

# PROTECTIVE JURISDICTION IN THE CONTIGUOUS ZONE AND THE RIGHT OF HOT PURSUIT: RETHINKING COASTAL STATES' JURISDICTIONAL RIGHTS

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*Considering the current influx of migration movements across international waters and cases of drug trafficking and offshore oil-bunkering, states require certainty about their powers in the protective belt contiguous to their territorial sea. While available literature is confined to the mere denial of full jurisdiction, this article explores under what circumstances states may exercise rights against incoming vessels in vertical passage. The article claims that states may exercise jurisdiction in their contiguous zone, but are limited to administrative measures of a protective nature referred to as 'protective jurisdiction'. When states act under protective jurisdiction, incoming vessels regularly escape a littoral state's authority by fleeing the contiguous zone to the high seas. A revised understanding of the rights in the contiguous zone also requires a fresh perspective on the right of hot pursuit — in particular: does protective jurisdiction in the contiguous zone entail the right of hot pursuit?*

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## I AN INTRODUCTION

On the night of 23–24 April 2007 a boat was launched off a Turkish vessel in international waters off the coast of Italy. Acting together, the vessel and boat transported non-European Union immigrants to the territory of Italy. The Italian navy intercepted the vessel within its contiguous zone and, following a hot pursuit, arrested two traffickers on board. At first instance Mr Kircaoglu and Mr Sanaga were convicted for illegal smuggling of immigrants and sentenced to eight years in prison. The Italian Court of Appeal upheld the decision. The Italian Court of Cassation finally struck down the previous holdings, claiming Italy possessed no criminal jurisdiction in its contiguous zone.<sup>1</sup>

Although the decision of the Court of Cassation dates back to 2010, several questions concerning a littoral state's rights within its contiguous zone remain unanswered.

The right to halt, inspect or arrest ships in an otherwise unappropriated, control-defiant area seems dissonant with the Grotian concept of the freedom of the high seas.<sup>2</sup> Yet art 33 of the *United Nations Convention on the Law of the Sea* ('*UNCLOS*') explicitly awards states the right to protect their territorial sea from future violations.<sup>3</sup> Unfortunately, the Court of Cassation failed not only to identify the concrete scope of state rights in the contiguous zone, but also the corresponding implications for the right of hot pursuit. However, considering migration movements across international waters, in particular towards the Australian mainland, as well as drug trafficking and offshore oil-bunkering, states require certainty about their powers in the protective belt contiguous to their territorial sea, especially if measures are undertaken without prior flag state consent.<sup>4</sup>

In 1999 Judge Laing of the International Tribunal for the Law of the Sea ('*ITLOS*') raised several pertinent questions in his Separate Opinion in *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* ('*Saiga No 2*'), exploring the extent of a littoral state's authority in its contiguous zone under *UNCLOS* art 33.<sup>5</sup> The exercise of the 'control necessary' as enumerated in *UNCLOS* art 33 seems to reject the notion of full jurisdiction in the contiguous zone.<sup>6</sup> Instead, international law seems to offer states a range of rights of a rather

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<sup>1</sup> See *Kircaoglu e Sanaga*, Corte di Cassazione [Italian Supreme Court of Cassation], No 32960, 8 September 2010 ('*Kircaoglu e Sanaga*'), cited in Andrea Caligiuri, '*Kircaoglu and Sanaga* Final Appeal Judgment, No 32960/2010' [2010] *Oxford Reports on International Law in Domestic Courts* 1635, [H4], [H10]; Giuseppe Cataldi and Massimo Iovane (eds), '*Judicial Decisions*' (2010) 20 *Italian Yearbook of International Law* 413, 419.

<sup>2</sup> Cf Robert Feenstra (ed), *Hugo Grotius: Mare Liberum 1609–2009* (Brill, 2009).

<sup>3</sup> *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 33 ('*UNCLOS*').

<sup>4</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) art 8(2) ('*Smuggling Protocol*'). Article 8(2) allows the coastal state to take 'appropriate measures' upon the prior consent of the vessel's flag state.

<sup>5</sup> *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* [1999] *ITLOS Reports* 10, 156–63 (Judge Laing) ('*Saiga No 2*').

<sup>6</sup> *UNCLOS* art 33.

administrative nature. Regarding incoming vessels such as the one of Mr Kircaoglu and Mr Sanaga, these rights evolve around the protective texture of the contiguous zone (see below Part II).

An understanding of the status of the contiguous zone under international law also allows for an assessment of its interaction with the right of hot pursuit. Consensus on the legality of hot pursuit reaches only as far as the territorial sea. While there exists a harmonious approach to hot pursuit beginning within the territorial sea and on the basis of infringements of laws committed therein,<sup>7</sup> it remains remarkably unclear under what circumstances a state may hotly pursue ships from within the contiguous zone for violations having occurred entirely in the contiguous zone — a right endorsed by *UNCLOS* arts 33 and 111. The core practical implications of the right of hot pursuit from the contiguous zone congregate around the question: what kind of violations in the contiguous zone trigger the lawful right of hot pursuit? In *Kircaoglu and Sanaga*, the Court of Cassation held that Italy did not possess criminal jurisdiction in its contiguous zone and could therefore not legally pursue a foreign ship, as the pursued ship could not have violated Italian laws.<sup>8</sup> While the court's reasoning seems convincing at first glance, it requires closer scrutiny in light of Judge Laing's considerations in *Saiga No 2*. Even if states may not exercise full jurisdiction in their contiguous zone, they have *some* rights in the contiguous zone and thus hot pursuit should be available to states if those rights are violated (see below Part III).

If a state has in fact halted a foreign ship either in its contiguous zone or after rightful hot pursuit for a violation committed within the contiguous zone, it will regularly want to claim some kind of remedy against the vessel and crew. If a state has criminal jurisdiction in the contiguous zone, the captain and crew may be convicted of whatever crime they committed. If, however, its rights in the contiguous zone are of protective nature, the answer remains equivocal (see below Part IV).

The government of Australia seems to rely on these rights while implementing its 'Operation Sovereign Borders',<sup>9</sup> intercepting boats of asylum seekers en route to the Australian mainland in its territorial sea and on the high seas. Although information on interception locations are scarce and imprecise, the contiguous zone may offer Australia a legal basis for interception and, in limited cases, redirection.

This article explores the dynamic interaction of *UNCLOS* arts 33 and 111 and seeks to answer the unsolved questions of a littoral state's rights within the contiguous zone when it comes to jurisdiction and the right of hot pursuit.

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<sup>7</sup> R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3<sup>rd</sup> ed, 1999) 214; D Guilfoyle, 'Part VII — High Seas: Articles 86–111' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Hart, 2017) 675, 774; Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff, 2<sup>nd</sup> ed, 2002) 39.

<sup>8</sup> *Kircaoglu and Sanaga*, Corte di Cassazione [Italian Supreme Court of Cassation], No 32960, 8 September 2010, [5.1].

<sup>9</sup> Also referred to as the 'Pacific Solution'. See Department of Home Affairs, Australian Government, *Operation Sovereign Borders (OSB)* (2018) <<http://osb.homeaffairs.gov.au/Operation-Sovereign-Borders>>.

## II AUTHORITY IN THE CONTIGUOUS ZONE

The contiguous zone is defined in *UNCLOS* art 33, which reiterates its first codification in the 1958 *Convention on the Territorial Sea and Contiguous Zone* ('*TSC Convention*')<sup>10</sup> and reflects customary international law.<sup>11</sup> *UNCLOS* art 33 reads:

1. 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.<sup>12</sup>

Since art 33 itself does not specify the term 'control necessary', its extent remains somewhat ambiguous, especially in relation to sub-paras (1)(a) ('prevent infringement') and (1)(b) ('punish infringement'). The decision of the drafters of *UNCLOS* and its predecessor, the *TSC Convention*,<sup>13</sup> to define the scope of state rights in the contiguous zone as encompassing the 'control necessary', rather than 'jurisdiction', demands the conclusion that state powers in the contiguous zone are confined and do not — as sometimes assumed — include full legislative and enforcement jurisdiction in matters of domestic customs, fiscal, immigration and sanitary laws (see below Part II(A)). The scope of rights awarded by *UNCLOS* art 33 must, therefore, encompass authority short of full jurisdiction (see below Part II(B)).

### A *The Question of Jurisdiction in the Contiguous Zone*

Jurisdiction is the 'lawful power of a State to define and enforce the rights and duties and control the conduct of natural and juridical persons'.<sup>14</sup> In the context of the international law of the sea, it was traditionally limited to the seas directly adjoining a state's territory, contemporarily referred to as the territorial sea, and subject to the restraints of innocent passage.<sup>15</sup>

The concept of states exercising jurisdiction outside their territory arose as early as the 18<sup>th</sup> century in relation to the smuggling of goods into Great

<sup>10</sup> *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964) art 24 ('*TSC Convention*').

<sup>11</sup> A V Lowe, 'The Development of the Concept of the Contiguous Zone' (1982) 52 *British Yearbook of International Law* 109, 111.

<sup>12</sup> *UNCLOS* art 33(1) (emphasis added).

<sup>13</sup> *Ibid*; *TSC Convention* art 24.

<sup>14</sup> Bernard H Oxman, 'Jurisdiction of States' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol 6, 546, 547. Cf Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6<sup>th</sup> ed, 2003) 297.

<sup>15</sup> Churchill and Lowe, above n 7, 71.

Britain,<sup>16</sup> paving the way for the United States liquor laws and the *Fordney–McCumber Tariff* of 1922.<sup>17</sup> Since then the question of a maritime belt contiguous to a state's territory has been one of controversy in international conferences and law-making bodies. States' main intentions regarding such a zone were invariably tied to customs control and security purposes;<sup>18</sup> apparently littoral states felt the need for protection starting beyond their territory. Naturally, this need collided with the concept of the freedom of navigation and the freedom of the high seas. The harmonisation of these interests has been controversial since the 1930 Hague Conference, which, unsurprisingly, failed to codify the question.<sup>19</sup> With adoption of the *TSC Convention*, states reached a compromise on the contiguous zone, codified in *TSC Convention* art 24, which is now *UNCLOS* art 33(1).

A conclusive understanding of *UNCLOS* art 33 and the rights it grants presupposes a distinction between the different types of jurisdiction.

### 1 *Types of Jurisdiction*

A distinction can be drawn between legislative, judicial and enforcement jurisdiction. Legislative jurisdiction is the right to establish rules, whereas enforcement jurisdiction describes the right to forcibly impose consequences for the breach of these rules. Judicial jurisdiction defines the right to establish procedures for identifying breaches.<sup>20</sup>

With the existence of some 193 states, the exercise of jurisdiction by multiple states may collide in certain cases. International law therefore recognises a number of principles that award a state jurisdiction in particular cases. The most prominent one is the principle of territoriality, where a state exercises jurisdiction within its territory.<sup>21</sup> Accordingly, on the high seas, as an area not assigned to any state's territory, no state may, in principle, exercise jurisdiction in the sense of legislative, judicial or enforcement jurisdiction, except over ships flying its flag. This principle forms an integral part of the concept of freedom of the high seas.<sup>22</sup> *UNCLOS* art 33, however, modifies the principle of the freedoms of the high seas by granting the littoral state some sort of jurisdictional rights.

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<sup>16</sup> Great Britain tried to suppress smuggling by enacting the British '*Hovering Acts*' of 1736, which enabled Great Britain to extend its criminal jurisdiction to foreign ships outside the territorial sea: see *ibid* 132; Lowe, above n 11, 110; Philip C Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (G A Jennings, 1927) 10; Bill Gilmore, '*Hovering Acts*' in Rüdiger Wolfrum et al (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol 4, 1010.

<sup>17</sup> Under these laws, foreign ships within twelve miles of the United States coast were subject to US prohibition laws. Other states rejected the US claim since it extended US jurisdiction beyond territorial waters at the time. See Churchill and Lowe, above n 7, 134.

<sup>18</sup> For an extensive analysis of the history of the contiguous zone, see Lowe, above n 11, 139–40.

<sup>19</sup> *Ibid* 145–6. Cf the preparatory report to the 1930 Conference by Rapporteur Schücking: *Bases of Discussion Drawn up by the Preparatory Committee*, League of Nations Doc C/74/M/39/1929/V (1929).

<sup>20</sup> Oxman, above n 14, 547.

<sup>21</sup> *Ibid* 548.

<sup>22</sup> Antonio Cassese, *International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 81; Churchill and Lowe, above n 7, 203, 205; Guilfoyle, above n 7, 687.

## 2 Legislative Jurisdiction in the Contiguous Zone

In the contiguous zone a state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory.<sup>23</sup> In *Saiga No 2* before the ITLOS, Guinea claimed the right to prescribe customs and related laws in its contiguous zone, which it may then, in turn, enforce.<sup>24</sup> However, closer scrutiny of the rights outlined in *UNCLOS* art 33(1)(a) under the means of interpretation outlined by the *Vienna Convention on the Law of Treaties* ('VCLT') art 31<sup>25</sup> reveals that the legislative jurisdiction Guinea claimed over its contiguous zone is limited to the exercise of control rights.

This is already implicated by the wording of *UNCLOS* art 33, which only grants a state the right to exercise the *control* necessary to prevent infringement of said laws.<sup>26</sup> The general meaning of control is the 'function or power of directing and regulating'.<sup>27</sup> The meaning in a legal setting differs in its particulars: in juxtaposition to 'jurisdiction', which entails the 'general power to exercise authority over all persons and things'<sup>28</sup> and the 'power of declaring and administering law or justice',<sup>29</sup> the term 'control' merely indicates the 'power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee'.<sup>30</sup>

More importantly, *UNCLOS* art 33 grants the right to prevent infringement of customs and related laws only within its *territory or territorial sea*. The wording therefore at the very least indicates that the right to prescribe customs, fiscal, immigration and sanitary laws must be limited to the zone where they prevail, namely the territorial sea.<sup>31</sup>

As opposed to *UNCLOS* art 33, *UNCLOS* art 21(1)(h) authorises a state to adopt laws and regulations relating to innocent passage through the territorial sea for the prevention of infringement of the customs, fiscal, immigration or sanitary laws or regulations of the coastal state. The ability to 'adopt laws and regulations' goes further than the exertion of mere control and is consistent with the broad state rights in the territorial sea.<sup>32</sup> Although *UNCLOS* art 21(1)(h) limits that power in the case of innocent passage to the *prevention* of infringement of the specified areas of law, the provision complements *UNCLOS*

<sup>23</sup> See *UNCLOS* art 33(1)(a).

<sup>24</sup> 'Counter-Memorial: Submitted by the Republic of Guinea', *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)*, 176–7, 182 [135].

<sup>25</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31 ('VCLT').

<sup>26</sup> Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–1954: Points of Substantive Law' (1954) 31 *British Yearbook of International Law* 371, 377.

<sup>27</sup> *The Oxford English Dictionary* (Clarendon University Press, 2<sup>nd</sup> ed, 1989) vol 3, 852.

<sup>28</sup> Bryan A Garner (ed), *Black's Law Dictionary* (West Group, 7<sup>th</sup> ed, 1999) 855; Stephen Michael Sheppard (ed), *The Wolters Kluwer Bouvier Law Dictionary* (Wolters Kluwer Law & Business, 2011) 2276.

<sup>29</sup> *The Oxford English Dictionary*, above n 27, vol 8, 320.

<sup>30</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 159 [9] n 4 (Judge Laing), citing Garner, above n 28, 330.

<sup>31</sup> Cf Churchill and Lowe, above n 7, 137; Lowe, above n 11, 167; I A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 330.

<sup>32</sup> *UNCLOS* art 21.

art 19(2)(g), which defines 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 as not innocent.<sup>33</sup> Together, these provisions give a coastal state enforcement jurisdiction in cases of a violation within the meaning of *UNCLOS* art 19(2)(g).<sup>34</sup> In principle therefore, customs, fiscal, immigration and sanitary laws fully apply in the territorial sea. Otherwise, there would not be a necessity to limit state powers during innocent passage, nor would *UNCLOS* art 21 speak of the adoption of ‘laws and regulations’. In contrast, in the contiguous zone *UNCLOS* art 33(1)(a) merely authorises states to exercise the ‘control necessary’ to prevent certain infringements.

A similar argument can be drawn from a comparison to the rights in the Exclusive Economic Zone (‘EEZ’): the contiguous zone forms part of a coastal state’s EEZ.<sup>35</sup> However, for the EEZ *UNCLOS* art 56(1)(b) explicitly awards a state jurisdiction for specifically limited matters such as marine scientific research or the preservation of the marine environment. No such explicit provision is made in the convention for the contiguous zone.

Furthermore, *UNCLOS* art 2 grants a state clear and explicit sovereignty over its territorial sea. No such provision is evident for the contiguous zone.

Finally, *UNCLOS* art 94(1) requires a state to effectively exercise jurisdiction *and* control in administrative, technical and social matters over ships flying its flag. The *UNCLOS* therefore portrays the terms jurisdiction and control as terms separate from each other. *UNCLOS* art 94(2) underlines that clear distinction, imposing the administrative duty in (a) to maintain a register and as a different duty in (b) to assume jurisdiction under its internal law over each ship. While para (2)(a) therefore enumerates the term ‘control’, para (2)(b) encompasses the scope of jurisdiction.

The limitation of ‘control’ to administrative rights is consistent with customary international law as well as the object and purpose of the contiguous zone. States not party to *UNCLOS* restrict their rights within maritime belts immediately adjacent to the territorial sea to administrative rights.<sup>36</sup> The proclamation of wide-ranging jurisdictional rights outside of the 12 nautical mile zone that forms the commonly accepted territorial sea have not been recognised by most states.<sup>37</sup> An extensive interpretation of state rights in the contiguous zone would circumvent the entire purpose of the contiguous zone vis-a-vis the

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<sup>33</sup> Myron H Nordquist, Satya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1993) vol 2, 201.

<sup>34</sup> *Ibid.* See below Part II(A)(3) for the assertion that enforcement jurisdiction also exists in the contiguous zone.

<sup>35</sup> The Exclusive Economic Zone (‘EEZ’) may not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; the EEZ thereby encompasses the contiguous zone. See *UNCLOS* art 57.

<sup>36</sup> Cf below Part II(B)(1); *The Customs Act* (Republic of India), Act No 52 of 1962, s 100; 《中华人民共和国领海及毗连区法》 [Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone] (People’s Republic of China) National People’s Congress, 25 February 1992, art 13; *Canada Oceans Act*, SC 1996, c 31, s 11; *О внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации* [Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation] (Russian Federation) 17 July 1998, art 23.

<sup>37</sup> Churchill and Lowe, above n 7, 80.

territorial sea.<sup>38</sup> The contiguous zone, in principle, forms part of the high seas.<sup>39</sup> Due to its adjacency to the territorial sea, certain confined powers may be exercised by coastal states to protect the integrity of their territory.<sup>40</sup> The contiguous zone is not an extension of the territorial sea with a limit to territorial power. The contiguous zone and the confined powers it awards must be derived from the high seas, not the territorial sea. The contiguous zone is not a subset of the territorial sea, but a constraint on the freedom of the high seas. The authority enumerated in *UNCLOS* art 33 must be interpreted restrictively and limited to the exercise of administrative rights that prevent future infringements of laws applicable in the territorial sea.

Subsequent state practice to the adoption of the *TSC Convention* has shown a tendency to reject the contention of some states that full jurisdiction should apply in the contiguous zone:<sup>41</sup> states have predominantly adopted regulations that fall short of full jurisdiction and illustrate a different scope of rights in the contiguous zone.<sup>42</sup>

As Judge Laing states: ‘control has a limited administrative connotation’.<sup>43</sup>

### 3 Enforcement Jurisdiction in the Contiguous Zone

The wording of *UNCLOS* art 33(1)(b) awards a coastal state the right to exercise the *control necessary to punish* infringements of customs and related laws upon the precondition of the infringement having taken place within the state’s territory or its territorial sea. The term ‘control necessary’ equally applies to ‘prevent’ as it does to ‘punish’. The provision therefore does not, as

<sup>38</sup> Fitzmaurice, ‘The Law and Procedure of the International Court of Justice’, above n 26, 377.

<sup>39</sup> *Ibid* 379; Shearer, above n 31, 329; Brownlie, above n 14, 192; Sir Gerald Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea: Part I — The Territorial Sea and Contiguous Zone and Related Topics’ (1959) 8 *International and Comparative Law Quarterly* 78, 111; D P O’Connell ‘Jurisdiction over the Contiguous Zone’ in I A Shearer (ed), *The International Law of the Sea* (Oxford University Press, 1984) vol 2, 1058. *Contra* Churchill and Lowe, above n 7, 139: regarding the contiguous zone as part of the EEZ, a zone distinct of the high seas.

<sup>40</sup> Accordingly, Reuland refers to the contiguous zone as a ‘buffer zone’: 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, 574.

<sup>41</sup> For example, in the *Saiga* case Guinea claimed its customs laws to fully apply in its contiguous zone, a submission rejected by St Vincent and the Grenadines: ‘Counter-Memorial: Submitted by the Republic of Guinea’, *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)*, 176–8, 181.

<sup>42</sup> Cf below Part II(B)(1); *Customs Act* (Republic of India) Act No 52 of 1962, s 100; 《中华人民共和国领海及毗连区法》 [Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone] (People’s Republic of China) National People’s Congress, 25 February 1992, art 13; *Canada Oceans Act*, SC 1996, c 31, s 11; *О внутренних морских водах, территориальном море и прилегающей зоне Российской Федерации* [Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation] (Russian Federation) 17 July 1998, art 23.

<sup>43</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 160 [11] (Judge Laing); Fitzmaurice describes ‘control’ as the power ‘of the policeman, rather than of the administrator or of the judge’: Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 113.

commonly assumed,<sup>44</sup> grant a state sovereignty, or full legislative or enforcement jurisdiction in the contiguous zone.<sup>45</sup>

### B *The Scope of State Rights in the Contiguous Zone*

Accordingly, *UNCLOS* art 33 only permits exercise of limited authority.<sup>46</sup> To determine the scope of authority as articulated by the provision, recourse may once again be held to the means of interpretation under *VCLT* art 31.

#### 1 *Scope of Control*

Specific rights in the contiguous zone cannot be deduced from the ordinary meaning of the term ‘control’, it merely indicates an extent of powers short of those which full jurisdiction awards.

Similarly, the wider context of art 33 *UNCLOS* initially sheds little light on the specific powers awarded by the term ‘control’. Although *UNCLOS* refers to the term ‘control’ in several of its articles, none enumerate specific rights the term entails. *UNCLOS* art 303, for example, refers to the control of traffic related to archaeological and historical objects found within the limits of the contiguous zone. The modes of control to manage traffic around those objects are, however, not defined. Moreover, the coastal state’s rights of control under *UNCLOS* art 33 exist independently of its rights under art 303 and there is no interrelationship between the two articles.<sup>47</sup> *UNCLOS* art 94 also provides little clarity, as the therein enumerated ‘control’, although outlined in paras (2), (3) and (4), is limited to administrative, technical and social matters *onboard* ships flying a state’s flag. The content of the provision cannot be transferred to art 33.

Subsequent practice on art 33 allows for some insight as to the meaning and extent of ‘control’.<sup>48</sup> The ITLOS failed to address the issue in *Saiga No 2*, citing only art 33 as the reason for declining Guinea’s contention that its customs laws fully applied in its EEZ. Despite this, the ITLOS failed to establish to what extent customs laws prevail in the contiguous zone. However, the legislative practice of states who have established a contiguous zone shows consistency. Australia, Canada, China, India and Russia — all signatories to *UNCLOS* — interpret the contiguous zone to convey rights of administrative, preventive nature, including the right to search, seize, inspect and halt persons or vessels believed to be involved in violations of customs laws and procedures if they

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<sup>44</sup> See, eg, Churchill and Lowe, above n 7, 137; Nordquist, Nandan and Rosenne, above n 33, 201. Cf Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2<sup>nd</sup> ed, 2015) 125.

<sup>45</sup> See Shearer, above n 31, 330.

<sup>46</sup> Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’ above n 39, 113.

<sup>47</sup> Nordquist, Nandan and Rosenne, above n 33, 275.

<sup>48</sup> *VCLT*, art 31(3)(b).

were to enter the territorial sea.<sup>49</sup> Only in a few instances do states claim the right to fully implement customs laws, including penalty provisions, within the contiguous zone for acts solely taking place therein.<sup>50</sup> Even the US, so far not a signatory to *UNCLOS*, limits its rights in its ‘customs waters’ to administrative rights, including the right to board, examine, inspect, stop and search vessels.<sup>51</sup> It follows from the subsequent practice to *UNCLOS* art 33 that the ‘control’ enumerated therein includes, in its practical application, administrative rights aimed at preventing violations of customs, fiscal, immigration or sanitary laws if the vessel were to enter the territorial sea. The administrative rights include actions such as searches, inspections and orders to halt.<sup>52</sup>

In his Separate Opinion in *Saiga No 2*, Judge Laing also took recourse to supplementary means of interpretation, relying on domestic, conventional and customary laws on protective jurisdiction, applied by states before the drafting of the *TSC Convention* and *UNCLOS* in maritime zones analogous to the contiguous zone.<sup>53</sup> The US, for instance, implemented for a while in the 1930s a ‘customs-enforcement area’, in which it asserted its right to board and seize ships suspected of smuggling liquor and other contraband into its territory.<sup>54</sup> In *Church v Hubbart*, a domestic case from 1804, the US Supreme Court held that the ‘right of a nation to seize vessels attempting illicit trade is not confined to its harbors, or to the range of its batteries’.<sup>55</sup> According to the Court, the power to prevent illicit trade ‘may certainly be exercised beyond the limits of its territory’.<sup>56</sup>

As has been established, the object and purpose of the contiguous zone as a limited restriction of the freedom of the high seas for protective purposes refutes the notion of full jurisdictional powers in the contiguous zone. However, *UNCLOS* art 33(1)(a) does award states *some* rights in the contiguous zone to prevent infringement of laws. If laws themselves do not fully apply, the remaining possibilities to prevent their infringement are administrative rights such as ordering a ship to stop, inspecting its cargo, or instructing crew members. Only then can the freedom of the high seas be properly balanced with protective rights as required by the establishment of a contiguous zone.

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<sup>49</sup> Cf below Part II(B)(1); *Customs Act* (Republic of India) Act No 52 of 1962, s 100; 《中华人民共和国领海及毗连区法》 [Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone] (People’s Republic of China) National People’s Congress, 25 February 1992, art 13; *Canada Oceans Act*, SC 1996, c 31, s 11; *О внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации* [Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation] (Russian Federation) 17 July 1998, art 23; *Maritime Powers Act 2013* (Cth) ss 41(1)(c), 50.

<sup>50</sup> See ‘Counter-Memorial: Submitted by the Republic of Guinea’, *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)*.

<sup>51</sup> *Tariff Act of 1930*, 19 USC 1930, §1581 (2010).

<sup>52</sup> Fitzmaurice speaks of ‘necessary inquiries, investigation, examination, search, etc’: Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 115.

<sup>53</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 161 [13] (Judge Laing).

<sup>54</sup> Cf Philip C Jessup, ‘Questions of International Law in the Spanish Civil War’ (1937) 31 *American Journal of International Law* 66, 104. For the arguments of the US, see also *SS ‘I’m Alone’ (Canada v United States) (Awards)* (1935) 3 RIAA 1609 (‘*I’m Alone*’); Sir Gerald Fitzmaurice, ‘The Case of the *I’m Alone*’ (1936) 17 *British Yearbook of International Law* 82, 96.

<sup>55</sup> *Church v Hubbart*, 6 US (2 Cranch) 187, 187 (1804).

<sup>56</sup> *Ibid* 234.

Judge Laing concludes that ‘permissible exercises of control under art 33 *UNCLOS* include those for taking such actions within the contiguous zone as inspections, verifications, instructions’.<sup>57</sup>

## 2 *Proportionality*

The term ‘necessary’ in conjunction with ‘control’ introduces an element of proportionality that ensures a cautious approach to the exercise of administrative rights due to their attenuating function regarding the freedom of the high seas. Only this conclusion honours the purpose of the contiguous zone as a zone distinct from the territorial sea and its vast jurisdictional powers on one side, and the control-defiant, semi-anarchical high seas on the other.

If a violation of one of the four enumerated laws in *UNCLOS* art 33 can only occur within the territorial sea, exercising the ‘control necessary’ in the contiguous zone presupposes a connection between the respective ship and the territorial sea. The proportionality element limits the exercise of control rights to situations in which there exists an indication for assuming future violations to occur when the respective ship enters the territorial sea of a state or, in the case of art 33(1)(b), in which a violation of the four enumerated laws has already occurred in the territory or territorial sea. Accordingly, art 33(1)(a) only applies to incoming vessels, meaning those traversing towards the territorial sea of a coastal state.<sup>58</sup> Article 33(1)(b), which presupposes a prior violation of laws in the territorial sea, applies to outgoing vessels, meaning those traversing from the territorial sea towards the high seas.<sup>59</sup>

A connection to the territorial sea cannot, then, be assumed during lateral passage of a ship through the contiguous zone on a course parallel to the coast of the respective littoral state.<sup>60</sup> If no indication exists for the assumption that a ship intends to enter the territorial sea of a state, it seems unnecessary to imply that the respective ship could, eventually, violate any laws only applicable in the territorial sea. In that case, the freedom of the high seas and the freedom of navigation prevail. The exertion of ‘control’ in its administrative dimension is unnecessary and the ship should continue to freely navigate the high seas. If, however, it becomes evident that a ship takes course towards the territorial sea of a coastal state, it seems reasonable to imply that the ship will, eventually, enter the territorial sea and be subject to the littoral states customs, immigration, fiscal and sanitary laws. In those cases, it will be necessary to exert limited control over the ship to prevent future infringements of said laws when the vessel enters the territorial sea.

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<sup>57</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 161 [13]. See also Shearer, above n 31, 330.

<sup>58</sup> O’Connell, above n 39, 1059; Tanaka, above n 44, 125; Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 114; Daniel-Erasmus Khan in Alexander Proelß et al (eds), *United Nations Convention on the Law of the Sea: A Commentary* (C H Beck, 1<sup>st</sup> ed, 2017) 154, 265.

<sup>59</sup> Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 114; Tanaka, above n 44, 125.

<sup>60</sup> Poulantzas, above n 7, 141–51. Poulantzas employs the terms ‘lateral’ and ‘vertical’ passage in the context of innocent passage. They may, accordingly, be applied to passage through the contiguous zone.

### 3 Administrative Jurisdiction in the Contiguous Zone

It follows from the assertion of administrative rights in the contiguous zone that jurisdiction reaches as far as compelling states to comply with the rights exercised under *UNCLOS* art 33. This very limited form of legislative and enforcement jurisdiction can generally be considered as the exertion of ‘administrative jurisdiction’, in order to express the restrained scope of rights exercisable under art 33.

In principle, the administrative jurisdiction granted by art 33 applies equally to its sub-paras (1)(a) and (1)(b). Another distinction can, however, be drawn between the two sub-paragraphs in terms of jurisdiction.<sup>61</sup>

#### (a) Punitive Jurisdiction in the Contiguous Zone

The black letter of art 33(1)(b) offers the conclusion that a state may in its contiguous zone exercise certain control rights in order to enable the exercise of enforcement jurisdiction for those criminal acts previously committed within the territory or the territorial sea.<sup>62</sup> This conclusion demonstrates the limits of state authority in the contiguous zone: a state is limited to the exercise of control to facilitate territorial enforcement jurisdiction for violations against customs, fiscal, immigration and sanitary laws. States do not have the right to enforce punitive measures in the contiguous zone; their rights are limited to exercising control to enable enforcement of certain — not all — punitive regulations applicable in the territorial sea, namely those relating to customs, fiscal, immigration and sanitary matters. To this end, permissible control under art 33(1)(b) includes the (forceful) return of the vessel to the territory of the coastal state.

#### (b) Protective Jurisdiction in the Contiguous Zone

In contrast, art 33(1)(a) is not of punitive, but of preventive nature. By virtue of art 33(1)(a) states may prescribe laws compelling incoming vessels to comply with orders to halt, to endure inspections, searches and verifications of the ship name and its registration number when there exists reason to believe a ship will violate customs, immigration, fiscal or sanitary laws should it enter the territorial sea.<sup>63</sup> Judge Laing considers this form of protection of coastal state interests ‘protective jurisdiction’.<sup>64</sup> While art 33(1)(a) does not grant coastal states the right to prescribe and enforce customs, immigration, fiscal or sanitary laws within the contiguous zone when there has been no previous penetration of the

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<sup>61</sup> Cf Rob McLaughlin, ‘Authorizations for Maritime Law Enforcement Operations’ (2016) 98 *International Review of the Red Cross* 465, 478: who distinguishes between ‘prevent’ and ‘punish’ jurisdiction.

<sup>62</sup> Where a state may, indisputably, exercise enforcement jurisdiction: Lowe, above n 11, 167; Brownlie, n 14, 174; Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law* (Oxford University Press, 9<sup>th</sup> ed, 1996) vol 1, 600; Gilbert Gidel, *Le Droit International Public de la Mer* (Recueil Sirey, 1934) vol 3, 181; D P O’Connell, ‘The Juridical Nature of the Territorial Sea’ (1971) 45 *British Yearbook of International Law* 303, 620–2.

<sup>63</sup> Cf *Saiga No 2* [1999] *ITLOS Reports* 10, 158–9 [8] (Judge Laing); O’Connell, above n 39, 1060. Reuland claims that ‘legislative jurisdiction within the contiguous zone ... should ... be limited to the protection of the state’s territory and territorial sea’: Reuland, above n 40, 574.

<sup>64</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 158–9 [8], 161 [13] (Judge Laing).

territorial sea,<sup>65</sup> it authorises states to legislate and act upon modes of control in order to protect its territorial sea from future infringements. The term ‘protective jurisdiction’ in the context of art 33(1)(a) therefore provides for the prescription and imposition of control rights, the ‘species of authority for the protection of coastal State interests’.<sup>66</sup>

Protective jurisdiction in the context of art 33(1)(a) cannot be equated with the protective principle under international criminal law. The protective principle serves to establish ‘extraterritorial effect to legislation criminalizing conduct damaging to national security or other central State interests’.<sup>67</sup> In contrast, protective jurisdiction in the contiguous zone is of an exclusively administrative nature, enabling the coastal state to protect itself from potential future criminal conduct in the territorial sea.

### III THE RIGHT OF HOT PURSUIT FROM THE CONTIGUOUS ZONE

What consequences result from the concept of protective jurisdiction in the contiguous zone for the right of hot pursuit if a vessel operates solely within said zone?

Sentence one of *UNCLOS* art 111(1) awards a coastal state the right of hot pursuit if it has good reason to believe that a ship has violated its laws and regulations. Hot pursuit may *commence* in the contiguous zone as per sentence two of art 111(1). Considering the scope of protective jurisdiction, it remains unclear for which specific acts hot pursuit may be undertaken from the contiguous zone. Sentence four of art 111(1) allows for hot pursuit to take place in response to ‘violations of the rights for the protection of which the zone was established’. Relying once again on an interpretation in accordance with *VCLT* art 31, the acts that trigger lawful hot pursuit and their localisation become evident.

#### A Ordinary Meaning

Sentence four of art 111(1) *UNCLOS* can be interpreted in two possible ways: First: ‘the pursuit may only be undertaken if there has been a violation of the *rights* for the protection of which the zone was established’.<sup>68</sup> The *rights* for the protection of which the zone was established are customs, immigration, sanitary and fiscal laws.<sup>69</sup> The right of hot pursuit would then be limited to acts previously committed within the territorial sea, since those laws do not prevail inside the contiguous zone.<sup>70</sup> Sentence four of *UNCLOS* art 111(1) would then *confine* the application in the contiguous zone of its sentences one and two — which allow for hot pursuit to commence within the contiguous zone after a violation of laws has occurred — to violations of customs and related laws inside

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<sup>65</sup> *Ibid* 161–2 [14]. See also above Part II(A)(2).

<sup>66</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 158–9 [8] (Judge Laing).

<sup>67</sup> Iain Cameron, ‘International Criminal Jurisdiction, Protective Principle’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol 5, 712.

<sup>68</sup> *UNCLOS* art 111(1) (emphasis added).

<sup>69</sup> *Ibid* art 33.

<sup>70</sup> See especially Lowe, above n 11, 166; Khan, above n 58, 269; Guilfoyle, above n 7, 775; Tanaka, above n 44, 125.

the territorial sea. The essence of this interpretation would limit the right of hot pursuit to outgoing vessels.<sup>71</sup>

Second: ‘the pursuit may only be undertaken if there has been a violation of the rights for the *protection* of which the zone was established’.<sup>72</sup> The contiguous zone has been established to enable coastal states to exercise certain limited rights aimed at preventing the infringement of laws inside territorial waters (protective jurisdiction). Sentence four can then be understood to refer to those control rights, which are protected by the establishment of the contiguous zone. Based on this interpretation, sentence four would function as an expansion of sentences one and two — in addition to the first interpretation — allowing not only for hot pursuit to *commence* within the contiguous zone after a violation of certain laws within the territorial sea, but also for the violation of control rights exercised under the protective jurisdiction of the contiguous zone *inside* the contiguous zone. The essence of this interpretation would extend the right of hot pursuit to both incoming and outgoing ships.

## B Context

These dual possibilities of interpretation can be linked to the structure of *UNCLOS* art 33, which sentence four of *UNCLOS* art 111(1) refers to. Either hot pursuit is legal only after the violation of rights as exercised under *UNCLOS* art 33(1)(b) — the punishment of violations committed within the territorial sea against customs and related laws — or hot pursuit may also be undertaken after the violation of rights exercised under *UNCLOS* art 33(1)(a) before trespass to the territorial sea has occurred.

The sheer inclusion of sentence four in art 111(1) supports the latter conclusion: sentence four would be superfluous if hot pursuit were only possible for violations having previously occurred in the territorial sea. Sentences one and two of the provision in conjunction with art 33(1)(b) cover this possibility fully: according to sentence one of art 111(1) hot pursuit may be commenced if a state has good reason to believe its laws have been violated. Sentence two determines the point of commencement: the territorial sea and the contiguous zone (*inter alia*). For hot pursuit commencing in the territorial sea, all violations of laws applicable in the territorial sea may be persecuted. For hot pursuit commencing in the contiguous zone, art 33(1)(b) stipulates a limitation to the pursuable violations, allowing only for the persecution of customs and related violations. Recourse to sentence four of art 111(1) must not be taken if hot pursuit could only be based on prior violations of laws applicable in the territorial sea.<sup>73</sup>

Consequently, if hot pursuit from the contiguous zone would presuppose a previous violation of customs and related laws in the territorial sea, sentence four of art 111(1) would have no distinct meaning.

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<sup>71</sup> Tanaka above n 44, 125.

<sup>72</sup> *UNCLOS* art 111(1) (emphasis added).

<sup>73</sup> *Contra* Khan, above n 58, 269.

### C Object and Purpose

Robert Reuland writes that the right of hot pursuit may ‘at first blush [appear] offensive to the right of private ships to navigate freely upon the high seas’.<sup>74</sup> It is an exception to the overarching principle of the freedom of high seas, guided by the necessity to ‘enforce ... laws and regulations against non-national ships that flee onto the high seas’.<sup>75</sup> According to William Hall, it

is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun ... and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.<sup>76</sup>

The right of hot pursuit hence serves as an extension of the lawful exercise of jurisdiction within the territorial sea.<sup>77</sup> Yet it remains questionable whether the right only permits the exercise of territorial jurisdiction or also the exercise of protective jurisdiction within the contiguous zone.<sup>78</sup> The answer relies upon the issue of whether the protection of the laws and regulations of territorial sea requires that a coastal state pursue a ship that ignores its order to stop or its request to board the vessel by fleeing the contiguous zone.

It may be argued that in the case of a vessel fleeing the contiguous zone before it reaches the territorial sea there is no further need for protection, since the danger for the integrity of the territorial sea is averted. However, this view appears short-sighted, since the fleeing vessel may very well return as soon as it is out of sight and navigate the vast seas back towards the coastal state’s territory. In fact, with the classical case of smuggling in mind, effective protection of a state’s customs laws will require the detention of contraband to avert the danger.<sup>79</sup> Without the right of hot pursuit, this interest, which is absorbed by the idea of protective jurisdiction, would be rendered meaningless.

On the other hand, hot pursuit is an exception to the fundamental principles of the freedom of the high seas and exclusive flag state jurisdiction.<sup>80</sup> As an exception, it may arguably be interpreted narrowly.<sup>81</sup> It is nowhere near radical to construe protective jurisdiction in such a limited manner as to defy the right of hot pursuit, in so far as there has not been an actual violation of laws within the territorial sea.<sup>82</sup>

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<sup>74</sup> Reuland, above n 40, 558.

<sup>75</sup> Ibid 559.

<sup>76</sup> William Edward Hall, *A Treatise on International Law* (Clarendon Press, 8<sup>th</sup> ed, 1924) 252.

<sup>77</sup> Ibid; Tanaka, above n 44, 169.

<sup>78</sup> As the term ‘protective jurisdiction’ is used in Part II(B)(3).

<sup>79</sup> To the controversial possibility of arresting and seizing a vessel, see below Part IV(B).

<sup>80</sup> Reuland, above n 40, 558–9; Poulantzas, above n 7, 129; Jennings and Watts, above n 62, 739.

<sup>81</sup> Reuland, above n 40, 558–9; Poulantzas, above n 7, 129.

<sup>82</sup> See, eg, Khan, above n 58, 269: ‘inbound ships merely suspected of a possible future violation of local laws may thus under no circumstances be made subject to measures under Art 111’. However, the corresponding footnote also acknowledges the doubt cast on that position by other commentators: at 269 n 102. See also Poulantzas, above n 7, ix.

## D State Practice

State practice on the right of hot pursuit shows a tendency towards recognising the right of hot pursuit from within the contiguous zone for acts having occurred solely therein.

One of the first extensively discussed cases of hot pursuit was the case of the *SS 'I'm Alone'* (*Canada v United States*).<sup>83</sup> The British vessel *I'm Alone* was involved in smuggling contraband off the coast of the US. It was eventually sighted by a US patrol ship, the *Wolcott*, which ordered the *I'm Alone* to halt.<sup>84</sup> It remained unclear at what location the *I'm Alone* was sighted and ordered to halt.<sup>85</sup> The British vessel proceeded to flee towards the high seas and was subsequently pursued by the *Wolcott*.<sup>86</sup> Two days after its first sighting, the *I'm Alone* was forcibly sunk by another US patrol ship, the *Dexter*, whose aid had been requested by the *Wolcott*.<sup>87</sup>

The case was referred to a commission for settlement, based on a liquor treaty applicable between the US and the United Kingdom.<sup>88</sup> The interests of the *I'm Alone* were represented by the Canadian government, since the ship was registered in Canada. The commission ultimately never ruled on the question of the legality of hot pursuit per se, but limited itself to declaring the act of sinking the *I'm Alone* as unlawful under the applicable convention.<sup>89</sup>

Although the arbitral decision offers no clarity on the question of hot pursuit commencing in a zone analogous to the contiguous zone, the arguments of the US and Canadian governments provide some insight as to the perception of control zones contiguous to a state's territorial sea. The US government argued that a customs zone contiguous to its territorial sea — as expressly provided for in the applicable liquor treaty — that allows for the arrest of smuggling ships would be superfluous if the power to hotly pursue vessels in the contiguous zone for smuggling activities were not implied by the treaty.<sup>90</sup> Canada rejected this view.<sup>91</sup>

In the case of the *SS Sleek*, the Italian Court of Cassation generally accepted the Italian Navy's right of hot pursuit from within a zone contiguous to the territorial sea.<sup>92</sup> The foreign ship *Sleek* had been involved in smuggling contraband while in Italy's proclaimed 'customs zone'. After the ship was

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<sup>83</sup> *I'm Alone* (1935) 3 RIAA 1609; William C Dennis, 'The Sinking of the *I'm Alone*' (1929) 23 *American Journal of International Law* 351; Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 900; Fitzmaurice, 'The Case of the *I'm Alone*', above n 54; Stefan Rindfleisch, *Das Recht der Nacheile zur See* (LIT, 2001) 53; C John Colombos, *The International Law of the Sea* (Longmans Green, 6<sup>th</sup> ed, 1967) 172.

<sup>84</sup> Fitzmaurice, 'The Case of the *I'm Alone*', above n 54, 82.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* 84.

<sup>89</sup> *I'm Alone* (1935) 3 RIAA 1609, 1614–15.

<sup>90</sup> For a summary of US arguments that Fitzmaurice rejects, see Fitzmaurice, 'The Case of the *I'm Alone*', above n 54, 95–100.

<sup>91</sup> *Ibid.* 84–5.

<sup>92</sup> *Re Martinez* (1959) 28 ILR 170, 172, 174 (Italian Court of Cassation). See also Angelo P Sereni, 'Criminal Jurisdiction over Foreign Ships on the High Seas' (1962) 89 *Journal du Droit International* 229, 231.

ordered to halt and after warning shots were fired, the *Sleek* fled towards the high seas and was subsequently pursued and arrested by an Italian navy vessel. In the criminal proceedings against the crew of the *Sleek*, the Court of Cassation eventually permitted the right of hot pursuit from the contiguous zone and did not require previous trespass of the territorial sea. However, it must be noted that the Italian Court of Cassation also interpreted international law at the time to award states full jurisdiction over customs matters within a zone contiguous to the territorial sea, a stance it has recently given up.<sup>93</sup>

Similarly, in the case of the fishing vessel *Taiyo Maru*, the US District Court for the District of Maine held that hot pursuit in a ‘contiguous fisheries zone’ outside the territorial sea for violations of laws applicable in such a zone was lawful.<sup>94</sup>

Although all cited decisions base the reasoning for acknowledging a right of hot pursuit for acts having occurred within the contiguous zone on varying legal grounds — most of which would, today, lack merit — the tendency seems clear: states interpret their right of hot pursuit from zones contiguous to the territorial sea as including situations that entirely occur within that zone and do not require prior traverse of the territorial sea.

#### E Travaux Préparatoires

The preparatory work to art 23 of the 1958 *Convention on the High Seas* (*HS Convention*),<sup>95</sup> whose wording was later incorporated into *UNCLOS* art 111, gives valuable insight into the intention of states for codifying the right of hot pursuit.

The extent of the right of hot pursuit was a subject of utmost controversy during the drafting of the *HS Convention*.<sup>96</sup> Most notably, Sir Gerald Fitzmaurice heavily opposed the right of hot pursuit from the contiguous zone.<sup>97</sup> Fitzmaurice believed that the agreed upon wording logically implies that the right of hot pursuit only applies in respect of outgoing ships for violations already committed by them in the coastal state’s territorial sea, stressing the formulation (‘if there *has been* a violation of the rights’) of *HS Convention* art 23.<sup>98</sup> He concludes that the right of hot pursuit may not be exerted upon an incoming vessel, if trespass of the territorial sea has not yet occurred.<sup>99</sup> He argues that this view was

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<sup>93</sup> Cf *Kircaoglu and Sanaga*, Corte di Cassazione [Italian Supreme Court of Cassation], No 32960, 8 September 2010.

<sup>94</sup> *United States v F/V Taiyo Maru*, 395 F Supp 413, 420–1 (SD Me, 1975).

<sup>95</sup> *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

<sup>96</sup> See Reuland, above n 40, 573; O’Connell, above n 39, 1081–5.

<sup>97</sup> Fitzmaurice, ‘The Case of the *I’m Alone*’, above n 54, 95–100; Fitzmaurice, ‘The Law and Procedure of the International Court of Justice’, above n 26, 380–1; Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 115–17.

<sup>98</sup> Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 115–17 (emphasis in original). See also DeVicentiis, ‘*Arresto di straniero eseguito su navi straniere e diritto d’inseguimento*’ (1957) 4 *Rivista di diritto processuale penale* 398.

<sup>99</sup> Fitzmaurice, ‘The Case of the *I’m Alone*’, above n 54, 100; Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, above n 39, 116.

accepted by states and forms the constructive limit of the right of hot pursuit in the contiguous zone.<sup>100</sup>

This conclusion lies, however, in stark contrast to the result of the negotiating process during the drafting of the *HS Convention*. Contrary to Fitzmaurice's conclusion, states did not agree to confine the commencement of hot pursuit from the contiguous zone to violations having previously occurred in the territory or the territorial sea of the state: an amendment submitted by Netherlands and supported by the United Kingdom to this effect did not find consensus amongst the majority of drafters.<sup>101</sup> Consequently, state agreement on the right of hot pursuit encompasses a less restrictive regime.

This line of argumentation has been picked up by various commentators — both prior to the codification of *HS Convention* art 23 and after. Gilbert Gidel holds the right of hot pursuit from the contiguous zone upon acts having occurred solely therein for as valid as the right of hot pursuit from the territorial sea.<sup>102</sup> Nicholas Poulantzas submits that the wording and the intention of the majority of the drafters of art 23 demands the conclusion that hot pursuit may commence in the contiguous zone also for acts committed therein, limited to the four mentioned protective interests.<sup>103</sup> Tullio Treves, Myres McDougal and William Burke and Stefan Rindfleisch favour a broad approach to the right of hot pursuit from the contiguous zone, including pursuing ships for acts having occurred only in the contiguous zone, citing in particular the *travaux préparatoires* to the *HS Convention*.<sup>104</sup>

#### F Consequences for the Rights Triggering Hot Pursuit

It follows from these considerations that sentence four of *UNCLOS* art 111(1) authorises states to commence hot pursuit in the contiguous zone for acts having occurred solely therein. Sentence four of art 111(1) also stipulates, as a precondition of hot pursuit, that the pursued vessel must have violated a right for the protection of which the contiguous zone was established, thereby referencing *UNCLOS* art 33. In regards to acts solely taking place within the contiguous zone, *UNCLOS* art 33(1)(a) limits a state to exercise administrative rights such as searches, inspections, verifications and orders to halt. The protective jurisdiction granted by the provision obligates vessels in vertical passage to endure the exercise of these administrative rights by the coastal state. The failure of those vessels in the contiguous zone to adhere to an order to stop, an inspection or to the process of verification consequently constitutes a violation that triggers the right of hot pursuit.

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<sup>100</sup> Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea', above n 39, 116.

<sup>101</sup> Rindfleisch, above n 83, 88; McDougal and Burke, above n 83, 912–3, 922; Poulantzas, above n 7, 164; 'Report of the International Law Commission Covering the Work of its Eighth Session' [1956] II *Yearbook of the International Law Commission* 253, 285.

<sup>102</sup> Gidel, above n 62, 349, 490. For a translation, see Poulantzas, above n 7, 159.

<sup>103</sup> Poulantzas, above n 7, 164.

<sup>104</sup> Rindfleisch, above n 83, 92; McDougal and Burke, above n 83, 913, 922; Tullio Treves, 'The Uses of the Sea' in René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea* (1991) vol 2, 833, 861. *Contra* Lowe, above n 11, 165–9.

## IV AVAILABLE REMEDIES UNDER PROTECTIVE JURISDICTION

If a foreign vessel halts on the grounds of a state's exercise of protective jurisdiction in the contiguous zone or has been successfully pursued for violating protective rights in the contiguous zone, the littoral state will want to implement some kind of penalty against the ship and its crew, especially if actions contrary to customs, fiscal, immigration or sanitary laws applicable in the territorial sea are discovered. In the past, states have implemented a variety of measures against vessels halted in the contiguous zone or after hot pursuit from the contiguous zone: arrest and seizure of the vessel,<sup>105</sup> criminal penalties against the captain and crew,<sup>106</sup> seizure of contraband<sup>107</sup> and redirection of vessels.<sup>108</sup>

The question of admissible remedies is only significant for incoming vessels in regards to *UNCLOS* art 33(1)(a) and protective jurisdiction. Since punitive jurisdiction under art 33(1)(b) presupposes a prior violation of territorial laws, a coastal state may eventually exercise criminal jurisdiction over the outgoing vessel based on the territoriality principle when it has returned the vessel to its territory pursuant to art 33(1)(b).<sup>109</sup> The legality of measures to be considered in cases of incoming vessels must revolve around the protective nature of its rights in the contiguous zone.

## A Criminal Penalties against the Captain and Crew

In *Kircaoglu and Sanaga*, the Italian Court of Appeal convicted the defendants for attempted crimes and of aiding and abetting illegal immigration, a ruling the Court of Cassation then overturned.<sup>110</sup> The Court based its decision to overturn on the assumption that states may not exercise any form of criminal jurisdiction in the contiguous zone.<sup>111</sup>

Criminal jurisdiction may follow from the territoriality principle, the active (or according to some, also the passive) personality (or nationality) principle, the universality principle or the flag state principle.<sup>112</sup> The captain and crew of a vessel involved in illegal activities may consequently be arrested and adjudicated by the coastal state if they are its nationals under the active personality principle,

<sup>105</sup> *Re Martinez* (1959) 28 ILR 170, 174; *Saiga No 2* [1999] *ITLOS Reports* 10, [33] (Judge Laing).

<sup>106</sup> *Re Martinez* (1959) 28 ILR 170, 171; *Kircaoglu and Sanaga*, above n 1, [F2], *M/V Saiga No 2* [1999] *ITLOS Reports* 10, [34].

<sup>107</sup> *Re Martinez* (1959) 28 ILR 170, 174; *Saiga No 2* [1999] *ITLOS Reports* 10, [33] (Judge Laing).

<sup>108</sup> The Government of Australia redirects vessels to Cambodia, Nauru or Papua New Guinea: *Australia Asylum: Why is it Controversial?* (31 October 2017) BBC News <<http://www.bbc.com/news/world-asia-28189608>> archived at <<https://perma.cc/5ZVT-YQER>>.

<sup>109</sup> See above Part II(B)(3).

<sup>110</sup> Cataldi and Iovane (eds), above n 1, 420.

<sup>111</sup> *Kircaoglu and Sanaga*, Corte di Cassazione [Italian Supreme Court of Cassation], No 32960, 8 September 2010, [5.1].

<sup>112</sup> Brownlie, above n 14, 458; Oxman, above n 14, 546; Christopher Blakesley, 'Extraterritorial Jurisdiction' in M Cherif Bassiouni (ed), *International Criminal Law* (Brill, 3<sup>rd</sup> ed, 2008) vol 2, 85. Cf *UNCLOS art 97*, for flag state jurisdiction.

or, in cases of human trafficking, potentially under the universality principle.<sup>113</sup> If the ship flies the coastal state's flag,<sup>114</sup> it may instigate criminal penalties itself or consent to measures by the arresting state.<sup>115</sup>

However, if such a foundation of criminal jurisdiction is not applicable, the arrest and adjudication cannot be based on the territoriality principle if the activities have not taken place in the territorial sea of the coastal state but solely in its contiguous zone. The principle of territorial criminal jurisdiction is restricted to the territorial sea (subject to certain limitations, such as the right of innocent passage) and does not apply to the contiguous zone.<sup>116</sup>

In his separate opinion in *Saiga No 2*, Judge Laing alludes to the doctrine of objective or effects jurisdiction.<sup>117</sup> He holds it

tenable that conduct occurring in the contiguous zone which is part of the jurisdictional facts or *actus reus* of conduct intended or due to occur or actually occurring in the territorial sea or other territorial areas can be punished as long as the vessel is apprehended in the course of the exercise of some legitimate means of control.<sup>118</sup>

*UNCLOS* art 97 seems to contradict the doctrine of effects jurisdiction by supporting the notion that *UNCLOS* as a whole solely refers to the flag state principle to award criminal jurisdiction.<sup>119</sup> Furthermore, Judge Laing himself provides an argument, which offers serious doubt as to whether *UNCLOS* art 33(1)(a) was meant to include the doctrine of effects jurisdiction by establishing protective jurisdiction in the contiguous zone. According to *UNCLOS* art 27(5), criminal jurisdiction may not be exercised during innocent passage of a vessel in the territorial sea for offences committed before the ship entered the territorial sea. As Judge Laing puts it: 'it could not have been intended that article 33 provides more authority relating to the identical conduct in respect of which article 27 requires restraint'.<sup>120</sup> In fact, a vessel would find greater protection by navigating towards the territorial sea than by fleeing to the high seas.<sup>121</sup>

Therefore, if the flag state principle, the personality (nationality) principle or the universality principle do not apply, the coastal state may not arrest and adjudicate the vessel's crew and captain. Penalties enacted by the littoral state

<sup>113</sup> Some consider human trafficking, in particular of women and children, as a crime similar to enslavement, which falls under the purview of universal jurisdiction: see, eg, Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (Oxford University Press, 3<sup>rd</sup> ed, 2014) 356.

<sup>114</sup> *UNCLOS* art 97.

<sup>115</sup> *Smuggling Protocol* art 8(2)(c).

<sup>116</sup> *UNCLOS* art 27(1): 'The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person ... in connection with any crime committed on board the ship during its passage, save only in the following cases'. In principle, therefore, criminal jurisdiction of the coastal state exists in the territorial sea, even if *UNCLOS* art 27 limits its exercise. Cf Tanaka, above n 44, 125; Cataldi and Iovane, above n 1, 420; Shearer, above n 31, 326.

<sup>117</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 163 [16]. Cf Cameron, above n 67, 714: assuming that protective jurisdiction in the contiguous zone includes the 'protective principle' of criminal jurisdiction.

<sup>118</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 163 [16].

<sup>119</sup> Cf *Arctic Sunrise Arbitration (The Netherlands v Russia) (Awards)* (Permanent Court of Arbitration, Case No 2014-02, 14 August 2015) [300]–[302] ('*Arctic Sunrise*').

<sup>120</sup> *Saiga No 2* [1999] *ITLOS Reports* 10, 162 [15].

<sup>121</sup> Churchill and Lowe, above n 7, 137.

based on violations against laws prescribed in accordance with *UNCLOS* arts 56 and 73 remain untouched.<sup>122</sup>

### B Arrest and Seizure of the Vessel

States have in the past resorted to arresting and seizing vessels inside the contiguous zone or after hot pursuit from that zone. For example, in *Saiga No 2* Guinea seized the oil bunker flying the flag of St Vincent and the Grenadines upon hot pursuit from the contiguous zone onto the high seas.<sup>123</sup> Especially in cases of potential fiscal violations coastal states will regularly want to seize the vessel, if only as collateral.

Given the protective nature of the rights enshrined in *UNCLOS* art 33(1)(a), the arrest and seizure of vessels would have to be necessary for an effective protection of the territorial sea of the coastal state. Consideration must at the same time be given to the freedom of the high seas and the flag state principle, which in principle prevail in the contiguous zone.

It is submitted that the arrest and seizure of vessels in the contiguous zone for activities having taken place entirely therein are not generally covered by the administrative jurisdiction stipulated in art 33(1)(a).<sup>124</sup> Such powers would cripple the underlying principles that prevail in the contiguous zone and ultimately lead to their erosion and the implementation of hardly repressible, wide-ranging state powers in the contiguous zone.<sup>125</sup> Since an actual violation of coastal state laws cannot occur while a vessel navigates the contiguous zone, the arrest and seizure of a vessel on the grounds of an anticipated violation in the territorial sea would take the administrative and protective nature of the contiguous zone too far.<sup>126</sup>

However, the right to seize the vessel on the grounds of exercising legitimate criminal jurisdiction remains untouched.

### C Seizure of Contraband and Illicit Trafficking of Narcotic Drugs

The seizure of contraband, especially narcotic drugs, discovered in the contiguous zone upon a lawful inspection seems a well-established practice

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<sup>122</sup> In particular, littoral states may in their EEZ prescribe and enforce sanctions against maritime pollution, in so far as the laws do not impair the rights and duties of the flag state: Alan E Boyle, 'Marine Pollution under the *Law of the Sea Convention*' (1985) 79 *American Journal of International Law* 347, 360.

<sup>123</sup> Republic of Guinea, 'Counter-Memorial: Submitted by the Republic of Guinea', *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)*, [32]–[33].

<sup>124</sup> See Shearer, above n 31, 330; Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea', above n 39, 114–15; O'Connell, above n 39, 1059. See also *UNCLOS* art 97(3): which refers to the flag state principle regarding the seizure of a vessel concerning matters of collision or navigation.

<sup>125</sup> Fitzmaurice observes 'that only by insistence on ... limitations is it possible to prevent coastal States from treating the contiguous zone as virtually equivalent to territorial sea': Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea', above n 39, 115. *Contra* Shigeru Oda, 'The Concept of the Contiguous Zone' (1962) 11 *International & Comparative Law Quarterly* 131, 132, 153.

<sup>126</sup> Accordingly, neither in the *M/V 'Saiga'* case, nor in the *Arctic Sunrise* (2015) has it been held that the vessel was lawfully seized, even if for different reasons: *Saiga No 2* [1999] *ITLOS Reports* 10.

amongst coastal states.<sup>127</sup> Although the international law of the sea offers little guidance on the illicit traffic of narcotic drugs, recurrence should be had to the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* ('1988 Convention'),<sup>128</sup> which 190 state parties have ratified.<sup>129</sup> Articles 17(3)–(4) of the *Convention* permit the boarding and search of vessels and approve of 'appropriate action with respect to the vessel, persons and cargo on board' under the preconditions that there exist reasonable grounds to suspect the vessel is engaged in illicit traffic and that the respective flag state has authorised the requesting state to take appropriate measures. At the same time, any action taken in accordance with art 17 shall take due account of the international law of the sea and the rights and obligations it confers.<sup>130</sup>

The *1988 Convention* therefore leaves little ambiguity for measures allowed under the purview of protective jurisdiction in the contiguous zone. Since *UNCLOS* arts 33(1)(a) and 111 acknowledge the right to halt, search, and inspect vessels and verify its relevant data, such control in the contiguous zone regarding vessels suspected of illicit drug trafficking is always permissible. Further measures must then adhere to the restrictions of the *1988 Convention*: 'appropriate action' such as the seizure of illicit drugs or penalising the crew can only be undertaken upon authorisation of the respective flag state.<sup>131</sup>

Article 4 of the *1988 Convention* sets the limits of exercising jurisdiction over persons involved in illicit drug trafficking by recognising territorial jurisdiction, the personality (nationality) principle and the principle of *aut dedere aut iudicare*.<sup>132</sup>

The *1988 Convention* only concerns the illicit trafficking of narcotic drugs. Its provisions cannot be applied analogously to cases outside the scope of drug trade. The restrictive and distinct provisions of the *Convention* show, however, that the contiguous zone, as part of the high seas, is subject to the flag state principle and any exercise of control over vessels beyond orders to stop, searches, inspections and verifications require restraint.

#### D Permissible Remedies under Protective Jurisdiction

Assuming that criminal penalties against the captain and crew of a vessel in the contiguous zone as well as the seizure and arrest of the vessel are generally not covered by *UNCLOS* arts 33(1)(a) and 111 outside cases of illicit drug trafficking, states require *some* kind of rights to institute remedies against vessels attempting illegal activities so as to not render the right of hot pursuit

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<sup>127</sup> Office on Drugs and Crime, 'Practical Guide for Competent National Authorities under Article 17 of the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*' (Report, January 2004) 111.

<sup>128</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990) ('1988 Convention').

<sup>129</sup> As of March 2018: United Nations, *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* United Nations Treaty Collection <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VI/VI-19.en.pdf>> archived at <<https://perma.cc/QZ23-QT4D>>.

<sup>130</sup> *1988 Convention* art 17(11).

<sup>131</sup> *Ibid* art 17.

<sup>132</sup> When no state requests extradition: *ibid* art 4(2).

meaningless. If there were no measure available, a coastal state would have absolutely no interest in pursuing a fleeing ship to the high seas.

Such remedies must remain within the administrative nature of the contiguous zone. Coastal states may therefore register the names of the crew, inform the respective flag state of the identified offences as well as impose warnings and prohibit the vessel to enter the territorial sea.<sup>133</sup>

Furthermore, a coastal state may also want to redirect the vessel to the high seas, another state's port or the vessel's homeport. This measure may, in fact, prove to be very effective when combatting, inter alia, illegal immigration, illegal bunkering of oil or untenable sanitary conditions. A redirection of the vessel to its home port or its flag state enables the port or flag state to exercise its jurisdiction and to take the necessary measures to remove the relevant disturbance.

States have succumbed to different approaches and strategies regarding the interception and redirection of vessels involved in illegal immigration. The EU, for instance, has tolerated the repatriation of immigrants to Libya by the Italian Navy, a practice the European Court of Human Rights condemned.<sup>134</sup> Nevertheless, the recent surge in immigration across the Mediterranean Sea has led the EU to reconsider the practice of repatriation, at least in so far as migrants rescued off the Libyan coast would be temporarily returned to camps in Libya, from where their claims to asylum would be processed.<sup>135</sup>

Australia on the other hand, regularly redirects vessels to third states such as Cambodia, Nauru or Papua New Guinea as well as to the asylum seekers' home states.<sup>136</sup> Australia's practice has, however, received harsh criticism from international lawyers, primarily because of the untenable circumstances under which asylum seekers suffer in the respective places to which they are redirected.<sup>137</sup>

As Seline Trevisanut suggests, 'interception and redirection is not clearly provided for by the wording of [UNCLOS art 33(1)(a)], but it is not forbidden either'.<sup>138</sup> Administrative jurisdiction must, to be effectively *protective*, include the interception or redirection of vessels to territories, which may legally exercise jurisdiction over captain, crew and vessel. However, states must also comply with the principle of proportionality stipulated by UNCLOS art 33(1): the measure taken must be 'necessary'.<sup>139</sup> Interpretation in accordance with VCLT art 31(3)(c) requires a state to take into account different legal regimes of public international law when assessing the question of necessity. In the case of illicit drug trafficking states will have to consider the *1988 Convention*. In the case of

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<sup>133</sup> Khan, above n 58, 265.

<sup>134</sup> *Hirsi Jamaa and others v Italy (Judgment)* (2012) European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012 ('*Hirsi Jamaa*').

<sup>135</sup> *Migrant Crisis: Macron Unveils Plans After Meeting* (28 August 2017) *BBC News* (online), <<http://www.bbc.com/news/world-europe-41071796>> archived at <<https://perma.cc/H5AN-DHLR>>.

<sup>136</sup> *Australia Asylum: Why is it Controversial?* (3 August 2016) *BBC News* (online), <<http://www.bbc.com/news/world-asia-28189608>> archived at <<https://perma.cc/KT4U-ZY77>>.

<sup>137</sup> *Ibid.*

<sup>138</sup> Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck Yearbook of United Nations Law* 205, 232–3.

<sup>139</sup> *Ibid.* 233.

migration across the high seas coastal states will have to respect the duty to render assistance at sea<sup>140</sup> and the principle of non-refoulement as well as other principles of refugee law.<sup>141</sup>

By virtue of protective jurisdiction under *UNCLOS* arts 33(1)(a) and 111, the law of the sea in principle allows for the redirection of a vessel upon interception inside the contiguous zone or upon hot pursuit from that zone.

## V CONCLUSION

Hugo Grotius was first to proclaim the ‘freedom of the seas’, a principle still enshrined in modern day international law of the sea.<sup>142</sup> Over time the principle has been furnished with various constraints: the territorial sea, the EEZ, the contiguous zone, the right of hot pursuit and several more. Yet the freedom of the high seas remains, in past and present, the outset of the international law of the sea.

Against the backdrop of Grotius’ *Mare Liberum*,<sup>143</sup> rights awarded to littoral states in the contiguous zone by *UNCLOS* art 33 and customary international law must be interpreted restrictively. Customs, fiscal, immigration and sanitary laws are not applicable outside the territorial sea of a state; art 33 merely grants administrative rights such as orders to stop and enacting inspections, searches and verifications of vessels in the contiguous zone. This administrative jurisdiction is partly of protective (art 33(1)(a)) and partly of punitive nature (art 33(1)(b)).

*UNCLOS* art 111 refers to those administrative rights for the right of hot pursuit. It was found that for hot pursuit to be legally commenced from the contiguous zone, it is sufficient that a vessel violates the administrative rights established by *UNCLOS* art 33 for the contiguous zone. In cases of incoming vessels, hot pursuit may therefore commence if the vessel refuses to follow an order to stop or endure an inspection, search or verification.

If hot pursuit is deemed to be legal, there must be some sort of remedies available to the coastal state after successful pursuit. In sync with the administrative nature of the contiguous zone, the state may not exercise criminal jurisdiction over crew and captain in the case of incoming ships. The seizure of vessel and contraband (if only as collateral) would take the protective nature of the contiguous zone too far. It may, however, under close scrutiny of the proportionality of the measure, intercept and redirect the incoming vessel from the contiguous zone.

While Australia vehemently implements its Pacific Solution, its legal authority within its proclaimed contiguous zone remains remarkably unclear.<sup>144</sup> The case of *Kircaoglu and Sanaga* exemplifies the difficulties in pinpointing the scope of rights in the contiguous zone and in assessing the lawfulness of hot pursuit. Since corresponding laws do not apply in the contiguous zone and Italy lacked criminal jurisdiction, the Italian Court of Cassation correctly overturned

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<sup>140</sup> *UNCLOS* art 98.

<sup>141</sup> *Hirsi Jamaa* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [123]; Trevisanut, above n 138, 233.

<sup>142</sup> Cf Brownlie, above n 14, 224.

<sup>143</sup> Cf Feenstra, above n 2.

<sup>144</sup> Department of Home Affairs, Australian Government, above n 9.

the conviction for illegal smuggling of immigrants. However, it should have endorsed the actions of the Italian Navy in so far as the order to halt, the search of the vessel and the hot pursuit were in line with the international law of the sea. As to Mr Kircaoglu and Mr Sanaga, a criminal conviction has no jurisdictional basis — remedies could only have been expulsion and informing Turkey as the flag state of the vessel. It would have been the flag state's purview to then instigate criminal proceedings.

The actions of Australia's Navy concerning the redirection of vessels to the high seas or to the territories of other states may find their legal basis in the contiguous zone. The contiguous zone offers the authority to halt, inspect and redirect vessels involved in illegal migration. However, the law of the sea also instructs coastal states to take into account the duty to render assistance at sea and other legal regimes when acting under protective jurisdiction in the contiguous zone, especially in regard to refugees and the principle of non-refoulement. The redirection of vessels carrying refugees may constitute a violation of international refugee law, despite its general lawfulness under *UNCLOS* art 33.