

# [Flag state jurisdiction on the high seas international law essay](https://assignbuster.com/flag-state-jurisdiction-on-the-high-seas-international-law-essay/)

This essay will focus on the internationally recognized right of hot pursuit and the rights and duties that lay upon the coastal state’s pursuing ships (pursuing aircrafts will not be included here). Since article 23 of the Geneva Convention on the High Seas (1958) has been revised into article 111 United Nations Convention on the Law of the Sea, the following text will therefore mainly refer to the latter convention. It is important to notice that both conventions reflect international customary law in this area. This gives the conditions that are set up in the conventions a wider significance, since not only the states that have adopted the conventions are bound by the right of hot pursuit stated there.

The focus will be on the following questions: What is the nature of hot pursuit and what are the international legal conditions that have to be fulfilled in order to exercise it? What is the objective of the right of hot pursuit? To answer the latter question, the focal point will be on what function the hot pursuit actually fill since it at first sight could be seen as a way for the coastal state to extend their sovereignty and jurisdiction to include foreign ships on the high seas, something that in general is supposed to be reserved to the flag state.

Hot pursuit is not the only exception to the flag state principle. As will be seen below, piracy, slave trade, unauthorized broadcasting and major pollution incidents are other examples of exceptions to the flag state principle, but, given the limited scope of this essay, there would not be much said about each exception if all of them were included in this essay.

1. 2. Purpose and disposition

The purpose of this essay is to clarify the international recognized conditions for a state to exercise the relatively extensive right of hot pursuit and to critically examine the objectives of this right. Since this is a rather far-reaching right, being a derogation from the general rule prohibiting any interference by a state with non-national ships on the high seas, it is important to examine the original objectives behind hot pursuit and what function it actually fills. Since this is a rather far-reaching right that is limiting the jurisdiction of the flag state on the high seas (and in a way therefore also affect the freedom of the high seas),

The essay will have the following disposition: First, the freedom of the high seas will be described in short together with the principle of flag state jurisdiction (section 2), to give a sufficient background to the reader. Thereafter, the circumstances which serve as prerequisites for the exercise of hot pursuit will be examined.

2. Jurisdiction on the high seas

2. 1. The freedom of the high seas – an overview

Ever since the eighteenth century the high seas[1]have been open to all states, with no state able to claim sovereignty over any part of it. This concept, called the freedom of the high seas, was developed as opposed to the closed seas-principle which was claimed by Portugal and Spain in the fifteenth and sixteenth centuries, leading to a division of the seas of the world between the two powers in 1506.[2]However, the high seas are nowadays subject to res communis and the general rule is that states cannot in principle control the activities and the whereabouts of other states on the high seas.[3]The freedom of the high seas has been traditionally established in customary international law but the first draft of codification was formulated in the Resolution on the Laws of Maritime Jurisdiction by the International Law Association in 1926, which declared that “ no state may claim any right of sovereignty over any portion of the high seas or place any obstacle to the free and full use of the high seas”[4]. The principle of the freedom of the high seas was eventually also declared in the Geneva Convention on the High Seas (1958) as well as in the 1982 United Nations Convention on the Law of the Sea (the first hereinafter referred to as GCHS and the latter as UNCLOS). These conventions clarified international customary law and made it easier to comprehend. Some articles in the conventions will be brought into light in the text below in order to give a clear and fuller view of the subjects presented.

Some of the key-principles regarding the high seas are stated in article 2 GCHS and article 87 and 89 UNCLOS, which affirm that the high seas are open to all states and that no state may validly purport to subject any part of them to its sovereignty. Furthermore, article 87 UNCLOS states that the freedom of the high seas includes inter alia the freedoms of navigation, overflight, laying of submarine cables or pipelines, the construction of artificial islands and other installations permitted under international law, fishing and scientific research. However, these freedoms are to be exercised with due regard for the interests of other states and for the rights under the convention with respect to activities in the area (meaning the International Seabed Area[5]). Worth noting is also that the high seas are reserved for peaceful purposes (article 88, UNCLOS).

2. 2. Flag state jurisdiction

Thus, the high seas have relatively far-reaching freedoms for all states, but there must however be some kind of maintenance of order and jurisdiction so that these freedoms do not get violated and used in a wrongful way by any state and so that wrongful acts on the high seas do not go unpunished. The main rule is that the state which has granted to a ship the right to sail under its flag (the flag state) has the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas.[6]It is accordingly the flag state that enforces the rules and regulations of its own municipal law as well as international law.[7]

The general principle that the flag state alone may exercise jurisdictional rights over its ships was elaborated in the Lotus-case (1927) where the Permanent Court of International Justice held that “ vessels on the high seas are subject to no authority except that of the state whose flag they fly”[8].[9]The flag state-principle is nowadays also stipulated in article 92 UNCLOS (and article 6 GCHS), where it is stated that ships must sail under the flag of one state only and that they will, as a general rule, be subject to that state’s exclusive jurisdiction on the high seas. Each state sets up its conditions for the grant of its nationality to ships, for registration of ships and for the right to fly its flag. This was declared by the International Tribunal for the Law of the Sea in the M/V Saiga (No. 2) case, where one concluded that the determination of the criteria and procedures for granting and withdrawing nationality to ships are parts of the flag state’s exclusive jurisdiction.[10]

The nationality of the ship depends accordingly upon the flag the ship flies, but there must be a genuine link between the state and the ship.[11]The requirement of a genuine link was intended to counter the use of flags of convenience (often operated by states such as Liberia and Panama) where states grant their nationality to ships looking for favorable taxation and work- and social agreements.[12]However, if a ship sails under the flags of more than one state according to convenience, the ship does not have any nationality in a juridical point of view and may therefore be boarded and seized on the high seas by any state. This is to be compared with ships that do have a flag, which (as a general rule) only can be boarded and seized by its own flag state on the high seas.[13]

Worth mentioning is that there are also some duties and responsibilities attached to the flag state jurisdiction, such as the obligation to legislate to make it an offence to break or injure submarine cables and pipelines under the high seas. Furthermore, the flag state also has to provide for compensation in case such an offence occurs and to adopt and enforce legislation dealing with assistance to ships in distress in compliance with international duties regarding safety at sea.[14]

When it comes to warships and ships owned or operated by a state where they are used only on governmental non-commercial service, the exclusivity of the flag state-principle is applicable without exception. As can be read in articles 95 and 96, UNCLOS, those ships have complete immunity from the jurisdiction of other states than its flag state.[15]Though, the principle of flag state jurisdiction on the high seas is not absolute. It is subject to some exceptions in which third states may share enforcement or legislative jurisdiction (or both) together with the flag state. In the following, the focus will be on the exception of hot pursuit, but some other exceptions worth mentioning are: piracy, unauthorized broadcasting, slave trade, drug trafficking and major pollution incidents.[16]The right of hot pursuit is however different from the other exceptions to the flag state principle, since the right of hot pursuit derives from jurisdiction under the “ territorial” (+ EEZ and continental shelf?) principle whereas enforcement related to slave trade and piracy (for example) derives from jurisdiction based on the universality principle.[17]

3. Hot pursuit – an exception to flag state jurisdiction

3. 1. Historical background and objective

When a foreign ship has infringed the rules of a costal state, the right of hot pursuit makes it possible for the state to pursue and seize the ship outside its territorial sea in order to ensure that the ship does not escape punishment by fleeing to the high seas. This principle limits the freedom of the high seas and represents an exception to the exclusive jurisdiction of the flag state on the high seas, since it makes it possible for the coastal state to follow and seize a ship registered in another flag state and in this way extend its jurisdiction onto the high seas.[18]

The right of hot pursuit is an act of necessity which is institutionalized and restricted by state practice. It emerged in its present form in Anglo-American practice in the first half of the nineteenth century.[19]In England there was an old rule of “ fresh pursuit” where the role of the pursuer was played by a mere individual, unlike today’s hot pursuit where the pursuer must be played by a person in his official capacity or by a member of a certain authority (see below).[20]The principle has now been recognized in international customary law for a long time. The I’m alone-case, 1935, can lead as an example, where it was stated that warships or military aircrafts of a state are allowed to engage in hot pursuit if a foreign ship has violated that state’s laws within its internal waters or territorial sea and to make an arrest on the high seas.[21]The Hague Codification of 1930 served as an evidence of general recognition of the right of hot pursuit by states when it provided the basis for the draft article adopted by the International Law Commission which later on became article 23 of the Geneva Convention on the High Seas of 1958.[22]

The objective of the right of hot pursuit is to make it possible for states that are exposed to delicts made by non-national ships to bring the escaping offenders before its jurisdiction. In this way the high seas may not provide a safe haven for ships having committed a delict within a state’s maritime jurisdictional zones. Hot pursuit could be seen as contrary to the exclusive principle of flag state jurisdiction on the high seas, but seen in the light of the high seas, it is not reckless to conclude that the right of hot pursuit is in accord with the objective of order on the high seas.[23]Moreover, the right of hot pursuit has a preventive function derived from the psychological effect of the increased disciplinary rights that the violated coastal state is entitled to. The psychological effect is not to be underestimated since it could prevent “ wrongdoers” to undertake illegal activity, knowing that they may be pursued, arrested and punished by the authorities of the state whose laws have been violated.[24]

Pursuit onto the high seas does not offend the territorial sovereignty of any state and it involves no intrusion into foreign territory since there is no sovereign to the high seas, except the state of the flag. To let the flag state principle stand in the way for effective administration of justice when a ship has committed a delict in another states juridical maritime zones has been seen as disproportionate, hence hot pursuit has become an international right for coastal states, regardless of the flag of the ship. Furthermore, the right of hot pursuit is a right of necessity since the coastal state would not be able to enforce its laws and regulations against fleeing ships without being able to pursue them.[25]

3. 2. Legal status

As mentioned above (section 2. 1.), the right of hot pursuit was codified and recognized by states in the Hague Codification in 1930, which led to the development of article 23 of the Geneva Convention on the High Seas (1958). The provisions on hot pursuit in article 23 GCHS was thereafter essentially reproduced in article 111 of the United Nations Convention on the Law of the Sea (1982), comprising the new developments in the international law of the sea, such as the generated rights followed by the establishment of the new jurisdictional zones of the continental shelf and the exclusive economic zone.[26]Since article 111 UNCLOS is a renewed definition of the right of hot pursuit, it is the definition stated in UNCLOS that is the most updated and will be in focus below.

Article 111 UNCLOS has the title “ Right of hot pursuit” and contains eight paragraphs, in comparison to article 23 GCHS which only has seven paragraphs. (See the appendix for the full and exact wording of article 111 UNCLOS). Article 111 declares the coastal state’s right to engage in hot pursuit and lays down a number of cumulative conditions under which this right may be exercised. These conditions have been set up in order to avoid abuse and incorrect exercise of hot pursuit by the coastal states, such as situations where the wrong ship is pursued by accident. The specific conditions are also of great importance when it comes to upholding the freedom of navigation on the high seas and to ensure that the coastal state have enough evidentiary material to support a hot pursuit before exercising it.[27]

4. International conditions and the nature of hot pursuit

4. 1. General conditions – (ta bort?)

The International Tribunal for the Law of the Sea has emphasized that the conditions laid down in article 111 UNCLOS are cumulative, which means that each one of them has to be fulfilled in order for the hot pursuit to be lawful.[28]The basis for the exercise of hot pursuit is specified in paragraph 1 of article 111 UNCLOS which notes that such pursuit may be undertaken when the authorities of the coastal state have good reason to believe that the foreign ship has violated its laws and regulations. The violation must be made within one of the costal state’s maritime zones, such as its internal waters, archipelagic waters, territorial sea, exclusive economic zone or its continental shelf. Furthermore, the laws and regulations that were violated must have been enacted in accordance with international law.[29]Thus, article 111 UNCLOS makes it possible to pursue a foreign ship onto the high seas, but with respect of international law and the principle of state sovereignty, the pursuit must cease as soon as the ship enters the territorial sea of its own flag state or any other state. Otherwise, the pursuit would end up in a violation of another state’s sovereignty.[30]

4. 2. Involved vessels

As can be seen in article 111 (5) UNCLOS, the coastal state may only exercise hot pursuit through the use of certain ships and aircraft having a connection to the governmental authority of the state. Warships and military aircrafts, together with other specially authorized government ships or aircrafts which are clearly marked and identifiable as such, are the only vessels that are required to exercise the pursuit.[31]This limitation to vessels vested with governmental authority ensures that the pursuing state cannot avoid its state responsibility for actions made by its pursuing ships acting on behalf of the coastal state. It is not the specific authority to pursue that is of importance; it is rather the general authority of applying laws and to take necessary measures in this regard. This guarantees the responsibility of a state for the actions made by its ships operating under the government. A state’s official connection to military aircrafts or warships needs not to be manifested since this connection is self-evident, thus, other pursuing vessels need to be specifically authorized by the state to exercise these measures.[32]

Commercial ships in government service as well as private ships are subject to the jurisdiction of the coastal state and can be pursued if there is good reason to believe that a violation of the laws have been made. However, it is not in accordance with international law to exercise hot pursuit against other states’ warships. These, together with other non-commercial ships operating under a foreign government, are generally immune from the jurisdiction of any state other than the flag state. Although these ships are excepted from a coastal state’s right of hot pursuit, this does obviously not mean that they do not have to follow the laws and regulations of the coastal state. The only immunity warships enjoy is the immunity from enforcement jurisdiction of the coastal state, so the flag state might have to answer for the violation made by one of its governmental ships. Furthermore, the coastal state may pursue and arrest warships and non-commercial ships in foreign government service in self-defense.[33]

4. 3. Offences

The right of hot pursuit arises “ whenever the offending ship has violated a law which has been validly enacted for the purpose of the zone where the offence has occurred”[34]. In order to be entitled to hot pursuit, the coastal state has to have good reason to believe that the foreign ship has made such an offence, or as it is stated in article 111 (1) UNCLOS: “ violated the laws and regulations of that State”[35]. The article states no predefined offences, so what kind of offences does this actually refer to? There is in fact no limit of how severe the delict must be in order to entitle the state to hot pursuit. The coastal state is entitled to undertake hot pursuit as soon as any local law or regulation has been violated, no matter how trivial. The wording in article 111 UNCLOS allows hot pursuit whenever a law has been violated, no matter what the character of the offence is.[36]There has been a view that the right of hot pursuit should arise only in respect of certain kinds of offences which could be considered as quasi-international offences (such as security offences), but the predominant view at the time of the Geneva Conference was that there should be no catalogue restricting the right of hot pursuit to offences of a certain character.[37]

The seriousness of the offence should however be taken into account by the coastal state before starting a pursuit, so that the freedom of navigation is not hindered for minor offences.[38]This would otherwise result in a disproportionate exercise of power.[39]Furthermore, international comity and goodwill can be seen as important reasons why a coastal state should not exercise in response to trivial offences. Naturally, this principle of comity does not legally bind the coastal state to behave in a certain way, since it is not a principle under international law. In general, states are however anxious to submit to this principle of comity, since it is in their own best interest to show respect to other sovereign states. A state that does not act hospitably to other states and pursues their ships without good reason may be subject to the same abuse when its own merchant fleet navigates in other states’ territorial seas. Except taking comity into account, states’ decision to exercise hot pursuit is also based on the practical reality that states are not likely to find minor offenders worth the trouble of pursuit. Besides, ships guilty of trivial offences are unlikely to risk the dangers of flight in the hope of avoiding arrest for a minor delicts. Although such flight could indicate that the ship has been engaged in a delict that is much less trivial than the coastal state first suspected.[40]

The nature of the offence entitling the state of hot pursuit is related to the competence to enact laws for the different maritime zones. In the territorial sea this competence is unlimited (except for the right of innocent passage), but regarding the contiguous zone or other zones of extraterritorial jurisdiction, the states’ competence to make acts offences is restricted since these are zones of limited jurisdiction. The right of hot pursuit arises when an offence has been made within one of these zones, but it is provided that the offence is made against laws which international law allows to be enacted for the purposes of that zone.[41]

Article 111 (1) UNCLOS sets up the condition that a state must have “ good reason to believe” that a ship has violated the state’s laws and regulations. This good reason standard prevents states from pursuing a foreign ship solely based on the suggestion that an offence has been made by it. However, this condition does not require that the coastal state has actual knowledge of an offence. The proper interpretation of this good reason condition lies somewhere between suspicion and actual knowledge of an offence. In regard to this, the mere flight of a vessel could be sufficient to justify hot pursuit, since it could give the state a suspicion that the ship is trying to flee from the consequences of an offence made by it. Even though the state originally lacked good reason to believe that the ship had made an offence, this suspicious behavior could be enough to live up to the good reason standard.[42]

Offences that are not attributed to the foreign vessel itself do not lay ground for hot pursuit, for example when an offence is committed by a passenger. The coastal state’s jurisdiction is towards the ship only, the passengers and crew remain under the jurisdiction of the flag state as long as their actions are not attributable to the ship itself. Robert C. Reuland states that “ the delict must have been committed under the color of the ship’s authority”[43]in order to give rise to hot pursuit. Finally, when it comes to offences, one can conclude that there are two main conditions that have to be fulfilled in order to give right to hot pursuit: first, the state must have good reason to believe that an offence has been committed and second, the offence must be attributable to the ship itself.[44]

4. 4. Commencement and cessation

Article 111 (1) UNCLOS states from which maritime zones a state may commence hot pursuit under international law; namely when the foreign ship (or one of its boats) is within the pursuing state’s internal waters, archipelagic waters, territorial sea or contiguous zone.[45]It is only when the offence is committed within one of these zones that the coastal state may undertake hot pursuit. However, in comparison to article 23 GCHS, article 111 (2) UNCLOS is more extensive and stipulates that the right applies mutatis mutandis to violations of legislation applicable to the exclusive economic zone or the continental shelf (including safety zones around continental shelf installations).[46]The right to begin hot pursuit while the foreign ship is within the contiguous zone is limited to the enforcement of certain rights, that is to say if there has been a violation of the rights for the protection of which the zone was established.[47]Robert C. Reuland mentions that “ although a state’s legislative jurisdiction within the contiguous zone may not be limited to the four purposes set out in both sea conventions, such laws should nevertheless be limited to the protection of the state’s territory and territorial sea. It follows that hot pursuit may not be commenced from the contiguous zone for violations of laws that do not reasonably comport with the littoral state’s legislative competence with respect to this zone.”[48]. Whether pursuit may start while the ship is in the continental shelf or in the exclusive economic zone is more directly an aspect of the question whether the violation was made against legislation relation to these zones, than in the case of the contiguous zone. The offence is more directly related to the regime of the zone.[49]The state may enact laws consistent with the sovereign rights in these zones, for example relating to protection of fisheries etc in the case of the exclusive economic zone. Similarly, the violation of any law enacted by the coastal state that is consistent with the state’s sovereign rights over the continental shelf may give rise to the right of hot pursuit.[50]

The right of hot pursuit ceases as soon as the pursued ship enters the territorial waters of its own or a third state.[51]To continue therein would result in a violation of that state’s sovereignty and that is accordingly offending international law.[52]This general rule may however be put aside where hot pursuit in another state’s territorial sea is permitted by treaty.[53]It is important to mention that the general rule of cessation at the territorial sea of another state does not apply to other maritime zones beyond the territorial sea, so the pursuing state may actually pursue the foreign ship into the exclusive economic zone or even the contiguous zone of another state. Such zones are to be considered as high seas when it comes to hot purs