg, *ASEAN Declaration on Transnational Crime*, signed 20 December 1997.

²⁶¹ The PSI is a multilateral commitment to addressing WMDs in operational law: 'Both the counterdrug shiprider agreements and the PSI ship boarding agreements serve as proxies for or to facilitate flag state consent or a request to board a suspicious vessel' (James Kraska, 'Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure' (2010) 16(1) *Ocean and Coastal Law Journal* 1, 16.

²⁶² For example, the Sub-Regional Fisheries Commission, comprising seven West African nations, recently sought an advisory opinion from ITLOS in an effort to overcome ineffective enforcement issues arising from regional IUU fishing activities. See, Sub-Regional Fisheries Commission, 'Request for an Advisory Opinion to the International Tribunal for the Law of the Sea—ITLOS, Written Statement' (2 November 2013)

<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_19_CSRP_orig_Eng_rev.pdf>.

²⁶³ Gerald Moore, 'Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Cooperation' (1993) 24(2) *Ocean Development and International Law* 197, 203.

²⁶⁴ The US has also entered into shiprider agreements with developed states of comparable capability. See, eg, the *Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda*, signed 13 July 1998 (entered into force on 30 October 2000); *Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada*, signed 26 May 2009, 12-1011 TIAS (entered into force 11 October 2012).

US can pursue its strategic agenda.²⁶⁵ Very few states possess the military and economic might to do the same.²⁶⁶ In the face of expanding threats to maritime security and the US' sustained extensive influence over the oceans, it is questionable whether remaining outside UNCLOS will best serve the US strategic objectives.²⁶⁷

While Australia has employed hot pursuit as a force multiplier to overcome its limited capability, US capability is constrained by fundamental principles entrenched in its municipal legal framework. However, in spite of the *Posse Comitatus Act*, the US recently indicated its intent to additionally employ naval assets for law enforcement purposes in Asia-Pacific waters.²⁶⁸ Provided that jurisdictional elements are present, the use of the Navy in this respect is an entirely permissible employment of hot pursuit pursuant under international law, yet the use of the US Navy in support of domestic law enforcement is in fact a violation of US legislation. Further, US bilateral agreements ordinarily define 'law enforcement officials' as members of the USCG and therefore the US Navy would additionally be prohibited to act.²⁶⁹ There has been scant detail released publicly on the execution of an expanded shiprider program that would employ US

²⁶⁵ On the face of it, US bilateral agreements appear to cater to different foreign policy aims as they are shaped by various diplomatic concessions made during negotiations and other internal factors such as weak governance and diminished capability. Some are clearly aimed at formalising joint cooperation with other developed states in relation to shared law enforcement objectives. Other agreements promote capacity building for smaller, developing states.

²⁶⁶ The US is proximate to a number of states with weak infrastructure and capability that generate illegal drugs and hopeful migrants. To overcome these geographical challenges, the US has incorporated hot pursuit provisions into bilateral agreements to provide the extra-territorial reach it requires. Even so, in spite of the vast military and law enforcement resources available to the US, more robust means have been necessary to address persistent maritime security issues.

²⁶⁷ See, eg, Bureau of Political-Military Affairs, US Department of State, *The Maritime Security Sector Reform (MSSR) Guide*, 1 December 2010 <<http://www.state.gov/t/pm/rls/othr/misc/151106.htm>>. These policy aims are additionally listed as specific objectives of the Office of Oceans and Polar Affairs, see US Department of State, *Oceans and Polar Affairs* (2017) <<http://www.state.gov/e/oes/ocns/opa/index.htm>>.

²⁶⁸ Expansion of the shiprider regime was announced in 2012 by Secretary of State Hillary Clinton: 'Now we're working to expand our shiprider partnership to include the United States Navy in addition to the United States Coast Guard. This will allow countries to take advantage of US Navy ships that are already in the region or are transiting through the region to get help enforcing their own laws' (Remarks Commemorating US Peace and Security Partnerships in the Pacific' (Speech delivered at Rarotonga, Cook Islands, 31 August 2012) <<http://www.state.gov/secretary/20092013clinton/rm/2012/08/197262.htm>>). This was confirmed more recently by Admiral Samuel J Locklear (*Statement of US Navy Commander, US Pacific Command before the Senate Committee on Armed Services on US Pacific Command Posture, 25 March 2014* <http://www.armed-services.senate.gov/imo/media/doc/Locklear_03-25-14.pdf>).

²⁶⁹ See, eg, *Agreement between the Government of the United States and the Government of the Republic of Kiribati concerning Cooperation in Joint Maritime Surveillance Operations*, TIAS 08-1124 (signed and entered into force 24 November 2008); *Agreement between the Government of the United States of America and the Government of the Republic of the Gambia concerning Cooperation to Suppress Illicit Transnational Maritime Activity*, TIAS 11-1010 (signed and entered into force 10 October 2011).

Navy vessels, however, it appears that there are significant legal impediments that must first be overcome.²⁷⁰

7.5 Conclusion

While there are distinct strategic imperatives and dissimilar foundational sources of law, the US and Australia both seek to effectively exercise sovereign and jurisdictional policing rights over adjacent maritime zones and elsewhere. When addressing contemporary maritime security concerns, the US and Australia have found some aspects of conventional international law wanting. As customary international law is slow to change in response to contemporary challenges, the US and Australia have developed solutions incorporating hot pursuit to meet their respective enforcement needs. Both states take an innovative approach to the employment of hot pursuit and the resulting state practice demonstrates that these developments can have application elsewhere. States that are impeded by internal factors, such as weak governance and limited capability, as well as external factors, such as challenging environmental features, may also benefit from this approach.

Although a principal military power, the geographical position of the US demands an enhanced enforcement regime to meet strategic policy initiatives relating to migrant interdiction, drug trafficking and, to a lesser extent, marine resource protection. Australia has also faced significant challenges arising from its geopolitical circumstances. With a much smaller capability, Australia has sought to maximise its enforcement regime while remaining engaged with UNCLOS and other regional and global institutional frameworks. Australia has utilised hot pursuit to give effect to its strategic initiatives regarding LMR and the maintenance of overwatch of its isolated EEZ in the southern Indian Ocean. Hot pursuit has proven to strengthen state control over Australia's disparate maritime zones, particularly in relation to its isolated external territories. The recent overhaul of the maritime law enforcement regime strengthens the areas considered problematic by Australia in light of its experiences in the Southern Ocean and largely accords with international law on hot pursuit.

The US has demonstrated that in spite of its persistence to remain an outsider to UNCLOS, there are other legal mechanisms such as hot pursuit that can be used to

²⁷⁰ See, eg, Mark Nevitt, 'Unintended Consequences: The Posse Comitatus Act in the Modern Era' (2014) 36 *Cardozo Law Review* 119.

achieve its strategic aims and policy objectives. It must be acknowledged, however, that the development of municipal law and consequential state practice is very much shaped by strategic initiatives. In addition to LMR protection, safeguarding maritime commerce and ensuring naval freedom of operations continue to be key aims of US foreign policy. The US has had little need to employ hot pursuit for environmental purposes. However, the capability-rich US has already identified that unilateral maritime enforcement has been unable to adequately address drug trafficking and irregular migration. By incorporating an abbreviated consent process alongside robust hot pursuit provisions into bilateral agreements, the US has been better able to implement effective maritime enforcement in these areas.

As international law has failed to offer methods that may address irregular migration by sea in a manner that supports this aim, Australia has sought to work around UNCLOS and quite possibly the *Refugee Convention*. While the US also moved to work around these principal treaties, entering into bilateral agreements has proven to be more beneficial. Leaving 'room to move' reflects the intent of the Commonwealth (including that of a number of successive governments) that Australia has a particular desire to contribute to the development of the law of the sea under customary international law. No more so than with hot pursuit does this example ring true. While there are a number of circumstantial variables, these developments in hot pursuit have, for the most part, strengthened bilateral and regional relations as well as addressing the resource-taxing logistics of monitoring extensive maritime zones.

PART IV
ENDSTATE

CHAPTER 8: ANALYSIS, RECOMMENDATIONS AND CONCLUSION

8.1 Introduction

Hot pursuit is a unique legal device born of the coastal state's right to project its sovereign rights and jurisdiction beyond the shoreline. It is a narrow but significant exception to the freedoms of the high seas and otherwise exclusive flag state jurisdiction. Accordingly, the exercise of hot pursuit must be limited in time, space and purpose. This thesis set out to determine the current scope of the law on hot pursuit and to assess contemporary and emerging developments. The research examined these developments in the context of historical and contemporary practice. A comparative analysis has been conducted to identify the advantages and challenges of hot pursuit and determine appropriate lessons for other states. This chapter outlines the key findings of the thesis, implications for the research questions, lessons learned, issues for further research and the way ahead.

This thesis has determined that conventional hot pursuit has been inadequate to address contemporary maritime challenges. Consequently, it may be concluded that there are shortfalls or sticking points in the law that prevent hot pursuit from being used to its best effect. In Chapter 5, a systematic exploration of scholarly works revealed that the majority of commentators have unequivocally called for a more dynamic or flexible interpretation of hot pursuit.¹ Chapters 6 and 7 analysed the themes arising from alternative approaches in domestic regimes such as South Africa² and regional arrangements, including the *Niue Treaty Agreement*.³ The research has demonstrated

¹ Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff, 2nd ed, 2002) 231; R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 216; Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 113; Myres S McDougal and William T Burke, *The Public Order of the Oceans* (Yale University Press, 1962) 898; Craig H Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20(4) *Ocean Development and International Law* 309, 325; Randall Walker 'International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century' (2011) 17 *Auckland University Law Review* 194, 217–8; Rachel Baird, 'Arrests in a Cold Climate (Part 2)—Shaping Hot Pursuit Through State Practice' in Rachel Baird and Denzil Miller (eds), *Antarctic and Southern Ocean Law and Policy Occasional Papers No 13, Special Edition: In Acknowledgement of Dr Denzil Miller* (Law School, University of Tasmania, 2009) 328.

² Chapter 6 examines hot pursuit provisions in South African legislation including, but not limited to, the *Customs and Excise Act 1964* s 4(c) and the *Defence Act 2002* s 27.

³ *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, signed 2 November 2012, [2017] ATS 11.

that states are, in fact, structuring their own conditions for enforcement to effectively address the shortfalls in the law. The examination of state practice has highlighted the advantages of utilising technology, international agreements, capacity building and cooperative measures over unilateral operations. Increasing state reliance on these alternative approaches to conventional application is indicative of a cautious amplification of hot pursuit.

8.2 Key Findings

This thesis analysed the current scope of the law on hot pursuit considering its contemporary employment in the context of modern maritime security. The analysis of contemporary practice has shown that, despite legal uncertainty, there has been a discernible shift in the parameters of hot pursuit. As a result, many key findings can be drawn from the material and these will be examined in the context of the research questions.

8.2.1 Research Question 1: What are the origins of hot pursuit and how has the doctrine developed?

Chapter 1 concluded that hot pursuit had its origins in the law of the sea rather than ‘fresh pursuit’ that arises from entry onto private land to reclaim property or persons. There are many examples where entry is permitted by agreement⁴ or within domestic jurisdictions.⁵ Pursuit over state boundaries without consent is sometimes employed (incorrectly) as justification for extraterritorial enforcement—Turkey’s past operations against Kurds on the Turkey-Iraq border being one example. Conversely, fresh pursuit does constitute a genuine right in some jurisdictions in the context of police enforcement under domestic law. A number of commentators have made a link between fresh pursuit and the origins of hot pursuit,⁶ but this thesis has distinguished the two legal concepts. As an extension of coastal state jurisdiction beyond the shoreline, hot pursuit is regulated quite differently and the power diminishes relative to distance from

⁴ Another cause for entry may be subject to an applicable UN Security Council Resolution. Police pursuits across territorial boundaries a separate issue. See, eg, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders*, opened for signature 19 June 1990 (entered into force 1 September 1993) art 41.

⁵ For example, ‘fresh pursuit’ is incorporated into the *Search and Surveillance Act 2012* (New Zealand) s 120 and the *Land Transport Act 1998* (New Zealand) s 268.

⁶ See, eg, Glanville L Williams, ‘The Juridical Basis of Hot Pursuit’ (1939) 20 *British Yearbook of International Law* 83, 85.

the shoreline. Hot pursuit operates within a framework where the rights of states are balanced to achieve a common interest in the law of the sea framework.⁷

Hot pursuit was initially hampered by other associations within the law. After overcoming an initial false start by a link to the laws of belligerency and prize, the development of hot pursuit was also impeded by state misgivings regarding diminishing sovereignty. Chapters 2 and 3 also confirmed that the early development of hot pursuit was bound to the lengthy and complex determination of territorial waters—although hot pursuit was later extended in a restricted fashion to outer maritime zones up to and including the EEZ. Early recognition that the coastal state could project its jurisdiction beyond the shoreline meant that the concept of hot pursuit was not of itself controversial during the codification process. Rather, it was the breadth of jurisdiction that was cause for extensive debate. This underscores the nexus between sovereignty and high seas freedoms and the fact that these competing interests must co-exist reflects a fundamental theme of the universal framework.

The tide turned in the late 1920s to early 1930s, when hot pursuit became part of customary international law. Until this time, hot pursuit was difficult to quantify as revealed in the analysis of case law and arbitrations in Chapter 2. State practice, determined in Chapter 2 to be largely driven by domestic policy objectives, was a key driver for hot pursuit's inception into customary international law. While safeguards representative of the broader law of the sea regime were incorporated early in the process, the subsequent shortfalls have only intensified with time. The parameters of hot pursuit in contemporary practice are examined below.

8.2.2 Research Question 2: What is the current scope of hot pursuit under customary international law and treaty, including its fundamental elements?

Some of the analysis in Chapter 4 merely confirms what was already known or suspected about hot pursuit. For example, attempted offences are not captured by the core elements of hot pursuit, although some commentators have supported the notion in the past.⁸ The findings strongly suggest that conventional hot pursuit is only useful for the most straightforward of enforcement operations. Without further legal development, states would require a sizeable, long-range enforcement capability that can be employed

⁷ McDougal and Burke, above n 1, 10–11.

⁸ This is examined in Chapter 4. See, eg, Robert C Reuland, 'The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33 *Virginia Journal of International Law* 557.

in extreme weather conditions, but this is impractical and cost prohibitive. In short, the current scope of hot pursuit remains relevant today, but there is a great deal of room for improvement. Accordingly, something more than flexible interpretation of the core elements is necessary to address multifaceted maritime challenges and states must look ‘outside the box’. States are already attempting to fill the gaps with innovative and cooperative efforts while the vast potential of technology is only now being contemplated.

If hot pursuit is to be effectively employed as a method of maritime enforcement, more development is necessary to address contemporary circumstances. In the absence of an effective UNCLOS provision, states have expedited developments by using bilateral agreements, regional arrangements and ad hoc measures. Consequently, hot pursuit is being shaped by states to advance a more practical agenda. Transfer to a third state may be facilitated on an ad hoc basis⁹ or more formally in bilateral agreements.¹⁰ This is becoming a more common practice in many regions and contexts¹¹ and it is a part of a greater effort by states to shift the conditions in which they operate hot pursuit. The contemporary practice of hot pursuit is examined next.

8.2.3 Research Question 3: How has hot pursuit been utilised more recently by states and what challenges are they seeking to address?

Part III analysed the period of resurgence in the late 1990s to early 2000s and the innovative application of hot pursuit in response to increasing transnational pressures. *M/V ‘Saiga’*, the only ITLOS case to deal with hot pursuit, did not expand on the law other than to declare that all elements must be satisfied cumulatively and that states cannot create additional zones in which to enforce hot pursuit.¹² This is hardly surprising, but it has added pressure to states that declare ‘customs’ or ‘security’ zones exceeding the limits of the universal framework—such as the example of the US, analysed in Chapter 7.

⁹ Such as in the Australian hot pursuit of the Uruguayan-flagged *Viarsa*, discussed in detail in Chapter 5.

¹⁰ Such as the *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Island*, [2011] ATS 1 (signed and entered into force 8 January 2007); *Agreement between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Interdiction* (signed and entered into force 20 May 2003).

¹¹ Examples include the *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden* (the ‘Djibouti Code of Conduct’) (signed and entered into force 29 January 2009), the *Niue Treaty Agreement*, Australia-France agreements pertaining to the Southern Ocean and various bilateral US agreements.

¹² *M/V ‘Saiga’ (No 2)* (Judgment) 126–9.

Determining whether this period of resurgence has generated tangible developments has been a fundamental question in this thesis. It is concluded that hot pursuit has advanced beyond conventional unilateral applications. Although not contemplated in *travaux préparatoires*, the analysis in Chapters 5 and 6 demonstrated that multilateral hot pursuit has been a crucial development during this period. Evidence of other alternative or unconventional applications have also emerged from the study of state practice in Chapters 5 to 7.

The findings in Chapter 6 illustrate that hot pursuit can and should be adapted to overcome the unique complexities of maritime crime. For example, bilateral agreements can empower states in circumstances where unilateral enforcement may be inadequate or unachievable. The preconditions examined in Chapter 4 do not preclude the adoption of more progressive methods of enforcement in international agreements, hence their growing popularity. However, the safeguards cannot be discounted altogether. Although this does not preclude ad hoc consent, ideally any attempt to work around Article 111(3) is formalised by agreement. While bilateral or multilateral arrangements have vast potential to extend the scope of hot pursuit, it must be kept in mind that agreements only bind the parties. Article 311(3) safeguard the rights of third states in relation to agreements, but the risk of flag state protest remains a real possibility and the prospect of independent third state enforcement is equally, if not more, constrained.¹³

It is clear from the research that strengthening domestic frameworks can resolve some of the legal uncertainty surrounding hot pursuit. Australia and South Africa have essentially codified multilateral hot pursuit into their domestic regimes,¹⁴ while the US has extended its jurisdiction via a network of bilateral agreements. In South Africa, its enforcement capability is under pressure as a result of competing security obligations in the region. Due to similar capability challenges, Australia has begun to employ its fisheries officers as shipriders on foreign vessels. Clearly, shiprider agreements are particularly beneficial in asymmetrical dealings when targeting shared objectives and they need not be co-located.¹⁵ Coastal states are harnessing the potential of emerging elements in a way that maximises state capability and geopolitical circumstances.

¹³ In a scenario distinct from multilateral hot pursuit where a third state arrests the suspect vessel upon entry to the third state's territorial sea. See also, UNCLOS art 311(3).

¹⁴ *Maritime Powers Act 2013* (Cth) s 42(2)(c); *Defence Act 2002* (South Africa) s 27.

¹⁵ *Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991*, signed 3 December 1993. The MOU

Not all states are willing to engage in more cooperative efforts to combat shared criminal objectives. Chapter 5 concluded that there has been less success in combating piracy in the Malacca Straits due to reluctance to cede sovereign rights in the territorial sea. Conversely, expansive provisions that have achieved more success have been applied elsewhere, such as the West and East African coastlines¹⁶ and the Gulf of Aden.¹⁷ This innovative use of enforcement, employed because of shared objectives and political will, has given new legitimacy to an enhanced application of hot pursuit.¹⁸

8.2.4 Research Question 4: What challenges remain and how could the law be applied to address those challenges?

Chapters 5 to 7 evaluated the work-around measures that states are employing, namely international agreements, collective regional action, strengthening domestic regimes and ad hoc cooperative enforcement. The research concluded that even the capability-rich US has had to develop more robust measures to address drug trafficking and irregular migration in its region. While Australia has previously tackled the difficult problem of IUU fishing in the Southern Ocean—thereby contributing to the contemporary development of hot pursuit—Australia’s strategic imperative has since shifted to aggressively counteract irregular migration in the northwest. This has meant that Australia has drawn heavily upon its bilateral agreements with France, which has had to bear the burden of patrolling and enforcement in the Southern Ocean. As a result of these findings, this thesis concludes that cooperative measures are crucial to the success of hot pursuit. Formalising one or more of the alternative approaches examined in Chapter 6 consolidates hot pursuit and ultimately advances further development in customary international law.

was extended on 31 December 2014 for another 5 years. For a discussion on the practical application of the MOU, see Kevin W Riddle, ‘Illegal, Unreported and Unregulated Fishing: Is International Cooperation Contagious?’ (2006) 37(3–4) *Ocean Development and International Law* 265.

¹⁶ In order to address piracy, two agreements were developed: the *Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa*, signed 25 June 2013 (the ‘*West and Central African Code of Conduct*’) and the *Djibouti Code of Conduct*. The agreements have been signed by 25 and 20 states respectively.

¹⁷ Such as the *Convention on Sub-Regional Cooperation in the Exercise of Maritime Hot Pursuit* (signed and entered into force 1 September 1993).

¹⁸ The *West and Central African Code of Conduct* was prompted by UN Security Council resolutions 2018 (2011) and 2039 (2012), United Nations General Assembly resolutions (including resolution 67/78 on Oceans and the Law of the Sea), the Zone of Peace and Cooperation in the South Atlantic, the maritime strategies of the African Union, the Economic Community of Central African States, the Economic Community of West African States and the Gulf of Guinea Commission. The *Djibouti Code of Conduct* implemented issues arising from UN Security Council resolutions 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008) and UN General Assembly resolution 63/111.

Chapters 6 and 7 examined case studies that strengthened hot pursuit provisions within municipal frameworks. On the face of it, amending domestic legislation to give effect to the coastal state's ideal strategic approach would seem short sighted. However, it is in municipal frameworks where the great majority of legal proceedings that involve hot pursuit will occur. This means that states can shape the conditions that they wish to operate in at the ground level—as was seen in the *Volga*—and this in turn contributes to the gradual development of hot pursuit under international law. While the law of the sea continues to evolve, albeit slowly, it is clear that a number of hot pursuit elements can only be developed with meaningful state action and consensus.

In Part II, the early development of hot pursuit incorporated important safeguards and attempted to achieve the balance required within the law of the sea framework. On the face of it, many core elements are amenable to more flexible interpretation, including the definition of interruption. How else can coastal states counter IUU fishing, for example, if the perpetrators already employ technology to vastly exceed fishing limits, disregard bycatch regulations and evade authorities? This issue is illustrated by Article 111(4) requiring that an order to stop must be seen or heard by a pursued vessel. This provision is onerous and outdated. The practical challenge for states then, is reconciling the theoretical foundations of hot pursuit and technological advancements within the overall framework. For example, Article 13 of the Niue Treaty Agreement permits tracking by 'reliable technical means'. It is crucial that the law, policy-makers and enforcement personnel engage with extant and emerging technology.

Despite these developments, there are other shortfalls within the law that cannot be resolved by flexible interpretations of hot pursuit. These issues demand more tangible effort by states if the aim is to further develop hot pursuit in a particular direction. For instance, regional cooperative efforts are becoming more popular to target crimes. This signals that states are prepared to move away from unilateral practice and forge change by consensus. At the other end of the spectrum, there are suggested measures that would require amendment to UNCLOS, although this is a very unlikely course of action. For instance, although resumption (examined in Chapter 5) has had the support of a number of commentators, the research concluded that there is no circumventing the unambiguous prohibition set out in Article 111(3). In the absence of a bilateral agreement that would still invite flag state opposition, a work-around measure to validate resumption would also be inconsistent with the overall framework.

Like resumption, pursuit into the territorial sea of a third state and third state enforcement (as distinct from multilateral hot pursuit) both threaten the central notion of sovereignty and can foster conflict with the flag state. As such, there is insufficient evidence that either of these issues will develop into customary international law in the near future. Instead, it would befit states to consider employing shipriders and developing agreements as more appropriate and effectual alternatives. There are other approaches, such as the *Port State Measures Agreement*,¹⁹ that will also address the challenges of IUU fishing. This is part of a broader effort by states to take more direct action to counter ocean exploitation and maritime security threats.

8.3 Other Lessons Learned

In addition to the findings outlined above, a number of lessons have been identified during the research into the contemporary practice of hot pursuit. The research established that hot pursuit can—with contemporary application and direct action—meet the needs of coastal states seeking to strengthen sovereign control over maritime zones. States can strengthen municipal frameworks in other ways by engaging with regional partners. This can be achieved by enhancing defence cooperation, capacity building and reinforcing interoperability, ideally by formal agreement. Australia has made significant gains in relation to countering IUU fishing by opening dialogue with flag states and demonstrating activism on a regional and international level. Despite its broad utility, it is clear from the US and Australian case studies that there are circumstances in which the preconditions of hot pursuit can hinder effective maritime law enforcement. There is no single approach that is advancing hot pursuit, but there are a number that seek to bring hot pursuit in line with contemporary maritime threats.

Additionally, the long-term forecast of defence asset acquisition must account for strategic objectives such as long-range patrol boats, icebreakers and surveillance airframes. The research demonstrated that Australia's maritime security policy has been reactive and short sighted in recent years. The plight of the ACV *Ocean Protector*, a dedicated Southern Ocean icebreaker largely employed as a transporter of asylum seekers in the waters north of Australia, is an example of this.²⁰ There is, however, a

¹⁹ *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* ('Port State Measures Agreement'), opened for signature 22 November 2009, [2009] ANTIF 41 (entered into force 5 June 2016). 30 states are party to the Agreement.

²⁰ Chapter 7 revealed that the Southern Ocean Maritime Patrol and Response vessel, the ACV *Ocean Protector*, which is able to conduct year-round patrols in sub-Antarctic weather conditions, used all of its 229 patrol days in northern waters, see Australian Customs and Border Protection Service (Cth), *Annual*

danger in shaping conditions to align with a strategic outlook: the law has the tendency to become untenable.

8.4 Technology: The Missing Piece

Much emphasis has been placed on the failure of hot pursuit to adapt to contemporary circumstances. The commentary has suggested that hot pursuit has tremendous potential if many the core elements were different. While it is true that a number of these elements have stunted progress in a way that threatens to make hot pursuit obsolete (examined in Chapter 4), the research has concluded that technology is an undervalued resource that has the potential to overcome some of these obstacles.

Technology is being underutilised in the application of hot pursuit in two important ways. First, to facilitate effective C3 and, secondly, to overcome the shortfalls of Article 111(4). Effective C3 provides real-time intelligence and supports the hierarchal decision making that is crucial to the success of hot pursuit enforcement operations. In analysing the *Viarsa*, *South Tomi* and *Volga* pursuits and the early case law outlined in Chapter 2, the research illustrated that pursuits are frequently hazardous, expensive and can rapidly escalate into skirmishes of a strategic or diplomatic nature. C3 promotes effective situational awareness and provides the precision that is needed when tracking and monitoring vessels in coastal state maritime zones. This results in a higher standard of evidence should the pursuits be prosecuted or litigated.

Putting aside C3 issues that have been examined in Chapter 6, Article 111(4) persists as another major obstacle to the conduct of effective hot pursuit operations. Chapters 4 and 5 examined the legal impediment in Article 111(4) that requires the signal to stop to be given at a distance that enables it to be seen or heard by the pursued vessel. The research concluded that there is significant scholarly support for applying a flexible interpretation to work around this issue. Should states apply this perspective to hot pursuit, technology must be a part of the solution. Not only will technological advances further enhance the accuracy of positional data, but they will also provide greater credibility to hot pursuit enforcement operations. The application of technologies, combined with substantial scholarly support, will advance the requisite shift in hot pursuit that is urgently required.

Chapter 5 also examined the role of technology purpose-built for maritime enforcement operations rather than warfighting or commercial use. These applications, such as unmanned capabilities and wave-riding robots, are opening previously unimagined methods of maritime enforcement (discussed below in the context of future research). With the aid of unmanned capabilities in particular, hot pursuit may be employed in more economically viable ways, facilitating better response times and increased ocean overwatch. This will close the gap on self-sufficient maritime security—Palau being an example of this approach. The ongoing roll-out of Project Eyes on the Seas, examined in Chapter 6, is particularly promising. Ultimately, states desire more effective control over adjacent maritime zones and the innovative application of hot pursuit underwritten by technological advances can facilitate this. While exclusive flag state jurisdiction may ultimately hinder these types of operations, there can be little doubt that these arrangements are effective as enforcement tools as well as deterrents.

8.5 Issues for Future Research

There are a number of issues beyond the scope of this thesis that are suitable for future research. The law is in a state of flux on the application of emerging technology to maritime enforcement operations, particularly in the context of hot pursuit. For example, it is anticipated that forward-operating semi-autonomous devices, such as drones and surface technology, will become more widespread as a cost-effective means of surveillance and tracking. The role of technology, aircraft and unmanned capabilities in particular should not be undervalued. However, legal clarity is necessary for this to occur.

Many keenly await the outcome of Project Eyes on the Seas. The development of Virtual Watch Rooms, the prototype of which was examined in Chapter 6, has the huge potential to strike a blow against IUU fishing operations. If a cost-effective and accessible model can be developed, states can monitor maritime zones and conduct enforcement more effectively and efficiently.

In the absence of judicial guidance, an agreement can put paid to legal uncertainty and address common concerns just as Article 311(3) permits. The consensus and concentrated effort that generated agreements such as the *Convention for the Conservation of Antarctic Marine Living Resources*,²¹ the *Djibouti Code of Conduct*,

²¹ Opened for signature 20 May 1980, 1320 UNTS 47 (entered into force 7 April 1982).

West and Central African Code of Conduct and *Niue Treaty Agreement* needs to be channelled elsewhere. By building upon the extant and emerging elements examined in this study, further development can ultimately produce a model framework based on the exercise of hot pursuit. Ideally, a model framework would contain enforcement measures with options for collaborative pursuits, compliance controls and dispute resolution. The IMO has had success in shaping measures to address piracy and armed robbery at sea; state parties may adopt or reflect these measures into domestic regimes, fostering more clarity and consistency in the practice of hot pursuit.

8.6 Conclusion

In this thesis, it has been necessary to look beyond customary international law and treaty to fully grasp the law and emerging developments of hot pursuit. This thesis examined the current scope of the law on hot pursuit as a result of historical and contemporary practice and, more specifically, whether hot pursuit has wider application for states wishing to exercise greater sovereign control over maritime zones. The universal framework does not exhaustively define hot pursuit nor is it static. The law of the sea enables evolution of legal concepts and accommodates cooperative efforts and the emergence of multilateral hot pursuit is evidence of that. The research also concluded that robust legal frameworks can have a deterrent effect and that domestic courts are more likely to be the arena in which hot pursuit disputes are settled. In short, this thesis has shown that there has been cautious amplification of hot pursuit in support of a common interest.

Other aspects of hot pursuit are emerging to address the shortfalls. These deficiencies are a result of conservative early drafting—something to be expected when conceiving an exception to high seas freedoms and flag state jurisdiction. However, this is also due to the difficult path to codification of the territorial sea and the ‘package deal’ nature of UNCLOS that transpired after so much negotiation and compromise. As long as hot pursuit continues to be applied in a manner that does not offend customary international law and Article 111, these measures can maximise jurisdiction, strengthen enforcement and ultimately consolidate state control over maritime zones.

While these are positive developments, particularly for marine resources, the strengthening of sovereign control has largely been in response to the onset of new security threats in the maritime domain. Accordingly, the desire of states to flesh out the details and to push the boundaries of hot pursuit is to be expected in the current

circumstances. Without further development of this kind, however, the current framework reflected in the theoretical foundations will fall short. States must continue to adapt to shifting strategic security realities and this also means that careful consideration of capabilities is essential.²² Part III concluded that there is no one-size-fits-all legal solution when crafting maritime law enforcement. States are moving away from unilateral operations towards innovative and collaborative efforts. States and institutions have reinvigorated what was a timeworn legal device and, by tackling gaps in the law, are shaping the conditions that they intend to operate in.

This thesis has a number of important implications for states. It is clear that capability-challenged states *and* capability-rich states struggle with maritime law enforcement when addressing contemporary challenges. However, as the trends examined in this thesis indicate, hot pursuit will continue to evolve in response to ongoing legal, environmental, technological and political pressures. Certainly, the law in relation to hot pursuit ought not to be obstructive, convoluted or burdensome. By utilising alternative approaches, the research concluded that hot pursuit can overcome challenges of weak governance, limited capability, geopolitical issues and regional tensions that arise in the context of maritime law enforcement. The principal challenge for states, however, is maintaining the momentum for functional and meaningful change. Should the development of hot pursuit slow or cease altogether, the right will likely fall into disuse and be relegated to the past. Only with persistent engagement of new and emerging approaches, particularly technological applications, will hot pursuit avail states' respective maritime enforcement wishlists and remain aligned with the fundamental tenets of the universal framework.

²² '[The Gulf of Guinea] states must invest in modern technology in their efforts to combat maritime crime due to the large expanse of the area to be kept under surveillance. With modern technology which is constantly improving, it is possible for the authorities to have virtual control of their maritime domains by investing in various maritime surveillance systems to complement water and aerial patrols' (Herbert Anyiam, 'The Legalities of Gulf of Guinea Maritime Crime with Suggested Solutions' (Paper, Centre for International Maritime Security, 17 July 2014) <<http://cimsec.org/legalities-gulf-guinea-maritime-crime-suggested-solutions>>).

APPENDICES

APPENDIX A

THE HAGUE CODIFICATION CONFERENCE

Article 11

The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State begun when the foreign vessel is within inland waters or the territorial sea of the State may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

The pursuit shall only be deemed to have begun when the pursuing vessel has satisfied itself by bearings, sextant angles, or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea, and has begun the pursuit by giving the signal to stop. The order to stop shall be given at a distance which enables it to be seen or heard by the other vessel.

APPENDIX B

**THE REPORT OF THE INTERNATIONAL LAW
COMMISSION, ARTICLES CONCERNING THE
LAW OF THE SEA, 1956**

Draft Article 47

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship is within the internal waters or the territorial sea of the pursuing State, and may only be continued outside the territorial sea if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship giving the order should likewise be within the territorial sea. If the foreign ship is within a contiguous zone, as defined in article 66, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by bearings, sextant angles or other like means, that the ship pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. 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.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship- It does not suffice to justify an arrest on the high seas 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.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

APPENDIX C
***THE FIRST UNITED NATIONS CONFERENCE ON
THE LAW OF THE SEA AND THE CONVENTION
ON THE HIGH SEAS, 1958***

Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It 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. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the 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.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship as a mothership are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. 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.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of this article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or 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. It does not suffice to justify an arrest on the high seas 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.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas 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.

APPENDIX D
THE THIRD UNITED NATIONS CONFERENCE
ON THE LAW OF THE SEA, 1979

Article 111

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters,¹ the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It 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. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

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

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

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

¹ Indonesia proposed the inclusion of 'archipelagic waters' in Article 111(1) at the Ninth Session (in 1980) and the change was supported. See *Report of the Chairman of the Second Committee*, UN Doc A/CONF.62/L.51 (29 March 1980) 13.

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.

5. 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.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;

(b) 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. 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.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. 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.

APPENDIX E

THE CORE ELEMENTS AND RELEVANT UNCLOS PROVISIONS

Article 21(1)

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Article 19(1)

Subparagraph (2) refers to activities which breach (1):

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;

- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

Article 27(1)

(a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Article 33

In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State *may* exercise the control necessary to

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea' (emphasis added).

Article 311(3)

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

APPENDIX F
EXTRACTS OF RELEVANT BILATERAL
PROVISIONS—AUSTRALIA AND FRANCE

Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands, opened for signature 24 November 2003, [2005] ATS 6 (entered into force 1 February 2005)

Article 4

Hot pursuit by a vessel or other craft authorised by one of the Parties may continue through the territorial sea of the other Party, provided that the other Party is informed, and without taking physical law enforcement or other coercive action against the vessel pursued during this phase of the hot pursuit.

Annex III

Article 2

The Parties may conclude agreements or arrangements that may also provide for law enforcement operations possibly accompanied by forcible measures.

The Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Island, [2011] ATS 1 (signed and entered into force 8 January 2007)

Article 2

Hot pursuit may be commenced where:

- a. the authorities of the relevant Party have good reason to believe that the fishing vessel or one of its boats has violated the laws of the Party within whose maritime zone the vessel is detected. The basis for such belief may include:

- i. direct visual contact with the fishing vessel or one of its boats by the authorised vessel; or
 - ii. evidence obtained by or on behalf of the authorised vessel by technical means; and
- b. a clear signal to stop has been given to the fishing vessel by or on behalf of the authorised vessel which enables it to be seen or heard by the fishing vessel.

APPENDIX G
EXTRACTS OF RELEVANT SOUTH AFRICAN
LEGISLATION

Customs and Excise Act 1964 (South Africa)

s 4C Border Patrol

(1)(a) Notwithstanding anything to the contrary contained in any other law, the Commissioner may patrol the borders of the Republic and acquire any equipment necessary for patrolling the land and sea borders of the Republic, including any—

- (i) patrol boats, aircraft and other vehicles; and
- (ii) arms and ammunition required to equip or supply any customs patrol boat, aircraft or other vehicle.

(b) When patrolling the borders of the Republic an officer may arrest any person in accordance with the provisions of section 4A.

(2)(a) The customs officer commanding any customs patrol boat having hoisted and carrying or displaying the South African Revenue Service (SARS) customs ensign or flag may pursue any vessel where—

- (i) that vessel does not immediately come to a stop when signalled, ordered or required to do so; or
- (ii) the operator of the vessel refuses to permit the vessel to be boarded.

(b) The customs officer commanding any customs patrol boat involved in pursuing a vessel as contemplated in paragraph (a) may, as a last resort and after having fired a warning, fire at or into the vessel to compel it to come to a stop.

(3)(a) Any customs patrol boat may exercise on behalf of the Republic, or on behalf of a foreign state, the right of hot pursuit of any vessel in accordance with Article 111 of the United Nations Convention on the Law of the Sea.

(b) The seizure of such a vessel and the arrest of any person on board such a vessel may be effected by any customs officer on board a customs patrol boat.

Marine Living Resources Act 1998 (South Africa)

s 52 Powers of Fishery Control Officers beyond South African waters

A fishery control officer may without a warrant following hot pursuit in accordance with international law as reflected in article 111 of the United Nations Convention on the Law of the Sea

(a) stop, board and search outside South African waters, any foreign fishing vessel which he or she has reasonable grounds to believe has been used in the commission of an offence in terms of this Act in South African waters and bring such vessel and all persons and things on board to any place, port or harbour in the territory of the Republic; and

(b) exercise beyond South African waters all the powers conferred on a fishery control officer in terms of this Act.

Defence Act 2002 (South Africa)

s 27 Hot Pursuit of Ships

(1) Any warship or military aircraft of the Defence Force may exercise on behalf of the Republic or on the behalf of a foreign state, the right of hot pursuit of any ship in accordance with article 111 of UNCLOS.

(2) The seizure of a ship and the arrest of any person on board such ship may be effected by any officer of any ship or aircraft which acts in accordance with this section.

(3) An officer of the Defence Force who exercises any power referred to in this section inside or outside the Republic, must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

s 29 Cooperation with Foreign States

(1) Subject to subsection (2), any officer of the Defence Force serving on a warship or military aircraft of the Defence Force or any other ship or aircraft on government service specially authorised, may, in respect of any violation of the law of a foreign state—

- (a) seize any vessel;
- (b) arrest any person on board such vessel;
- (c) seize any property on board such vessel;
- (d) conduct a hot pursuit operation in relation to such vessel;
- (e) escort such vessel to a foreign port;
- (f) surrender such vessel, person or property to the authorities of the foreign state contemplated in paragraph (e); and
- (g) assist in any of the actions contemplated in paragraphs (a) to (e).

(2) An action contemplated in subsection (1) may only be taken—

- (a) in pursuance of a reciprocal agreement on co-operation in law enforcement at sea between the Republic and the relevant foreign state;
- (b) if the law enforcement measure taken, is consistent with the agreement; and
- (c) if the relevant foreign state may take the law enforcement measures contemplated in subsection (1) (a) to (e) under international law.

(3) Subsections (1) and (2) apply with the necessary changes to enforcement in respect of violations of South African or foreign law by officers of the—

- (a) Defence Force on board a foreign warship, military aircraft or other authorised foreign vessel or aircraft; and
- (b) armed forces of a foreign state on board a warship or military aircraft of the Defence Force or on board any other authorised South African vessel.

(4) An officer contemplated in subsection (3) (b) must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), when taking enforcement measures in respect of the violation of any South African law.

APPENDIX H

**EXTRACTS OF RELEVANT UNITED STATES
MARITIME LAW ENFORCEMENT LEGISLATION**

14 USC § 2 Primary duties

The Coast Guard shall-

- (1) enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States;
- (2) engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States;
- (3) administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States, covering all matters not specifically delegated by law to some other executive department;
- (4) develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States;
- (5) pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States;
- (6) engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States; and
- (7) maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities.

14 USC § 89 Law enforcement

(a) 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 of 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.

19 USC § 1401 Customs Waters

(j) In the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

19 USC § 1701 Customs Enforcement Area

(a) Whenever the President finds and declares that at any place or within any area on the high seas adjacent to but outside customs waters any vessel or vessels hover or are being kept off the coast of the United States and that, by virtue of the presence of any such vessel or vessels at such place or within such area, the unlawful introduction or removal into or from the United States of any merchandise or person is being or may be occasioned, promoted, or threatened, the place or area so found and declared shall constitute a customs-enforcement area for the purposes of this Act. Only such waters on the high seas shall be within a customs-enforcement area as the President finds and declares are in such proximity to such vessel or vessels that such unlawful introduction or removal of merchandise or persons may be carried on by or to or from such vessel or vessels. No customs-enforcement area shall include any waters more than one hundred nautical miles from the place or immediate area where the President declares such vessel or vessels are hovering or are being kept and, notwithstanding the foregoing provision, shall not include any waters more than 50 nautical miles outwards from the

outer limit of customs waters. Whenever the President finds that, within any customs-enforcement area, the circumstances no longer exist which gave rise to the declaration of such area as a customs-enforcement area, he shall so declare, and thereafter, and until a further finding and declaration is made under this subsection with respect to waters within such area, no waters within such area shall constitute a part of such customs-enforcement area. The provisions of law applying to the high seas adjacent to customs waters of the United States shall be enforced in a customs-enforcement area upon any vessel, merchandise, or person found therein.

APPENDIX I
EXTRACTS OF US COAST GUARD MODEL
MARITIME SERVICE CODE

Article 3.18 Right of Hot Pursuit

(a) [State] may continue to assert jurisdiction over, and take enforcement action against, a vessel or person that violates [State] law or directives in waters subject to [State] jurisdiction, but departs those waters subject to hot pursuit by [State] authorities.

(b) The Maritime Force may undertake the hot pursuit of a foreign vessel when it has good reason to believe that the vessel has violated the laws and directives of [State]. Such pursuit must be commenced when the foreign vessel or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of [State], and may only be continued outside the territorial sea or the contiguous zone if pursuit has not been interrupted. If the foreign vessel is within the 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. The right of hot pursuit ceases as soon as the vessel pursued enters the territorial sea of its own state or of a third country.

(c) Hot pursuit is not deemed to have begun unless the pursuing vessel has satisfied itself that the vessel pursued, or one of its boats or other craft working as a team and using the vessel pursued as a mother vessel, is within the limits of the territorial sea or the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign vessel.

(d) The right of hot pursuit may be exercised only by warships or military aircraft, or other vessels or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

(e) The pursuit may be handed off between authorized vessels and aircraft as long as continuous uninterrupted contact is maintained with the vessel being pursued [LOSC 111]

APPENDIX J
EXTRACTS OF US MODEL MARITIME
SHIPRIDER AGREEMENT CONCERNING
COOPERATION TO SUPPRESS ILLICIT
TRAFFIC BY SEA

Article 5

The Government of ‘State A’ may designate qualified law enforcement officials to act as law enforcement shipriders. Subject to ‘State A’ law, these shipriders may in appropriate circumstances: embark on US law enforcement vessels authorize the pursuit, by the US law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into ‘State A’ waters’...‘d. enforce the laws of ‘State A’ in waters or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law; and e. authorize the US law enforcement officials to assist in the enforcement of the laws of ‘State A’.

Article 8(b)

A suspect vessel or aircraft, detected seaward of the territorial sea of State A enters State A waters or airspace and no State A shiprider is embarked on a US law enforcement vessel in the vicinity, and no State A law enforcement vessel is immediately available to investigate, the US law enforcement vessel may follow the suspect vessel or aircraft into State A waters to investigate, and board and search the vessel, and, if the evidence warrants, detain the vessel and the persons on board pending expeditious disposition instructions from State A authorities.

APPENDIX K

EXTRACTS OF RELEVANT AUSTRALIAN LEGISLATION

Maritime Powers Act 2013 (Cth)

s 42(2)

The chase is not interrupted only because:

- (a) it is continued by another maritime officer; or
- (b) it is begun, or taken over, by a vessel or aircraft (including a vessel or aircraft of a foreign country) other than the vessel or aircraft from which the requirement was made; or
- (c) if the chase is continued by a vessel or aircraft of a foreign country—there is no maritime officer on board the vessel or aircraft; or
- (d) the vessel is out of sight of any or all of the maritime officers, or officers of a foreign country, involved in the chase; or
- (e) the vessel cannot be tracked by remote means, including radio, radar, satellite or sonar.

s 54(3)

If the person in charge of a vessel does not comply with a requirement to stop or facilitate boarding of the vessel, a maritime officer may do one or more of the following:

- (a) chase the vessel;
- (b) use any reasonable means to obstruct the passage of the vessel;
- (c) use any reasonable means to halt or slow the passage of the vessel, including by fouling the propellers of the vessel;

(d) after firing a warning shot, fire at or into the vessel to disable it or compel it to be brought to for boarding.

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