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Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction

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NOTE

Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction

I am indeed lord of the world,
but the law is lord of the sea.
—Antoninus

ABSTRACT

Pursuant to the exclusivity rule of flag-state jurisdiction, a ship on the high seas is subject to the exclusive jurisdiction of the state whose flag she lawfully flies. Conversely, a state may not ordinarily interfere with those ships registered under the laws of another state. International law makes exception to this general rule in certain discrete circumstances. When such an exception exists, a state may lawfully stop, visit, search, and arrest a non-national ship on the high seas—a right normally reserved to the flag-state alone. These exceptions to the exclusivity rule of flag-state jurisdiction form the subject matter of this Note.

The author begins with a brief history of the origin of the exclusivity rule of flag-state jurisdiction and the development of the rule in international jurisprudence. The Note then provides a discussion of the two modes of permissible interference—the customary right of reconnaissance *and the* droit de visite. *The simple right of* reconnaissance *affords a public ship the right to approach a private vessel on the high seas to inquire her identity. The more elaborate* droit de visite *is composed of two distinct operations: the* droit d'enquête du pavillion *and the right of visitation and search. Pursuant to her* droit d'enquête du pavillion, *a public ship may board a private vessel to ascertain the private vessel's right to her flag. If warranted, the boarding party may proceed to search the vessel to determine whether she is engaged in some proscribed activity.*

The author finds that in time of peace a state may not interfere with the ships of another state unless there exists an exception to the exclusiv-

ity rule of flag-state jurisdiction. Exceptions to the exclusivity rule permit a state to proceed against a vessel suspected of being (1) a pirate; (2) a trader in slaves; (3) a stateless ship; (4) a threat to the security or integrity of the state; or (5) in actuality a ship belonging to the interfering state, although flying the flag of another state. These exceptions exist as a matter of customary international law and are therefore available to all states. States may also enter into treaty regimes that permit a mutual right of interference, but such an exceptional right is enforceable against treaty parties only. Such a right may exist in the case of suspected pirate radio broadcasters. The author addresses each customary exception to the exclusivity rule as well as the pirate radio broadcaster exception, all of which are codified in the 1982 United Nations Convention on the Law of the Sea.

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I. INTRODUCTION

On 4 December 1989, the United States Navy confronted on the high seas members of the environmental group Greenpeace, who had hoped to disrupt the test launch of a Trident nuclear missile by a United States submarine.[1] Despite repeated radio warnings, the protestors' vessel *Greenpeace*, registered in the Netherlands, encroached upon the five-thousand yard security zone drawn around the nuclear submarine standing fifty miles off the Florida coast.[2] The *Greenpeace* dispatched two motorized rafts, from which members of the environmental group attempted to confound the launch of the missile. The Navy towed away the rafts, but when the *Greenpeace* refused to quit the launch site, two Navy submarine tenders approached the *Greenpeace* and shouldered her from the area. In the process, the *Greenpeace* sustained two gashes in her hull and began to take water. Although the *Greenpeace* returned safely to port, a spokeswoman for Greenpeace reported that the organization would consider a suit against the United States. For its part, the Navy disputed the asserted right of Greenpeace to obstruct the missile launch.[3]

Myriad questions of international and domestic law flow from the *Greenpeace* incident, but perhaps the most interesting question is the one to which this Note is primarily devoted—whether in peacetime the warships of a state may on the high seas interfere with a private ship registered under the laws of another state?

As a general proposition, a state may not interfere with the vessels of another state. Pursuant to the exclusivity rule of flag-state jurisdiction, ships on the high seas are subject only to the jurisdiction of the state whose flag they lawfully fly. International law, however, draws several exceptions to the exclusivity rule. These exceptions, which form the subject matter of this Note, arise only in certain discrete circumstances.

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1. Schmalz, *After Skirmish with Protesters, Navy Tests Missile*, N.Y. Times, Dec. 5, 1989, at A1, col. 2.
2. *Id.* at A12, col. 1.
3. *Id.* at A1, col. 3; A12, cols. 1-2.

Exceptions to the exclusivity rule exist as a matter of both customary and conventional law. Customary law permits a state to interfere with a non-national vessel if she is (1) a pirate; (2) a slave trader; (3) a threat to the state; (4) without nationality; or (5) in actuality a ship of the interfering state, although flying the flag of another state. Apart from these customary exceptions, states sometimes agree by treaty to make an exception to their right of exclusive jurisdiction in order to achieve some desirable end, such as the suppression of unauthorized broadcasting from the high seas. These conventional exceptions apply only between the parties to the convention and are not, like the customary exceptions, universally applicable.

This Note considers the circumstances in which one state may proceed against the ships of another. The Note first sets out the manner in which a state may interfere with the vessels of another state and the rules that govern such interference. The remainder of the Note discusses the exceptions to the exclusivity rule of flag-state jurisdiction.

II. INTERFERENCE ON THE HIGH SEAS

A. *The Exclusivity Rule of Flag-State Jurisdiction*

Ships on the high seas are, as a general rule, subject to the exclusive jurisdiction and authority of the state whose flag they lawfully fly. This principle of exclusivity of flag-state jurisdiction is a pillar of the international law of the sea and is firmly rooted in the axioms of state equality and the freedom of the high seas.[4] The Permanent Court of Interna-

4. These principles—the exclusivity of flag-state jurisdiction, the freedom of the seas, and the equality of states—go hand in hand; the exclusivity rule follows from the freedom of the high seas which in turn follows from the equality of states. This proposition is cogently set out in the English case of *Le Louis*, in which Lord Stowell observed:

> [A]ll nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.

Le Louis, 2 Dods. 210, 243, 165 Eng. Rep. 1464, 1475 (1817). On the other side of the Atlantic, Justice Story held in the United States case of *The Marianna Flora* that "[u]pon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there." The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826). For a more recent affirmation of this principle, see United States v. Hensel, 699 F.2d 18, 27 (1st Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); United States v. Postal, 589 F.2d 862, 878 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979). The prin-

tional Justice articulated this principle in the *Lotus* case, finding that

> vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[5]

The exclusivity rule is codified in the 1958 Convention on the High Seas, which provides that "[s]hips shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high

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ciples of state sovereignty and the absolute equality of states, therefore, afford all states equal right to the free and unmolested use of areas beyond the jurisdiction of any state, including the high seas.

The notion of the freedom of the high seas contains both a right and an obligation. A corollary to the right of equal use of the high seas is the obligation to refrain from interference in the lawful utilization of the high seas by other states. The International Law Commission (I.L.C.) discusses the permissive and the obligatory nature of the freedom of the high seas as follows:

> The freedom of the high seas, essentially negative, may nevertheless contain positive consequences . . . . All maritime flag-states have equal right to put the high seas to legitimate use. But the idea of equality of usage comes only in second place. The essential idea contained in the principle of the freedom of the high seas is the idea of interdiction of all flag-states from interference in navigation in time of peace with all other flag-states.

Mémorandum présenté par le Secrétariat, U.N. Doc. A/CN.4/32, *reprinted in* [1950] 2 Y.B. I.L.C. 67, 69, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (translation).

From this obligation to refrain from interference with non-national vessels flows the principle of exclusivity of flag-state jurisdiction. *See generally* J. BRIERLY, THE LAW OF NATIONS 304-10 (Sir H. Waldock 6th ed. 1963); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 238-42 (3d ed. 1979); 2 D. O'CONNELL, INTERNATIONAL LAW 645-47 (2d ed. 1970) [hereinafter O'CONNELL, INTERNATIONAL LAW]; 2 D. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 796-99 (I. Shearer ed. 1984) [hereinafter O'CONNELL, LAW OF THE SEA]; 1 L. OPPENHEIM, INTERNATIONAL LAW §§ 248-59 (H. Lauterpacht 8th ed. 1955).

5. Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 27).

6. Geneva Convention on the High Seas, *opened for signature* Apr. 29, 1958, art. 6(1), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter Convention on the High Seas].

The article most relevant to the present inquiry is article 22, which provides:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> (a) That the ship is engaged in piracy; or
>
> (b) That the ship is engaged in the slave trade; or

seas."[6] This provision is re-codified in the 1982 Convention on the Law of the Sea.[7]

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Id. art. 22.

7. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 92(1), U.N. Doc. A/CONF. 62/122 [hereinafter Convention on the Law of the Sea], *reprinted in* 21 I.L.M. 1261 (1982).

Article 110 is most pertinent to this Note:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity . . ., is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction . . . ;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships of aircraft clearly marked and identifiable as being on government service.

Id. art. 110.

The 1982 Convention on the Law of the Sea is the most comprehensive multilateral agreement on the international law of the sea. The Convention is "the culmination of over 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems [and] all degrees of socio-economic development." UNITED NATIONS, THE LAW OF THE SEA, at xix, U.N. Sales No. E.83.V.5 (1983). In over three hundred articles, the Convention on Law of the Sea addresses nearly every area of the law of the sea, including the territorial sea, navigation, the contiguous zone, archipelagic states, the exclusive economic zone, the continental shelf, the high seas, islands, the environment, and deep sea-bed mining.

The exclusivity rule is not, however, an absolute rule from which no derogation is permitted. International law permits interference with non-national ships in certain discrete circumstances defined by customary or conventional law. These circumstances are, however, very much exceptional to the general rule that jealously safeguards the exclusive competence of a state to assert jurisdiction over its own shipping. Halleck warns:

> To enter into [a non-national] vessel, or to interrupt its course, by a foreign power in time of peace . . . is an act of force, and is *primâ facie*, a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations. The right of a vessel of one State to visit and search a vessel of another State on the high seas, in any case, is therefore an exception to the general rights of property, jurisdiction, equality, and independence of sovereign States.[8]

The presumption is against the legitimacy of any exception and the burden of proof in contentious cases rests with the state asserting the exception.[9]

Exceptions to the exclusivity rule of flag-state jurisdiction are either customary or conventional.[10] Customary exceptions to the exclusivity

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The Convention on the Law of the Sea is not yet in force. The Convention provides that it shall enter into force one year "after the date of deposit of the sixtieth instrument of ratification or accession." Convention on the Law of the Sea, *supra*, art. 308(1). As of 2 March 1989, only thirty-nine states had ratified the Convention. 13 LAW OF THE SEA BULLETIN 5 (United Nations Office for Ocean Affairs and the Law of the Sea, No. 89-16301, May 1989). The United States has not signed the Convention. *Id.* Nor is the United States expected to ratify the Convention in its present form, due in large part to the controversial deep sea-bed regime set out in the agreement. *See* Statement of President Ronald Reagan, *reprinted in* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 416, LAW OF THE SEA AND OCEANS POLICY 1 (July-Aug. 1982).

The 1982 Convention incorporates much of the 1958 Convention on the High Seas and makes substantial additions to that earlier agreement. The provisions of the 1982 Convention may be viewed as codifications of existing customary international law insofar as such provisions duplicate the provisions of the 1958 agreement, which is "generally declaratory of established principles of international law." Convention on the High Seas, *supra* note 6, preamble. The provisions with which this Note is primarily concerned may be found without substantive variation in both conventions and are for the most part codifications of customary international law, as demonstrated below.

8. 2 H. HALLECK, INTERNATIONAL LAW 239 (S. Baker 3d ed. 1893).

9. C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 311 (6th rev. ed. 1967).

10. Halleck observes that "to justify [interference] it must be shown that the particular case comes clearly within the exceptions to this rule [of exclusivity of flag-state jurisdiction], which have been established by the positive law of nations, or by treaty stipulations between the parties." 2 H. HALLECK, *supra* note 8, at 239.

The 1958 Convention on the High Seas maintains the distinction between customary

rule exist under the general law of nations, and every state may exercise these exceptions as a general right.[11] Conventional exceptions, conversely, are particular contractual arrangements enforceable by and against only those states party to the treaty regime establishing the exception.[12] No bright line test separates the customary from the conventional exceptions; customary rules are often codified in treaties and treaty provisions occasionally evolve into custom.[13] In time of peace,[14] no state

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and conventional exceptions to the exclusivity rule. The Convention provides, "Ships shall sail under the flag of one State only and, *save in exceptional cases expressly provided for in international treaties or in these articles*, shall be subject to its exclusive jurisdiction on the high seas." Convention on the High Seas, *supra* note 6, art. 6(1) (emphasis added); *cf.* Convention on the Law of the Sea, *supra* note 7, art. 92(1). The "in these articles" language is doubtless a reference to customary law, which the Convention purports to codify. Convention on the High Seas, *supra* note 6, preamble.

11. Gidel characterizes customary exceptions as measures of "police général," which arise

> indépendamment de conventions et résultent purement et simplement de la coutume. Elles ont également ce caractère de pouvoir être exercées par tous les navires de guerre (ou éventuellement d'autres navires publics) à l'égard de tous les navires privés, quel que soit le pavillon qu'ils battent; elles sont en outre générales en ce qu'elles ne sont pas localisées à certaines zones maritimes; elles sont générales, enfin, en ce qu'elles ne sont pas relatives à un ordre d'activité déterminé.

1 G. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 289 (1932) (reprint 1981).

12. Gidel writes that the conventional exceptions, or measures of "police spéciale," n'existent qu'en vertu de conventions: elles ne peuvent donc s'appliquer qu'entre les Etats parties à ces conventions; elles sont spéciale également en ce qu'elles se rapportent à des activités déterminées (par exemple: pêche, câbles sous-marins, etc. . . .). Il résulte de là également qu'elles sont localisées aux parages où ces activités sont susceptibles de s'exercer.

Id. at 289. Dupuy and Vignes observe:

> [A]fin de mieux assurer le respect des règles de police en haute mer, les Etats on de plus en plus tendence à limiter par le droit conventionnel l'exclusivité de l'Etat du pavillon en confiant à leurs navires de guerre respectifs la responsibilité de rechercher et de constater la violation des règles de police pour les navires qui arborent leur pavillon, la répression des infractions commises continuant à relever, dans la plupart des cas, de la compétence des tribunaux de l'Etat du pavillon. Il s'agit là des polices spéciales de la haute mer, par opposition à la police générale exercée par les navires de guerre conformément au droit coutumier.

R. DUPUY & D. VIGNES, TRAITÉ NOUVEAU DROIT DE LA MER 370-71 (1985).

13. North Sea Continental Shelf Cases (W. Ger. v. Den./W. Ger. v. Neth.), 1969 I.C.J. 4, 41-42.

14. There does exist a *jure belli* right of interference with non-national ships. Indeed, the right of visit was once thought exclusively a belligerent right. *See* J. FRASCONÀ, VISIT, SEARCH, AND SEIZURE OF THE HIGH SEAS (1938); 1 C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 764-65 (2d rev. ed. 1947). This issue, however, falls outside the ambit of this Note and will not be

may interfere with the shipping of another state unless the interfering state possesses an exceptional right clearly vested by customary law or pursuant to a particular treaty regime.[15]

B. *Interference with Non-National Ships*

When justified by a customary or conventional exception to the exclusivity rule of flag-state jurisdiction, a state may interfere with a vessel of another state on the high seas. Although the nature of this interference varies, justifiable acts of interference fall under two general rubrics: the right of *reconnaissance* and the *droit de visite* (right of visit).[16] The least obtrusive mode of interference is the right of *reconnaissance*—a simple right permitting a warship to request that the encountered ship show her flag. The *droit de visite*, on the other hand, involves physical interference with the suspect vessel. The *droit de visite* is actually composed of two distinct operations: the *droit d'enquête du pavillon* (right of investigation of flag) and the right of search. A state may exercise her *droit d'enquête du pavillon* to ascertain whether the encountered ship is entitled to the flag she flies. In the most extreme cases, a state may proceed to search the vessel.

1. The Right of *Reconnaissance*

Under the customary law of nations, the public ships of every state may approach a vessel on the high seas to ascertain her identity and nationality.[17] This right of *reconnaissance* is a perfect customary right.[18]

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addressed here. For a discussion of the belligerent exception to the exclusivity rule, see 3 R. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 255-75 (3d ed. 1885) (discussing belligerent rights in the context of the *Alabama* arbitrations).

15. Convention on the Law of the Sea, *supra* note 7, art. 110.

16. I shall refer to the various modes of interference by their French names—partially to avoid the confusion that exists among English-speaking writers as to the proper name of each mode, and partially to honor and acknowledge the French academic Gilbert Charles Gidel, whose contribution to the law of the sea proved invaluable in the preparation of this Note. I adopt M. Gidel's terminology.

17. *See* I. BROWNLIE, *supra* note 4, at 247; C. COLOMBOS, *supra* note 9, at 311; 1 G. GIDEL, *supra* note 11, at 288-90; van der Mensbrugghe, *Le pouvoir de police des etats en haute mer*, 11 REVUE BELGE DE DROIT INTERNATIONAL 56, 60-61 (1975).

18. Smith writes that the right of *reconnaissance* "is the only qualification under customary law of the general principle which forbids any interference in time of peace with ships of another nationality upon the high seas." H. SMITH, THE LAW AND CUSTOM OF THE SEA 64 (3d ed. 1959). While Smith probably overstates the point, it is true that every public ship may at all times exercise this right of *reconnaissance*. The exercise of the right, consequently, is not dependent on the existence of an exception to the exclu-

The United States Supreme Court has held:

> In respect to ships of war . . . , there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce.[19]

The right of *reconnaissance* is limited to the right to approach a ship to identify her. An approaching warship may request that an encountered vessel show her colors, which are prima facie evidence of nationality.[20] Without evidence to counter this showing of nationality, a warship may not board the encountered vessel and, *a fortiori*, may not proceed to examine her papers or perform a search.[21]

2. The *Droit de Visite*

Under extreme circumstances, the public ships of a state are competent to visit and search the vessels of another state. This *droit de visite* is not a perfect customary right and, unlike the right of *reconnaissance*, does not obtain unless provided by a customary or conventional exception to the general rule of noninterference.[22] The *droit de visite*, or right of

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sivity rule of flag-state jurisdiction. That is, a public ship may inquire the nationality of any ship she meets on the high seas regardless of whether there exists reason to suspect she has committed an international delict.

19. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 43-44 (1826).

20. 2 H. HALLECK, *supra* note 8, at 250 n.2; 1 J. ORTOLAN, RÈGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 252 (Paris 4th ed. 1864). A warship exercising her right of *reconnaissance* may not compel the vessel to show her colors. Should the vessel refuse to identify herself, the warship may merely report the uncooperative vessel to the proper authorities. R. DUPUY & D. VIGNES, *supra* note 12, at 370; 1 G. GIDEL, *supra* note 11, at 289-90; van der Mensbrugghe, *supra* note 17, at 61.

21. 1 G. GIDEL, *supra* note 11, at 290; François, *Regime of the High Seas*, U.N. Doc. A/CN.4/17, *reprinted in* [1950] 2 Y.B. I.L.C. 36, 41, U.N. Doc. A/CN.4/SER.A/1950/Add.1. *But see infra* note 27 and accompanying text.

22. The acceptance of the peacetime *droit de visite* has been gradual and controversial. The *droit de visite* was originally conceived as a belligerent right which did not apply in time of peace. *See supra* note 14. Hyde is instructive:

> The right to visit and search a foreign vessel on the high seas is regarded as pertaining to a belligerent as such, and hence a privilege which, in time of peace, no State may justly exercise. That the existence of the right depends upon that also of a state of war does not seem to be due to the belief that a State is deterred by any rule of law from defending itself in seasons of peace by the same means which it may employ when it is a belligerent. The true reason would appear to be that what may be and usually is a frequent need of a belligerent, rarely, if ever, be-

visit, is composed of two distinct operations. The first phase of the *droit de visite* is the *droit d'enquête du pavillion*, or the right of investigation of flag; the second phase is the right of search. When boarding is justified, the warship may visit the vessel to investigate her right to fly her flag. Only circumstances of extreme suspicion, however, will justify a search of the ship.[23] The *droit d'enquête* is, therefore, "part, indeed, but a very small part, of the [*droit de visite*]."[24] The 1958 Convention on the High Seas maintains this distinction:

> In the cases [in which a ship is reasonably suspected of being engaged in some proscribed activity], the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of

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comes a necessary mode of safeguarding the vessels of a State which is at peace. 1 C. HYDE, *supra* note 14, at 764 (footnotes omitted). For the views of United States and English courts, see The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826); The Antelope, 23 U.S. (10 Wheat.) 66, 119 (1825); The Nereide, 13 U.S. (9 Cranch) 388, 427 (1815); United States v. Hensel, 699 F.2d 18, 27-28 (1st Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); Le Louis, 2 Dods. 210, 245, 165 Eng. Rep. 1464, 1475-76 (1817). Several early writers express similar concern over the assertion of a peacetime *droit de visite*. *See, e.g.*, 3 L. HAUTEFEUILLE, DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES EN TEMPS DE GUERRE MARITIME 93-108 (Paris 2d ed. 1858); 1 J. ORTOLAN, *supra* note 20, at 242, 258-62; *see also* Letter of Mr. John Adams, Secretary of State, to Mr. Stratford Canning (Aug. 15, 1821), *reprinted in* 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 919-20 (1906) [hereinafter MOORE'S DIGEST].

Eventually, states accepted a peacetime right of visit and search as a matter of custom or treaty arrangement. Much remains, however, of the historical distaste for this right, which is regarded today as a necessary evil; while states indeed acknowledge the right, they do so grudgingly. Dupuy and Vignes warn, "Véritable atteinte au principe de l'exclusivité de l'Etat du pavillon, les Etats ont été de tout temps hostile à la reconnaissance du droit de visite, même dans un cadre conventionnel." R. DUPUY & D. VIGNES, *supra* note 12, at 372. Halleck similarly observes that the assertion of a peacetime *droit de visite* "upon the high seas is now universally regarded as a belligerent right which cannot be exercised in time of peace, except when it has been conceded by treaty or where there is suspicion of piracy or crime." 2 H. HALLECK, *supra* note 8, at 240. As late as 1932, Gidel wrote that "le droit de 'visite' en temps de paix n'existe pas, sauf exceptions strictement limitées et résultant d'accords conventionnels." 1 G. GIDEL, *supra* note 11, at 292.

23. *See infra* note 26 and accompanying text.

24. 3 R. PHILLIMORE, *supra* note 14, at 523. Ortolan further distinguishes the two phases of the *droit de visite*:

> Independent of their goal, the two rights still differ considerably in the process or means by which they are exercised.
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> The expression *droit d'enquête du pavillon* indicates a process more gentle, of less direct means, the preliminary option for inquiring nationality, that is to say for asking exhibition of the relevant signs.

1 J. ORTOLAN, *supra* note 20, at 234 (translation).

> an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship . . . .[25]

A warship may employ the *droit d'enquête du pavillon*—the first element of the comprehensive *droit de visite*—to ascertain or verify the true nationality of a vessel she encounters upon the high seas. She may exercise her *droit d'enquête* against only those vessels she reasonably suspects of having engaged in some proscribed activity which, under customary or conventional law, would permit the warship to proceed against the suspect vessel.[26] Furthermore, the *droit d'enquête du pavillon* may attach whenever the warship possesses a "reasonable ground for suspicion that the character of the ship is feigned."[27] Pursuant to this

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25. Convention on the High Seas, *supra* note 6, art. 22(2); *see* Convention on the Law of the Sea, *supra* note 7, art. 110(2).

26. The High Seas Convention and the later Convention on the Law of the Sea provide that before a warship visits a foreign merchantman on the high seas, there must exist "reasonable ground for suspecting that" she has committed some proscribed activity. Convention on the High Seas, *supra* note 6, art. 22(1); Convention on the Law of the Sea, *supra* note 7, art. 110(1). That a state must have "reasonable ground" to suspect an infringement prevents the state from visiting a ship on the barest suspicion that she has committed a delict. But the reasonable ground standard does not limit the availability of the *droit de visite* to circumstances in which the warship has actual knowledge of an infringement. The appropriate standard, therefore, lies somewhere between mere suspicion and actual knowledge. Because the propriety of any particular exercise of the *droit de visite* relies on the factual milieu out of which the visitation arose, it is probably not possible—nor indeed prudent—to be more precise than this. *See* United States v. Williams, 617 F.2d 1063, 1076-77 (5th Cir. 1980); United States v. Crews, 605 F. Supp. 730 (S.D. Fla. 1985), *aff'd sub nom.* United States v. McGill, 800 F.2d 265 (11th Cir. 1986).

27. C. COLOMBOS, *supra* note 9, at 312. There is ample support for this assertion. Oppenheim observes:

> It is a universally recognised customary rule of International Law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows a flag, she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag.

1 L. OPPENHEIM, *supra* note 4, § 266(2) (footnote omitted); *see also* I. BROWNLIE, *supra* note 4, at 248-49; 1 J. ORTOLAN, *supra* note 20, at 252-55. Accordingly, a warship may visit a vessel of dubious identity regardless of whether she is suspected of piracy, slave trading, or any other customary or conventional exception to the exclusivity rule—dubious identity is sufficient cause. Dupuis writes, "L'enquête du pavillon, si elle est motivée à la fois par des sérieux motifs de douter de la nationalité du navire rencontré et par l'intrérêt de la sécurité de la navigation, n'est pas une infraction au droit des gens; elles n'est pas une offense envers l'Etat dont le navire a droit de porter le pavillon."

right, the investigating warship seeks to

> ascertain whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in cir-

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Dupuis, *Liberté des voies de communications relations internationales*, 2 RECUEIL DES COURS 125, 145 (1924).

One can imagine how the exercise of the normally benign right of simple *reconnaissance* could easily ripen into a proper visitation and search. For example, a warship approaches a ship on the high seas and requests that she identify herself. The ship responds in a suspicious manner, taking evasive action or refusing to fly a flag. It is true that a ship on the high seas is not, *in stricto jure*, obliged to await visitation nor even to identify herself. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826); 2 H. HALLECK, *supra* note 8, at 242; 2 MOORE'S DIGEST, *supra* note 22, at 137; 2 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 647; 1 J. ORTOLAN, *supra* note 20, at 250-52. Such behavior, however, is often sufficiently suspicious per se to justify boarding. Halleck reminds us that

> the United States Government, without distinctly recognising the right of a vessel of war to compel a merchant vessel to display [her] colours, declared that the simple fact of refusing to exhibit colours was so high a ground of suspicion that it might seem to sanction boarding and further inquiry, and that even if such inquiry were not justified by the result the Government of the United States would not demand redress for an act of visit executed under such circumstances.

2 H. HALLECK, *supra* note 8, at 251; *see also* C. COLOMBOS, *supra* note 9, at 312 ("It may happen that the vessel which it is desired to approach may prove obstinate and refuse to hoist her flag. She at once becomes suspect.").

A recent case illuminates this possibility. In *United States v. Alvarez-Mena*, a United States Coast Guard cutter approached a vessel on the high seas and requested that she identify herself. The vessel flew no flag, had no stern markings indicating a home port, and engaged in evasive maneuvers upon the cutter's approach. When the cutter requested that she show her colors, the vessel responded by flying the Honduran flag—upside down. The United States Court of Appeals for the Fifth Circuit held the cutter possessed a reasonable suspicion sufficient to justify the seizure of the vessel. 765 F.2d 1259 (5th Cir. 1985); *see also* United States v. Hensel, 699 F.2d 18, 28 (1st Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); Molvan v. Attorney-General for Palestine, 1948 App. Cas. 351 (P.C.) (vessel seized after hoisting two flags, one of which signified no recognized state). Hence, while a merchantman is not strictly obligated to show colors to an approaching warship, nor indeed to accomodate the warship in any way, failure to do so may render the merchantman suspicious and therefore amenable to seizure. Smith, however, warns:

> Provided that the merchant vessel responds by showing her flag the captain of the warship is not justified in boarding her or taking any further action, unless there is reasonable ground for suspecting that she is engaged in piracy or some other improper activity. . . . If the vessel approached shows a foreign flag even suspicious conduct will not justify active interference except in those cases, such as slave trading, where it is authorised by treaty. Otherwise the captain should merely report the incident to superior authority so that further action, if deemed necessary, may be taken through diplomatic channels.

H. SMITH, *supra* note 18, at 64-65.

> cumstances which render her liable to the suspicion, first, that she is not entitled to the protection of the flag; and, secondly, that if not entitled to it, she is [by treaty] subject to the supervision and search of . . . cruisers.[28]

It follows that "a vessel may, under extraordinary circumstances of grave suspicion, be *visited* in time of peace upon the *high seas*; for how otherwise could it be ascertained whether or no she carried the proper papers on board? Or for what purpose, if she may not be visited, is she to carry them?"[29]

A suspicious vessel may be brought to on the high seas by the public vessels[30] of any state authorized to proceed against the suspect vessel under customary or conventional law. To effect a stoppage, the warship will hail the suspect vessel or, if this is impossible or ineffectual, fire across her bow.[31] Should the suspect vessel prove obstinate, the warship may use reasonable force.[32] The actual verification of flag takes place

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28. Letter of Mr. Daniel Webster, Secretary of State, to Mr. Everett (Mar. 28, 1843), *reprinted in* 3 F. WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 137 (2d ed. 1887) [hereinafter WHARTON'S DIGEST].

29. 3 R. PHILLIMORE, *supra* note 14, at 523; *see also* H. SMITH, *supra* note 18, at 64.

30. Aircraft may undertake visitation under the 1982 Convention on the Law of the Sea. Convention on the Law of the Sea, *supra* note 7, art. 110(4). The public ships of a foreign state, so long as they maintain that character, may not be stopped even when reasonably suspected of having engaged in some proscribed activity. *Id.* arts. 95 (providing for immunity of warships on the high seas), 96 (providing for immunity of ships used only on government noncommercial service); Convention on the High Seas, *supra* note 6, arts. 8(1), 9.

31. Ortolan describes the procedure:

> [A] merchantman which encounters a warship on the sea quickly hoists the flag. However, *in stricto jure*, nothing obliges her to show her flag first. If the warship shows her colors, it is on her part a warning given to the other that she make known, by showing her own, the nation to whom she belongs. This warning is supported when necessary by a blank cannon shot and, in case of obstinate refusal, by another cannon shot without a ball.

1 J. ORTOLAN, *supra* note 20, at 252-53 (translation). Oppenheim expresses himself along similar lines, although he points out that the warship may resort to force if notice is not taken of the "informing gun." 1 L. OPPENHEIM, *supra* note 4, §§ 267-68; *see also* R. DUPUY & D. VIGNES, *supra* note 12, at 371.

32. The right to use force against a vessel refusing to submit to boarding is coextensive with the *droit de visite*. That is, the "right to stop a foreign vessel and visit her must carry the right to use the requisite force, if the exercise of the right is resisted. If not, it is not a right in any sense worth disputing." H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 180 n.89 (R. Dana 8th ed. 1866) (G. Wilson rev. ed. 1936) (Dana's note). Colombos warns, however, that "the use of force in time of peace must not be abused and is only permitted as a last extremity. Even in such a case, the forcible steps taken must not exceed the immediate necessity, as otherwise a naval commander may involve by his

aboard the suspect vessel.[33] The warship will send a boarding party under the command of an officer to the suspect vessel.[34] Once aboard, the boarding party will examine the papers and documentation of the suspect vessel. If the ship's papers are in order and the exercise of the *droit d'enquête du pavillon* has discharged the original suspicions of the warship, the warship will allow the merchantman to go on her way.[35]

If the exercise of the *droit d'enquête du pavillon* fails to discharge the suspicion of the warship that the merchantman is engaged in some proscribed activity, the warship may proceed to the second phase of the *droit de visite*: the right of search.[36] The object of the search is the dis-

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action the responsibility of his State." C. COLOMBOS, *supra* note 9, at 313.

The use of force must be tempered by reason in light of the circumstances. McDougal and Burke write:

> The primary determinants of reasonableness in assessing the lawfulness of the measures taken would appear to relate both to the apparent grounds for taking any enforcement action, i.e., the reasons for the suspicions of the vessel concerned, and to the possibilities in alternative practicable methods for enforcement causing less interference with navigation. Thus, responsibility ought to be imposed upon the acting state if the bases for enforcement action do not appear on review to have been sufficiently adequate or if other less burdensome enforcement techniques were available and could have been practically utilized.

M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 885-86 (1962).

33. Gidel, however, writes that this "examination of the ships papers may be made on the investigating ship by sending an officer to the ship whose nationality it is verifying, or, on the contrary, in receiving on board an officer furnished with the papers of the ship investigated." 1 G. GIDEL, *supra* note 11, at 290 (translation); *see also* 1 L. OPPENHEIM, *supra* note 4, § 268 ("After the vessel has been brought to, either an officer is sent on board for the purpose of inspecting her papers, or her master is ordered to bring his ship's papers for inspection on board the man-of-war."). With respect, it does not seem prudent to require an officer of the suspect ship to carry the vessel's papers to the warship for two reasons: first, the papers of a vessel should never be exposed to chance of loss; and second, suspicion may remain after the papers are examined and it may be necessary to proceed to the merchantman in order to search her. In all cases, then, a warship exercising her *droit de visite* should do so aboard the suspect vessel. *See* Convention on the High Seas, *supra* note 6, art. 22(2); Convention on the Law of the Sea, *supra* note 7, art. 110(2).

34. Convention on the High Seas, *supra* note 6, art. 22(2); Convention on the Law of the Sea, *supra* note 7, art. 110(2).

35. 1 L. OPPENHEIM, *supra* note 4, § 268.

36. Convention on the High Seas, *supra* note 6, art. 22(2); Convention on the Law of the Sea, *supra* note 7, art. 110(2) ("If suspicion remains after the documents have been checked, [the warship] may proceed to a further examination on board the ship . . . ."). As drafted, the Convention on the Law of the Sea authorizes the warship to search the suspect vessel if the original suspicion has not dissipated upon the exercise of her *droit d'enquête*. That is, no further or greater suspicion must arise for the warship to proceed to a search. It seems evident that the warship may search if the original

covery of evidence that would bear out the suspicions of the warship. The right of search is, consequently, far more intrusive than the *droit d'enquête*. Daniel Webster observes that the right of search

> implies not only a right to inquire into the national character, but to detain the vessel, to stop the progress of the voyage, to examine papers, to decide on their regularity and authenticity, and to make inquisition on board . . . into the business which the vessel is engaged in. In other words, it describes the entire right of belligerent visitation and search.[37]

The search must be exercised with due care. Oppenheim writes:

> Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being obliged to render any assistance whatever, except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searching party must carefully replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course.[38]

Upon the consummation of the search, either the suspicions of the warship are borne out, or the vessel is found innocent. If the search yields sufficient evidence that the vessel has indeed engaged in proscribed activity, the warship may arrest the vessel or otherwise bring the vessel to account.[39] If, however, the search proves fruitless, the flag-state of the warship may be liable for any loss or damages sustained by the vessel as a result of the visit and search.[40]

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suspicion has dissipated and a new suspicion has arisen.

37. Letter of Mr. Daniel Webster, Secretary of State, to Mr. Everett (Mar. 28, 1843), *reprinted in* 3 WHARTON'S DIGEST, *supra* note 28, at 136.

38. 1 L. OPPENHEIM, *supra* note 4, § 269.

39. Oppenheim writes:

> Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. This officer is responsible for the vessel, and for her cargo, which must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest.

1 L. OPPENHEIM, *supra* note 2, § 270. The 1982 Convention on the Law of the Sea is silent with respect to the arrest of vessels found to have engaged in a proscribed activity, with the exception of "radio pirates." Convention on the Law of the Sea, *supra* note 7, art. 109(4); *see infra* part VII. The arresting state is obliged promptly to release the vessel and her crew. Convention on the Law of the Sea, *supra* note 7, art. 292.

40. Liability for an unjustified visit and search is well-established. *See* 1 G. GIDEL, *supra* note 11, at 298 ("Le navire saisissant agit à ses risques et périls."); 3 H. LAUTERPACHT, INTERNATIONAL LAW 173 (E. Lauterpacht ed. 1977) ("The governing rule,

III. THE PIRACY EXCEPTION

A. *Pirates Subject to Universal Jurisdiction*

Piracy is an international crime. From ancient times, those who have undertaken depredations upon the high seas have been subject to the universal condemnation of states. Anyone engaged in piracy is deemed *hostis humani generis*—an enemy of all humanity.[41]

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with regard to verification and search by warships in time of peace, is still that any interference by a man-of-war with a vessel flying the flag of a foreign country takes place at the risk and subject to the strict accountability of the State to which the warship in question belongs."); 1 L. OPPENHEIM, *supra* note 4, § 266(2) ("[T]he home State is responsible in damages in case a man-of-war stops and visits a foreign merchantman without sufficient ground for suspicion."); 3 R. PHILLIMORE, *supra* note 14, at 525 ("[A]ll proceeding beyond the exchange of hailing and signals, must be taken at the risk of the man-of-war who visits.") (footnote omitted).

Liability will attach if the suspicions of the warship prove unjustified, provided the suspect vessel did nothing to raise the suspicion of the warship. The 1958 Convention on the High Seas provides that "[i]f the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained." Convention on the High Seas, *supra* note 6, art. 22(3); *see* Convention on the Law of the Sea, *supra* note 7, art. 110(3). Liability, therefore, does not flow merely from visits that are fruitless, but from visits that are truly unjustified.

This notion of fault liability apparently followed from a suggestion of Yugoslavia to the International Law Commission that "search of merchant ships by warships should not be discouraged by too strict sanctions. It is necessary therefore to consider whether a provision should be inserted freeing the warship from *damnam emergens*, if *dolus* or *culpa lata* cannot be charged to the warship." *Regime of the High Seas and Regime of the Territorial Sea, Comments by Governments*, U.N. Doc. A/CN.4/99/Add. 1, *reprinted in* [1956] 2 Y.B. I.L.C. 1, 97, U.N. Doc. A/CN.4/SER.A/1956/Add.11 (comment of Yugoslavia). The inclusion of the above-quoted provision in the 1958 Convention on the High Seas was likely, at that time, a progressive development. Prior to 1958, state practice and opinion supported strict liability for unjustified searches. *See, e.g.*, The Wanderer (Gr. Brit. v. U.S.), 6 R.I.A.A. 68, 69 (1921); The Jessie (Gr. Brit. v. U.S.), 6 R.I.A.A. 57, 57 (1921) (United States liable for wrongful search "notwithstanding the good faith of the naval authorities"); *see also* 3 H. LAUTERPACHT, *supra*, at 173. *But see* The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826) (warship not liable for boarding a private vessel after mistaking her for a pirate).

Curiously, a visit unjustified *ab initio* may be justified after the fact if sufficient evidence of the vessel's guilt is uncovered upon visitation and search. Gidel writes, "S'il prouve le délit commis par l'autre navire, son attitude se trouve légitimée." 1 G. GIDEL, *supra* note 11, at 290; *see also Marianna Flora*, 24 U.S. (11 Wheat.) at 42.

41. That piracy is an international crime may be taken as a general axiom of international law. There exists universal, unequivocal support for this proposition. As early as 1688, Sir Leoline Jenkins observed, "All pirates and sea rovers are outlawed, as I may

Pirates, being the enemies of all states, enjoy the protection of no state. Judge Moore, dissenting in the *Lotus* case, explains:

> [I]n the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come . . . .
>
> Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.[42]

Hence, any ship engaged in acts of piracy is, for jurisdictional purposes, "stateless." The flag-state of a pirate vessel does not possess exclusive jurisdiction over her; rather, such a vessel is subject to universal jurisdiction.[43]

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say, by the law of nations . . . ." 1 W. WYNNE, THE LIFE OF SIR LEOLINE JENKINS 86 (1724), *quoted in* 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 967 n.234. Later writers echo Sir Leoline's words. *See, e.g.*, J. BRIERLY, *supra* note 4, at 311; C. COLOMBOS, *supra* note 9, at 443-44 ("The act of piracy, being one against the whole body of civilised States, is often described as an 'international crime,' whilst the pirate himself is generally referred to as *hostis humani generis*, the enemy of the human race."); 1 C. HYDE, *supra* note 14, at 768; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 967; 1 L. OPPENHEIM, *supra* note 4, § 272; H. SMITH, *supra* note 18, at 65 ("By the ancient custom of the sea all honest men are entitled to treat the pirate as an outlaw, an Ishmaelite, and a general enemy of mankind."); H. WHEATON, *supra* note 32, at 162.

Lest the reader think this discussion somewhat anachronistic, I hasten to point out that piracy remains to this day an active and serious impediment to the international regime of the high seas. *See generally* Ellen, *Piracy*, in VIOLENCE AT SEA 225 (B. Parritt ed. 1986); Kime & Sheehan, *Violence at Sea: Scope of the Problem*, in THE LAW OF THE SEA: WHAT LIES AHEAD? 419 (T. Clingan ed. 1988) [hereinafter WHAT LIES AHEAD?].

42. Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 70 (Moore, J., dissenting); *see* United States v. Smith, 18 U.S. (5 Wheat.) 153, 162-63 (1820); Le Louis, 2 Dods. 210, 244, 164 Eng. Rep. 1464, 1475 (1817) ("With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war.").

43. This is not to say that a pirate vessel is stripped of her flag. Rather, the pirate vessel merely loses the protection of that flag. The 1982 Convention on the Law of the Sea provides that a "ship . . . may retain its nationality although it has become a pirate ship . . . . The retention or loss of nationality is determined by the law of the State from which such nationality was derived." Convention on the Law of the Sea, *supra* note 7, art. 104; *see* Convention on the High Seas, *supra* note 6, art. 18; *see also* 1 L. OPPENHEIM, *supra* note 4, § 272; 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 650

A ship engaged in piracy is ipso facto under the protection of no state, rendering all states competent to stop, search, and arrest a suspected pirate vessel.[44] This exception to the exclusivity rule of flag-state jurisdiction is perhaps the most firmly-rooted of all exceptions.[45] Indeed, not merely are states entitled to arrest pirate vessels encountered upon the high seas, they are obliged to do so.[46] The 1982 Convention on the Law of the Sea codifies the piracy exception and provides that any state that encounters a pirate vessel on the high seas is competent to board,[47]

(1965) [hereinafter WHITEMAN'S DIGEST]; van Zwanenberg, *Interference with Ships on the High Seas*, 10 I.C.L.Q. 785, 805 (1961). *But see* 1 J. WESTLAKE, INTERNATIONAL LAW 182 (2d ed. 1910) ("There is . . . no state flag in the case [of piracy]. If the piratical ship was ever entitled to carry one, her title to do so has been withdrawn.").

44. Wheaton observes, "Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals." H. WHEATON, *supra* note 32, at 162 (footnote omitted).

Dana, in a footnote to Wheaton's comment, notes, "It is true, that a pirate *jure gentium* can be seized and tried by any nation, irrespective of his national character, or of that of the vessel on board which, against which, or from which, the act was done. The reason of this must be, that the act is one over which all nations have equal jurisdiction." *Id.* at 163 n.83.

Oppenheim is in accord, writing:

> Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a "*hostis humani generis.*" According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called "international crime"; the pirate is considered the enemy of every State, and can be brought to justice anywhere.

1 L. OPPENHEIM, *supra* note 4, § 272 (footnote omitted); *see also* J. BRIERLY, *supra* note 4, at 311 ("Under an ancient rule of maritime law, pirates are offenders against the law of nations, *hostes humani generis*, who may be arrested on the high seas by the warships of any state and brought into port for trial together with their ship."); D. GREIG, INTERNATIONAL LAW 333 (2d ed. 1976); 1 C. HYDE, *supra* note 14, at 768; M. MCDOUGAL & W. BURKE, *supra* note 32, at 876; 2 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 658; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 967, 977; 1 R. PHILLIMORE, *supra* note 14, at 488; H. SMITH, *supra* note 18, at 68; 1 J. WESTLAKE, *supra* note 43, at 182.

45. M. SHAW, INTERNATIONAL LAW 320 (2d ed. 1986).

46. The Convention on the Law of the Sea provides, "All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." Convention on the Law of the Sea, *supra* note 7, art. 100; *see* Convention on the High Seas, *supra* note 6, art. 14.

47. The relevant article provides in pertinent part, "[A] warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasona-

search,[48] and arrest her.[49]

B. *Piracy* Jure Gentium *Defined*

The right to proceed against a pirate vessel and those aboard her exists only in the case of piracy *jure gentium*—piracy as defined by the law of nations. While the municipal law of a state may purport to define piracy, such parochial legislation is ineffective beyond the borders of the state; on the high seas, a state may proceed against a vessel on the grounds that she is a pirate under its law only to the extent that its law duplicates the law of nations.[50]

Although several writers acknowledge that it is no simple matter to define piracy *jure gentium*,[51] the 1982 Convention on the Law of the Sea nevertheless attempts to put into black letter the following definition of piracy *jure gentium* in article 101:

> Piracy consists of any of the following acts:
> (a) any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . , and directed:
> (i) on the high seas, against another ship . . . , or against persons or property on board such ship . . . ;
> (ii) against a ship . . . , persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship . . . with knowledge of facts making it a pirate ship . . . ;

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ble ground for suspecting that . . . the ship is engaged in piracy . . . ." Convention on the Law of the Sea, *supra* note 7, art. 110(1)(a); *see* Convention on the High Seas, *supra* note 6, art. 22(1)(a).

48. Convention on the Law of the Sea, *supra* note 7, art. 110(2); *see* Convention on the High Seas, *supra* note 6, art. 22(2).

49. The pertinent provision stipulates:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . , or a ship . . . taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships . . . , subject to the rights of third parties acting in good faith.

Convention on the Law of the Sea, *supra* note 7, art. 105; *see* Convention on the High Seas, *supra* note 6, art. 19. This article preserves the ancient maxim *pirata non mutat dominium*—piracy does not change ownership. *See* 1 L. OPPENHEIM, *supra* note 4, § 279.

50. 1 L. OPPENHEIM, *supra* note 4, § 280.

51. *See, e.g.*, J. BRIERLY, *supra* note 4, at 312; I. BROWNLIE, *supra* note 4, at 244; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 966.

(c) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).[52]

The Convention subsequently defines a "pirate ship" as a ship "intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship . . . has been used to commit any such act, so long as it remains under the control of the persons guilty of that act."[53]

Several writers express concern that article 101 inadequately captures the customary definition of piracy *jure gentium*.[54] Article 101 restates, without substantive modification, article 15 of the 1958 Convention on the High Seas—a provision intended to be "generally declaratory of established principles of international law."[55] Discussion of the draft of article 15 evinced uncertainty regarding that provision's accuracy.[56] Still, any inquiry into the nature of piracy *jure gentium* must begin with these two provisions, the constituent elements of which are examined below.

1. Acts of Piracy

The 1982 Convention on the Law of the Sea refers to piratical acts as "any illegal acts of violence or detention, or any act of depredation."[57] This provision rejects the traditional notion that acts of piracy are limited to those acts committed with an *animus furandi*—an intent to plunder.[58] The Convention instead sets out a definition of piracy *jure gen-*

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52. Convention on the Law of the Sea, *supra* note 7, art. 101; *see* Convention on the High Seas, *supra* note 6, art. 15.

53. Convention on the Law of the Sea, *supra* note 7, art. 103; *see* Convention on the High Seas, *supra* note 6, art. 17.

54. O'Connell, for example, writes in reference to the corresponding provision of the earlier Convention on the High Seas: "Because of its elliptical nature, Article 15 is one of the least successful essays in codification of the Law of the Sea, and the question is open whether it is comprehensive so as to preclude reliance upon customary law, where this may differ, or has superseded customary law." 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 970.

55. Convention on the High Seas, *supra* note 6, preamble; *see Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9) at 2, 28, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. I.L.C. 253, 260-61, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereinafter 1956 Report of the I.L.C.].

56. *See* C. COLOMBOS, *supra* note 9, at 448; D. GREIG, *supra* note 44, at 329 ("The discussions on the various drafts drawn up by the International Law Commission concerning the law of the sea showed wide disagreement on the nature of piratical acts."). For a helpful survey of the debates of the I.L.C. on the definition of piracy, see B. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 104-23 (1980).

57. Convention on the Law of the Sea, *supra* note 7, art. 101(a).

58. Previously, an intent to plunder was thought necessary to the commission of

tium that is broad enough to encompass any illegal acts of violence, detention, or depredation and not merely those delicts committed with an intent to plunder.[59] The view that piracy need not necessarily be attended by an *animus furandi* has historical support. Dana observed in the last century:

> It has sometimes been said, that the act [of piracy] must be done *lucri causâ*, and the English common-law definition of *animus furandi* has been treated as a requisite; but the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons, or classes of persons, or by a particular national authority.[60]

Acts of piracy *jure gentium* therefore consist of "violence upon the high seas . . . that may or may not involve *animus furandi*."[61]

By refusing to limit the definition of piracy to mere acts of plunder, the Convention implicitly acknowledges that no particular course of conduct is piratical. Rather, the Convention describes piracy as "essentially a continuous crime, and overt acts of violence are merely evidence of the piratical character."[62] Piracy is a state of being; piratical acts are manifestations of that unlawful condition. Accordingly, piracy is distinguishable from criminal acts committed on the high seas. Pirates commit crimi-

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piracy. Justice Story, writing in 1820, observed that "all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy." United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); *see also* 1 L. OPPENHEIM, *supra* note 4, § 272.

59. In adopting this broad definition, the Convention on the Law of the Sea rejects article 3 of the Harvard Research Draft Convention on Piracy, which defines piracy as "[a]ny act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property." Harvard Research Draft Convention on Piracy, art. 3, *reprinted in* 26 A.J.I.L. 739, 768-69 (Supp. 1932). The I.L.C. adopted this provision verbatim. François, *Regime of the High Seas*, U.N. Doc. A/CN.4/79 (1954), *reprinted in* [1954] 2 Y.B. I.L.C. 7, 15-16, U.N. Doc. A/CN.4/SER.A/Add.1. The English Privy Council, in 1934, supported this broader definition, observing that "[a] careful examination of the subject [of piracy] shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions." *In re* Piracy Jure Gentium, 1934 App. Cas. 586, 600 (P.C.).

60. H. WHEATON, *supra* note 32, at 163 n.83 (Dana's note); *see* 1 C. HYDE, *supra* note 14, at 772 ("As piracy does not necessarily involve the taking of property, the absence of an intent to steal is not necessarily decisive of the character of what takes place.").

61. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 969.

62. H. SMITH, *supra* note 18, at 66.

nal acts at sea, but the commission of a crime at sea does not make one a pirate; criminal acts are offenses against a particular state, whereas piracy is an offense against the law of nations.[63]

In sum, piratical acts are acts of violence, detention, or deprivation that evince a general lawlessness, that affect the interests of all law-abiding states, and that render one who commits such acts—properly speaking—the common enemy of all mankind.

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63. O'Connell asks rhetorically:

> What is the common element which links the several listed acts of violence, detention or depredation together in the one category? Put negatively by John Marshall in a Speech in the House of Representatives piracy is
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> > any act which denotes this universal hostility . . . . Not only an actual robbery therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offense against all and every nation, and is therefore alike punishable by all. But an offense which in its nature affects only a particular nation is only punishable by that nation.
>
> This test, that the offence in its nature affects more than a particular nation, enables one to propose that violence not amounting to theft or involving the intention to commit theft may be piracy, and that something more than a single murder on a national ship is necessary to constitute violence in this sense.

2 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 659 (footnotes omitted).

Smith agrees with O'Connell that acts which do not affect more than one state are incapable of classification as piracy *jure gentium*: "Robbery, kidnapping, and murder constitute the normal evidence of piratical character, but these crimes do not by themselves become acts of piracy merely because they are committed at sea. In all ordinary cases a crime committed on board ship is nothing more than an offence against the law of the flag State." H. SMITH, *supra* note 18, at 67.

Actions that do not affect states other than the flag-state, except in the most attenuated fashion, cannot therefore be deemed piratical. The reasoning behind this proposition is straightforward. Recall that a pirate is the universal enemy of all humanity and, for this reason, is subject to the extreme sanction of the universal jurisdiction of states. *See supra* note 41 and accompanying text. One who offends the laws of a single state is not properly a "universal enemy of all mankind." The imperative that this label connotes simply does not arise vis-à-vis one who, for example, commits a single murder aboard a ship on the high seas. The law of the flag-state is sufficient to deal with the shipboard murderer. The conclusion is very different, however, in the case of one who engages in lawless behavior that threatens the shipping of several states and menaces international commerce. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820) (murder is an offense against the laws of the state, whereas piracy is an offense against mankind). The offense must be against the international order itself, not merely against the laws of a single state, for the offense to be deemed piratical *jure gentium*.

2. Private Ends

Under the article 101 definition of piracy, the illegal acts of violence, detention, or depredation must be "committed for private ends."[64] This "private ends" requirement renders non-piractical acts committed in furtherance of some putative non-private—that is to say, public or political—purpose.[65] This definition, consequently, excludes acts of violence, detention, or depredation committed by insurgents who take to the high seas in connection with their rebellion. Such an exclusion squares with existing custom; states are historically reluctant to deem insurgents pirates—provided the insurgents reasonably tailor their activities to their political objective.[66] Depredations unrelated to an insurgency may be de-

64. Convention on the Law of the Sea, *supra* note 7, art. 101(a).

65. In favor of the proposition that insurgents may not be deemed pirates except insofar as their activities are unconnected with their rebellion, see J. BRIERLY, *supra* note 4, at 313; I. BROWNLIE *supra* note 4, at 246; 1 L. OPPENHEIM, *supra* note 4, § 273 ("It must be emphasised that the motive and the purpose of such [insurgent] acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required.").

66. In the early English case of the *Magellan Pirates*, Dr. Lushington held:

> It is true that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But however this may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.

The Magellan Pirates, 1 Sp. Ecc. & Ad. 81, 83, 164 Eng. Rep. 47, 48 (1853).

State practice has followed Dr. Lushington. In 1887, for example, Great Britain and Peru agreed to treat as a pirate the insurgent vessel *Huascar*, which had stopped a British vessel on the high seas, taking coal and two hostages. That same year, Cuban insurgents commandeered the Spanish vessel *Montezuma* in furtherance of the Cuban revolt against Spain. Brazil refused to treat the insurgents as pirates because the *Montezuma* had restricted its scope of operation to Spanish targets. *See* C. COLOMBOS, *supra* note 9, at 451-52; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 975-76; 1 L. OPPENHEIM, *supra* note 4, § 273; 1 J. WESTLAKE, *supra* note 43, at 184-85; van Zwanenberg, *supra* note 43, at 809.

Somewhat anomalous, however, is the early United States case of *The Ambrose Light*, in which the United States District Court for the Southern District of New York held, without qualification, that "recognition by at least some established government of a 'state of war,' or of the belligerent rights of insurgents, is necessary to prevent their cruisers from being held legally piratical by the courts of other nations injuriously affected." The Ambrose Light, 25 F. 408, 428 (S.D.N.Y. 1885). *The Ambrose Light* is, for

fined properly as private *ergo* piratical.[67] Even if insurgents may not be

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all intents and purposes, no longer good precedent in United States courtrooms insofar as the United States has admitted that "[t]he question whether a vessel in the hands of insurgents is piratical depends upon its actions, that is, whether it confines itself to depredations against its own country or commits depredations against vessels of other countries." Statement of the Solicitor for the United States Department of State (Aug. 16, 1929), *reprinted in* 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 697 (1941) [hereinafter HACKWORTH'S DIGEST]. On *The Ambrose Light*, see C. COLOMBOS, *supra* note 9, at 451-52; D. GREIG, *supra* note 44, at 330; 1 C. HYDE, *supra* note 14, at 774; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 976; 1 J. WESTLAKE, *supra* note 43, at 184; Green, *The* Santa Maria: *Rebels or Pirates*, 37 BRIT. Y.B. INT'L L. 496, 501-03 (1961); van Zwanenberg, *supra* note 43, at 810-11.

More recent incidents are likewise aligned with Dr. Lushington's proposition that insurgents shall not be deemed pirates so long as they reasonably comport their activities to the furtherance of their revolt. In 1961, the Portuguese liner *Santa Maria* was seized by a group of passengers opposed to the Governments of Portugal and Spain. This group killed one crew member and held hostage 560 passengers for eleven days. The Portuguese Government obtained the assistance of the United States in bringing the takers of the *Santa Maria* to justice.

Initially, both the United States and Portugal expressed the view that the *Santa Maria* ought to be treated as a pirate. The United States, however, softened its position once the *Santa Maria* was safely returned. McDougal and Burke observe that "[t]he principle significance of these events in clarification of the law of piracy lies, clearly, in the recognition by the interested states . . . that this seizure by violence was not, because of the political objectives of the actors, a case of piracy." M. MCDOUGAL & W. BURKE, *supra* note 32, at 822. On the *Santa Maria* incident, see J. BRIERLY, *supra* note 4, at 312-13; C. COLOMBOS, *supra* note 9, at 445-46; D. GREIG, *supra* note 44, at 331-32; Green, *supra*; van Zwanenberg, *supra* note 43, at 798-801.

A similar incident arose in 1985 when four members of the Palestinian Liberation Front seized the Italian liner *Achille Lauro*. The four Palestinians, who boarded as passengers, sought the release of fifty of their compatriots held in Israel. Over four hundred passengers and crew were held hostage for three days. One passenger was killed. Egypt eventually agreed to provide the Palestinians with safe passage and the liner was returned.

However one may wish to classify their actions, the takers of the *Achille Lauro* were not acting to secure some private end. Accordingly, the taking of the *Achille Lauro* would not likely fall within the article 101 definition of piracy. In any event, the *Achille Lauro* incident—like the *Santa Maria* incident—involved only one ship, making the action non-piratical by operation of the so-called two-ship rule, which is discussed below. *See infra* part III, section B.4. On the *Achille Lauro* incident, see Gooding, *Fighting Terrorism in the 1980's: The Interception of the* Achille Lauro *Hijackers*, 12 YALE J. INT'L L. 158 (1987); McGinley, *The* Achille Lauro *Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985); Note, *Towards a New Definition of Piracy: The* Achille Lauro *Incident*, 26 VA. J. INT'L L. 723 (1986).

67. Brierly observes that "[a]lthough it has long been the practice of outside states not to treat insurgents as pirates provided that they do not interfere with foreign vessels, that has not always been the case when they have operated against foreign vessels." J. BRIERLY, *supra* note 4, at 312. Brownlie, citing the 1928 Convention on the Rights and

classified as pirates, state law may hold those who revolt against the state accountable for their actions.[68]

3. Private Ship

Piracy *jure gentium*, as defined by article 101 of the 1982 Convention on the Law of the Sea, consists of unlawful acts committed "by the crew or the passengers of a private ship."[69] This definition, taken literally, leads to the conclusion that the public vessels of a state are incapable of classification as pirates.[70] This provision must, however, be read alongside article 102, which provides that "[t]he acts of piracy, as defined in article 101, committed by a warship [or] government ship . . . whose crew has mutinied and taken control of the ship . . . are assimilated to acts committed by a private ship."[71] Hence, under the Convention on the Law of the Sea, a public vessel under discipline cannot commit acts of piracy, whereas a mutinied ship may so act.

Duties of States in the Event of Civil Strife, warns that "it may be that it is lawful to punish acts constituting *mala prohibita*—murder, robbery, and so on—carried out *ultra vires* by insurgents." I. BROWNLIE, *supra* note 4, at 246 & n.4. Colombos is of a similar mind:

> If a warship rebels and confines her attentions solely to political acts done for political ends against the State towards which she is in revolt, principle and practice require such ship to be left unmolested by the ships of war of other States. She should not be treated as a pirate so long as no acts of violence are committed against others than the Government party against which the insurrection is directed.

C. COLOMBOS, *supra* note 9, at 450. Green writes, "[I]nsurgents, if they were to be treated as pirates, would have to commit some predatory act against the nationals of third States or their property, which acts would need *prima facie* to be unconnected with the political activities of the rebel group." Green, *supra* note 66, at 501; *see also* 3 H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 303 (1947) ("The great majority of writers are of the view that ships of unrecognized insurgents which do not confine their activities to their own State are and may be treated as piratical.").

68. J. BRIERLY, *supra* note 4, at 313-14 ("Naturally, the exclusion of these acts from being considered criminal acts of piracy under international law does not in any way relieve the persons concerned of any criminal liability which may attach to them in respect of these acts under the law of the flag state or of the state whose nationals they may be.").

69. Convention on the Law of the Sea, *supra* note 7, art. 101(a).

70. The International Law Commission, the body responsible for the draft that eventually became the Convention on the High Seas, asserts that "piracy can be committed only by private ships and not by warships or other government ships." 1956 Report of the I.L.C., *supra* note 55, art. 39, comment (1)(iii), at 28, [1956] 2 Y.B. I.L.C. at 282; *see also infra* note 77 and accompanying text.

71. Convention on the Law of the Sea, *supra* note 7, art. 102.

This "private ship" requirement is innovative. Prior to the 1958 Convention on the High Seas—the relevant provisions of which the 1982 Convention on the Law of the Sea largely restates[72]—"it was taken for granted that commissioned vessels under discipline could be guilty of piracy."[73] Dr. Lushington wrote in 1853 that, "even an independent state may, in my opinion, be guilty of piratical acts."[74] Oppenheim observes that the definition of piracy *jure gentium* may be applicable "to vessels which, though acting under orders of a recognised Government, commit acts which are in gross breach of International Law and which show a criminal disregard of human life."[75] Given the long history of support for the notion that public vessels under discipline might be guilty of piracy, it is understandable that the exclusion of such a stipulation from the 1958 Convention on the High Seas definition of piracy pro-

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72. *See supra* note 7.

73. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 974.

74. The Magellan Pirates, 1 Sp. Ecc. & Ad. 81, 83, 164 Eng. Rep. 47, 48 (1853). The statement was, however, a dictum.

75. 1 L. OPPENHEIM, *supra* note 4, § 273(a) (footnote omitted). Oppenheim cites as support for his position the 1937 Nyon Arrangement, pursuant to which acts of unrestricted submarine warfare were declared "contrary to the most elementary dictates of humanity [and] should be justly treated as acts of piracy." The Nyon Arrangement, *done* Sept. 14, 1937, preamble, 181 L.N.T.S. 135, 137. The principles of the Nyon Arrangement, however, gained little support outside that regime and are not deemed declaratory of a general axiom of public international law. Indeed, the principles of the Nyon Arrangement were expressly rejected by the International Law Commission, which was of the opinion that

> such treaties [as the Nyon Arrangement] do not invalidate the principle that piracy can only be committed by private ships. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement confirmed a new law in process of development. In particular, the questions arising in connexion with acts committed by warships in the service of rival Governments engaged in civil war are too complex to make it seem necessary for the safeguarding of order and security on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question.

1956 Report of the I.L.C., *supra* note 55, art. 39, comment (2), at 28, [1956] 2 Y.B. I.L.C. at 282. Oppenheim himself admits in an earlier passage that "private vessels only can commit piracy." 1 L. OPPENHEIM, *supra* note 4, § 273; *see also* C. COLOMBOS, *supra* note 9, at 446; Comment, *The Nyon Arrangements*, 19 BRIT. Y.B. INT'L L. 198 (1938).

voked some small controversy.[76]

In the final analysis, state practice and good sense support the principle that public ships under discipline may not be guilty of piracy. A public vessel under commission does not fit the traditional image of the lawless, freebooting pirate vessel for the simple reason that the commissioned vessel—unlike the pirate—may be held strictly accountable to her flag-state. This accountability also explains why mutiny transforms a commissioned vessel into a vessel capable of acts of piracy. O'Connell writes:

> The supposition that officers and crew of a commissioned ship cannot commit piracy unless they overthrow their own authority . . . seems, however, correct in principle since the commissioned vessel's State may be held internationally responsible. The connotation of pirates as *hostes humani generis* presupposes an absence of State responsibility for them.[77]

Hence, so long as a public vessel remains accountable to a state, there is no justification for subjecting her to the universal jurisdiction of states by labelling her a pirate.

4. Against Another Ship

The definition of piracy set forth in the 1982 Convention on the Law of the Sea incorporates the so-called "two-ship" rule, which provides that acts of violence and depredation upon the high seas are not piratical unless directed by one ship against another ship or ships.[78] Hence, acts taken by the passengers or crew of a ship against the ship itself or against its property are not piratical.

The two-ship rule is controversial because it forecloses the consideration of mutiny as piracy. Prior to the 1958 Convention on the High Seas, the precursor of the 1982 Convention, it was a foregone conclusion that

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76. The Soviet Union commented at the time, "The International Law Commission's decision to restrict the concept of piracy to acts of piracy committed by private ships . . . for private ends [is] contrary to the practice and theory of international law." 11 U.N. GAOR C.6 (488th mtg.) at 37, U.N. Doc. A/C.6/SR.488 (1956).

77. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 974-75. Oppenheim writes:

> It is widely believed that a man-of-war or other public ship under the orders of a recognised government or belligerent, so long as she remains such, is not a pirate, and that if she commits unjustified acts of violence redress must be asked from her flag State, which has to punish the commander, and to pay damages where required. In any case if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed by her are indeed piratical acts.

1 L. OPPENHEIM, *supra* note 4, § 273 (footnote omitted).

78. Convention on the Law of the Sea, *supra* note 7, art. 101(a)(i).

mutineers could be guilty of piracy. Oppenheim writes, "If the crew, or passengers, revolt on the open sea and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is private or public."[79] The Law of the Sea Convention purports to change this supposition.[80]

The two-ship rule has some support in state practice,[81] but the matter remains uncertain. While mutiny per se is nevertheless non-piratical under the 1958 and 1982 Conventions, a mutinied ship may become piratical if "the mutineers, when they have gained control, then proceed to use the ship for criminal purposes. In other words, there is no piracy unless a ship itself is made the instrument or vehicle of crime."[82]

5. On the High Seas

The final element in the 1982 Convention on the Law of the Sea definition of piracy requires that acts of piracy occur "on the high seas"[83] or "in a place outside the jurisdiction of any State."[84] This requirement is

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79. 1 L. OPPENHEIM, *supra* note 4, § 274. For similar views, see 1 G. GIDEL, *supra* note 11, at 323; W. HALL, A TREATISE ON INTERNATIONAL LAW 257 (J. Atlay 6th ed. 1909); 1 J. ORTOLAN, *supra* note 20, at 214; van Zwanenberg, *supra* note 43, at 814-15.

80. This is, however, not altogether clear from the wording of the provision. O'Connell explains that paragraph 1(a) of article 15 of the 1958 Convention on the High Seas, which corresponds to article 101(a)(i) of the 1982 Convention on the Law of the Sea,

> defines piracy by reference to acts directed against another ship, and if that is all the Article said it would exclude internal seizure. But paragraph 1(b), in oracular terms, defines piracy as acts "against a ship" in a place outside the jurisdiction of any State. If that is a reference to location, then "a ship" might mean "another ship". But if it is not, then "a ship" might mean "the ship" and not "another ship". In that case sub-paragraph (b) would not be redundant but it would make the word "another" in sub-paragraph (a) redundant.

2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 970. O'Connell eventually concludes, after making reference to the *travaux prêparatoires*, that the "history indicates an intention to exclude internal seizure from the definition." *Id.* at 971.

81. As observed above, states and commentators do not regard the internal seizure of the *Santa Maria* and the *Achille Lauro* as acts of piracy. *See supra* note 66.

82. H. SMITH, *supra* note 18, at 67. Accordingly, the 1982 Convention on the Law of the Sea provides, "[A]cts of piracy . . . committed by a warship [or] government ship . . . whose crew has mutinied and taken control of the ship . . . are assimilated to acts committed by a private ship . . . ." Convention on the Law of the Sea, *supra* note 7, art. 102.

83. Convention on the Law of the Sea, *supra* note 7, art. 101(a)(i).

84. *Id.* art. 101(a)(ii).

uncontroversial.[85] All states may seize pirate ships encountered on the high seas.[86]

IV. THE SLAVE TRADE EXCEPTION

A. *Evolution of the Right*

The right of visitation and search of suspected slave traders has been historically a conventional right only—a right nonexistent under customary law.[87] The slave trade occupies a peculiar place in legal history;

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85. *See* I. BROWNLIE, *supra* note 4, at 244-45; C. COLOMBOS, *supra* note 9, at 444; D. GREIG, *supra* note 44, at 332-33; 1 C. HYDE, *supra* note 14, at 767; M. MCDOUGAL & W. BURKE, *supra* note 32, at 813-14; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 978.

86. Convention on the Law of the Sea, *supra* note 7, arts. 105, 110(1)(a).

87. The well-known writers all agree that the slave trade exception is solely a conventional right. Wheaton remarks, "The African slave-trade, though prohibited by the municipal laws of most nations . . . is not such by the general international law; and its interdiction cannot be enforced by the exercise of the ordinary right of visitation and search. That right does not exist, in time of peace, independently of special compact." H. WHEATON, *supra* note 32, at 165-68. Westlake observes that "for the detection and suppression of the slave trade there is no right of visit and search by general law, but only by treaty between states which have conceded it to one another in their just hatred of that traffic, which, however abominable, has never been regarded as an international offence." 1 J. WESTLAKE, *supra* note 43, at 170. Hyde writes, "It is said that the law of nations does not permit the visitation and search of foreign vessels in time of peace as a means of suppressing the slave trade." 1 C. HYDE, *supra* note 14, at 765; *see also* C. COLOMBOS, *supra* note 9, at 457; 1 L. OPPENHEIM, *supra* note 4, § 340(h).

Early jurisprudence supports the proposition that the right to visit suspected slave traders is a conventional right only. In *The Antelope*, the leading United States case on the subject, Chief Justice Marshall held that the slave trade "has claimed all the sanction which could be derived from long usage, and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each." The Antelope, 23 U.S. (10 Wheat.) 66, 115 (1825). On the British side, see Le Louis, 2 Dods. 210, 248-54, 165 Eng. Rep. 1464, 1476-79 (1817); Madrazo v. Willes, 3 B. & Ald. 353, 357, 359, 106 Eng. Rep. 692, 693-94 (1820).

The acceptance of the right to seize traders in slaves as only a conventional right was, however, gradual and not without controversy. Great Britain, throughout the first half of the nineteenth century, asserted a general customary right of visit and search for the suppression of the slave trade. The assertion of this putative right met with loud protest from the United States, sparking the so-called Visitation Controversy. Great Britain eventually succumbed to United States protestations and abandoned the practice altogether. In response, Lord Lyndhurst proclaimed to the House of Lords, "[W]e have surrendered no right, for . . . no right such as that which is contended for has ever existed. We have . . . abandoned the assumption of a right, and in doing so we have . . .

while the trade has been roundly condemned as inhuman[88] and declared illegal under the laws of several states,[89] the general law of nations has never proscribed the slave trade. International society abhors the trade but international law tolerates it.[90] One may argue, however, that the slave trade is today repugnant to customary international law. In any event, the customary right of visit and search, historically speaking, did not provide an effective legal mechanism for the abolition of the slave trade.

States initially overcame the lack of customary measures enforceable against slave traders by binding themselves to treaties that conceded a reciprocal *droit de visite*. Pursuant to these treaties, one state would permit another to visit and search those ships of its merchant fleet suspected of engaging in the slave trade.[91] Such treaties were opposable *inter se* but did not, of course, affect the rights of third states, which remained free to engage in this odious trade.[92] Nevertheless, the limited conventional regimes established by these treaties proved extraordinarily effective against slave traders.[93]

At the turn of the nineteenth century, states eagerly voiced their disapproval of the slave trade. In 1814, the United States and Great Britain signed the Treaty of Ghent, which stipulated, inter alia, that each state

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acted justly, prudently, and wisely." Statement of Lord Lyndhurst (July 26, 1858), *reprinted in* 2 MOORE'S DIGEST, *supra* note 22, at 945; *see also* Statement of Lord Malmesbury, *reprinted in* 2 MOORE'S DIGEST, *supra* note 22, at 945. For a full account of the Visitation Controversy, see 2 MOORE'S DIGEST, *supra* note 22, at 914-51; 3 R. PHILLIMORE, *supra* note 14, at 525-30; H. SOULSBY, THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS, 1814-1862 (1933), *republished in* 51 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 115 (1933); 3 WHARTON'S DIGEST, *supra* note 28, at 122-71.

88. Justice Story, for example, held in 1822 that the slave trade was "founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice." United States v. La Jeune Eugénie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

89. *See* C. COLOMBOS, *supra* note 9, at 458; Wilson, *Some Principle Aspects of British Efforts to Crush the African Slave Trade, 1807-1929*, 44 A.J.I.L. 505 *passim* (1950).

90. *See* H. WHEATON, *supra* note 32, at 178-79.

91. *See supra* note 12 and accompanying text.

92. International law follows the maxim *pacta tertiis nec nocent nec prosunt*—states are not bound by treaties to which they are not party. This principle is codified in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 34, 1155 U.N.T.S. 331, 341, *reprinted in* 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980); *see* I. BROWNLIE, *supra* note 4, at 619-22.

93. *See infra* note 97.

would seek to abolish the trade.[94] That year, Great Britain and France expressed similar resolve in a separate article to the Treaty of Paris.[95] In 1815, all signatories to the Treaty of Paris declared the slave trade "repugnant to the principles of humanity and universal morality."[96] Unfortunately, none of these treaties contained a reciprocal visit and search provision—rendering these bold statements largely impotent. While states were fervent in their disavowal of the trade, they did not so readily concede the right to interfere with their merchant fleets.

Over the course of the century, however, states gradually began to concede jurisdiction over their shipping for the purpose of suppressing the slave trade.[97] In treaties of 1831[98] and 1833,[99] France and Great Britain granted each other the mutual *droit de visite.* Other European maritime powers acceded to these treaties,[100] the provisions of which were expanded in the Quintuple Treaty of 1841.[101] The Quintuple Treaty—signed by Austria, Great Britain, Prussia, Russia, and France—provided that "the High Contracting Parties agree by common

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94. Treaty of Ghent, *done* Dec. 24, 1814, United States-Great Britain, art. 10, 8 Stat. 218, 223, T.S. No. 109.

95. Definitive Treaty of Peace and Amity, Additional Articles between France and Great Britain, art. 1, *done* May 30, 1814, 63 Parry's T.S. 171, 193-94.

96. Declaration of the Eight Courts Universal Abolition of the Slave Trade, *done* Feb. 8, 1815, 63 Parry's T.S. 473, 474 (translation); *see* Definitive Treaty of Peace, Additional Article, *done* Nov. 20, 1815, 65 Parry's T.S. 251, 306. On this aspect of the Congress of Vienna, see C. COLOMBOS, *supra* note 9, at 458-59; D. GREIG, *supra* note 44, at 334; H. SMITH, *supra* note 18, at 75; H. WHEATON, *supra* note 32, at 168-69 & n.85.

97. History credits Great Britain with making the first meaningful steps in abolishing the slave trade. In 1815, the British Government invited France to sign a treaty that provided for the reciprocal right of search upon suspicion of slave trading. France declined the invitation. H. WHEATON, *supra* note 32, at 170 n.85 (Dana's note). France again refused to concede the right of search at the 1822 Congress of Verona. Declaration Respecting the Abolition of the Slave Trade, *done* Nov. 28, 1822, 73 Parry's T.S. 31. Great Britain persevered and, by the middle of the nineteenth century, was party to a number of treaties for the suppression of the slave trade, all but two of which (treaties with the United States and France) provided for a mutual *droit de visite.* C. COLOMBOS, *supra* note 9, at 459-60. At that time, one-fourth of the British fleet was employed in enforcing these treaty obligations. As a result, 117,000 slaves were freed at sea by Great Britain between 1810 and 1846. Wilson, *supra* note 89, at 515 & nn.62-63 (1950).

98. Convention for the More Effectual Suppression of the Traffic in Slaves, *done* Nov. 30, 1831, Great Britain-France, 18 BRIT. & FOREIGN ST. PAPERS 641, 9 Martens Nouveau Recueil (ser. 2) 544.

99. Supplementary Convention, *done* Mar. 22, 1833, Great Britain-France, 20 BRIT. & FOREIGN ST. PAPERS 286, 9 Martens Nouveau Recueil (ser. 2) 549.

100. C. COLOMBOS, *supra* note 9, at 459; H. WHEATON, *supra* note 32, at 169.

101. *See* H. WHEATON, *supra* note 32, at 169.

consent, that those of their ships of war which shall be provided with special warrants and orders . . . may search every merchant-vessel belonging to any one of the High Contracting Parties which shall, on reasonable grounds, be suspected of being engaged in the traffic in slaves."[102] Belgium later acceded to the treaty.[103] The battle against the slave trade was joined.

The United States did not allow foreign interference with its shipping until several years after the signing of the Quintuple Treaty. In the 1862 Treaty of Washington, the United States—due partly to the exigencies of the then-raging Civil War—finally agreed to concede to Great Britain the mutual right of visit. The treaty provided that the public ships of either state could detain, search, seize, and send in for adjudication those merchant vessels of the other state reasonably suspected of trading in slaves.[104]

In 1890, a group of states signed the first truly multilateral response to the slave trade problem—the General Act of Brussels.[105] The General Act of Brussels effectively "placed the cornerstone [on the] edifice of bilateral treaties" constructed over the previous half-century.[106] The General Act permitted, for the purpose of repressing the slave trade, a mutual search within a defined zone on the eastern coast of Africa of vessels

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102. Treaty for the Suppression of the African Slave Trade, *done* Dec. 20, 1841, art. 2, 92 Parry's T.S. 437, 441. All signatories, except France, ratified this treaty. In 1845, France entered into a separate arrangement with Great Britain that provided for naval cooperation in the suppression of the slave trade but not, curiously, for a mutual right of search. Convention for the Suppression of the Traffic in Slaves, *done* May 29, 1845, Great Britain-France, 33 BRIT. & FOREIGN ST. PAPERS 4, 56, 98 Parry's T.S. 219; *see* C. COLOMBOS, *supra* note 9, at 459; H. WHEATON, *supra* note 32, at 169.

103. *Done* Feb. 28, 1848, 102 Parry's T.S. 95.

104. Treaty for the Suppression of the African Slave Trade (Treaty of Washington), *done* Apr. 7, 1862, 12 Stat. 1225, T.S. No. 126; *see also* Additional Article, *done* Feb. 17, 1863, 13 Stat. 645, T.S. No. 127. The Treaty of Washington provided for mixed claims tribunals to entertain seizure claims. A supplementary treaty, signed in 1870, abolished the establishment of mixed claims tribunals and substituted therefor the courts of the contracting parties. Additional Convention, *done* June 3, 1870, 16 Stat. 777, T.S. No. 131. On the Treaty of Washington, see C. COLOMBOS, *supra* note 9, at 459-60; 2 MOORE'S DIGEST, *supra* note 22, at 946-48; H. WHEATON, *supra* note 32, at 170-71 n.85 (Dana's note).

105. General Act of the Brussels Conference Relating to the African Slave Trade, *done* July 2, 1890, 27 Stat. 886, T.S. No. 383, 173 Parry's T.S. 293 [hereinafter General Act of Brussels]. Seventeen states eventually signed and ratified the General Act of Brussels. M. MCDOUGAL & W. BURKE, *supra* note 32, at 882.

106. Gutteridge, *Supplementary Slavery Convention, 1956*, 6 I.C.L.Q. 449, 456 (1957).

of less than than five hundred tons burden.[107] The agreement remained in force until superseded in 1919 by the Treaty of St. Germain-en-Laye.[108]

The Slavery Convention,[109] signed in 1926 under the auspices of the League of Nations, "embraced an undertaking on the part of the contracting parties to negotiate a general convention with regard to the slave trade which would give them 'rights and impose upon them duties.' "[110] The Slavery Convention, however, "failed to substitute for the Brussels Act and for the crumbling structure of nineteenth-century treaties on which the Brussels Act was based, satisfactory provisions for the international control of the slave trade at sea."[111] Specifically, the Slavery Convention failed to provide a mutual right of visit or an otherwise effective enforcement mechanism applicable to suspected slave traders under a foreign flag. The subsequent Supplementary Slavery Convention of 1956 was intended to fill the lacunae left by the previous Slavery Convention;[112] the Supplementary Slavery Convention, however, added little to the Slavery Convention and failed, as did its predecessor, to provide for a mutual *droit de visite.*

B. *The Modern Rule*

In the second half of the twentieth-century, the right to visit suspected slave traders on the high seas gained currency in international thought and practice. The same year that the Supplementary Slavery Convention was opened for signature, the International Law Commission submitted a report to the United Nations General Assembly which recommended that certain measures be taken for the abolition of the slave trade. Specif-

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107. *Id.* at 456-57; General Act of Brussels, *supra* note 105, arts. 22-3.

108. Treaty Revising the General Act of Berlin and the Declaration of Brussels (Treaty of St. Germain-en-Laye), *done* Sept. 10, 1919, 49 Stat. 3027, T.S. No. 877, 225 Parry's T.S. 500. This treaty provided that the parties would seek to "secure the complete suppression of slavery in all its forms and of the black slave trade by land and sea." *Id.* art. 11; *see* 1 C. HYDE, *supra* note 14, at 766.

109. Slavery Convention, *done* Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253.

110. 1 C. HYDE, *supra* note 14, at 766 (quoting Slavery Convention, *supra* note 109, art. 3).

111. Gutteridge, *supra* note 106, at 460.

112. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 40. On the Supplementary Convention on Slavery, see C. COLOMBOS, *supra* note 9, at 461-62; M. MCDOUGAL & W. BURKE, *supra* note 32, at 880; Gutteridge, *supra* note 106, at 461-69.

ically, the Commission advocated the reciprocal right of visit and search within certain "maritime zones treated as suspect in the international conventions for the abolition of the slave trade."[113] The recommendation was adopted, with some modification, two years later in the 1958 Convention on the High Seas.[114]

The 1958 Convention on the High Seas contains several provisions relative to slave trade. Article 13 provides:

> Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.[115]

More important, the Convention provides for a reciprocal right of visitation and search of suspected slave traders; article 22 provides that "a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting . . . [t]hat the ship is engaged in the slave trade."[116] Upon encountering such a vessel, the warship may "send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship."[117] The 1982 Convention on the Law of the Sea retains these provisions without substantive modification.[118]

These last two conventions—the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea—finally give the international community an effective tool to deploy against those engaged in the slave trade. They moreover solidify a century and a half of political and social evolution with respect to slave trade. The willingness of states to bind themselves to such agreements arguably provides a firm customary basis for the seizure of non-national vessels on the high seas suspected of the slave trade.[119] The weight of time and the consistent prac-

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113. 1956 Report of the I.L.C., *supra* note 55, art. 46, at 29, [1956] 2 Y.B. I.L.C. at 261.

114. Convention on the High Seas, *supra* note 6, art. 22(1)(b).

115. *Id.* art. 13.

116. *Id.* art. 22(1)(b).

117. *Id.* art. 22(2).

118. Convention on the Law of the Sea, *supra* note 7, arts. 99, 110(1)(b), (2).

119. The Convention on the High Seas purports to be "generally declaratory of established principles of [customary] international law." Convention on the High Seas, *supra* note 6, preamble. Churchill and Lowe write that the 1958 Convention on the High Seas is "generally regarded as codifying customary international law in this respect." R. CHURCHILL & A. LOWE, THE LAW OF THE SEA 150-51 (1983).

tice of states[120] with regard to this matter beg the conclusion that the right to seize on the high seas non-national vessels suspected of slave trading is no longer a merely conventional right; the right to seize suspected slave traders likely exists today as a customary right.

V. THE STATELESS VESSEL EXCEPTION

A. *Seizure of Stateless Vessels on the High Seas*

Order upon the high seas is predicated on the nationality of ships.[121] A ship's nationality determines which state is competent to exercise jurisdiction over her;[122] which state may impose regulations upon her;[123]

120. The International Court of Justice has held that in the formation of custom, state practice "should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." North Sea Continental Shelf Cases (W. Ger. v. Den./W. Ger. v. Neth.), 1969 I.C.J. 4, 43.

121. B. BOCZEK, FLAGS OF CONVENIENCE 92 (1962) ("This subjection of the high seas to juridical order is organized and effected by means of a permanent legal relation between ships flying a particular flag and the state whose flag they fly."); I. BROWNLIE, *supra* note 4, at 424 ("In the maintenance of a viable regime for common use of the high seas the law of the flag and the necessity for a ship to have a flag are paramount."); R. CHURCHILL & A. LOWE, *supra* note 119, at 179 ("The ascription of nationality to ships is one of the most important means by which public order is maintained at sea."); C. COLOMBOS, *supra* note 9, at 288-89; 1 G. GIDEL, *supra* note 11, at 73 ("L'attribution aux navires de mer d'une identité et d'une nationalité est le corollaire du principe du libre usage de la haute mer. Grâce à cette réglementation . . . les navires peuvent être surveillés, contrôlés: les abus que pourrait entraîner le principe de la liberté des mers se trouvent limités si l'on n'admet à l'usage de ces mers que les navires pouvant justifier d'une nationalité."), 80-83; 1 L. OPPENHEIM, *supra* note 4, §§ 260-61; M. MCDOUGAL & W. BURKE, *supra* note 32, at 1010 ("[B]oth the substantive and jurisdictional policies comprising the established system of public order of the oceans project, and are built upon, a fundamental distinction between national and non-national vessels."); 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 750-51; R. RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL 13-14 (1937); M. SHAW, *supra* note 45, at 317; Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 335-36 (1982).

122. The flag-state has exclusive jurisdiction over vessels that lawfully fly its flag—with certain discrete exceptions that comprise the subject matter of this Note. The exclusivity principle of flag-state jurisdiction and the nationality of ships go hand-in-hand. Smith writes, "The principle of the exclusive jurisdiction of the flag State makes it necessary that every ship which is lawfully on the high seas should have a definite nationality." H. SMITH, *supra* note 18, at 64. Were vessels free to ply the high seas without a flag, the notion of flag-state jurisdiction and the order of the high seas predicated thereon would be a nullity. The International Law Commission observes, "The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential

which state may hail her into court for the violation of a domestic or international law;[124] which state is liable under international law for acts of the ship fairly attributable to the state;[125] and which state may take up the ship's claim should she suffer injury at the hands of another state.[126] Unless a ship lawfully sails under the flag of a recognized state, the elaborate system of rules established for the maintenance of order upon the high seas is meaningless.[127] Without the nationality of ships,

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adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State." 1956 Report of the I.L.C., *supra* note 55, art. 30, comment (1), at 25, [1956] 2 Y.B. I.L.C. at 279.

123. R. RIENOW, *supra* note 121, at 7. States not only have the right to proscribe regulations for their merchant fleet, they are obliged to do so. The 1982 Law of the Sea Convention provides that "[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Convention on the Law of the Sea, *supra* note 7, art. 94(1). Article 94 mirrors the language of article 5(1) of the 1958 Convention on the High Seas, *supra* note 6. Both conventions set forth a nonexhaustive list of the duties of effective jurisdiction. These duties include the obligation to ensure safety at sea in regard to (1) the seaworthiness of ships; (2) the manning of ships; (3) the use of signals; (4) the maintenance of communications; and (5) the prevention of collisions. *Id.* art. 10; Convention on the Law of the Sea, *supra* note 7, art. 94(3). The 1982 Convention on the Law of the Sea goes further, requiring flag-states regularly to survey those ships that fly their flag and to ensure that the captain and crew of such vessels possess appropriate qualifications, are well-trained, and are conversant with applicable international regulations. *Id.* art. 94(4); *see* R. CHURCHILL & A. LOWE, *supra* note 119, at 184-93; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 831-36; 1 L. OPPENHEIM, *supra* note 4, § 265; 9 WHITEMAN'S DIGEST, *supra* note 43, at 2-3.

124. Convention on the Law of the Sea, *supra* note 7, arts. 92(1), 94(2)(b); Convention on the High Seas, *supra* note 6, art. 6(1); *see* B. BOCZEK, *supra* note 121, at 92; R. CHURCHILL & A. LOWE, *supra* note 119, at 180; 1 L. OPPENHEIM, *supra* note 4, § 261; M. SHAW, *supra* note 45, at 317.

125. R. CHURCHILL & A. LOWE, *supra* note 119, at 180; C. COLOMBOS, *supra* note 9, at 289.

126. B. BOCZEK, *supra* note 121, at 92; R. CHURCHILL & A. LOWE, *supra* note 119, at 180; C. COLOMBOS, *supra* note 9, at 289; R. RIENOW, *supra* note 121, at 14.

127. Professor Westlake observes that by assigning nationality to a ship, the state "accepts the authority and responsibility which result from the ship's nationality. The responsibility can be real only if the ship belongs to a port of the state, on her return to which the captain, crew and passengers can be punished for any offenses they may have committed at sea." 1 J. WESTLAKE, *supra* note 43, at 169. The Indian Government made a similar argument before the International Court of Justice in the *I.M.C.O.* case:

> The law of nations imposes the duty on every State having a maritime flag to provide by its own municipal laws the conditions to be fulfilled by those vessels which must need sail under its flag. The registration of ships and the need to fly the flag of the country where the ship is registered are considered *essential for the maintenance of order on the open sea* . . . .

the regime of the high seas is a nullity.[128]

Because the international regime for the peaceful use of the high seas is founded upon the nationality of ships and the notion of flag-state jurisdiction, stateless vessels are anathema upon the high seas. International law appropriately forbids stateless vessels from the high seas and severs from them the bundle of rights and freedoms that ordinary attach to ships sailing there.[129] "[T]he freedom of the open sea," writes Lord Simonds, "is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations."[130] Although "statelessness" is not per se repugnant to the law of nations,[131] stateless vessels may nevertheless suffer extraordinary penalties by virtue of that condition. Harsh treatment of stateless vessels is justified by the danger that stateless vessels pose to the international regime of the high seas.

A more cynical justification for the hostile treatment of stateless vessels is that a stateless vessel ipso facto lacks a flag-state competent to seek redress on her behalf[132] and is therefore vulnerable to the exercise of jurisdiction by any state. This justification has support in the decision in the English case of *Molvan v. Attorney-General for Palestine*,[133] the *locus classicus* of the stateless vessel exception to the exclusivity rule. This 1949 case arose from the seizure by a British destroyer of the motor

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Written Statement of the Government of India, 1960 I.C.J. Pleadings (Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization) 253 (June 8, 1960) (emphasis added).

128. Rienow observes, "The entire legal system which States have evolved for the regulation of the use of the high seas is predicated on the possession by each vessel of a connection with a State having a recognized maritime flag. This connection has been commonly called nationality." R. RIENOW, *supra* note 121, at 13-14.

129. The Convention on the Law of the Sea sets out a non-exhaustive list of freedoms that states may exercise on the high seas, including the freedom of navigation, the freedom to fish, and the freedom to conduct scientific research. Convention on the Law of the Sea, *supra* note 7, art. 87; *see* Convention on the High Seas, *supra* note 6, art. 2; *see also* C. COLOMBOS, *supra* note 9, at 64-67.

130. Molvan v. Attorney-General for Palestine, 1948 App. Cas. 351, 369 (P.C.); *see* D. GREIG, *supra* note 44, at 334 ("It is a basic principle of international maritime law that a vessel can only enjoy the freedom of the seas if it is entitled to sail under the flag of a state."); 1 L. OPPENHEIM, *supra* note 4, § 261 ("[T]he freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State."); M. SHAW, *supra* note 45, at 317 ("A ship without a flag will be deprived of many of the benefits and rights available under the legal regime of the high seas.").

131. H. MEYERS, THE NATIONALITY OF SHIPS 318 (1967).

132. R. CHURCHILL & A. LOWE, *supra* note 119, at 151; 2 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 607; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 755-56.

133. 1948 App. Cas. 351 (P.C.).

vessel *Asya* on the high seas. The *Asya* flew no colors when the destroyer first sighted her. The destroyer exercised her right of *reconnaissance* and the *Asya* hoisted the Turkish flag. The destroyer became suspicious and sent a boarding party to the *Asya*, whereupon the *Asya* hauled down the Turkish colors and ran up a "flag which was not the flag of any State in being."[134] The boarding party failed to uncover the *Asya*'s papers or any evidence linking her to a recognized state. The destroyer promptly seized the *Asya* and escorted her to Haifa, where she was confiscated.[135] The ensuing litigation eventually came before the Privy Council of the United Kingdom, which observed:

> [T]he freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions. *No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails.* . . . Having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, *the Asya could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.*[136]

The fundamental principle enounced in the *Asya* opinion, that stateless vessels are fair game, has considerable support and is codified in the recent Law of the Sea Convention.[137]

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134. *Id.* at 370. This flag was the Zionist bunting later to become the flag of Israel. The vessel itself was engaged in the illegal transportation of over seven hundred immigrants to Palestine. *Id.* at 352.

135. The seizure of the *Asya* provides a textbook example of the operation of the customary right of *reconnaissance* blossoming into the fuller *droit de visite* upon the suspicious behavior of the reconnoitered vessel. *See supra* note 27.

136. *Molvan*, 1948 App. Cas. at 369-70 (emphasis added).

137. The 1982 Convention provides, "[A] warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that . . . the ship is without nationality . . . ." Convention on the Law of the Sea, *supra* note 7, art. 110(1)(d).

Interestingly, the 1958 Convention on the High Seas contains no provision similar to article 110(1)(d), leading one delegate to the Geneva Conference to posit that, under the Convention on the High Seas, "ships could sail without flying a flag, without having a nationality and without being subject to the legislation of any state." H. MEYERS, *supra* note 131, at 310 (statement of Pfeiffer, Delegate of the Federal Republic of Germany). Although the 1958 Convention fails to provide a conventional right to seize stateless vessels, states may nevertheless assert such a right as a matter of customary law. The obligation to sail under the flag of a recognized state predated the 1958 Convention,

As earlier discussed, the public ships of every state, exercising their customary right of *reconnaissance*, may approach any private vessel they may encounter upon the high seas to ascertain her nationality.[138] Should the approached vessel appear of dubious nationality, the right of *reconnaissance* may ripen into the fuller *droit de visite*, permitting the approaching vessel to board the suspect vessel to examine her papers.[139] If this examination fails to discharge the suspicion that the vessel is without nationality, the investigating warship may search, seize, and place the suspicious vessel under the jurisdiction of the warship's flag-state.[140] Ac-

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which simply failed to codify the customary right to seize stateless vessels. *See Molvan*, 1948 App. Cas. at 369-70.

138. *See supra* part II, section B.1.

139. The Convention on the Law of the Sea provides that

> the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

Convention on the Law of the Sea, *supra* note 7, art. 110(2).

140. *Molvan*, 1948 App. Cas. at 369-70; R. CHURCHILL & A. LOWE, *supra* note 119, at 151; M. MCDOUGAL & W. BURKE, *supra* note 32, at 1084-86; 2 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 607; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 755-56; 1 L. OPPENHEIM, *supra* note 4, § 261; Anderson, *supra* note 121, at 335-37.

The United States Congress recently took advantage of the unique opportunities that statelessness offers by enacting the Biaggi Act. Maritime Drug Law Enforcement Act, 46 U.S.C. app. §§ 1901-1904 (Supp. V 1987). The Biaggi Act provides:

> It is unlawful for any person on board a vessel of the United States, *or on board a vessel subject to the jurisdiction of the United States*, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Id. § 1903(a) (emphasis added). The Biaggi Act defines "vessel subject to the jurisdiction of the United States" as including

> (A) a vessel without nationality;
>
> (B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas . . . .

Id. § 1903(c)(1). The Biaggi Act further defines "vessel without nationality" within the meaning of the Act as

> (A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; and
>
> (B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel.

Id. § 1903(c)(2).

The Biaggi Act has withstood legal challenge. The United States Court of Appeals for the Eleventh Circuit determined that the United States may seize stateless vessels upon

cordingly, any ship that sails the high seas must possess nationality and the means to prove it.[141]

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the high seas, finding that such seizure "in no way transgresses recognized principles of international law." United States v. Marino-Garcia, 679 F.2d 1373, 1382 (11th Cir. 1982), *cert. denied sub nom.* Pauth-Arzuza v. United States, 459 U.S. 1114 (1983); *see also* United States v. Ayarza-Garcia, 819 F.2d 1043 (11th Cir. 1987), *cert. denied*, 484 U.S. 969 (1987); United States v. Gonzalez, 810 F.2d 1538 (11th Cir. 1987); United States v. Alvarez-Mena, 765 F.2d 1259 (5th Cir. 1985); United States v. Manute, 767 F.2d 1511 (11th Cir. 1985); United States v. Marquez, 759 F.2d 864 (11th Cir. 1985).

There is no express exception to the exclusivity rule for vessels suspected of drug-smuggling. Absent a per se rule, however, a state may argue perhaps validly that drug-smugglers fall within the self-defense exception and may be arrested as such. *See infra* part VI. This proposition is controversial and no attempt will be made to resolve it here. For further reading on this issue and on the Biaggi Act, as applied to stateless vessels, see Anderson, *supra* note 121; Note, *Drug Enforcement on the High Seas: Stateless Vessel Jurisdiction over Shipboard Criminality by Non-resident Alien Crewmembers*—United States v. Alvarez-Mena, 11 MAR. LAW. 163 (1986); Note, *High on the High Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (1980); Note, *The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels*, 25 WM. & MARY L. REV. 313 (1983); Note, *"Smoke on the Water": Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone*, 13 N.Y.U. J. INT'L L. & POL. 249 (1980); Note, United States v. Marino-Garcia: *Criminal Jurisdiction over Stateless Vessels on the High Seas*, 9 BROOKLYN J. INT'L L. 141 (1983); Comment, *Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction*, 9 MAR. LAW. 273 (1984); Development, 13 DEN. J. INT'L L. & POL'Y 109 (1983); Recent Development, 20 HARV. INT'L L.J. 397 (1979); Recent Case, 52 U. CIN. L. REV. 292 (1983). On maritime drug interdiction generally, see Anderson, *In the Wake of the* Dauntless: *The Background and Development of Maritime Interdiction Operations*, in WHAT LIES AHEAD?, *supra* note 41, at 11; Friedman, *Cuba Accuses U.S. of Firing on Freighter*, N.Y. Times, Feb. 1, 1990, at A7, col. 1.

141. C. COLOMBOS, *supra* note 9, at 289; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 750-51; 1 J. WESTLAKE, *supra* note 43, at 168-69; Anderson, *supra* note 121, at 341. The ship's flag serves as prima facie evidence of nationality. C. COLOMBOS, *supra* note 9, at 291-93; 2 H. HALLECK, *supra* note 8, at 250, n.2; M. MCDOUGAL & W. BURKE, *supra* note 32, at 1120-21; 2 MOORE'S DIGEST, *supra* note 22, at 1002; 2 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1421 (1898) (*Montijo* arbitration); 1 L. OPPENHEIM, *supra* note 4, §§ 261-62; 1 J. ORTOLAN, *supra* note 20, at 252; Anderson, *supra* note 121, at 338-39. For a generous treatment of the relationship between flag and nationality, see R. RIENOW, *supra* note 121, at 140-53.

Rarely, however, is the possession of a mere piece of bunting sufficient proof of nationality. A vessel must be possessed of papers or documentary proof of nationality. Badger v. Gutierez, 111 U.S. 734, 736-37 (1884); The Merritt, 84 U.S. (17 Wall.) 582, 586 (1873) ("The documents a vessel carries furnish the only evidence of her nationality."); The Mohawk, 70 U.S. (3 Wall.) 566, 571 (1865); C. COLOMBOS, *supra* note 9, at 295; 1 G. GIDEL, *supra* note 11, at 89-90; 2 HACKWORTH'S DIGEST, *supra* note 66, at 724-

B. *Conditions Rendering a Vessel Stateless*

The operation of various circumstances may render a ship stateless and subject to the jurisdiction of any state. The want of proper registration with a recognized state is the most obvious such circumstance. Even a properly registered ship, however, may be assimilated to a stateless vessel by operation of law. Statelessness and the assimilation to statelessness are discussed below. For now, it is necessary only to observe that "statelessness" is a term of art that imports a meaning beyond the mere lack of a flag.

1. Stateless Vessels

A ship on the high seas that is not entitled to fly the flag of any recognized state is stateless and ipso facto vulnerable to seizure by any state.[142] This axiom points up the importance in ascertaining whether a ship is entitled to the flag she flies.

By long-standing custom, the flag-state has complete discretion in ascribing nationality to its merchant fleet. The United States Supreme Court has held:

> Perhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.[143]

25; M. McDOUGAL & W. BURKE, *supra* note 32, at 1118-20; R. RIENOW, *supra* note 121, at 154-88; 4 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 69-74 (1971); Anderson, *supra* note 121, at 338-39. The 1982 Convention on the Law of the Sea provides that "[e]very State shall issue to ships to which it has granted the right to fly its flag documents to that effect." Convention on the Law of the Sea, *supra* note 7, art. 91(2); *see* Convention on the High Seas, *supra* note 6, art. 5(2).

Professor Oppenheim indicates that while there is some difference of opinion among states as to the number and kind of papers that a ship must possess, all states agree that at the very least a ship must carry (1) a certificate of registry, passport, sea-letter, sea-brief, or some official voucher issued by the state which indicates the ship's nationality; (2) the muster roll; (3) the log book; (4) the manifest of cargo; (5) the bills of lading; and (6) the charter party, if applicable. 1 L. OPPENHEIM, *supra* note 4, § 262; *see* C. COLOMBOS, *supra* note 9, at 295.

142. *See supra* note 130 and accompanying text.

143. Lauritzen v. Larsen, 345 U.S. 571, 584 (1953). The Permanent Court of Arbitration tackled this issue in the case of the *Muscat Dhows*. There, the Court considered an 1844 treaty between France and the Sultan of Muscat, pursuant to which France issued documents authorizing subjects of the Sultan to fly the French flag. The Court held that every sovereign state possesses the right to decide to whom it shall accord the

Although this rule remains largely intact today, support is growing for the view that the international community need not recognize a state's allocation of nationality unless there exists a "genuine link" between the flag-state and the ship.[144] Judge Jessup, dissenting in *Barcelona Traction, Light and Power Co.*, argues that "[i]f a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognize the asserted nationality of the ship."[145]

The 1982 Convention on the Law of the Sea at first blush appears to follow the traditional rule, providing that "[e]very State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly."[146] But the provision reads further: "There must exist a *genuine link* between the State and the ship."[147] The Convention does not, however, specify the

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right to fly its flag and to prescribe the rules governing such grants. The granting of the French flag to the subjects of the Sultan of Muscat was, therefore, proper and not an impermissible encroachment upon the sovereign independence of the Sultan. Affaire des Boutres de Mascate (Muscat Dhows) (Fr. v. Gr. Brit.), 11 R.I.A.A. 83 (1905). For support of the proposition that a state has complete discretion in ascribing its nationality to ships, see B. BOCZEK, *supra* note 121, at 99-106; J. BRIERLY, *supra* note 4, at 310; I. BROWNLIE, *supra* note 4, at 424; R. CHURCHILL & A. LOWE, *supra* note 119, at 180; C. COLOMBOS, *supra* note 9, at 289-91; C. FENWICK, INTERNATIONAL LAW 373-74 (4th ed. 1965); 1 G. GIDEL, *supra* note 11, at 80; M. MCDOUGAL & W. BURKE, *supra* note 32, at 1011-12; 2 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 606; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 752-53; 1 L. OPPENHEIM, *supra* note 4, § 261 ("[A] State is absolutely independent in framing the rules concerning the claim of vessels to its flag."); R. RIENOW, *supra* note 121, at 15-23; 5 J. VERZIJL, *supra* note 141, at 146-47.

144. Brownlie, for one, believes the traditional method of ascription of nationality "suffers from . . . organic faults." I. BROWNLIE, *supra* note 4, at 424. On the "genuine link" requirement, as applied to natural persons, see Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4; *see also* R. CHURCHILL & A. LOWE, *supra* note 119, at 180-82 (discussing the effect of *Nottebohm* on the genunine link requirement as applicable to ships).

Read narrowly, the *Nottebohm* case stands for the principle that the ascription of nationality to a person by a state is not opposable to another state to which the person is connected by a genuine link. Under this construction of *Nottebohm*, the flag-state of a ship flying a flag of convenience would have no claim against a state to which the ship is genuinely connected, should the latter state assert jurisdiction over that ship on the high seas.

145. (Belg. v. Spain), 1970 I.C.J. 4, 188 (Jessup, J., dissenting).

146. Convention on the Law of the Sea, *supra* note 7, art. 91(1).

147. *Id.* (emphasis added). Article 91(1) parallels the more expansive Convention on the High Seas, which provides that "[t]here must exist a genuine link between the State

nature of the relationship necessary to discharge this genuine link requirement; nor does the Convention spell out the consequences, if any, that flow from the lack of such a genuine link.

The requirement of a genuine link is controversial and does not likely reflect the current state of customary international law. What little support the requirement does command derives mainly from publicists, who argue that ships unconnected with their flag-state by a genuine link pose a danger to the order of the high seas; the genuine link requirement is necessary, they argue, to rid the high seas of ships sailing under flags of convenience.[148] The belief that ships under flags of convenience are unruly is ill-founded. Professor Bowett writes, "Obviously, if there had been evidence to show that vessels [unconnected to their flag-state by a genuine link] were productive of anarchy and disorder in the sense that the flag States exercised no effective jurisdiction over them, then the case for restriction would be compelling: but there appears to be no such evidence."[149]

Independent of the merits on either side of this complex issue, international law still abides by the traditional rule; a ship properly registered under the laws of a recognized state bears the nationality of that state.[150] Fortunately, for the purposes of this Note, the issue of the genuine link is a nice one, concerning to whom the ship belongs and not whether she is stateless. A ship is not stateless if she is registered with a recognized state, no matter how tenuous her connection to that state may be. De-

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and the ship; *in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*" Convention on the High Seas, *supra* note 6, art. 5(1) (emphasis added). This language reappears without substantive modification in the 1982 Convention under the head "Duties of the flag State." Convention on the Law of the Sea, *supra* note 7, art. 94(1).

148. "Flag of convenience" or "open registry" states—most notably Panama, Liberia, and Honduras (the "Panlibhon" states)—are those whose registration requirements are notoriously lax, enabling shipowners to dodge the stringent maintenance rules and hefty fees required by most other states. *See generally* B. BOCZEK, *supra* note 121; R. CARLISLE, SOVEREIGNTY FOR SALE (1981). The 1982 Convention on the Law of the Sea seeks to remedy the problem believed posed by such states by requiring flag-states to exercise effective jurisdiction over its merchant fleet. *See supra* note 123.

149. D. BOWETT, THE LAW OF THE SEA 56-57 (1967). In the twenty years that have passed since Professor Bowett made this observation, however, the world has witnessed the advent of the drug smuggler—who in many cases operates under the flag of a state that fails to exercise effective jurisdiction over him. *See generally* Anderson, *supra* note 121; *see also supra* note 140.

150. *See supra* note 143. On the nationality of ships, see generally B. BOCZEK, *supra* note 121, at 91-124; M. MCDOUGAL & W. BURKE, *supra* note 32, at 1008-140; H. MEYERS, *supra* note 131; R. RIENOW, *supra* note 121; Watts, *The Protection of Merchant Ships*, 1957 BRIT. Y.B. INT'L L. 52.

spite the sound and fury over the genuine link requirement, flag of convenience vessels are not stateless and are not for that reason amenable to visitation on the high seas.[151] Vessels not registered under the laws of a recognized state[152] are, however, stateless properly so called; such ships may be seized as stateless vessels.

2. Vessels Assimilated to Stateless Vessels

A ship properly registered with a state may lose her allocation of nationality by operation of law should she abuse her flag. The ascription of nationality of ships is so important to the regime of the high seas that a vessel which abuses that ascription is deprived of its protection. Such a vessel is assimilated to a vessel without nationality and risks seizure as a stateless vessel. The Convention on the Law of the Sea provides, "A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality."[153]

As observed above, order on the high seas follows from the existence of a flag-state competent to ensure the good behavior of ships under its

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151. Were this otherwise, more than one-quarter of the world's merchant fleet would be stateless; as of 1980, that percentage of the world's merchant shipping tonnage was registered in Liberia and Panama alone. Lloyds Register of Shipping Statistical Tables, *reprinted in* R. CHURCHILL & A. LOWE, *supra* note 119, at 179.

152. A ship must fly the flag of a recognized state. In the *Asya* case, discussed above, a British destroyer seized a vessel that had hoisted the flag of Israel which, in 1948, was not yet a recognized state. Molvan v. Attorney-General for Palestine, 1948 App. Cas. 351 (P.C.); *see supra* notes 133-37 and accompanying text.

Historically, vessels were required to fly the flag of states entitled to a maritime flag—a right generally unavailable to states without a coastline. 1 L. OPPENHEIM, *supra* note 4, § 262; 1 J. WESTLAKE, *supra* note 43, at 169. The 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea eliminate this traditional requirement by providing that every recognized state—whether coastal or landlocked—has the right to a maritime flag. Convention on the High Seas, *supra* note 6, art. 4; Convention on the Law of the Sea, *supra* note 7, art. 90. International organizations are also competent to register ships to sail the high seas under the flag of the organization. *See* R. CHURCHILL & A. LOWE, *supra* note 119, at 182-83; H. MEYERS, *supra* note 131, at 323-51; 5 J. VERZIJL, *supra* note 141, at 150. This principle is codified in the 1958 Convention on the High Seas and in the 1982 Convention on the Law of the Sea. Convention on the High Seas, *supra* note 6, art. 7; Convention on the Law of the Sea, *supra* note 7, art. 93.

153. Convention on the Law of the Sea, *supra* note 7, art. 92(2); *see* Convention on the High Seas, *supra* note 6, art. 6(2). If a warship suspects that a vessel, although flying the flag of another state, is actually a vessel of the same nationality as the warship, the warship may visit her to determine her true character. *See infra* part VIII.

flag.[154] A ship that sails randomly under two or more flags is as repugnant to this principle as a ship with no flag at all.[155] Accordingly, a ship may sail under no more than one flag at a time.[156]

A ship nevertheless may be entitled to two or more flags, "for the only rule that international law would seem to have is that a ship must be jurisdictionally attached to one State only for a particular purpose at a particular time, not that it may not have double factors which connect it for different purposes to different States."[157] International law merely bars the use of one or more flags "according to convenience." Indeed, the above-quoted provision contained in the 1982 Convention on the Law of the Sea concerns the use of flags, not the entitlement to a flag or flags. A ship might therefore be entitled to multiple flags and would not be stripped of her nationality unless she failed to fly one of them consistently.[158]

VI. THE SELF-DEFENSE EXCEPTION

A. *Self-Defense on the High Seas*

Customary international law permits a state to take reasonable measures to defend itself from aggressive threats to its political security or territorial integrity.[159] In order for this right to obtain, however, there

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154. *See supra* note 121 and accompanying text.

155. Meyers observes:

> The possibility of two allocations existing simultaneously is contrary to the maintenance of good order at sea. If the existence of multiple allocations should be possible, it would be difficult to reconcile with the "exclusive jurisdiction", which is such an essential legal construction for the whole of the Convention on the High Seas. What law would apply on board, what treaties would be applicable to the ship-users?

H. MEYERS, *supra* note 131, at 173.

156. Convention on the Law of the Sea, *supra* note 7, art. 92(1); Convention on the High Seas, *supra* note 6, art. 6(1); *see* Arakas Bros. v. Bulgaria, 7 Trib. Arb. Mixtes 39, 42 (1926) ("L'opinion unanime des auteurs reconnaît que tout vaisseau doit avoir une nationalité et une seule nationalité."); B. BOCZEK, *supra* note 121, at 105; H. MEYERS, *supra* note 131, at 171-79; 1 L. OPPENHEIM, *supra* note 4, § 261.

157. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 754-55.

158. *Id.* at 755. That a ship may be entitled to more than one flag points up the difficulty in framing a coherent definition of the nationality of ships. This difficult issue is, however, beyond the ambit of this Note, although it receives excellent treatment elsewhere. *See generally* H. MEYERS, *supra* note 131, at 171-79.

159. *See generally* D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); D. GREIG, *supra* note 44, at 876-900.

must exist "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[160] This oft-quoted formula, emanating from the *Caroline* incident, is widely accepted as declaratory of customary international law.[161]

While the right of self-defense, as a general proposition, is well-founded and uncontroversial, much controversy does exist over the scope and extent of this right. The right unquestionably obtains in the event of an actual armed attack against a state,[162] but there is less certainty whether a state may respond to an imminent attack or to threats that do not amount to an actual armed attack.[163] State practice and opinion nev-

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160. Letter from Mr. Daniel Webster to Lord Ashburton (July 27, 1842), *reprinted in* Jennings, *The* Caroline *and McLeod Cases*, 32 A.J.I.L. 82, 89 (1938) [hereinafter *Caroline* Letter].

161. The Legal Advisor of the United States Department of State observed, consistent with the *Caroline* rule, that

> the exercise of the inherent right of self-defense depends upon a prior delict, an illegal act that presents an immediate, overwhelming danger to an actual and essential right of the state. When these conditions are present, the means used must then be proportionate to the gravity of the threat or danger.

Memorandum from Mr. Monroe Leigh, Legal Advisor of the Department of State, to Mr. John Morrison, Deputy General Counsel of the CIA (May 29, 1975), *reprinted in* E. McDOWELL, 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 17 (1976). Oppenheim expresses a similar view.

> [V]iolations of other States in the interest of self-preservation are excused in cases of *necessity* only. Only such acts of violence in the interest of self-preservation are excused as are necessary in self-defence, because otherwise the acting State would have to suffer, or have to continue to suffer, a violation against itself.

1 L. OPPENHEIM, *supra* note 4, § 130; *see also* J. BRIERLY, *supra* note 4, at 405-06; D. GREIG, *supra* note 44, at 883-87; 1 C. HYDE, *supra* note 14, at 239-40; M. SHAW, *supra* note 45, at 549-50.

162. This is basic learning. One writer concludes that "[d]espite controversy and disagreement over the scope of the right of self-defence, there is an indisputable core and that is the competence of states to resort to force in order to repel an attack." M. SHAW, *supra* note 45, at 553. Indeed, the Charter of the United Nations provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." U.N. CHARTER art. 51. Article 51, however, must be read alongside article 2(4) of the Charter, which provides, "All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.* art. 2(4).

163. The modern debate on the self-defense issue focuses predominately on the putative right of anticipatory self-defense. Under the traditional *Caroline* equation, a state is permitted to take anticipatory measures in its own defense, provided there exists "a *necessity of self-defence*, instant, overwhelming, leaving no choice of means, and no moment for deliberation." *Caroline* Letter, *supra* note 160 (emphasis added). The advent of the

ertheless support the taking of defensive action in circumstances short of an actual armed attack.

Whenever the right of self-defense properly does obtain, its exercise is subject to the constraints of reasonableness and proportionality. Under the customary *Caroline* rule, the defensive act must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[164] The *Caroline* rule, therefore, imposes on states a double constraint

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United Nations casts doubt on this traditional rule. Much attention is centered upon the construction of article 51 of the Charter of the United Nations, which provides that the right of self-defense shall obtain in the event of an "armed attack." U.N. CHARTER art. 51. One faction, construing article 51 strictly, asserts that the right of self-defense is limited to circumstances of actual armed attack; accordingly, they argue, article 51 disables the customary right of anticipatory self-defense. *See, e.g.*, I. BROWNLIE, *supra* note 159, at 264-80; P. JESSUP, A MODERN LAW OF NATIONS 165-66 (1968); H. KELSON, THE LAW OF THE UNITED NATIONS 269, 797-98, 918 (1964); 2 L. OPPENHEIM, *supra* note 4, § 52*aa*; Aréchaga, *International Law in the Past Third of the Century*, 159 RECUEIL DES COURS 1, 87-98 (1978); Christol & Davies, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962*, 57 A.J.I.L. 525, 531 n.32 (1963). The recent opinion of the International Court of Justice in *Nicaragua v. United States* appears to follow this strict construction of article 51, but the Court left the issue open. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98-106.

The opposing argument is put forward with equal fervor by those who assert that article 51 does not foreclose the traditional right of anticipatory self-defense. Greig expresses the view of many:

> The view has been expressed that Article 51 has restricted the right of a state to employ force in self-defence to cases where an armed attack has occurred against it. However, all that Article 51 is stating is that nothing contained in the Charter restricts the pre-1945 rights of a state to meet force with force. In other words, where international law recognised a wider right to use force in self-defence prior to 1945, that same right still exists, subject to modifications introduced by the Charter. These modifications relate to the procedures for settlement available to the parties to a dispute and the powers of settlement granted to the Security Council under Chapters VI and VII of the Charter and to the General Assembly under Chapter IV. But it is clear that if these procedures do not prove adequate, a residual power to act in self-defence must remain even where no actual armed attack has taken place.

D. GREIG, *supra* note 44, at 336-37 (footnote omitted); *see* D. BOWETT, *supra* note 159, at 185-86; J. STONE, AGGRESSION AND WORLD ORDER 43, 95-96 (1958); *see also* J. BRIERLY, *supra* note 4, at 416-21; 1 O'CONNELL, INTERNATIONAL LAW, *supra* note 4, at 315-20; Skubiszewski, *Use of Force by States*, in MANUAL OF PUBLIC INTERNATIONAL LAW 739-50 (M. Sørensen ed. 1968); Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 6, 231-37.

164. *Caroline* Letter, *supra* note 160. This proscription is taken as a declaration of long-standing custom. *See supra* note 161.

which cabins defensive action within the bounds of necessity and reasonableness.

Subject to the *Caroline* limitations of necessity and reasonableness, a state may meet a threat to its political security or territorial integrity wherever such threat may be found, including *a fortiori* the high seas. A state may therefore address a threat on the high seas even before that threat actually consummates itself upon the territory of the state. Professor Bowett writes:

> It can scarcely be contemplated that a state must remain passive whilst a serious menace to its security mounts on the high seas beyond its territorial sea. It is accordingly maintained that it is still permissible for a state to assume a protective jurisdiction, within the limits circumscribing every exercise of the right of self-defence, upon the high seas in order to protect its ships, its aircraft, and its rights of territorial integrity and political independence from an imminent danger or actual attack.[165]

While controversial, this view is supported by several writers[166] and, most important, is borne out in state practice and opinion.[167]

Given this support, it is curious that the 1958 High Seas Convention does not draw an exception to the exclusivity rule in the case of self-defense. A possible explanation for this omission may be found in the commentary to the original draft of that convention. There, the International Law Commission—the body responsible for the draft—reported:

> The question arose whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile

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165. D. BOWETT, *supra* note 159, at 71.

166. *See, e.g.*, C. COLOMBOS, *supra* note 9, at 315 ("[T]he right of self-defence, as recognised by the law of nations, will confer on a State, in a case where its safety is threatened, a self-protective jurisdiction which will entitle it to visit and arrest a vessel on the high seas and to send her in for adjudication."); D. GREIG, *supra* note 44, at 341 ("Once the proposition is accepted that self-defence is available as a basis for action in the absence of an actual armed attack, it is clear that some form of interference with the freedom of passage of foreign vessels on the high seas may be justifiable."); W. HALL, *supra* note 79, at 328; 1 C. HYDE, *supra* note 14, at 245; P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 97-98 (1927); H. SMITH, *supra* note 18, at 70-71; 1 J. WESTLAKE, *supra* note 43, at 171; *see also* The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 3, 69 (Sept. 27) (Moore, J., dissenting); Le Louis, 2 Dods. 210, 243-44, 165 Eng. Rep. 1464, 1475 (1817). This proposition, that a state may address imminent threats on the high seas, is predicated upon the propriety of the right of anticipatory self-defense, and is, therefore, not without its critics. *See supra* note 162; *see, e.g.*, I. BROWNLIE, *supra* note 4, at 250 ("[I]t may be said here that the legal basis of such a right [of self-defense on the high seas], in the absence of an attack on other shipping by the vessel sought to be detained, is lacking.").

167. *See infra* part VI, section B.

> to the State to which the warship belongs, at a time of imminent danger to the security of that State. The Commission did not deem it advisable to include such a provision, mainly because of the vagueness of terms like "imminent danger" and "hostile acts", which leaves them open to abuse.[168]

The absence of a self-defense provision in the High Seas Convention should not, therefore, imply that such a right was deemed nonexistent by the International Law Commission. The Commission's tentative approach to the issue merely reflects modern sentiment vis-à-vis the right of self-defense; states and writers at once accept the notional existence of a right of self-defense, but are anxious and uncertain as to the scope and practical operation of the right. Moreover, because the validity of any assertion of the right of self-defense tends to be fact-specific, it is difficult or impossible sufficiently to capture the right of self-defense within the bounds of a black letter rule. In the absence of any authoritative pronouncement on the character of a maritime right of self-defense, it is necessary briefly to examine those occasions on which states have successfully asserted the right and to sketch therefrom the broad outline of this right.

B. *Self-Defense on the High Seas in State Practice*

The right of self-defense on the high seas in time of peace is not clearly defined. Professor Bowett observes that whereas it is "generally recognized that a state may exercise its authority on the high seas in exceptional circumstances where this is necessary to forestall a real threat to its territorial integrity and general security," there exists "no agreement on the precise nature of the circumstances which enable this protective jurisdiction to be exercised or on the forms of prevention to which the state may have recourse in the exercise of its right of self-defence."[169] Nevertheless, some states take measures of self-defense on the high seas, and other states frequently support those measures—or at least acquiesce in them. These incidents fall along a continuum; some are of a more extreme nature than others. The readiness with which states take and accept defensive measures relates directly to the extremity of the threat; the more grave the threat, the more likely will a state take defensive measures and the more readily will other states accept such action. Because the inquiry is at bottom a factual one, it is not possible

168. 1956 Report of the I.L.C., *supra* note 55, art. 46, comment (4), at 30, [1956] 2 Y.B. I.L.C. at 284.

169. D. BOWETT, *supra* note 159, at 66.

nor terribly useful to set out a rule more specific than the *Caroline* equation already discussed.[170] Accordingly, the facts of any case in which a state asserts the right of self-defense must be viewed closely to determine first, whether defensive measures were necessary and should have been taken; and second, whether the measures actually taken were a reasonable response to the perceived threat. The following incidents flesh out the vague notions of necessity and reasonableness in light of state practice and opinion.

1. The *Kearsarge* Incident

The French Government, during the time of the United States Civil War, put forward one of the earliest invocations of the right of defense against maritime threats. In 1864, the Union cruiser *Kearsarge* stood on the high seas off the coast of France awaiting the Confederate vessel *Alabama*, which was at that time sheltering in Cherbourg harbor. France, fearful for its shipping and coastline, requested the United States to withdraw the *Kearsarge*. While refusing to recognize any right of France to interfere with United States warships on the high seas, the United States advised the captain of the *Kearsarge* to refrain from engaging the *Alabama* near French waters. The French authorities subsequently escorted the *Alabama* beyond French territorial sea, whereupon the *Alabama* encountered the *Kearsarge* and was sunk in a brief engagement. Although initially wary about the French assertion of this right of self-protection, the United States did later acknowledge the legitimacy of the French position.[171]

2. The *Virginius* Incident

The *locus classicus* of the right of self-defense upon the high seas is the nineteenth century case of the *Virginius*. In 1873, the *Virginius* put to sea bound for Cuba where a revolution against Spain was underway. Although sailing under the United States flag, the *Virginius* was actually under the control of Cuban insurgents who fraudulently obtained United States registry and were employing the vessel to run men and guns to

170. *See supra* part VI, section A.

171. On the *Kearsarge* incident, see D. BOWETT, *supra* note 159, at 74-75; P. JESSUP, *supra* note 166, at 97-98; 1 MOORE'S DIGEST, *supra* note 22, at 723-24; 1 WHARTON'S DIGEST, *supra* note 28, at 107-09, 114-15; *see also* Letter of Mr. Bayard, Secretary of State, to Mr. Manning, Secretary of the Treasury (May 28, 1886), *reprinted in* 1 WHARTON'S DIGEST, *supra* note 28, at 108 ("[T]he sovereign of the shore has a right, by international law, to require that no action be taken by ships of other friendly nations by which subjects should be injured, or the peace of the shore impaired.").

Cuba. On the high seas, the Spanish man-of-war *Tornado* captured the *Virginius* and brought her to Santiago de Cuba. There, the fifty-three passengers and crew of the *Virginius*—Englishmen, Americans, and Cubans—were put to death after summary court martial. A storm of diplomatic protest followed. Spain asserted the right of self-defense. Great Britain accepted this argument and eventually reached a settlement with Spain. The settlement, however, addressed the irregular execution of the British passengers and not the actual seizure of the *Virginius*, to which Great Britain did not object. The United States refuted the Spanish assertion of a right of self-defense. When, however, it was learned that the *Virginius* was not properly under United States registry, the matter was settled amicably between the two states.[172]

Although the convoluted facts of the *Virginius* incident and the equivocal nature of the settlements lessen the incident's value as precedent, the case of the *Virginius* is widely taken as support for the proposition that states may take defensive measures against non-national ships on the high seas in time of peace.[173] Hyde summarizes the lesson of the *Virginius*:

> On grounds of self-defense an aggrieved State may subject a foreign ship to restraint on the high seas and in times of peace, if the conduct of those controlling the vessel is such as to render the seizure of her the necessary mode of warding off threatened and instant danger. Circumstances may in fact rarely combine to warrant such preventive action. In the case of the *Virginius* they appear to have been such as to impose no duty on the Spanish authorities to refrain from seizing the vessel until she entered Cuban waters.[174]

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172. On the *Virginius* incident, see C. COLOMBOS, *supra* note 9, at 314-15; D. GREIG, *supra* note 44, at 338-39; 1 C. HYDE, *supra* note 14, at 244-45; 2 MOORE'S DIGEST, *supra* note 22, at 895-903; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 803-04; 1 J. WESTLAKE, *supra* note 43, at 171-73; 3 WHARTON'S DIGEST, *supra* note 28, at 147-59. See also the similar case of the *Mary Lowell*, P. JESSUP, *supra* note 166, at 97 n.88; H. SMITH, *supra* note 18, at 70-71; van Zwanenberg, *supra* note 43, at 794, and the case of the *Deerhound*, 3 WHARTON'S DIGEST, *supra* note 28, at 153; van Zwanenberg, *supra* note 43, at 794.

173. According to Greig, the "majority of writers have accepted the subsequent compensation paid by Spain to Britain as establishing the incident as authority for the proposition that self-defence may be a basis for exercising a power of arrest over foreign vessels, including foreign warships, on the high seas." D. GREIG, *supra* note 44, at 338-39. Greig's statement is overbroad insofar as it purports to justify an extension of jurisdiction over non-national warships. *See* Convention on the High Seas, *supra* note 6, art. 8(1); Convention on the Law of the Sea, *supra* note 7, arts. 95-96 (proscribing interference with non-national public ships).

174. 1 C. HYDE, *supra* note 14, at 245.

In other words, the weight of circumstances attending the seizure of the *Virginius* and the appropriateness of the Spanish response to those circumstances combined to satisfy the bipartite *Caroline* requirements of necessity and reasonableness.[175]

3. The Declaration of Panama

In October 1939, the foreign ministers of the American republics adopted a resolution that stipulated in part as follows:

> As a measure of continental self-protection, the American republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American Continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea, or air.[176]

The putative effect of this Declaration of Panama was to disallow the warships of any belligerent nation—Allied or Axis—from taking hostile actions in the waters located three hundred to twelve hundred miles from the American continent.[177] The United States Secretary of State held out the Declaration of Panama as a justifiable measure of continental self-defense, claiming

> I believe that the creation of this zone should be considered rather as a practical measure designed to maintain certain vital interests . . . . [T]he Declaration of Panama sets forth merely a statement of principle, based on the *inherent right of self-protection* rather than a formal proposal for the modification of international law.[178]

This novel application of the principle of self-defense by the American republics is of dubious legality. O'Connell observes, "The view of the British and German Governments was that the Declaration of Panama was a legal nullity, but that it should not be opposed because in various ways its existence served their purposes, and it was for a time effective.

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175. *See supra* part VI, section A.

176. *Report of the Delegate of the United States of America to the Meeting of the Foreign Ministers of the American Republics Held at Panamá, Sept. 23-Oct. 3, 1939*, at 62-64, *reprinted in* 11 WHITEMAN'S DIGEST, *supra* note 43, at 451.

177. On the Declaration of Panama, see M. MCDOUGAL & W. BURKE, *supra* note 32, at 590-91; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 806-07; 11 WHITEMAN'S DIGEST, *supra* note 43, at 451-57; Brown, *Protective Jurisdiction*, 34 A.J.I.L. 112 (1940); Fenwick, *The Declaration of Panama*, 34 A.J.I.L. 116 (1940); Masterson, *The Hemisphere Zone of Security and the Law*, 26 A.B.A. J. 860 (1940).

178. Statement of Mr. Sumner Welles, Undersecretary of State, to Mr. Henry Coster, *reprinted in* 7 HACKWORTH'S DIGEST, *supra* note 66, at 703-04 (emphasis added).

Legal opinion has not supported it."[179]

The failure of the Declaration of Panama to garner international support undoubtedly follows from the overbroad competence asserted by the American republics. While a state may properly seek to ensure that activities of belligerents or others do not adversely affect state territory,[180] a state may not take the extreme measure of closing off vast portions of the high seas to protect itself against hypothetical dangers. Under *Caroline*, a state's defensive response must be measured and in proportion to the particular threat.[181] If the response is unreasonable vis-à-vis the per-

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179. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 807 (footnotes omitted).

180. Recall the *Kearsarge* incident in which France sought to ensure the same ends contemplated by the American republics—the protection of territory and nationals from the acts of belligerents upon the high seas. *See supra* part VI, section B.1. There, however, the defensive measures taken by France were not overbroad in relation to the perceived threat. Instead, France closely tailored its response to the circumstances and in so doing properly exercised its right of self-defense.

181. O'Connell writes:

> There is no question that a right of self-defence exists in the case of any ship illegally subject to force on the high seas, but this is a different case from the exercise of force in the interests of national self-defence. One view is that the ordinary law of self-defence applies, namely that there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation", and that the action taken must not be "unreasonable or excessive" and "limited by that necessity and kept clearly within it". If that were so it would be difficult to justify a regime of visit and search unconnected with immediate threats, and which is really intended to create a *cordon sanitaire*.

2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 804 (quoting *Caroline* Letter, *supra* note 160).

States nevertheless may establish certain zones about them for their own protection. The notion of the contiguous zone is well established in international law and is codified in recent conventions. The 1982 Convention on the Law of the Sea provides:

> 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.

Convention on the Law of the Sea, *supra* note 7, art. 33; *see* Geneva Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) [hereinafter Convention on the Territorial Sea].

The contiguous zone is a band of ocean adjacent to the territorial sea, extending up to twenty-four nautical miles from the baselines of the littoral state. Convention on the Law of the Sea, *supra* note 7, art. 33(2). The contiguous zone is neither part of the territorial sea nor part of the high seas, but is rather part of the state's exclusive economic zone. *Id.* arts. 55, 86. Within this contiguous zone, the littoral state may take steps to control,

ceived threat, international opinion will—as in the case of the Declara-

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prevent, and punish violations of its customs, fiscal, immigration, and sanitary laws. The authority of the state within its contiguous zone is, therefore, broader than on the high seas but narrower than on its territorial sea. O'Connell writes:

> A State exercises dominion, or at least jurisdiction, in the territorial sea, whereas in the contiguous zone it has a limited right of police. In the territorial sea, jurisdiction involves the exercise of powers conferred by municipal law in an area which municipal law regards, for all practical purposes, as belonging to the coastal State. The powers exercised by a State over foreign shipping in the contiguous zone, however, like other powers exercised on the high seas, are derived from international law and not from municipal law, even though the latter may purport to confer them. In the territorial sea, international law operates as a restraining rather than an enabling force, whereas in the contiguous zone the situation is reversed. The enumeration of rights in Article 24 [of the Convention on the Territorial Sea] clearly indicates the absence of any general jurisdictional rights and their limitation to certain stated purposes. What is exercised is not jurisdiction but control.

2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 1058. On the concept of the contiguous zone, see *id.* at 1034-61; R. CHURCHILL & A. LOWE, *supra* note 119, at 101-07; 1 L. OPPENHEIM, *supra* note 4, § 190(ii); Gidel, *La mer territoriale et la zone contiguë*, 48 RECUEIL DES COURS 133, 241-73 (1934).

Because the state's competence in the contiguous zone is necessarily limited to the enforcement of customs, fiscal, immigration, and sanitary laws, no state may ordinarily purport to create in the contiguous zone a generalized security zone or similar zone based upon the state's inherent right of self-defense. Commenting upon its draft of the Convention on the Territorial Sea, the International Law Commission reports:

> The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations.

1956 Report of the I.L.C., *supra* note 55, art. 66, comment (4), at 39-40, [1956] 2 Y.B. I.L.C. at 295.

A state's right to take defensive measures may still obtain in the contiguous zone, but this right flows from customary principles of international law and not from contiguous zone theory. There may exist circumstances in which the establishment of a security zone—within the contiguous zone or elsewhere—conceivably is a necessary and reasonable response to a threat to the security or territorial integrity of a state. Because the establishment of a security zone is an extreme measure, however, the circumstances justifying it must themselves be extreme. *See* 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 804 ("[T]here is a possible view that general considerations of self-defence would operate to vindicate [the establishment of a security zone], independently of immediate threats."); *see, e.g., infra* notes 185-88 and accompanying text (discussing the Falkland Islands total exclusion zone).

tion of Panama—condemn it.

The security zone established by the Declaration of Panama offended international law not because security zones are unlawful per se,[182] but because the establishment of the zone was, under the circumstances, neither necessary nor reasonable within the meaning of the *Caroline* rule.[183] McDougal and Burke observe that despite the opposition to the Declaration of Panama, "influential publicists have affirmed the soundness of the principle embodied in the Declaration, conceding the validity of objections to enforcement only in the particular instances in which enforcement could be shown to be unreasonable."[184] Had the danger confronting the American continent been more poignant, or the response thereto more measured, the Declaration of Panama would likely have been more warmly received.

The recent British-Argentine conflict in the Falklands provides an example of a justifiable security zone. Incident to the Argentine invasion and occupation of the Falkland Islands, the British Government announced on 7 April 1982 the establishment of a "maritime exclusion zone" around the islands, within which "any Argentine warships and Argentine naval auxiliaries found [would] be treated as hostile and [were] liable to be attacked."[185] On 28 April 1982, the British imposed a two hundred mile "total exclusion zone" in the place of the "maritime exclusion zone." The British Government addressed the following statement to the Goverment of Argentina:

> In announcing the establishment of a total exclusion zone around the Falklands, Her Majesty's Government made it clear that this measure was without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in exercise of its right to self-defence under Article 51 of the Charter of the United Nations. In this connexion, Her Majesty's Government now wishes to make clear that all

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182. *See supra* note 181.

183. *See supra* part VI, section A.

184. M. McDOUGAL & W. BURKE, *supra* note 32, at 591. One of these "influential publicists" writes:

> We may confidently assert that the principle of protective jurisdiction enunciated in the Declaration of Panama has never been repudiated in international law and practice. On the contrary, the consensus of opinion, as well as of practice, overwhelmingly sustains the right of every nation to defend its laws and security from threatened violations, under varying circumstances, in the waters contiguous to the conventional three-mile limit . . . .

Brown, *supra* note 177, at 114.

185. 21 PARL. DEB., H.C. (6th ser.) 1045 (1982) (statement of Mr. John Nott, United Kingdom Secretary of State for Defense).

> Argentine vessels, including merchant vessels, apparently engaging in surveillance of, or intelligence-gathering activities against, British forces in the South Atlantic will be regarded as hostile and are liable to be dealt with accordingly.[186]

The total exclusion zone was to apply

> not only to Argentine warships and Argentine naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The Exclusion Zone will also apply to any aircraft, whether military or civil, which is operating in support of the illegal occupation. Any ship and any aircraft whether military or civil which is found within this Zone without due authority from the [Ministry of Defence] in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British Forces.[187]

The establishment of the total exclusion zone around the Falklands is distinguishable from the zone established under the Declaration of Panama. In the former case, the danger was clear and present; in the latter, the danger was vague and speculative. The circumstances in the Falklands called for immediate action, for delay could have meant loss of life or injury to a substantial state interest. Not only was the British action necessary, it was reasonably tailored to the circumstances. Contrary to the action taken by the American republics, the establishment of the total exclusion zone was a reasonable defensive measure, proportionate to the nature of the perceived threat. The size of the zone in the British example was limited to a discrete portion of the sea; the Declaration of Panama closed off the high seas around an entire continent. More important, the British total exclusion zone addressed the precise nature of the threat; the purpose of the exclusion zone

> seems to have been simply to overcome the necessity for determining whether any ship or aircraft in the area presented a serious threat to the task force, in circumstances where the time taken to make such a determination could have given a decisive advantage to the other ship or aircraft,

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186. Communication from the Government of the United Kingdom to the Government of Argentina (Apr. 29, 1982), *reprinted in* 1982 BRIT. Y.B. INT'L L. 544.

187. 22 PARL. DEB., H.C. (6th ser.) 296 (1982) (written answer of Mr. John Nott). On the Falklands War and the exclusion zones, see Barston & Birnie, *The Falkland Islands/Islas Malvinas Conflict: A Question of Zones*, 7 MARINE POL'Y 14 (1983). On war zones generally, see C. COLOMBOS, *supra* note 9, at 528-31; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 1109-12.

before taking action against it in self-defence.[188]

The establishment of the exclusion zone, therefore, was both necessary and reasonable. The same cannot confidently be said about the Declaration of Panama.

4. The Algerian Emergency

During the Algerian Emergency, between 1956 and 1962, the French Navy undertook to visit and search foreign ships on the high seas in an effort to stem the flow of arms and munitions into Algeria. In the first year of the operation, the French visited approximately 4775 ships.[189] The flag-states of many of the affected vessels vigorously protested to the French Government.[190] In one instance, the owners of the Italian vessel *Duizar* sought damages from France, claiming that the French Navy lacked legal authority to visit and search non-national vessels on the high seas.[191] While the matter of the *Duizar* remained largely unresolved in the French courts, the French Minister of Defense, in a memorial submitted to the *Tribunal administratif de Paris*, argued that the French action "constituted a measure of police affecting the external safety of the State" which was "necessary for safety reasons, and ha[d] no vexatious character."[192]

The French action and the corresponding international response afford another illustration of the fundamental requirement of international law that defensive action be both necessary and closely tailored to fit the nature of the threat. There is a tantalizing similarity between the French action and the seizure of the *Virginius* by Spain over eighty years earlier.[193] In both cases, a state wished to quell hostilities by choking off arms and munitions flowing to the troubled area from the high seas; yet whereas international opinion accepts the seizure of the *Virginius* as proper, condemnation of the French action is nearly universal. Churchill and Lowe observe, "The explanation of the distinction between the responses to the *Virginius* and the Algerian incidents probably lies partly in the emergence during the intervening period of rules limiting the use of force generally . . . and partly in the scale of the French opera-

188. R. CHURCHILL & A. LOWE, *supra* note 119, at 272.

189. *See generally id.* at 153; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 805-06.

190. *See* 4 WHITEMAN'S DIGEST, *supra* note 43, at 513-14.

191. Ignazio Messina et Cie v. L'Etat, *reprinted in* 90 JOURNAL DU DROIT INT'L 1190 (1963).

192. *Id.* at 1193 (Mémoire du Ministre des armées) (translation).

193. *See supra* part VI, section B.2.

tion . . . ."[194] A comparison between the Algerian Emergency and the Declaration of Panama[195] is likewise instructive. In both cases, the defensive response was far out of proportion to the perceived threat; and in both cases, international condemnation was the result.

The axiom of the *Caroline* is again borne out in state practice—the defensive action must contain "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[196] States ignore this rule at their peril.

5. The Cuban Quarantine

The well-known milieu of the 1962 Cuban missile crisis provides the backdrop to one of the more dramatic incidents of maritime visit and search. On 22 October 1962, President Kennedy announced that "unmistakable evidence has established the fact that a series of offensive missile sites is now in preparation"[197] on the island of Cuba. The following day, the Organization of American States called for the withdrawal of missiles from Cuba and recommended that all member-states take steps consistent with this end. Pursuant to this resolution, the President immediately ordered the United States Navy to interdict the flow of offensive materials to Cuba. Cuba was placed under "strict quarantine,"[198] and ships proceeding there were subject to visitation and search on the high seas. Any vessel found carrying proscribed material was turned away. The Cuban quarantine remained in force until the United States and the Soviet Union reached a peaceful resolution of their differences.[199]

On the myriad possible justifications for the Cuban quarantine, O'Connell writes:

> The legal basis for the United States action was a combination of factors: it was said to be "a collective claim for a temporary and special use of limited areas of the high seas"; directed not against ordinary maritime commerce, but against a threat to the peace; the defensive character of the

194. R. CHURCHILL & A. LOWE, *supra* note 119, at 153.

195. *See supra* part VI, section B.3.

196. *Caroline* Letter, *supra* note 160. This proscription, part of the *Caroline* formula, is taken as a declaration of long-standing custom. *See supra* note 161 and accompanying text.

197. 5 WHITEMAN'S DIGEST, *supra* note 43, at 443.

198. *Id.*

199. On the Cuban quarantine, see generally D. GREIG, *supra* note 44, at 339-40; 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 807-08; 4 WHITEMAN'S DIGEST, *supra* note 43, at 523-29; 5 WHITEMAN'S DIGEST, *supra* note 43, at 440-50.

> action, bringing it within the scope of Article 51 of the United Nations Charter; the sanction of a regional organization, which derived further validity from the reference to regional arrangements or agencies in Article 52 of the Charter; and the "reasonableness of the claim" coupled with international toleration and acquiescence.[200]

Despite this plenitude of rationalizations—and perhaps because of it—the quarantine remains a controversial issue.

The quarantine incident, due to its mixed nature, yields few lessons useful to this Note's inquiry. While self-defense undoubtedly played a role in the decision to impose the quarantine, too many other elements are present in the equation to draw any substantive conclusions from the incident vis-à-vis the nature of the right of self-defense on the high seas. Truly, hard cases make bad law.[201] Perhaps the most that one may conclude from the incident is that "even in peacetime States do take exceptional measures of enforcement jurisdiction on the high seas, any opposition from other States being insufficient to deter them."[202] And this is not an insignificant observation.

6. The *Torrey Canyon* Incident

In 1967, the Liberian oil tanker *Torrey Canyon* grounded on the high seas off Cornwall, England, spilling over 100,000 tons of crude oil. The United Kingdom ordered the bombing of the wreckage, hoping to ignite the oil to reduce the pollution damage. The British Government justified the bombing as an act of self-defense.[203]

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200. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 808 (citing Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550 (1963); Christol & Davies, *supra* note 163; Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Self-Defense Claims Valid under International Law*, 31 GEO. WASH. L. REV. 335 (1962)) (footnote omitted). Greig concludes that "it is difficult to accept the American contention that it was their naval quarantine which was necessitated on the grounds of self-defence." D. GREIG, *supra* note 44, at 341; *see also* Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL. 763 (1962).

201. Churchill and Lowe write, "[I]f the intention to create a precedent for future behaviour is a desirable quality in State practice called in evidence to support the existence of a rule of customary law, then the [quarantine] incident is perhaps best forgotten." R. CHURCHILL & A. LOWE, *supra* note 119, at 153. O'Connell also concludes that "[w]hatever be the plausibility of these justifications the Cuban Quarantine was a highly exceptional matter with little value as a precedent in situations of self-defence which fall short of global deterrence." 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 808.

202. R. CHURCHILL & A. LOWE, *supra* note 119, at 153.

203. On the *Torrey Canyon* incident, see E. COWAN, OIL AND WATER: THE *TORREY CANYON* DISASTER (1968); C. GILL, F. BOOKER & T. SOPER, THE WRECK OF THE *TORREY CANYON* (1967).

Subsequent international practice and opinion bear out the legitimacy of the British action. At the time of the incident, however, the United Kingdom's action was of questionable legality; the bombing of the vessel was not clearly justifiable under then-existing customary international law because the landing occurred on the high seas and not within British territorial waters.[204] Accordingly, the United Kingdom agreed to submit the matter to the International Maritime Organization. This action resulted ultimately in the Intervention Convention of 1969, which provides that party states

> may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.[205]

Before taking defensive measures, the interested state must consult with experts and notify affected parties.[206] A state may forego consultation and notification, however, when the danger is imminent.[207] All measures taken are subject to the *Caroline* constraints of necessity and reasonableness; defensive measures must reflect the probability and extent of imminent injury, the probable effectiveness of the measures selected, and the extent of damage likely to be inflicted thereby.[208] A state must pay compensation for measures that prove excessive or unreasonable.[209]

The 1982 Convention on the Law of the Sea makes no remarkable

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204. If the landing had occurred within British territorial waters, the United Kingdom presumably could have taken any measures it saw fit to protect itself. *See* 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 1007. A vessel grounding and spilling oil within the territorial sea of a state does not enjoy the right of innocent passage since she is neither "innocent" nor "in passage." *See* Convention on the Law of the Sea, *supra* note 7, arts. 17-19 (defining innocent passage). Similarly, customary international law would likely permit a state to take defensive actions in response to a landing within the state's contiguous zone. Within its contiguous zone, a state enjoys a special competence with regard to the enforcement of its protective laws. *See supra* note 181.

205. Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties, *opened for signature* Nov. 29, 1969, art. I, 26 U.S.T. 765, 767, T.I.A.S. No. 8068, 970 U.N.T.S. 211 (entered into force May 6, 1975) [hereinafter Intervention Convention]. A subsequent protocol authorizes the affected state to intercede in cases of pollution other than oil. *See* Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, *opened for signature* Nov. 2, 1973, — U.S.T. —, T.I.A.S. No. 10561, — U.N.T.S. — (entered into force Mar. 30, 1983).

206. *See* Intervention Convention, *supra* note 205, art. III(a)-(c).

207. *Id.* art. III(d).

208. *Id.* arts. I, V.

209. *Id.* art. VI.

contribution to this issue.[210] Nevertheless, the Convention does acknowledge the

> right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.[211]

Here again, the right to take offensive measures is shaped by the exigencies of the circumstances, consistent with the *Caroline* equation.[212]

Both the Intervention Convention and the Convention on the Law of the Sea indicate that coastal states have a right to take defensive measures on the high seas against vessels threatening their coastline, subject to the twin constraints of necessity and reasonableness. Given the readiness with which states have accepted these provisions, one may reasonably argue that these rules are generally declaratory of existing customary law.[213] This is, however, by no means clear.

C. *Summary*

These few incidents of state practice, far from being conclusive, merely hint at the vague parameters within which a state may lawfully act in its own self-defense on the high seas. While no simple equation may be

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210. The Convention does purport to grant states jurisdiction for the suppression of the discharge of oil by non-national ships sailing in the state's territorial sea, contiguous zone, or exclusive economic zone. When "clear grounds" exist for believing a foreign vessel has polluted the waters near a state, the affected state may request information from the vessel. Convention on the Law of the Sea, *supra* note 7, art. 220(3). In extreme cases, the state may submit the vessel to visitation and inspection. *Id.* art. 220(5). When sufficient evidence exists that the vessel has caused "major damage or threat of major damage to the coastline or related interests of the coastal State," that state may detain the vessel and bring proceedings against her. *Id.* art. 220(6).

211. *Id.* art. 221(1).

212. *See supra* part VI, section A.

213. Churchill and Lowe observe:

> Whether a coastal State possesses powers of intervention on the high seas under customary international law, as [the Convention on the Law of the Sea] assumes, is perhaps controversial. At least, there must have been some doubt about this question, for otherwise it would not seem necessary to have concluded the Intervention Convention. On the other hand, it can be argued that the United Kingdom's action against the *Torrey Canyon* in 1967, coupled with its ready acceptance by other States, constituted an emerging rule of customary international law which the Intervention Convention simply crystallised and clarified.

R. CHURCHILL & A. LOWE, *supra* note 119, at 232.

derived from existing state practice and opinion, certain broad conclusions are supportable. Most important, it is clear that states do indeed possess an inherent right to defend themselves against threats to their territorial integrity or political security. States take defensive actions in time of extremity, and other states often support these actions.

At other times, however, states will condemn actions taken in the name of self-defense. The line that separates proper from improper defensive actions is not bright. Still, the ancient *Caroline* maxim is frequently borne out in practice; there must exist a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[214] While a strict application of this maxim is inappropriate, a state is probably unjustified in taking defensive actions unless it is laboring under the weight of necessity. State practice indicates that the right of self-defense will arise whenever the state is suffering or is likely to suffer an injury to some territorial, political, environmental, or other important interest. The gravity or relative importance of the interest does not significantly affect the determination whether the right of self-defense obtains. The weight of the interest appears relevant only to the reasonableness of the action taken to prevent it; a more important interest will justify a more ardent defense. The threat must, however, be sufficiently grave to justify encroachment upon the traditional and dearly-held freedom of the high seas. That is, hypothetical threats are insufficent.

When a state has the right to take defensive action—that is, when the state is suffering or is likely to suffer an injury to a substantial state interest—it is constrained to act in a reasonable manner proportionate to the threat. This limitation is the second element of the *Caroline* rule; the defensive act should contain "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[215] The incidents of state practice discussed above demonstrate that defensive actions of a scope disproportionate to the threat are consistently criticized by the international community. On the other hand, reasonable acts that are consonant with the nature of the threat, and which are carefully tailored to address the specific danger posed by the threat, are applauded by states—or at least tolerated by them. This is the teaching of *Caroline*, and it is the lesson of state practice.

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214. *Caroline* Letter, *supra* note 160.

215. *Id.*; *see supra* note 164 and accompanying text.

VII. THE PIRATE RADIO BROADCASTER EXCEPTION

The past few decades have seen an increase in the abuse of international radio regulations by individuals operating from "pirate" broadcasting stations aboard ships on the high seas. The problem has particularly affected Western Europe,[216] where at one time eleven pirate transmitters were in operation on the Baltic Sea, the Irish Sea, and the North Sea.[217] Consistent with their romantic appellation, pirate broadcasters plunder the airwaves in contravention of existing international and regional broadcasting laws,[218] compromising the careful system of international radio frequency allocation.[219]

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216. Western Europe is a likely target for pirate broadcasters. Radio there is largely state-run and noncommercial; radio pirates attempt to skirt these limitations and offer programming of broader appeal than that offered by the staid, traditional European broadcasters. Hunnings, *Pirate Broadcasting in European Waters*, 14 I.C.L.Q. 410, 410-20 (1965); *see* Robertson, *The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory*, 45 LAW & CONTEMP. PROBS. 71, 72, 75-76 (Winter 1982); Smith, *Pirate Broadcasting*, 41 S. CAL. L. REV. 769, 770-72 (1968); van Panhuys & van Emde Boas, *Legal Aspects of Pirate Broadcasting*, 60 A.J.I.L. 303, 309-11 (1966).

217. Pirate broadcasting reached its apex in the mid-1960s and has since declined. Radio Caroline, however, has been broadcasting intermittently from the *Caroline* since March 1964 and is somewhat of a legend in the business. Registered in Panama, the *Caroline* began transmitting to Eastern England and Holland, but later moved off the Irish coast. C. COLOMBOS, *supra* note 9, at 144; H. MEYERS, *supra* note 131, at 315 & n.5; Hunnings, *supra* note 216, at 410-12. The *Caroline* successfully avoided the laws of several European states for several years, only to sink in 1979 during a storm at sea. Robertson, *supra* note 216, at 71. Apparently, however, Radio Caroline has since been resurrected. While up at Cambridge in 1987, as I wrote portions of this Note, my radio was tuned to Radio Caroline—which purported to be "Rockin' you from the North Sea!" The long life of Radio Caroline, in its various incarnations, points up the difficulty of effectively silencing pirate broadcasters.

218. *See generally* Evensen, *Aspects of International Law Relating to Modern Radio Communications*, 115 RECUEIL DES COURS 471, 564-67 (1965); Hunnings, *supra* note 216, at 413-24; Robertson, *supra* note 216, at 72-74; van Panhuys & van Emde Boas, *supra* note 216, at 304-11.

219. One writer observes:

> The basic problem presented by pirate radio stations was that they struck at the very heart of the comprehensive and sophisticated national and international regulatory schemes adopted by the international community to ensure order and noninterference between uses and users of the radio spectrum. Since the spectrum of radio frequencies allocated to radio broadcasting is limited and a large number of broadcasting stations were competing for places on the spectrum, the intrusion of broadcasting stations free to pick their own frequencies and radiated-power levels was bound to create interference with other stations.

Robertson, *supra* note 216, at 75 (footnote omitted).

Efforts to curb pirate radio have so far met with limited success. While many affected states have enacted legislation criminalizing unauthorized broadcasting from the high seas,[220] enforcement of such legislation consistently proves problematic.[221] The central difficulty encountered is, not surprisingly, the questionable legitimacy of extending the state's enforcement jurisdiction over non-national vessels suspected of unauthorized broadcasting on the high seas.[222] A state is, of course, competent to arrest on the high seas troublesome vessels flying under its flag as well as stateless vessels.[223] Often, however, the pirate broadcasting ship is registered to a state unable or simply unwilling to cooperate in the suppression of this activity.[224] In this case, the enforcing state can exercise jurisdiction provided it acts pursuant to some customary or conventional exception to the exclusivity rule of flag-state jurisdiction; a state may not assume jurisdictional competence over radio pirates by legislative fiat.[225] To justify a state's assertion of jurisdiction solely on the basis

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220. Such laws have been enacted by the Scandinavian states, the United Kingdom, the Netherlands, and Belgium. 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 815-19; Evensen, *supra* note 218, at 569-74; Hunnings, *supra* note 216, at 417-22; Smith, *supra* note 216, at 806-14; van Panhuys & van Emde Boas, *supra* note 216, at 307-09.

221. Enforcement of international radio frequency regulations is left to individual states, which must take measures to ensure that vessels on the high seas under their flag comport with the appropriate norms. But "[r]eliance upon the law of the flag to prevent 'pirate radio' broadcasting [has] proved to be ineffective." 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 815.

222. Hunnings observes, "The difficulties have arisen because the stations . . . have been operating in international waters either without a flag or with a flag of convenience only. The basic problem is, therefore, one of jurisdiction . . . ." Hunnings, *supra* note 216, at 412 (footnotes omitted).

> The case of pirate broadcasting from ships [is] particularly difficult because there is no authority in international law for boarding a foreign ship on the high seas, even when it is engaged in activities contrary to the law of the State against which these activities are directed, and even when the offenders are nationals of that State.

2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 816.

223. *See supra* part V, section A.

224. Often, pirate broadcasters fly under flags of convenience or without a flag. Radio Syd, for example broadcast from an Honduran vessel; Radio Mercur from a Guatemalan vessel; and Radio Veronica and Radio Caroline from Panamanian vessels. Hunnings, *supra* note 216, at 410-12. On flags of convenience, see *supra* note 148.

225. Two publicists observe:

> [G]overnments contemplating measures against such stations will have to be sure that they will be able to justify their action from the point of view of international law. If they cannot base the action on general treaties, they must fall back on the rules or principles of general international law.

van Panhuys & van Emde Boas, *supra* note 216, at 304.

of the state's desire to proscribe broadcasting from the high seas would offend the principle of exclusive flag-state jurisdiction.

International efforts to address the inherent difficulties in unilateral extensions of enforcement jurisdiction over unauthorized broadcasters have resulted in a number of multilateral declarations and conventions. In 1965, the Council of Europe opened for signature the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (European Agreement).[226] Under the European Agreement, signatory states are obliged to punish individuals aboard ships under its flag who are engaged in or assisting with unauthorized broadcasting.[227] While the European Agreement permits states to punish non-nationals as well as nationals found aboard its ships,[228] the treaty does not authorize signatories to proceed against one another's ships. No mutual *droit de visite* is conceded, leaving the European Agreement without teeth. Professor Bowett observes, "The interesting aspect of this Agreement is that it does not contemplate any unusual jurisdiction: that is to say, the jurisdiction of each State is confined to its own territory, its own ships, aircraft or nationals—and this is perfectly consistent with the rules of international law."[229] The European Agreement, while evincing a growing state practice condemning unauthorized broadcasting, does little to remedy the core problem of jurisdiction.

The 1982 Law of the Sea Convention purports to fill the lacunae of the European Agreement by providing a right of visit and search to specially interested states. Under the Convention, a state may board a non-national vessel reasonably suspected of unauthorized broadcasting,[230] provided the state receives the unauthorized broadcasts or otherwise suffers from radio interference caused by the pirate broadcasters.[231] If

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226. European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories, *opened for signature* Jan. 22, 1965, 1968 U.K.T.S. No. 1 (Cmd. 3497), 634 U.N.T.S. 239 [hereinafter European Agreement]; *see* 2 O'CONNELL, LAW OF THE SEA, *supra* note 4, at 817-18; 9 WHITEMAN'S DIGEST, *supra* note 43, at 792-94; Evensen, *supra* note 218, at 574-77; Robertson, *supra* note 216, at 94-96; Smith, *supra* note 216, at 801-05; van Panhuys & van Emde Boas, *supra* note 216, at 324-26.

227. European Agreement, *supra* note 226, art. 2.

228. *Id.* art. 3.

229. D. BOWETT, *supra* note 149, at 55.

230. Convention on the Law of the Sea, *supra* note 7, art. 110(1)(c).

231. *Id.* art. 109(3). The Convention defines unauthorized broadcasting as "the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations." *Id.* art. 109(2). The relevant provision, article 190, reads in full:

1. All States shall co-operate in the suppression of unauthorized broadcasting

boarding does not discharge the suspicion of the boarding party, the boarding party may proceed to search the vessel,[232] arrest her, and seize her broadcasting apparatus.[233] The arresting state may then prosecute those engaged in the unlawful broadcasting—no matter what their nationality.[234] The Convention therefore purports to invest affected states with judicial, legislative, and enforcement jurisdiction over radio pirates.

While the 1982 Law of the Sea Convention attempts to make a novel and useful contribution to the existing body of international law, it is hardly without defect. The provision granting the flag-state jurisdiction over non-national radio broadcasters is uncontroversial if intended merely to apply to treaty parties *inter se*. States may agree among themselves to concede a mutual *droit de visite*.

This particular provision, however, cannot properly be viewed as a codification of existing customary law. As already observed, international law has not drawn an exception to the exclusivity rule of flag-state jurisdiction in the case of pirate broadcasters.[235] The right to exercise jurisdiction over radio pirates is a conventional right only and therefore is not opposable to states not party to the 1982 Convention. The inclusion of this provision in the Convention and the willingness of states to commit

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from the high seas.

2. For the purposes of this Convention, "unauthorized broadcasting" means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.

3. Any person engaged in unauthorized broadcasting may be prosecuted before the court of:

(a) the flag State of the ship;

(b) the State of registry of the installation;

(c) the State of which the person is a national;

(d) any State where the transmission can be received; or

(e) any State where authorized radio communication is suffering interference.

4. On the high seas, a State having jurisdiction in accordance with paragraph 3 may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.

Id. art. 190.

232. *Id.* art. 110(2).

233. *Id.* art. 109(4).

234. *Id.* art. 109(3).

235. One writer, referring to this provision as "an exercise in overkill," observes that

[t]o grant to any state in which a broadcast can be received the authority to board a ship . . . and to arrest and prosecute the persons or ships involved is a drastic departure from the traditional freedoms of the high seas and the principle of the exclusive jurisdiction of flag states over ships flying their flags.

Robertson, *supra* note 216, at 101.

themselves to it is puzzling. The *travaux préparatoires* offer no explanation. One must assume the drafters of the Convention intended this provision as a progressive development that would over time pass into the general corpus of customary international law.[236] In any event, this provision is at least enforceable by parties to the Convention *inter se* even if party states cannot visit non-party state vessels. In this one respect, the Convention is an improvement upon the impotent European Agreement.[237]

To summarize, customary international law does not permit states to interfere with non-national ships suspected of unauthorized broadcasting from the high seas. States, in the enforcement of broadcasting regulations, must rely upon their neighbors to mind their own shipping. Alternatively, states may enter into treaty arrangements with other states, conceding a mutual *droit de visite* for the suppression of pirate broadcasting. The 1982 Convention on the Law of the Sea authorizes such a reciprocal right of visit. A state cannot, however, exercise the Convention provisions against the shipping of non-parties without offending the exclusivity rule of flag-state jurisdiction.

VIII. THE SAME STATE EXCEPTION

The 1958 High Seas Convention and the 1982 Convention on the Law of the Sea both provide that a warship may visit any vessel that the warship has reasonable grounds to suspect that "though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality of the warship."[238] The legal basis for the assertion of competence over such vessels flows from the principle of flag-state jurisdiction; a state has jurisdiction over ships registered under its laws.[239] If the vessel belongs to the state of the warship, the warship may assert jurisdic-

236. Customary international law may flow from treaty provisions of a specific nature, given extensive and uniform state practice in accord with the provision, which practice evinces a belief that the practice is legally mandated. *See* North Sea Continental Shelf Cases (W. Ger. v. Den./W. Ger. v. Neth.), 1969 I.C.J. 4, 41-42.

237. Actually, the 1982 Convention as applicable only to treaty parties may yield very satisfactory results if the Convention ever comes into force; most affected states are signatories to the Convention, as are the states from which radio pirates frequently hail. *See* UNITED NATIONS, *supra* note 7, at 190.

238. Convention on the High Seas, *supra* note 6, art. 22(1)(c); Convention on the Law of the Sea, *supra* note 7, art. 110(1)(e); *see also* R. CHURCHILL & A. LOWE, *supra* note 119, at 151; *see, e.g.*, United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980); United States v. Petrulla, 457 F. Supp. 1367 (M.D. Fla. 1979).

239. *See supra* notes 4-7 and accompanying text.

tion over her as any ship of the flag-state. Should the vessel actually be a non-national vessel, the state of the warship must compensate the vessel for any injury done her without good cause.[240]

IX. SUMMARY

This Note has followed the cautious process of the law of nations with respect to interference with non-national ships on the high seas. While international law has made improvements and innovations over the course of the preceding centuries, the fundamental principle of the exclusivity of flag-state jurisdiction remains the general rule; no state may assert competence over ships lawfully flying the flag of another state except in singular circumstances. Exceptions to this general rule derive only from customary law or the binding agreements of states. These exceptions, which comprise the body of this Note, permit states momentarily to push aside the general rule of the exclusivity of flag-state jurisdiction when a non-national vessel encountered on the high seas is reasonably suspected of being a pirate, a trader in slaves, a stateless ship, a threat to the security or integrity of the state, a disguised ship of the interfering state, or, arguably, a pirate broadcaster. These exceptions are precisely that—small chinks in an otherwise firm pillar of the law of nations.

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240. *See supra* note 40. If the vessel is flying a flag of convenience, the assertion of jurisdiction over her raises an interesting legal problem. *See supra* note 144 and accompanying text.

* I remain grateful to Professor D.W. Bowett, Whewell Professor of International Law, Queens' College, Cambridge University, for his time and attention in the preparation of this Note which, regardless of its relative merits, is the better for his guidance.