Drug Trafficking at Sea: A Practice- Based Analysis of International Law and the US Approach to High Seas Interdictions

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Drug Trafficking at Sea: A Practice-Based Analysis of International Law and the US Approach to High Seas Interdictions

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Thesis Abstract

The thesis investigates international law and jurisdiction over illegal drug trafficking vessels on the high seas. Illegal drug trafficking is prevalent, with, for example, States reporting record drug seizures from Drug Trafficking Vessels [DTVs] when they are interdicted on the high seas. Transnational organized crime groups also adopt new and more sophisticated methods for drug smuggling, such as the use of self-propelled semi-submersible craft ['narco-submarines'], intentionally flagging vessels to State's with open registers, or not flagging vessels at all, leaving them stateless. Therefore, in consideration of all these factors, a fundamental research question emerges concerning DTV interdictions on the high seas, namely: whether and, if so, the extent to which, the international law of the sea, as set out in the 1982 U.N. Convention on the Law of the Sea [LOSC] and relevant customary international law, provide an adequate legal framework for the interdiction of DTVs on the high seas. That said, the law of the sea is not the only body of law addressing drug trafficking at sea. The 1988 Vienna Convention is a significant transnational crime convention that considers this recurrent problem, which has given rise to additional agreements at the regional and bilateral levels. As such, the thesis considers the adequacy of this web of agreements for states seeking to exercise criminal jurisdiction over DTVs on the high seas.

Through a doctrinal analysis of these agreements, the research identifies gaps in the law; for example: both the 1988 Vienna Convention and the LOSC are silent on the question of the exercise of criminal jurisdiction over vessels on the high seas. Similarly, the use of vessels without nationality in drug trafficking exposes further gaps in the applicable law. This underscores the practical implications of these doctrinal lacunae; indeed, they manifest every day when States are conducting high seas interdictions.

Therefore, the thesis moves beyond a strict doctrinal analysis to incorporate empirical data gathered from practitioners in the field. The empirical data furthers the doctrinal research by identifying how some States overcome the lacunae in the relevant law. Of note here is the contemporary approach of the U.S. to high seas interdictions, in part as the accepted global leader in DTV interdictions. As such, the thesis reviews this approach, relative to the relevant international law, which also captures an assessment of bilateral drug interdiction agreements, domestic statutes, and associated case law. The objective of this analysis, as supplemented by the empirical data, is to demonstrate how through domestic

statutes and other rules of international law, such as the principles of jurisdiction, States may address the gaps in the treaty framework and exercise their criminal or enforcement jurisdiction over DTVs on the high seas.

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List of Acronyms

1958 GCTSCZ – 1958 Geneva Convention on the Territorial Sea and Contiguous Zone

1958 GCHS – 1958 Geneva Convention on the High Seas

1988 Vienna Convention – 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

1995 FSA – Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

1995 CoE Agreement – Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

ABD – Air Bridge Denial Agreement

ALCOA – U.S. v. Aluminium Co. of America

BCN – Biological, Chemical, or Nuclear Weapons

BILAT – Bilateral Agreement

CBP – United States Customs and Border Patrol

CCAR – Central Caribbean

CIL – Customary International Law

CND – Commission on Narcotic Drugs

CMF – Combined Maritime Force

CoE – Council of Europe

CRMA – 2003 Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean area

CTF-150 – Combined Task Force 150

DHS – United States Department of Homeland Security

DoD – United States Department of Defense

DoJ – United States Department of Justice

DTO – Drug Trafficking Organization

DTV – Drug Trafficking Vessel

DTVIA – Drug Trafficking Vessel Interdiction Act

ECAR – Eastern Caribbean

ECOSOC – U.N. Economic and Social Council

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEZ – Exclusive Economic Zone

EPAC – Eastern Pacific Ocean

GFV – Go-Fast Vessel

ICJ – International Court of Justice

ILC – International Law Commission

ILoS – International Law of the Sea

INCB – International Narcotics Control Board

ITLoS – International Tribunal for the Law of the Sea

IUU Fishing – Illegal, Unreported, and Unregulated Fishing

JIATF – Joint Interagency Task Force

LEDET – Law Enforcement Detachment Team

LSD – Lysergic Acid Diethylamide

LOSC – 1982 U.N. Law of the Sea Convention

MARPOL – International Convention for the Prevention of Pollution from Ships

MDLEA – Maritime Drug Law Enforcement Act

MHSA – Marijuana on the High Seas Act

MLAT – Multilateral Treaty

Narco-Sub – Semi/Fully Self-Propelled Submarine

OAS – Organization of American States

PANEX – Operation Panama Express

PCIJ – Permanent Court of International Justice

PSI – Proliferation Security Initiative

RFMO – Regional Fisheries Management Organization

RSS – Regional Security System

SOUTH-COMM – U.S. Southern Command

SRFMO – Sub-regional Fisheries Management Organization

SUA Convention – Convention for the Suppression of Unlawful Acts at Sea

UJ – Universal Jurisdiction

U.K. – United Kingdom of Great Britain and Northern Ireland

UKOT – Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda

U.N. – United Nations

UNCLOS - 1982 U.N. Law of the Sea Convention

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

UNODC – U.N. Office on Drugs and Crime

U.S. – United States of America

U.S.C. – United States Code

USCG – United States Coast Guard

VBSS – Visit, Board, Search, and Seizure

VCLT – 1969 Vienna Convention on the Law of Treaties

WCAR – Western Caribbean

WHO – World Health Organization

WMD – Weapon of Mass Destruction

WTO – World Trade Organization

Dedication and Acknowledgements

This project is dedicated to three people. Firstly, to my loving wife Laura, who without her help, support, and encouragement I would have been unable to have undertaken such a monumental project. She proofread this project enough times that she now points out law of the sea legal accuracies and inaccuracies in films and television shows [although any errors remain my own]. Laura has also been amazing in the last nine months of this project while pregnant with our daughter Lorelai, and I am excited for this new chapter in our lives, I Love You. Secondly and thirdly, to my parents Dennis and Lynn, who despite both having passed away before this journey set out, remained a constant and everlasting reminder to work hard and set high goals for yourself, which made this possible, thanks mom and dad.

I would like to acknowledge the hard work of my supervisory team as well as thank, Ruth Mackenzie and Emma McClean, whose feedback, support [especially after my daughter was born!], and guidance helped develop and enhance this project well beyond what I could have ever hoped from our first meeting four years ago. Their expertise, enthusiasm, and ability to continually drive me to critically think and apply the law have been invaluable. I look forward to working together as colleagues with them in the future as a fellow lecturer or researcher. I would also like to thank my internal assessors, Professor Hélène Lambert, Professor Stefaan Smis, and Professor Marco Roscini for all their useful and highly valued feedback throughout this journey, which too has help mould this project over the last few years. Furthermore, thank you to the staff of the law school, including Dr. Aurora Voiculescu, especially for organizing the yearly PhD seminars, and even more especially for the ones during the pandemic so we at least had some venue to see each other!

I would also like to thank my doctoral colleagues, particularly Dr. Elizabeth Mavropoulou and Dr. Arianny Seijo-Noguera, who not only provided help and ideas when needed, but also simultaneously shared in the highs and lows a project such as this inevitably brings with it. Thank you both for your ongoing friendship and I also look forward to working together in the future.

I am also very grateful to my loyal and faithful Welsh Corgi, Rory, whose dependable and accurate internal clock made sure I was always working at the right times and taking breaks to walk in the park.

Lastly, and in no small part, I also dedicate this project to my fellow law enforcement officers around the world both civilian and military. Every single day brings with it the possibility of never returning home to your friends and family. We understand the risks everyday whether it's on land or sea. We strive to protect, serve, defend, and enforce the law no matter what the personal cost, be it physically or mentally to ourselves or to our family and friends. We do this to keep our families, neighbourhoods, and country safe from all threats we know or do not. We do this to try and make the world just a little safer and a little better. May God and St. Michael be with you all wherever you are and see you safely home at the end of your watch.

Declaration

I, Nicholas A. Louis, do hereby make the declaration that this thesis is my own work.

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Tuesday, 12 July 2022

For Lorelai

Chapter 1: Introduction to the Research

Introduction

The thesis is about how States establish and exercise their jurisdiction to suppress drug trafficking vessels on the high seas. The thesis contributes to the existing body of knowledge because it is not only seeking to identify and analyse the current legal regime in international law that applies to suppressing drug trafficking at sea, but it also looks to how the law works in practice and may develop regarding contemporary drug trafficking vessel [DTV] interdictions. In other words, the thesis takes a more practice-oriented approach in its analysis of whether the legal regime works in practice and what practical problems might manifest during DTV interdictions by reference to contemporary interdiction practice. Furthermore, the thesis adds to and departs in some respects from, existing scholarship in defining the nature and significance of the gaps in the existing legal regime and identifying possible solutions to those gaps. However, the legal regime is not only dedicated to jurisdiction in international law in respect of DTV interdictions but also predicated on a duty of States to cooperate in the suppression of drug trafficking on the high seas. Thus, there are fundamental questions concerning this duty, its implementation, enhancement, and development with respect to drug trafficking on the high seas, and maritime security more generally.

In this regard, the thesis further contributes to knowledge by embarking on a systematic review and analysis of U.S. domestic law and practice in the context of the international legal regime because the U.S. is the dominant global actor in high seas drug trafficking interdictions. The thesis conducts this review of the U.S. approach by first looking to its extensive and growing domestic case law regarding high seas DTV interdictions. This examination involves engaging with U.S. domestic courts' interpretation and application of U.S. domestic law and international law as applied to drug traffickers on the high seas. Furthermore, the thesis looks to the U.S. and its approach to international cooperation through bilateral agreements. These agreements have resulted in cooperative measures including capacity building, technical assistance, intelligence sharing, judicial and prosecutorial assistance for suppressing drug trafficking on the high seas. Within this international legal regime, however, there are several gaps. These gaps are set out below in section 1.2 and are further acknowledged by much of the prominent literature presented in section 1.3.1

Thus, as it acknowledged that these gaps exist in the legal regime, the thesis considers how the U.S. has sought to remedy those deficiencies through its own domestic law, international cooperation, and engaging with drug trafficking on the high seas within the broader context of maritime security issues. Furthermore, the thesis integrates elite semi-structured interviews as part of its data collection method. The purpose of these interviews is to incorporate contemporary interdiction practices that will ultimately aid in answering the research sub-questions, primarily regarding the practice of the U.S. and high seas DTV interdictions.

1.1. Drug Trafficking on the High Seas: Outlining the Problem

International drug trafficking remains at critically high levels with reports from the U.N. Office on Drugs and Crime [UNODC] highlighting that 'larger shipment sizes' and the 'increased use of waterway routes' continued to rise as of 2021.[1] These 'waterway routes' the vast majority of which are at sea, continue to provide Drug Trafficking Organisations [DTOs] with a very effective means for moving 'larger shipments' of drugs.[2] DTOs '[h]ave long focused on speeding up transportation of drugs by using ships, containers, aircraft or even by manufacturing their own semi-submersible vessels'.[3] Ships are favoured conveyances used by DTOs, which rely heavily on oceanic transport because they allow 'increased quantities of drugs to be moved by roundabout and circuitous routes'.[4] A 2010 resolution of the U.N. General Assembly recognises this ongoing:

> problem of transnational organised crime committed at sea, including illicit traffic in narcotic drugs and psychotropic substances (…) and noting the deplorable loss of life and adverse impact on international trade, energy security and the global economy resulting from such activities.[5]

Drug trafficking at sea is generally accomplished by two methods: legitimate shipping and smuggling DTVs. Legitimate shipping includes commercial cargo ships or commercial cruise ships.[6] Smuggling drugs on such vessels involves crew members or passengers carrying large quantities of drugs onboard.[7] Drugs may also be hidden inside preloaded

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[1] United Nations Office on Drugs and Crime, 2021 World Drug Report, Book 1 at 13.
[2] Rear Admiral Chris Tomney, 'USCG, Joint Interagency Task Force South, QUB Phase 1 Brief (CG),' Calendar Year 2016, 01 March 2017.
[3] United Nations Office on Drugs and Crime, World Drug Report 2017, Book 5, 17.
[4] Revised Guidelines for The Prevention and Suppression of The Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic, Resolution FAL.9(34) adopted on 30 March 2007.
[5] A/Res/65/37, Oceans and the Law of the Sea, 7 December 2010, Agenda Item 74 at 3.
[6] IMO Guidelines (n 4) Section 2.
[7] ibid Section 2.

cargo containers, placed onboard a vessel, or placed outside the hull.[8] Smuggling vessels, on the other hand, are very often custom-designed, being heavily modified with several high-speed motors, difficult to detect, and very fast. The most common of these crafts are known as 'go-fast' vessels [GFVs]. There are also the newer and even more difficult to detect semi-submersibles or 'narco-submarines' [narco-subs].[9] According to UNODC, 'drug-traffickers in Central America have become highly sophisticated because 'apart from [GFVs], they use semi-submersible vessels, which are almost impossible to be properly stopped and visited'.[10] Narco-subs, once thought to be diminishing in use and isolated to Central America, are now seeing a considerable resurgence of these craft with reports of their construction and use in Europe as well as increased use in the Eastern Pacific and Caribbean Area.[11] However, any ship can potentially become a smuggling vessel. There are on-going reports of high seas interdictions taking place against dhows and fishing vessels as well.[12] The thesis will primarily focus clandestine vessels such as GFVs, dhows, and 'narco-subs,' which are the more frequently interdicted types of DTVs. The focus is narrowed to clandestine vessels because most cargo container ships, or cruise ships are interdicted in port. As ports are under the domestic jurisdiction of the coastal or port state, there is little to no international legal question concerning jurisdiction over when interdictions take place against a vessel in port. The map below illustrates the most common drug trafficking routes for cocaine, which are notably by sea.

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[8] Bikram Singh, 'Precautions and Safety Measures to Curb Drug Trafficking Onboard Ships,' [2019] Marine Safety, <https://www.marineinsight.com/marine-safety/drug-trafficking-onboard-ships/> accessed on 10 April 2020.

[9] Coast Guard Breaks Record for Cocaine Seizures, Posted by CWO3 Chad Saylor, Wednesday, October 4, 2017, Coast Guard Compass: Official Blog of the US Coast Guard, <http://wow.uscgaux.info/content.php?unit=Q-DEPT&category=coast-guard-blog> accessed on 19 August 2018.

[10] *Combating Transnational Organized Crime Committed at Sea*: Issue Paper, United Nations 2013, 34.

[11] Spanish Police seize first ever narco-submarine made in Europe; Europol Press Release of 15 March 2021, <https://www.europol.europa.eu/newsroom/news/spanish-police-seize-first-ever-narco-submarine-made-in-europe> accessed on 15 March 2021. See also Joseph Trevithick, 'The first narco-submarine ever seized off a European coast is a monster,' (The Dive, 27 November 2019) <https://www.thedrive.com/the-war-zone/31248/the-first-narco-submarine-ever-seized-off-a-european-coast-is-a-monster> accessed on 27 November 2019.

[12] Royal Canadian Navy Led Task Force Making an Impact on Regional Smuggling. Combined Maritime Force, Press Release of 13 May 2021 <https://combinedmaritimeforces.com/2021/05/13/royal-canadian-navy-led-task-force-making-an-impact-on-regional-smuggling/> accessed on 13 May 2021.

Figure 1: Major drug trafficking Cocaine Routes. Source: UNODC 2020 World Drug Report.[13]

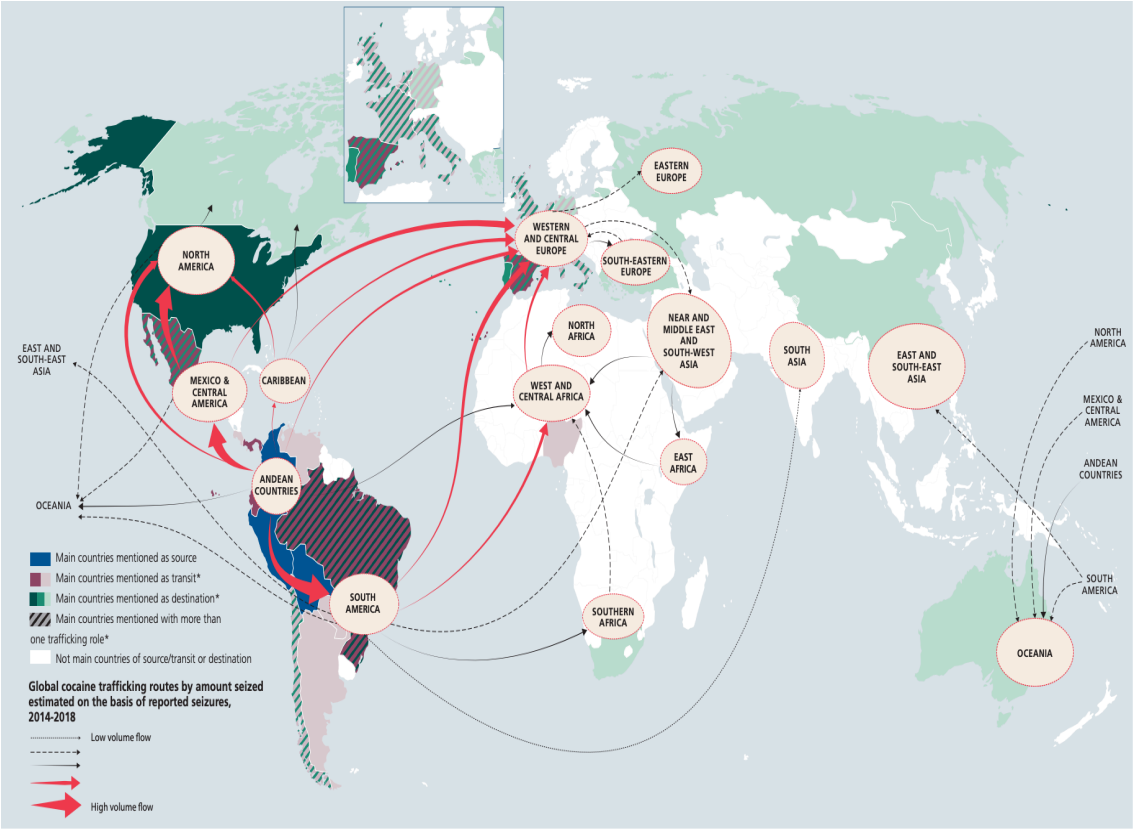


Figure 2: A semi-submersible 'Narco-Submarine in the Western Pacific:' U.S. Southern Command[14]

[13] United Nations Office on Drugs and Crime, 2021 World Drug Report, Book 3, 30.
[14] Operation Martillo, US Southern Command Media Release. Recent Photos: January 2021. <https://www.southcom.mil/Media/Special-Coverage/Operation-Martillo/> accessed on 31 January 2021.

Figure 3: Go-Fast Boat in the Eastern Caribbean: U.S. Southern Command [2021] [15]

Figure 4: Dhow in the Indian Ocean: CMF [2021][16]

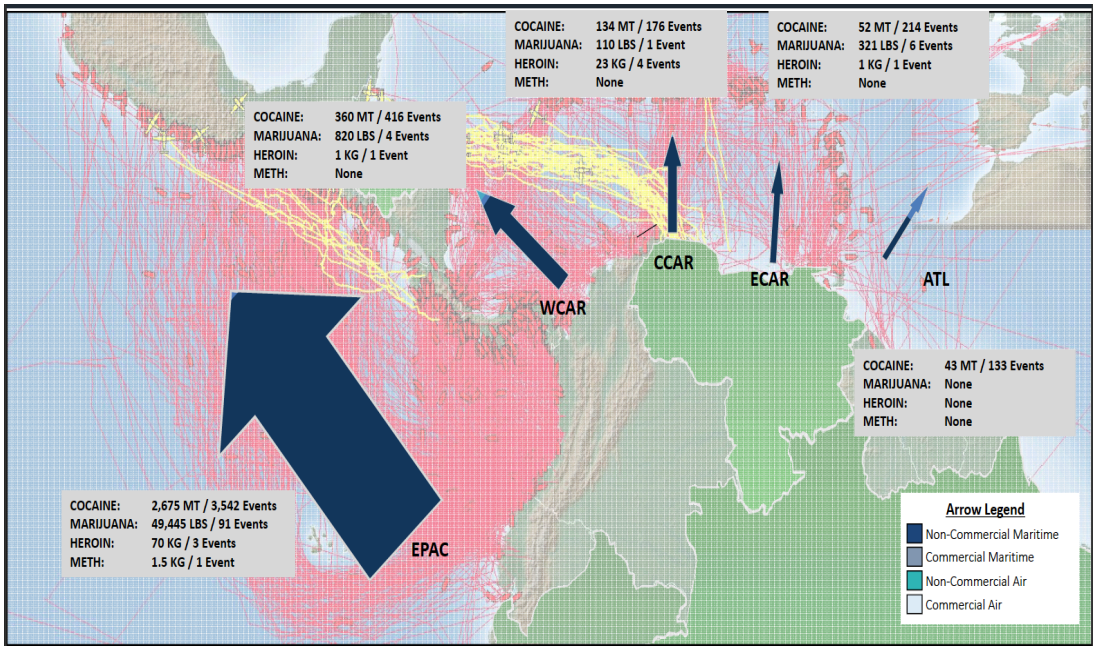
There are also two primary 'theatres' of high seas DTV interdiction activity. These are the Eastern Pacific/Caribbean Area and the East Coast of Africa/Indian Ocean Area. The Eastern Pacific/Caribbean Area, however, on average, sees far more interdictions taking

[15] ibid US Southern Command. <https://www.southcom.mil/MEDIA/NEWS-ARTICLES/Article/2558575/uss-wichita-interdicts-17-million-in-drugs/> accessed on 21 April 2021. See also Kieran Corcoran, 'Drug cartels using new 'go-fast' boats that are almost INVISIBLE to radar on Central American smuggling missions,' (The Daily Mail, 19 January 2015) <https://www.dailymail.co.uk/news/article-2913854/Drug-cartels-using-new-fast-boats-INVISIBLE-radar-Central-American-smuggling-missions.html.> accessed on 21 April 2021.

[16] Combined Maritime Forces, 'F.S. Languedoc Expands CTF-150 Record with $4.3 Million Counter-Narcotics Seizure,' 2021, <https://combinedmaritimeforces.com/2021/06/17/fs-languedoc-expands-ctf-150-record-with-4-3-million-counter-narcotics-seizure/> accessed on 17 June 2021.

place, which can be three or more times per week.[17] The map below details the five major transit areas in the Eastern Pacific [EPAC]/Caribbean [Western [WCAR], Central [CCAR], and Eastern [ECAR]] area, with the number of metric tons of various types of drugs seized and the number of interdiction 'events' by the U.S. Coast Guard in 2016.

Figure 5: Interdictions by USCG 2016: Source USCG[18]



The East Coast of Africa/Indian Ocean Area, although a significant transit area, sees fewer interdictions, which may be attributed to different factors including the capacity of states in the area as 'many nations active in policing the Indian Ocean not only lack countertrafficking mandates but are also [being] hampered by jurisdictional boundaries' in the international legal regime.[19] These 'jurisdictional boundaries' prompt the central research question of the thesis, which is, *to what extent do the existing gaps in the international legal framework impact DTV interdictions in practice and how has the US addressed these gaps in its approach to DTV interdictions?*

[17] Counter Drug Operations, Fiscal Year 2021 Annual Report, US Department of Homeland Security, August 2021 at 6, accessed on 3 September 2021 <https://www.dhs.gov/sites/default/files/publications/uscg_-_counter-drug_operations.pdf>.
[18] Tomney (n 2).
[19] Lucia Bird, Julia Stanyard, Val Moonien and Riana Raymond Randrianariosa, 'Changing Tides: The Evolving Illicit Drug Trade in the Western Indian Ocean,' Global Initiative Against Transnational Organized Crime, June 2021 at 48 <https://globalinitiative.net/wp-content/uploads/2021/05/GITOC-Changing-Tides-The-evolving-illicit-drug-trade-in-the-western-Indian-Ocean.pdf.> accessed on 8 July 2021.

1.1.1 Vessels without Nationality and 'Stateless Vessels': A note on terminology

The use of a *vessel without nationality* for drug trafficking on the high seas is a serious and increasing problem, especially with the re-emergence of 'narco-subs;' and is a focal point for this research.[20] The term 'stateless vessel' is often used synonymously with a *vessel without nationality* or 'unflagged vessel'. According to McLaughlin, these vessels all have categorically different legal statuses.[21] The lesser-used term of 'unflagged vessel' concerns the act of failing to show a flag. A vessel failing to show its flag is an 'operational trigger' and this means that it may trigger an investigatory visit from a foreign warship to determine and verify the unknown vessel's nationality.[22] For example, it is similar to a police officer detaining a vehicle failing to display a license or registration plate to ultimately confirm the vehicle is lawfully registered.

A *vessel without nationality*, according to McLaughlin, is 'a legal status, drawn from bringing into play a series of 1982 U.N. Convention on the Law of the Sea [LOSC] (as well as customary international law or another treaty) authorisations, which in turn create the potential for additional exercises of boarding State jurisdiction'.[23] This legal status is found in Article 92(2) LOSC or Article 6 of the 1958 Geneva Convention on the High Seas [GCHS], which states that a vessel may be assimilated to one without nationality if it should use 'two or more flags' according to convenience.[24] A 'stateless vessel' is the term for ships with 'inconclusive nationality' and often appears 'in writings of the most respected publicists'.[25] For example, this could be a vessel which shows a flag but the claimed flag state denies said vessel is on its registry, and thus cannot fly its flag. The thesis does not adopt these distinctions between the terms. Instead, it will use the term *vessel without nationality* as this is the term used in both the 1958 GCHS and the LOSC to denote a vessel that is not fulfilling the criteria that all vessels on the high seas shall sail under the flag of one State or where a claim of nationality is refuted by the State a vessel claims as its flag state.[26]

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[20] See (n 14) generally. See also (n 11).
[21] Rob McLaughlin, 'Article 110 of the Law of the Sea Convention 1982 and Jurisdiction over Vessels without Nationality,' [2019] 51 Geo Wash Int'l L Rev 373, 378.
[22] ibid 378.
[23] ibid 378.
[24] United Nations Convention on the Law of the Sea (Adopted 10 December 1982, Entry into Force 16 November 1994) UNTS vol. 1833, p. 3, at Article 92(2) LOSC; Convention on the High Seas (Adopted 29 April 1958, Entry into Force 30 September 1962) UNTS vol. 450 p. 11, at Article 6 1958 GCHS.
[25] McLaughlin (n 21) 378.
[26] LOSC (n 24) Article 91(1);1958 GCHS (n 24) Article 5(1).

1.2 The Gaps in the International Legal Framework

When a government enforcement vessel, such as a naval or coast guard patrol, seeks to interdict a suspected DTV on the high seas, it must have jurisdiction to do so. The overall legal regime applicable to DTVs on the high seas primarily exists in two treaties, the LOSC and the 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [1988 Vienna Convention]. Generally, and as will be discussed throughout the thesis, the exercise of jurisdiction on the high seas is governed by the principle of *exclusive flag state jurisdiction*, which exists both as treaty and customary international law.[27] This means that unless an exception exists in the applicable legal regime or through another rule of international law, only the State which has registered and granted its nationality to a vessel by permitting it to fly its national flag may exercise its jurisdiction over that vessel and all those onboard. However, certain exceptions to this rule do exist, and as will be seen, the LOSC contains more detailed enforcement provisions against vessels engaged in piracy, slave transport, or unauthorised broadcasting. Drug trafficking on the high seas, however, does not have as detailed provisions in the LOSC.[28] Article 108 LOSC is the only article addressing DTVs on the high seas in the LOSC, it states:

> 1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
>
> 2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.[29]

The gap in Article 108 LOSC may not be overtly recognisable; however, it is quite significant from a practical perspective. A close reading of Article 108 shows there is no exception to the flag state's exclusive jurisdiction. According to Article 108(2), *only the flag state* may request 'the cooperation of other States to suppress such traffic', which unfortunately is generally not the case in a high seas DTV interdiction. Most interdictions are the other way around, conducted by a State other than the flag state. A scenario such

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[27] LOSC (n 24) LOSC. See Article 6 1958 GCHS. See also Richard A. Barnes, 'Flag States,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 305.

[28] LOSC (n 24) Article 99 LOSC: Prohibition of the Transport of Slaves; Articles 100-107 all concern the suppression of piracy and enforcement measures to supplement this objective; Article 109: Unauthorized Broadcasting contains extensive provisions concerning the exercise of enforcement jurisdiction over such vessels on the high seas. See Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing Limited 2013) 206-209; Natalie Klein, *Maritime Security and the Law of The Sea* (University Press 2012) 130-13; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 83; Douglas Guilfoyle, 'Article 108' in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of the Sea (LOSC): A Commentary* (2017, Verlag CH Beck OHG) 760-764.

[29] LOSC (n 24) Article 108.

as this is much more common than a flag state requesting a third-party state's assistance.[30] Furthermore, while the article has cooperative obligations in the suppression of illicit traffic on the high seas, it does not provide any means to achieve this obligation nor does it contain enforcement powers against another State's vessels.[31] For example, the Norquist Commentary to the LOSC recognises that Article 108 has no means for a non-flag state enforce the article's objectives.[32]

The article also says nothing about what, if any, enforcement actions such as arrest or prosecution, may be undertaken on the flag state's behalf or if a non-flag state may request to take any such actions on its own initiative. Additionally, the article operates under the assumption all DTVs are flagged to a State, which, as will be further considered, is often not the case. Similarly, it says nothing about a DTV which is not flagged and could be *without nationality*. Nor does Article 108(1) reference what 'international conventions' are 'contrary' to its purposes; however, it is generally agreed by most commentators, including Guilfoyle, Kraska, and Klein that the 1988 Vienna Convention is a convention that applies to the cooperative framework envisioned in Article 108(1) LOSC.[33]

The 1988 Vienna Convention, specifically Article 17, creates a framework applicable to DTV interdictions on the high seas for the States Parties. The main framework for the interdiction of a flagged DTV on the high seas is provided in Article 17, subsections (3) and (4), which state:

> 3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.
>
> 4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, inter alia: a) Board the vessel; b) Search the vessel; c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.[34]

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[30] William C. Gilmore 'Drug trafficking by sea: The 1988 United Nations convention against illicit traffic in narcotic drugs and psychotropic substances,' [1991] 15 Marine Police 3, 183, 185.
[31] Guilfoyle 'Article 108' (n 28) 762.
[32] Papastavridis (n 28) 228.
[33] James Kraska & Raul Pedrozo, *International Maritime Security Law*, (BRILL, 2013) ProQuest Ebook Central, 523-524; Guilfoyle, 'Article 108' (n 28) 762; Klein (n 28) 130-131.
[34] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Entry into Force 11 November 1990, UNTS vol. 1582 p 95 at Article 17(1).

Apart from the above framework, Article 17's first two subsections closely mirror Article 108 LOSC, but with two differences. Firstly, Article 17 obligates States Parties to cooperate 'to the fullest extent possible'.[35] Secondly, subsection (2) provides that, '[a] Party which has reasonable grounds to suspect that a vessel (…) not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose'.[36] In effect, the article permits a party to request assistance from another party in suppressing a suspected DTV *without nationality* on the high seas. Still, despite these notable differences, there are some gaps in this framework created by Article 17.

Similarly, to Article 108 LOSC, Article 17 operates under the assumption that DTVs are registered, which implies the DTV flies a legitimate flag based on the grant of nationality from a flag state. However, as Chapter 4 will show, the wording of Article 17 is counter to the LOSC, and so can create practical hurdles for a State requesting authorisation from a flag state to board a DTV. In the same vein, as Papastavridis highlights, Article 17 only establishes enforcement jurisdiction to non-flag States with *prior* authorisation from the flag state, which means that on the ground, a non-flag state enforcement vessel may be waiting hours or days for the authorisation to arrive.[37] Papastavridis also observes that the Vienna Convention fails to create an obligation for states to establish domestic law when acting under Article 17(3), creating a serious gap in the legal framework.[38] Chapter 4 engages with these and other lacunae further, but as a whole, both the LOSC and 1988 Vienna Convention have, as noted, one rather significant lacuna; they only consider enforcement measures against flagged vessels, not ones *without nationality*.

As stated, there is ongoing use of *vessels without nationality* for drug-trafficking and other criminal acts at sea such as piracy, human trafficking, arms smuggling, migrant trafficking, transport of Weapons of Mass Destruction [WMD], and Illegal, Unreported, Unregulated Fishing [IUU], which are all recognised threats to the safety of maritime navigation.[39]

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[35] Ibid Article 17.
[36] ibid Article 17(2).
[37] Papastavridis (n 28) 210-211.
[38] ibid 213.
[39] For example, many of the seizure reports of the Combined Maritime Force concern the use of a vessel without nationality for drug trafficking on the high seas, <http://combinedmaritimeforces.com/2020/01/10/fs-courbet-makes-first-bust-of-2020/> accessed on 10 January 2020. See also Combined Maritime Force, 'HMS Defender Makes Second Drugs Bust' <http://combinedmaritimeforces.com/2020/02/04/hms-defender-makes-second-drugs-bust/> accessed on 4 February 2021. See Andrew Murdoch, 'Ships without nationality: Interdiction on the High Seas,' in Malcolm D. Evans and Sofia Galani, *Maritime Security and The Law of The Sea: Help or Hindrance?* (Edward Elgar Publishing 2020).

McDorman even reasons that it is 'difficult to know the true extent of the 'stateless vessel' phenomena'.[40] The interdiction of a *vessel without nationality* on the high seas presents numerous legal and practical challenges, many of which are due to their noticeable exclusion from the overall enforcement framework of the LOSC. Subsequent chapters will further draw these gaps and seek to address them as part of the thesis's overall contribution to knowledge.

The gaps discussed above, and the ones subsequent chapters consider further, often mean in practice, States are typically forced to seize and dispose of drugs without subjecting the drug traffickers to criminal sanctions, which means there is also a lack of deterrent.[41] The following examples serve to highlight the nature of the varied practice in high seas interdictions, which are often based on how individual states interpret the existing international legal regime.

1.2.1 Approaches to High Seas Drug Interdictions: Two Examples

In March 2021, the HMS Montrose [U.K.], acting as part of the Combined Maritime Force [CMF], a U.S.-led multinational cooperative maritime security coalition, operating under the Combined Task Force 150 [CTF-150] conducted an interdiction of a suspicious dhow in the Arabian Sea.[42] The vessel showed no indicia of nationality, or a flag, thus it was boarded and searched. The interdiction resulted in the seizure of nearly six thousand pounds of hashish and heroin, which were seized by the boarding party and subsequently destroyed at sea.[43] These actions and others like this, are assessed in a 2021 report by the Global Initiative Against Transnational Organized Crime, which focused on the efforts of CTF-150, concluding that '[e]ven if the vessel is boarded and illicit goods are seized, prosecuting the crew is often complex, and consequently many interceptions merely result in the narcotics being thrown overboard, with the crew and vessel free to go'.[44] The release of the drug traffickers in this situation directly links to the specific gaps in the law noted in the previous section. As the treaty regime makes no particular mention of enforcement

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[40] Ted L. McDorman, 'Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference' [1994] 25 J Mar L & Com 531, 531. See Murdoch (n 39) 158-160.

[41] Global Initiative Against Transnational Organized Crime, 'Permission to Board: Challenges to Seizing Drugs at Sea on the Indian Ocean, 29 April 2014, <https://globalinitiative.net/analysis/indianoceanheroin/> accessed on 22 March 2021.

[42] Combined Maritime Force, Press Release of 22 March 2021, HMS Montrose Seizes Third Drugs Haul in Five Weeks, <https://combinedmaritimeforces.com/2021/03/22/hms-montrose-seizes-third-drugs-haul-in-five-weeks/> accessed on 22 March 2021.

[43] ibid CMF Press Release of 22 March 2021.

[44] Bird et al (n 19) at 48.

measures against *vessels without nationality* engaged in drug trafficking, 'most states are understandably unwilling to assert any additional jurisdiction over these vessels beyond such seizures (…) and [t]he dhows, consequently, are then often simply sent on their way'.[45]

Conversely, the 2018 interdiction of a 'home-made' DTV, which was *without nationality* on the high seas, by the U.S. Coast Guard [USCG] stands in stark contrast to the above example. The DTV 'lacked a visible name or registration number and used no navigation lights'.[46] The small vessel, occupied by four men, was boarded, and searched by a USCG boarding team. A search of the vessel yielded approximately 180 kilograms of cocaine; the four crew members were detained, were subsequently transferred to the U.S. for trial, prosecuted under domestic law and ultimately sentenced to prison for drug trafficking on the high seas.[47] Although not dissimilar in factual circumstances, each of these interdictions had markedly different outcomes.

On the one hand, regarding the practice of the USCG and application of U.S. domestic law within the legal regime applicable to DTV interdictions, there is a substantial amount of international cooperation that plays a significant role in these types of high seas DTV interdictions. Chapters 5 and 6 take up this discussion further as they analyse the U.S. bilateral agreements, U.S. cooperative programmes, and practice of the USCG. On the other hand, the U.S. domestic criminal law, as it is situated in international law, provides for such an exercise of domestic criminal jurisdiction on the high seas. Considering this matter, especially the significance of international cooperation in high seas DTV interdictions, a short discourse on the general duty to cooperate in international law informs the thesis.

1.2.2 The Duty to Cooperate in International Law

International cooperation is central to the interdiction of DTVs on the high seas. The primary legal regime, discussed above, reflects this in Article 108(1) LOSC and Article 17(1) of the 1988 Vienna Convention. Furthermore, it resonates in every regional and bilateral agreement concluded under the 1988 Vienna Convention addressing drug trafficking on the high seas and international drug trafficking. The first agreement

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[45] Global Initiative (n 41).
[46] *US v. Nunez et al.* No. 19-14181, Eleventh Circuit Court of Appeals, D.C. Docket No. 1:19-cr-00033-JB-N-2, Appeal from the Southern District of Alabama, June 17, 2021, at 3.
[47] ibid 1-4.

demonstrating international cooperation to suppress international drug trafficking is the *Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs.*[48] Furthermore, and more specifically, there is a general duty placed on States to cooperate, which stems from the U.N. Charter.

Article 1(3) of the U.N. Charter is the bedrock for establishing cooperation between States; it states that a purpose of the U.N. is:

> [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[49]

Engaging in international cooperation is necessary because, as Kolb reasons, 'cooperation must confront the increasing number of matters of international concern among States and other actors in international life; it must also address the common dangers of humanity (…)'.[50]

Building on this general purpose to cooperate established in Article 1(3), Articles 55 and 56 of the U.N. Charter set out the general obligations to cooperate. The first obligation concerns areas related to 'economic and social cooperation,' and which subsequent chapters will discuss, this does include cooperation in the suppression international drug trafficking under the umbrella of ECOSOC and the UNODC. Thus, Article 55 outlines the obligation of the U.N., including its subsidiary organs like ECOSOC, in facilitating cooperation between itself and its member states. Article 55 states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (1) higher standards of living, full employment, and conditions of economic and social progress and development;

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[48] Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (Adopted 26 June 1936, Entry into Force 10 October 1947) LNTS, vol 198, p.301. Article 9. The article considers extradition of offenders between parties. Article 11 creates an obligation for international cooperation by establishing central offices for the 'supervision and coordination of all operations necessary to prevent the offenses specified in Article 2.' Article 12 obliges the 'central offices' of each state to cooperate with those in other states party, to the maximum extent possible, concerning prevention and punishment of the offenses specified in Article 2'. Article 35 of the 1961 Single Convention, Article 21 of the 1971 Convention, and Article 17(7) 1988 Vienna Convention.

[49] The Charter of the United Nations (Adopted 26 June 1945, entered into force 24 October 1945) at Article 1(3).

[50] Robert Kolb, *An Introduction to The Law of the United Nations* (Hart 2010) 99.

> (2) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> (3) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[51]

While Article 55 establishes the general obligation of the U.N. in cooperating, Article 56 sets out the obligations of member states in cooperating with the U.N. and other member States. Article 56 states that member states 'pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'.[52] Combined, these two articles create the general duty on States to cooperate, but this obligation in not limited to just the conditions set out above, it may also contain a 'special duty to cooperate, qualified *ratione materiae*'.[53] Such obligations to cooperate concerning specific subject matter may often be greater than those in Article 55, and this duty to cooperate is set out in Resolution 2625, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*.[54]

Resolution 2625, although not a binding resolution, not only serves to reaffirm States of their obligations to cooperate under the U.N. Charter, it states that the 'principles of international law concerning (…) cooperation among states and the fulfilment in good faith of the obligations assumed by states, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation for the other purposes of the [U.N.]'.[55] However, the overall scope of this obligation, as Kolb contends, is one that is 'legally soft,' even noting there is often a lack of 'cooperation both qualitatively and quantitatively'.[56] Should States fail to cooperate, there is little to no actions that can be taken for such [in]action.[57] Nevertheless, despite no specific mention of suppressing international drug trafficking or drug trafficking at sea, States do indeed cooperate, especially in addressing the problem of international drug trafficking. In this regard, conventions like the LOSC and the 1988 Vienna Convention

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[51] U.N. Charter (n 49) at Article 55.
[52] ibid Article 56.
[53] Kolb (n 50) 100.
[54] UNGA Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, 4 October 1970, UNGA A/RES/2625(XXV).
[55] Kolb (n 50) 122.
[56] ibid 100.
[57] ibid 100.

have ultimately elaborated on the general duty to cooperate and placed this duty specifically in the context of suppressing international drug trafficking.

Furthermore, the efforts from ECOSOC and UNODC suggest that the U.N. too is fulfilling its obligations in Article 55 to cooperate with member states. For example, and which is part of the obligation to cooperate in 'solutions in social and health related problems,' UNODC is responsible for assisting U.N. member states in their 'struggle against illicit drugs, crime, and terrorism'.[58] UNODC supports cross-border sharing of information, cooperation, and facilitation of best practice solutions over those matters.[59] Cooperation includes UNODC assisting states with prosecution, legislative assistance, training, and other tools for investigation/law enforcement.[60] Additionally, UNODC works to '[s]trengthen international cooperation and coordination between law enforcement, judicial practitioners and other relevant actors through a variety of mechanisms'.[61] These efforts incorporate joint anti-trafficking strategies for, 'countries of origin, transit, and destination to combat trafficking in (…) drugs'.[62] Indeed, international cooperation with respect to high seas DTV interdictions, aids in forming the sub-questions for this thesis.

1.3 The Research Sub-Questions

The primary research question is *to what extent do the existing gaps in the international legal framework impact DTV interdictions in practice and how has the US addressed these gaps in its approach to DTV interdictions?* The primary research question has generated three research sub-questions. These questions aid in the overall objective of answering the primary research question.

1. What is the international legal framework that applies to interdictions of DTVs on the high seas and what is the nature and significance of any gaps in this framework in the context of contemporary interdiction practice?

2. What is the practice of the U.S., the primary global actor in high seas DTV interdictions, at the domestic level, and where is this practice situated in international law?

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[58] UNODC, 'About UNODC,' <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> accessed on 23 October 2018.
[59] UNODC, 'UNODC Services and Tools,' U.N. Publication, 5, accessed on 23 October 2018 <https://www.unodc.org/unodc/en/commissions/CND/indexold.html>.
[60] ibid 7.
[61] ibid 8.
[62] ibid 8.

> 3. What forms of international cooperation have been developed to address interdiction of DTVs on the high seas, and do these address the gaps identified in sub-research question (1) above? This sub-question again focuses significantly on U.S. practice in relation to international cooperation, as it has been a leading player in the development of such arrangements.

The U.S. is recognised as the primary global actor for high seas drug interdictions and it engages in substantial individual and international efforts to achieve this in the end.[63] On the one hand, for example, in 2019, U.S.-led interdictions in the western hemisphere accounted for the removal of '207.9 metric tons of cocaine [which] is equivalent to 4.16 billion individual doses'.[64] Most of these interdictions were facilitated through bilateral interdiction agreements, which in the period ranging from 2016-2019, resulted in over seven hundred interdictions and over eight hundred metric tons of pure cocaine being seized.[65] These agreements, which Chapter 5 considers, are leading to broader U.S. bilateral 'maritime security' agreements. The broader maritime security agreements address issues such as the smuggling of migrants, IUU Fishing, and the non-proliferation of WMDs. On the other hand, U.S. interdictions of *vessels without nationality*, are estimated to account for roughly forty percent of U.S. interdictions in 2019 alone.[66] The U.S. approach to *vessels without nationality* is explored in Chapter 6 and this approach may be indicative of how the law may be further developed to counter this ongoing issue in international law.

1.3.1 The Literature Concerning DTV Interdictions and Contribution to Knowledge

The interception or interdiction of vessels on the high seas by States seeking to secure the oceans is not a new or unexplored topic, especially in international law. Traditionally, States conducted interdictions of vessels on the high seas during times of belligerent hostilities or through a naval blockade making such actions the study of the laws of armed conflict or laws of naval warfare; however, these interdictions have different legal obligations than those presently under consideration.[67] The types of interdictions this

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[63] US Southern Command, <https://www.southcom.mil/Media/Special-Coverage/Operation-Martillo/> accessed on 7 June 2019. See United States Coast Guard, Bureau of International Narcotics and Law Enforcement Affairs. <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253221.htm> accessed 7 June 2019. See also Peter J.J. van der Kruit, 'Maritime Drug Interdiction in International Law' (PhD Thesis, University of Utrecht 2007) 267; Guilfoyle 'Shipping Interdiction' (n 28) 89-90; Klein (n 28) 134.

[64] 2021 DHS Report (n 17) 6.

[65] ibid 6.

[66] ibid 6.

[67] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict,* (3rd edn, Cambridge University Press 2016) 258. For example, Dinstein observes that '[a] blockade does not target any particular cargo as contraband, what it undertakes is to "exclude all transit into and out of a defined area or location" (…) and '[u]nlike contraband control, the enforcement of a blockade cannot take place anywhere on the

study is focused on concern vessel interceptions on the high seas in a non-belligerent or peacetime scenario, with the primary aim of suppressing transnational crime at sea. Peacetime interdictions have become more commonplace post-Second World War, especially with the overall reduction in large scale naval combat, States have sought to make use of naval military assets for other functions.[68] Indeed, and particularly with the formation of the U.N., the global naval focus has generally shifted to more 'constabulary' or law enforcement related functions.[69] Thus, these law enforcement type interdictions and the relevant sources of international law permitting such actions have been considered in much of the existing scholarship.[70] In this regard, the interdiction of a DTV on the high seas is a law enforcement action and these types of interdictions are cited in many scholarly works ranging from those dedicated broadly to the law of the sea and scholarship dedicated to high seas interdictions.[71]

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high seas: it has to be conducted near the notional blockade line drawn within a reasonable distance from an enemy port or coast'. See Steven Haines, 'War at Sea: Nineteenth Century Laws for Twenty First Century Wars,' [2016] ICRC 98, War and Security at Sea (2), 424.

[68] Haines (n 67) 421.

[69] ibid 421.

[70] Combating Transnational Organized Crime Committed at Sea: Issue Paper, United Nations 2013. See Bernard H. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea,' [1984] 24 Va. J. Int'l L. 809; Ivan A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquency Vessels,' [1986] 35 Int'l & Comp. L.Q. 320; R.F. Reuland, 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction,' [1989] 22 Vand. J. Transnat'l L. 1161; Deirdre M. Warner-Kramer & Krista Canty, 'Stateless Fishing Vessels: The Current International Regime and A New Approach,' [2000] 5 Ocean & Coastal L.J. 227; Natalie Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,' [2008] DENV. J. INT'L L. & POL'Y VOL. 35:2, 287; Natalie Klein, Joanna Mossop and Donald Rothwell, *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge, 1st edition, 2009); Natalie Klein, 'Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants,' 15 MELB. J. INT'L L. 1, 9 (2014); Martin Fink, *Maritime Interception and the Law of Naval Operations: A Study of Legal Bases and Legal Regimes in Maritime Interception Operations* (The Hague: Asser Press, 2018); Rob McLaughlin, 'Article 110 of the Law of the Sea Convention 1982 and Jurisdiction over Vessels without Nationality,' [2019] 51 Geo Wash Int'l L Rev 373; Cameron Moore, *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force* (London: Routledge, 2021).

[71] William C. Gilmore, 'Narcotics Interdiction at Sea: UK-US Co-operation,' [1989] 15 Commw. L. Bull. 1480; William C. Gilmore 'Drug trafficking by sea: The 1988 United Nations convention against illicit traffic in narcotic drugs and psychotropic substances,' [1991] 15 Marine Police 3, 183; Michael J. Merriam, 'United States Maritime Drug Trafficking Search and Seizure Policy: An Erosion of United States Constitutional and International Law Principles,' [1996] 19 Suffolk Transnat'l L. Rev. 441; Kennith Rattray, 'Caribbean Drug Challenges, Drugs: A Global Problem,' in Myron H Nordquist and John Norton Moore, *Oceans Policy* (M Nijhoff 1999); William C. Gilmore, 'Counter-Drug Operations at Sea: Developments and Prospects,' [1999] 25 Commw. L. Bull. 609; William C Gilmore, *Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 2003* (The Stationery Office, 2005); Peter J.J. van der Kruit, 'Maritime Drug Interdiction in International Law' (PhD Thesis, University of Utrecht 2007); S.A. Haughton, 'Bilateral Diplomacy: Rethinking the Jamaica-US Ship-rider Agreement,' [2008] 3 Hague J. Dipl. 253; Charles R. Fritch, 'Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction Over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement,' [2009] 8 Wash. U. Global Stud. L. Rev. 701; Ann Marie Brodarick, 'High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the DTV Interdiction Act,' [2012] 264 University of Miami Law Review, 67; Aaron Casavant, 'In Defense of the US Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach,' [2017] 8 Harvard National Security Journal, 114.

What appears to be missing from the overall literature is further consideration of how the applicable legal regime works in practice, where and when the gaps in said legal regime manifest, if at all, and any possible practical implications of those gaps should they manifest. Furthermore, when considering the general question of suppressing drug trafficking on the high seas, many commentators often turn to the U.S. and its DTV interdiction practices on the high seas. Papastavridis, for example, analyses the U.S. practice and DTV interdictions as part of a larger study of high seas interdictions. Papastavridis concludes that with respect to U.S. practice, 'the practice of the USCG as well as the application of the relevant statutes by the U.S. courts' is not always 'in strict compliance with international law'.[72]

According to Papastavridis, the lack of compliance includes not respecting 'basic tenets of international law, such as the freedom of the high seas and the requirements of due process, legal certainty and foreseeability, [thus this approach] hardly merits general approbation'.[73] However, this analysis focuses on the incompatibility of the U.S. practice rather than situating the U.S. practice within international law, especially in light of the obligation to cooperate in the suppression of DTVs on the high seas.[74] Furthermore, some commentators view not only the U.S. practice but general interdiction practices from a standard treaty interpretation approach. This does not fully account for how the international legal regime is often used in contemporary interdiction practice. Therefore, the practice-oriented approach of the thesis complements the more traditional treaty interpretation approach evident in the scholarship in several ways.

Firstly, specifically as it relates to U.S. practice, the thesis does this by situating its analysis of existing U.S. domestic case law within the structure of the U.S. Courts of Appeals. Situating the case law within this structure then allows for the analysis of the U.S. practice within the existing international legal regime. In other words, as the U.S. Courts of Appeals play a significant role in the overall practice of the U.S., it is critical to consider the domestic case law opinions in this way. Secondly, the thesis looks to the existing scholarship and the gaps already identified in this scholarship to determine if those gaps are indeed as significant as the scholarship has identified. There are two overarching gaps in the legal regime applicable to DTV interdictions on the high seas and these are discussed

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[72] Papastavridis (n 28) 257.
[73] ibid 258.
[74] Later chapters explore additional obligations to cooperate set out in multiple agreements as well as the recurring calls to cooperate in the suppression of international drug trafficking in certain U.N. resolutions.

throughout the thesis. The first gap concerns 'authorisations' to interdict flagged vessels on the high seas. The second gap is the overall absence of any regulation in the legal regime addressing a *vessel without nationality*. Concerning these gaps in the legal regime and their identification in the scholarship, general overviews identifying these gaps can be found in international law of the sea [ILoS] textbooks. These sources are broader in scope as they are dedicated more to a range of ILoS topics. There are also more specific sources in the scholarship which consider these gaps in greater detail, and these are generally research pieces dedicated to high seas interdictions.

Tanaka, for example, conducts a broad overview of the international legal regime applicable to a high seas DTV interdiction, which is found in Article 108(1) LOSC and Article 17(3) and (4) of the 1988 Vienna Convention.[75] Tanaka observes that this framework has subsequently been enhanced through regional and bilateral agreements; however, the general focus remains on various methods of obtaining flag state consent to board a suspected DTV.[76] Rothwell and Stephens too offer a similar, although slightly different take on the framework. They reason the framework created in Article 108 LOSC is 'complimentary' to the drug control conventions, the 1961 Single Convention and 1971 Psychotropic Substances Convention, later supplemented by the 1988 Vienna Convention.[77] However, they do observe the LOSC 'is silent as to a right of high seas boarding' and so a State would need to justify a boarding through their 'acceptance of the 1988 Vienna Convention if it took such measures on the high seas'.[78]

Douglas Guilfoyle has published extensively on maritime interdictions and the ILoS. Guilfoyle concludes that Article 108 LOSC is 'manifestly defective as a general instrument of international counter narcotics cooperation'.[79] As Guilfoyle explains, the problem is not the lack of international cooperation between states in suppressing the narcotics trade.[80] The problem with Article 108 LOSC is there is a perception that the deterioration of exclusive flag state jurisdiction could happen should States be granted any additional enforcement powers against DTVs on the high seas.[81] Since there is a lack of any framework in Article 108 LOSC, Guilfoyle notes that due to the fact the LOSC is silent

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[75] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2013) 167-168.
[76] ibid 168-169.
[77] Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2014) 165. These conventions are set out in later chapters with respect to the international regulatory framework concerning drugs and drug trafficking.
[78] ibid 165.
[79] Guilfoyle 'Article 108' (n 28) 762.
[80] ibid 761-762.
[81] ibid 761-762.

on 'how' to suppress maritime drug traffic and only that States should cooperate in doing so, this necessitates the changes introduced in Article 17 of the 1988 Vienna Convention.

Guilfoyle also expands his assessment of the enforcement framework in the LOSC through an analysis of Article 110, the *right of visit*.[82] Combined, he observes, the omission of narcotics smuggling from the *right of visit*, as well as the overall 'piecemeal' approach to addressing 'high seas threats to public order' sees the international community more prone to responses through new agreements or even U.N. Security Council resolutions, although no such resolution has granted additional jurisdiction where DTVs are concerned.[83] Thus, he turns his assessments to the other treaties that have come into force to specifically address DTVs on the high seas. Guilfoyle begins this analysis by considering Article 17 of the 1988 Vienna Convention, and concludes that Article 17(3) and (4) do address the lacuna in Article 108(2) LOSC.[84] However, he ultimately questions if this is a practical solution since sections (3) and (4) have a 'procedural obstacle'.[85] The obstacle is the problem of confirming a vessel's 'registry' before a flag state may authorise a ship-boarding under Article 17.

According to Guilfoyle, several matters may frustrate a 'registry' verification before a State receives authorisation, including a lack of capacity in the State of registry to locate such records, lack of a competent authority to authorise a ship-boarding, malefactors making use of States of open-registries, and the fact a response may take days.[86] To overcome such practical hurdles, Guilfoyle proposes the possible use of *Presumptive Flag State Authority*, which may also address some of the outstanding gaps surrounding the matter of a vessel's 'registry' or the use of small unregistered vessels that may be entitled to fly a flag.[87] Later chapters of the thesis engage more with *Presumptive Flag State Authority*, which is a U.S. operational procedure and that, according to Guilfoyle, 'takes the view that a ship ostensibly claiming its nationality (by flag, markings of registry, or masters verbal claim) is assumed to be subject to that jurisdiction and may authorise a boarding'.[88] Yet, Guilfoyle reasons this practice is not well accepted, especially since a falsely claimed flag state may bear possible liability for an improperly authorised ship-boarding.[89]

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[82] Douglas Guilfoyle, 'The High Seas,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 221.
[83] ibid 221.
[84] Guilfoyle 'Shipping Interdiction' (n 28) 83.
[85] ibid 95.
[86] ibid 95.
[87] ibid 95.
[88] ibid 95.
[89] ibid 95.

Kraska, a leading authority on maritime interdictions, and Pedrozo conclude '[t]he major drawback of Article 17 is that it is based on the flag State consent provisions of' the LOSC'.[90] Their focus is on the matter of exclusive flag state jurisdiction established in Article 92 LOSC. In Article 92, it only permits a non-flag state the ability to circumvent exclusive flag state jurisdiction in 'exceptional cases expressly provided for in international treaties or in [the LOSC]'.[91] As Kraska and Pedrozo note, '[c]ounter-narcotics, however, is not one of the exceptional cases provided for in UNCLOS [and] [n]on-consensual boardings are only permitted under Article 110 of UNCLOS for ships engaged in piracy, slave trade or unauthorized broadcasting, as well as ships without nationality or ships assimilated to a ship without nationality under Article 92(2)'.[92] Indeed, other scholars including Papastavridis and Gilmore have homed in on such practical issues that can arise under the treaty framework.

Gilmore, who also has published extensively on interdictions, counter-narcotics, and international law, concludes that additional matters in the legal regime created by Article 17 of the 1988 Vienna Convention may affect the legal outcome of an interdiction. In this respect, Gilmore cites the Case of *R. v. Charrington and Others*, which involves the interdiction of the *Simon de Danser* by U.K. authorities. Gilmore, in analysing the case and its subsequent results, observes that under the 1988 Vienna Convention, flag state consent can be lawfully given under Article 17 yet absent proper domestic statutes and policies, the interdiction may remain unlawful.[93] For Gilmore, the way to remedy some of these practical issues begins with addressing specific inadequacies at the domestic level. For example, one solution is the establishment of 'procedures which should be followed in future in instances in which there is uncertainty as to the identity of the appropriate authority in the State of registry'.[94]

Papastavridis, concurring with Gilmore's assessment of the interdiction of the *Simon de Dancer*, also discusses this practical lacuna in Article 17. In his assessment, Papastavridis argues Article 17 contains no prohibition on the method by which States are authorised to board a foreign-flagged vessel under the Convention.[95] Papastavridis further contends that the framework created by Article 17 for verification of a ship's registry implies each State

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[90] James Kraska & Pedrozo (n 33) 540.
[91] LOSC (n 24) Article 92.
[92] Kraska & Pedroso (n 33) at 540.
[93] William C. Gilmore, 'Drug Trafficking at Sea: *The Case of R. v. Charrington and Others*,' [2000] 49 Int'l & Comp. L.Q. 477, 479.
[94] ibid 488.
[95] Papastavridis (n 28) 216.

party can formulate their requests in whatever way 'they see fit,' if such requests are based on a good faith interpretation of Article 17.[96] According to this view it is not up to the requesting state to determine if the request is of a certain format, rather it is the requested state to make the determination of the sufficiency of the request to board one of its flagged ships.[97] Lacunae such as this ultimately raise a question concerning whether or not the 1988 Vienna Convention closes all the gaps in the LOSC.

Klein, who has published extensively on broad issues of maritime security, seems to be of the mind that Article 17 of the 1988 Vienna Convention does succeed in permitting a non-flag state the right to at least request a flag state permission to board a suspect vessel.[98] However, she cautions against sole reliance on the framework created in Article 17 as it 'is not intended to be the definitive statement on interdictions to suppress drug trafficking'.[99] In Klein's view, as Article 17 also focuses on the existence of previous agreements or encourages the parties to enter into new regional or bilateral agreements, because such actions can be used to address the gaps in the law.[100] As it relates to the framework established in Article 17, Klein's assessment is supported by the U.N. published Commentary to the 1988 Vienna Convention. The commentary makes clear that the interdiction framework set out in the 1988 Vienna Convention is not a finite solution to the question of interdicting DTVs on the high seas.[101] Thus, States should not consider the interdiction framework created by Article 17 to be a 'self-contained mini-treaty'.[102] The commentary concludes that Article 17 only provides guidelines, policy, practices, and procedures that states *should* implement, but this implies a 'broad range of policy and practical concerns' for each party.[103]

An alternative view of the legal framework created by Article 108 LOSC, and Article 17 of the 1988 Vienna Convention is provided by McLaughlin. McLaughlin agrees with the primary observations set out above concerning the gaps in the legal regime applicable to DTVs on the high seas. However, McLaughlin proposes a view less reliant on Article 17

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[96] ibid 216.
[97] ibid 216.
[98] Klein (n 28) 131.
[99] ibid 132.
[100] ibid 132.
[101] Henri Mazaud and others, *Commentary on The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1st edn, United Nations 1998), 334.
[102] ibid 334.
[103] ibid 334.

of the 1988 Vienna Convention.[104] For McLaughlin, the central gap stems from the *right of visit* in Article 110 LOSC, and so Article 17 of the 1988 Vienna Convection should be seen as the 'less than Article 110' approach to high seas DTV interdictions.[105] According to McLaughlin, Article 17 is only a 'guide' rather than the 'law'. The reason Article 17 should be viewed as a guide, as McLaughlin argues, is due to many parties to the 1988 Vienna Convention having underdeveloped legal systems.[106] Since these states have underdeveloped legal systems, many too have failed to amend their legal systems to mirror more developed states.[107] This in turn creates a general difficulty in regional criminal justice matters.[108] Indeed, the need for domestic legislation to enable high seas interdictions and cooperation in conducting them is critical to addressing the gaps in the legal regime applicable to high seas DTV interdictions.

Thus, McLaughlin concludes that there must be further capacity building measures to improve domestic legal systems, especially those for verifying a vessel's registry so flag state authorisations can be provided to board a suspected DTV on the high seas.[109] Then, once 'capacities and confidence have improved, the logical next step is to move towards a select set of regional tri-partite arrangements encompassing the most willing and interested States'.[110] Most scholarship concerning high seas DTV interdictions, to varying degrees, all make a note of the use of 'regional or bilateral agreements' to continue to try and fill the various legal gaps as they are identified or manifest in practice. However, another commentator, Van der Kruit, has offered a different solution in his thesis to address the gaps in the legal regime applicable to DTVs on the high seas.

According to Van der Kruit, one way to address the overall gaps in the various legal regimes is through 'the principle of universality' meaning 'all states would have jurisdiction to try and punish illicit maritime drug traffickers'.[111] He approaches the question of universal jurisdiction over drug trafficking on the high seas by first reasoning, 'that prescriptive jurisdiction over drug-related offences committed on board vessels is rapidly developing to or even has achieved the status of universality, assuming that all relevant

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[104] Dr. Rob McLaughlin, 'Towards a more effective counter-drugs regime in the Indian Ocean,' [2016] Journal of the Indian Ocean Region, 12:1, 24, 28.
[105] ibid 28.
[106] ibid 28-9.
[107] ibid 28-9.
[108] ibid 28-9.
[109] ibid 34.
[110] ibid 34-35.
[111] Van der Kruit (n 63) 249.

states have become party to the maritime drug-interdiction treaties'.[112] Furthermore, concerning enforcement jurisdiction on the high seas, he reasons that:

> [l]ooking at all of the agreements concluded in the last hundred [sic] of years and analysed in this study a development in the direction of universal jurisdiction over illicit maritime drug trafficking, is not out of the question for the future. Also, the exercise of universal jurisdiction may develop in a way that all states may apprehend a suspect vessel on the high seas irrespective of the flag the suspect vessel is flying.[113]

Van der Kruit observes that universal jurisdiction over drug trafficking at sea is achievable if States 'amend their national legislation on drug trafficking to reflect an acceptance of universal jurisdiction over illicit drug trafficking on the high seas'.[114] Another conclusion he proposes concerns the fact that 'the time will come to review Articles 108 and 110 LOSC with a view to establishing the right of visit in cases of illicit drug trafficking as is provided for in cases of slavery or non-authorised broadcasting'.[115] This review could then be bolstered by 'all states becom[ing] party to the 1988 [Vienna] Convention and adopt[ing] an additional protocol to the 1988 [Vienna] Convention. The proposed additional protocol would establish universal jurisdiction over illicit drug trafficking on the high seas, including the right to exercise this jurisdiction under the universality principle'.[116]

Van der Kruit's proposals are based on the principles of jurisdiction in international law, and this thesis engages with them as well; however, the use of universal jurisdiction to address the gaps in the DTV framework is likely to be very difficult to implement in practice. Universal jurisdiction implies that flag state authorisation is not needed for another State to board or arrest a flagged vessel and its crew on the high seas. However, as Chapters 2 and 3 will elaborate, this approach to DTVs on the high seas was indeed attempted during the LOSC drafting and met with failure. Therefore, attempting to circumvent the exclusive jurisdiction of the flag state in cases of flagged DTVs on the high seas without the flag states prior authorisation is one of the reasons the thesis approaches it as an overarching gap in the international legal regime.

The above scholarship identifies similar gaps in the legal regime governing the interdiction of a DTV on the high seas. The thesis seeks to address these two overarching gaps in the international legal regime, which are flag state boarding authorisations and the absence of

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[112] ibid 255.
[113] ibid 255.
[114] ibid 257.
[115] ibid 257.
[116] ibid 257.

any regulation of *vessels without nationality* on the high seas, by complementing the existing scholarship. This thesis complements the above scholarship by considering how the gaps in the international legal regime are addressed in contemporary interdiction practice. The thesis does this through its practice-oriented approach, notably through how it situates U.S. practice and domestic law within the international legal regime.

Thus, in doing so, the thesis will focus on U.S. domestic legislation forming the basis of U.S. interdictions, which also includes cooperation for the suppression of DTVs on the high seas. Regarding cooperation, the thesis further complements the existing scholarship by considering how the bilateral and regional interdiction agreements situate within a broader international legal context including other forms of maritime security cooperation such as the PSI and U.S. bilateral maritime security agreements. Ultimately, this leads to the thesis's conclusions, which considers how domestic legislation and international cooperation address the gaps in the international legal regime. However, there are some limitations to the thesis and the overall research.

Throughout researching the interdiction of DTVs on the high seas, some fundamental questions arise concerning this law enforcement action. The primary issue of concern is the individuals on interdicted vessels. There is a significant human rights dimension to the interdiction, detention, arrest, transport, and incarceration of individuals from high seas DTV interdictions. Another dimension concerns the use of force in high seas interdictions both as part of a general human rights matter and from a general use of force perspective. Indeed, this concern impacts all types of interdictions, not just those of drug traffickers. Although the thesis touches on this issue to some degree, this is a facet of the overall interdiction process that exceeds the scope of the research. However, all these matters warrant further research since it can impact the future development of new maritime security agreements or cooperative endeavours like the PSI or future agreements addressing mixed migration flows at sea. In this regard, another limitation concerns this overall question of broader maritime security agreements. The thesis considers some of these agreements in the form of U.S. bilateral maritime security agreements. Still, should these agreements expand beyond the bilateral agreements concluded by the U.S., there will undoubtedly be further research needed to consider the impact of such agreements on the freedom of the high seas and the exclusive jurisdiction of the flag state.

1.4 Methodology

This section presents the methodology and the methods of data collection for the thesis. The thesis is grounded on rules of treaty interpretation, with state practice as a supplementary aid to treaty interpretation. Thus, the project primarily uses a legal doctrinal methodology because the thesis is 'concerned with the analysis of legal doctrine and how it was developed and is applied'.[117] The primary research question and the sub-questions are both concerned with the interpretation of relevant treaty provisions and the relevant customary international law. Thus, doctrinal research builds the foundation of this research by identifying gaps in the law, engaging with scholarly legal debate concerning those gaps, and highlighting problems that may remain controversial in practice.[118] Also, since 'the principal purpose of legal doctrinal research (…) is to provide explicit normative comment on 'how things should be' this method is necessary to formulate any 'needed proposals for improvement'.[119] Doing this means first setting out the relevant international law concerning DTV interdictions on the high seas.[120] Once the applicable international legal regime is set out, interpretive tools and legal reasoning must be applied to evaluate the present status of the law and to suggest recommendations for the development of the law.[121]

Legal doctrinal research 'also aims to 'systematize, rectify, and clarify the law on any topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources'.[122] As Dobson and Johns note, '[t]he researcher's principal or even sole aim is to describe a body of law and how it applies. In doing so, the researcher may also provide an analysis of the law to demonstrate how it has developed'.[123] The thesis does more than describe a body of law and its application. The thesis undertakes a critical analysis of the existing law, its development, and its application in the actual practice of States. In other words, as stated, existing treaty rules establish an enforcement framework applicable to DTV interdictions on the high seas. Most of the existing scholarship, as also discussed above, generally approaches the analysis of this framework primarily through

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[117] Salim Ibrahim Ali et al, 'Legal Research of Doctrinal and Non-Doctrinal,' [2017] 4 International Journal of Trend in Research and Development, Volume 1, 493, 493.
[118] Ian Dobson and Francis Johns, 'Qualitative Legal Research,' in Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 19.
[119] Andria Naude Fourie, 'Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research,' [2015] 8 Erasmus L. Rev. 95, 96. See also Jan Vranken, 'Exciting Times for Legal Scholarship,' [2012] 2 *Recht en Methode in onderzoek en onderwijs* 2, 42, 43.
[120] David J. Stott, *Legal Research* (2nd edn, Cavendish 1999) 3.
[121] Lee Epstein and Gary King, 'The Rules of Inference,' [2002] 69 U. Chi. L. Rev. 1, 3.
[122] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 4.
[123] Dobson & Johns (n 118) 19.

the interpretation of relevant treaty provisions. However, the thesis takes a practice-based approach to see if these enforcement gaps identified in the international legal regime create practical problems in contemporary interdiction practice. Thus, since state practice is used as a supplementary aid to interpretation, an empirical method of data collection, in the form of elite semi-structured interviews, is used in this regard to supplement the doctrinal methodology.[124]

1.4.1 Formal Sources of International Law

Much of the thesis focuses on analysing the international legal regime concerning high seas DTV interdictions as set out in the LOSC and the 1988 Vienna Convention. However, this legal regime also includes other treaties that are part of ILoS including the 1958 Geneva Convention on the High Seas, and the regional/bilateral drug interdiction agreements. The thesis also considers relevant customary international law and principles of international law, specifically the principles of jurisdiction in international law as they relate to domestic criminal jurisdiction.[125] Combined, treaty and custom are considered 'the two most important sources of international law' and for the purposes of this study, they are primarily formal sources of legal obligations that create the legal regime applicable to DTV interdictions on the high seas.[126] The Statute of the International Court of Justice [ICJ] considers these sources in Article 38 (a-b). Article 38 states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

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[124] Ethics approval for the use of empirical data was granted by the University of Westminster College of Liberal Arts and Sciences Research Ethics Committee. The committee approved application ETH1819-0628 on June 11, 2019. The data collected is accordance with the University of Westminster Code of Practice Governing the Ethical Conduct of Research. Considering the Covid-19 Pandemic, all the interviews were conducted remotely in accordance with all evolving university issued guidance and applicable restrictions.

[125] With respect to other primary sources, primarily those concerning the work of the Maritime Safety Committee [MSC] of the International Maritime Organization [IMO] such as MSC circulars, amendments to SOLAS and its regulations, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation [SUA Convention] and its 2005 Protocol, and the and resolutions of the organization, accessed for this thesis, a research-based internship was conducted at the IMO from June 3 – June 21, 2019. Several of the primary sources used and cited in this thesis were accessed at the IMO in person at the Maritime Knowledge Centre. It was also during this internship where several interviewees were identified and had granted initial requests for the semi-structured interviews. A second research-based internship was scheduled for May 2020 in order to conduct some of these interviews as well as access additional primary source materials; however, due to the Covid-19 Pandemic, the IMO cancelled the internship due to the imposing of lockdown measures across the U.K.

[126] Antonio Cassese, *International Law* (2nd edn, University Press 2005) 153.

> b. international custom, as evidence of a general practice accepted as law.[127]

However, Article 38 (c-d) takes into account subsidiary means including:

> c. the general principles of law recognized by civilized nations
>
> d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[128]

When examining these sources of law, this is done based on specificity.[129] Cassese discusses this by outlining that:

> [o]ne must first look for a treaty or source deriving from a treaty; failing an applicable rule, one should search for a customary rule or general principle of international law. Only at that stage when no relevant rule or principle can be found, may one apply general principles of law recognized by the domestic legal orders of states.[130]

The primary source of the international legal regime concerning DTV interdictions on the high seas is established by treaties.

1.4.1.1 Treaties

As the primary enforcement framework under scrutiny here is set out in multiple treaties, treaty interpretation is a crucial component of the study. Interpreting a treaty begins with the 1969 Vienna Convention on the Law of Treaties [1969 VCLT], Articles 31, 32, and 33. The approach set out under Article 31 of the 1969 VCLT reflects customary international law.[131] The present study is grounded in Articles 31 and Article 32, practice as a supplementary means of interpretation. Article 31 [General Rules of Interpretation] states:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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[127] Statute of the International Court of Justice, as Established by Article 92 of the U.N. Charter, Chapter II of the ICJ Statute: Competence of the Court, Article 38 <https://www.icj-cij.org/en/statute#CHAPTER_II> accessed on 19 November 2019.
[128] ibid Article 38 ICJ Statute.
[129] Cassese (n 126) 183.
[130] ibid 183.
[131] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 380.

> 3.) There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4.) A special meaning shall be given to a term if it is established that the parties so intended.[132]

Article 32 [Supplementary Means of Interpretation] states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.[133]

These general rules are heavily relied upon by international courts and tribunals.[134] For example, the International Court of Justice [ICJ], the World Trade Organization, the International Tribunal for the Law of the Sea [ITLOS], and the European Court of Justice all to some degree incorporate the general rules established by the VCLT into their approaches to treaty interpretation.[135] The thesis considers the decisions from these tribunals, including the ICJ and ITLOS.

Overall, there are three approaches to treaty interpretation. The first approach is the *Objective / Textual Approach,* and this focuses on the actual text of the treaty and emphasises an analysis of the words used through 'unveiling the meaning of the text'.[136] The thesis primarily adopts the Textual approach to treaty interpretation as the most appropriate method of treaty interpretation, focusing on the words used in the agreement. The thesis adopts this approach because while the specific words used in the treaty may be indicative of what the parties intended, from a practice-oriented approach, how the text of the treaty is applied in practice can indicate what the parties understand the text to mean.[137] The

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[132] Vienna Convention on the Law of Treaties Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.
[133] ibid Article 32 VCLT.
[134] Jan Klabbers, 'Virtuous Interpretation,' in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, edited by Malgosia Fitzmaurice, et al., BRILL, 2010. ProQuest Ebook Central, 18.
[135] ibid 18.
[136] Malcolm Shaw, *International Law*, (Nineth Edition, Cambridge University Press, 2021) 812. See Klabbers (n 134) 29.
[137] Malgosia Fitzmaurice & Panos Merkouris, 'Canons of Treaty Interpretation,' in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on: 30 Years On*, edited by Malgosia Fitzmaurice, et al., BRILL, 2010. *ProQuest Ebook Central*, 154-157.

Objective/Textual approach is also generally seen in the jurisprudence of the ICJ.[138] The second approach is the *Subjective Approach* which looks at the intention of the parties adopting the treaty to address any ambiguity in the provisions of a treaty.[139] The third approach *Teleological Approach* looks to the object and purpose of the treaty against which the meaning of any specific provision is measured.[140] Treaty interpretation will encompass elements of all three approaches, and none should be excluded when seeking to interpret a treaty.[141]

1.4.1.2 Customary International Law

The thesis engages with customary international law on two fronts. The first concerns the existing customary international law reflected in the ILoS. Several relevant treaty articles in the LOSC reflect customary international law, primarily those concerning the interdiction of and/or exercising jurisdiction over vessels on the high seas. For example, Article 92 LOSC affirms the exclusive jurisdiction of the flag state over its vessels and is customary international law.[142] Similarly, Article 110, the *Right of Visit,* which is a means of enforcement on the high seas, and as will be discussed through subsequent chapters, exists both in treaty and custom, but is arguably different in substance. Therefore, these rules of customary international law, such as the *right of visit*, warrant additional scrutiny as the thesis seeks to answer the primary research question.

The second front where the thesis engages with customary international law concerns the types and bases of jurisdiction in international law. The five accepted principles of jurisdiction in international law set out in Chapter 2, are considered by most commentators and States to be reflective of customary international law.[143] As stated, the thesis considers the use of domestic law to address specific gaps in the international legal regime applicable to DTVs on the high seas. Indeed, this is central to the overall focus of the thesis, which is the U.S. approach to DTV interdictions. Since these principles of jurisdiction are also frequently applied by U.S. Courts of Appeals in DTV interdiction case law, these case law opinions are helpful in discussing the bases of jurisdiction as custom.

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[138] Crawford (n 131) 380.
[139] Shaw (n 136) 812.
[140] ibid 812.
[141] ibid 812.
[142] LOSC (n 24) Article 92(1): 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'.
[143] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 85-86.

1.4.1.3 Evidentiary Sources

In order to aid in the identification and analysis of what the law is, judicial decisions, soft law, and the teaching of highly qualified publicists, such as those presented in the literature review, are used in the thesis. These subsidiary means, particularly judicial decisions, run throughout the thesis. As will be discussed, these means provide strong indications concerning the interpretation of the relevant legal provisions by States, primarily the U.S. Furthermore, to help with the identification of what the law is and how the law is used in practice, elite semi-structured interviews provide the added value of viewing the relevant international legal regime from the vantage point of practice, which is done through empirical data collection.

Judicial Decisions

One type of data that the thesis uses are judicial decisions. The judicial decisions used in the thesis are both international and domestic decisions. International Judicial decisions are not sources of law; however, they aid as a subsidiary means of identifying certain rules of law.[144] For example, the thesis considers decisions from the ICJ, ITLOS, and Permanent Court of International Justice [PCIJ]. Although these judicial bodies and their decisions are generally only binding on the parties to the dispute and limited to each case under consideration, the opinions of these courts are often cited as authoritative decisions.[145]

The thesis also considers judicial decisions from domestic courts. Unlike decisions from international courts, the decisions of national courts may be sources of domestic law. Typically, this source of law comes in the form of binding case law opinions. For example, the thesis analyses the case law opinions of the U.S. Circuit Courts of Appeals regarding DTV interdiction cases. Indeed, these case law opinions have the effect of expanding U.S. domestic law that applies to high seas DTV interdiction. Furthermore, these case law opinions heavily factor international law into the overall decision. Domestic case law may also provide evidence concerning how the court interprets specific international legal obligations or legal regimes. Additionally, although the decisions of national courts do not have the effect of creating a source of international law, they can provide evidence of the actual practice of states or examples of how states behave.[146] As it relates to the U.S. case

[144] ICJ Statute (n 127) Article 38(d). See Shaw (n 136) 92.
[145] Shaw (n 136) 92.
[146] ibid 92.

law, these cases do evidence U.S. practice and how the U.S. conducts high seas DTV interdictions. Therefore, these decisions are included in the thesis not only to evidence practice but because they also show how the U.S. addresses the gaps in the international legal regime applicable to DTV interdictions on the high seas, specifically regarding questions of flag state authorisations and domestic jurisdiction over *vessels without nationality*. Ultimately, this data is used to aid in situating the overall U.S. practice within international law.

Soft Law

The thesis considers several soft law instruments, particularly non-binding U.N. Resolutions, and intergovernmental cooperative initiatives. These types of soft law may aid in the identification and analysis of the law. Furthermore, soft law instruments may provide models for addressing specific gaps in the existing DTV framework and any lessons learned regarding improving international cooperation. Although these instruments are defined as a non-legally binding, they may facilitate the evolution of international law, and soft law can present alternatives to the sometimes-cumbersome process of treaty creation.[147]

One form of soft-law instrument with which the thesis engages are resolutions of the Economic and Social Council of the U.N. [ECOSOC]. These resolutions have been central to many U.N. efforts to address international drug trafficking, and such resolutions have gone on to spark the creation of certain treaties, specifically, the 1988 Vienna Convention.[148] For example, ECOSOC *Resolutions 1987/28* and *1987/29* encourage states to engage in the maximum amount of international cooperation [and information sharing] between all U.N. member states, the drug control bodies of the U.N., and the General Assembly in setting a plenipotentiary conference for the 1988 Vienna Convention.[149]

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[147] Alan E Boyle and C. M Chinkin, *The Making of International Law* (Oxford University Press 2007) 213.

[148] ECOSOC *Resolution E/20* established the Commission on Narcotic Drugs [CND] and the drug control secretariat, which provides 'the machinery whereby full effect may be given to the international conventions relating to narcotic drugs and…review of progress for the international control of such drugs. ECOSOC Resolution E/20 of 15 February 1946. ECOSOC/Res/E20 - Establishment of a Commission on Narcotic Drugs, supplemented by the action taken 18 February 1946 concerning the appointment of representatives of fifteen members of the United Nations as Members of this commission. These were followed by ECOSOC Resolution 1474 (XLVIII) 3 at 3, whereby ECOSOC requested the Secretary-General to call a conference in 1971 for a protocol on psychotropic substances.

[149] ECOSOC Resolution 1987/28 (1987). ECOSOC/RES/1987/28 (1987). Education and information on drug abuse and illicit traffic in narcotic drugs and psychotropic substances and 1987/29. Role of the drug control bodies of the United Nations at Vienna, 14th plenary meeting 26 May 1987.

Furthermore, ECOSOC resolutions are an example of U.N. resolutions that are referred to throughout the thesis when examining what the law is and if the law may be developing.

Another type of soft-law instrument drawn on in subsequent chapters is the Proliferation Security Initiative [PSI] created by the U.S. The PSI 'is an innovative and proactive approach to preventing WMD proliferation that relies on voluntary actions by states that are consistent with their national legal authorities and relevant international law and frameworks'.[150] The PSI itself is not an agreement. However, its underlying principles are based in existing international legal regimes established in both treaty and custom. For example, one of these legal regimes is the Right of Visit and thus the PSI helps identify what that law is concerning the generally accepted circumstances that may trigger a right of visit ship boarding.

Furthermore, the PSI aids in considering how the law may be developing. For example, as the PSI encourages participating States to act within the 'relevant international law and frameworks' it must be scrutinized against both the LOSC and any relevant customary international law applicable to the PSI's overall objectives, WMD interdictions on the high seas. Such analysis can then be used to determine if these instruments are serving as the foundation to begin the process of concluding a new multilateral treaty or possible identification of new customary international law. Indeed, the PSI has led to the development of bilateral WMD interdiction agreements between the U.S. and other PSI endorsing States.[151] Therefore, such agreements demonstrate the influence of the PSI on international law and indicate how the law is developing to address new types of prohibited conduct taking place on the high seas.

Interviews

The use of interviews as a form of data collection and evidentiary source was done through elite semi-structured interviews of highly experienced officials. Those individuals selected to provide this data are or were in sensitive specialized positions within the government of states. While interviewees were selected based on their professional experience, they gave the interviews in their personal capacity and not representing the views of any specific

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[150] ibid.

[151] For example, the *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 13 August 2004, Entered into force 24 November 2004, KAV 7064.

government or organisation, thus their data was not the official views of a state or practice as an element of evolving customary international law. In other words, as the overall approach of the thesis was practice-oriented, the purpose of obtaining supplemental data from those in practice was to gain an understanding of the relevant legal framework and how gaps and ambiguities in that legal framework influence what happens in practice. The interviewees positions are those who are or were responsible directing interdictions, conducting interdictions, implementing, or developing cooperative measures addressing international drug trafficking, conducting international drug trafficking enforcement, directing, and conducting international drug trafficking prosecutions, and directing national interdiction policy and procedures.[152]

The principal reason for conducting these elite interviews, which supported the doctrinal method, is to shed light upon the actual 'on the ground' practice and cooperation taking place during a high seas DTV interdiction. In other words, asking interviewees about their personal understandings of the relevant legal framework and how gaps and ambiguities in that legal framework influence what happens in practice. As noted above in the literature review, the international legal regime is deficient mainly in what specific actions an interdicting state may take prior to and during a ship-boarding, so there is a question of process. In other words, the interviews provide supplementary data on this point. The interviews were able to detail what actions takes place when a DTV is encountered on the high seas by a State's enforcement authorities. The interviews also provide insight into what the officials' understanding of the legal basis in international law is for such interdictions. In other words, if a State, through its officials, interprets a certain provision in the treaty framework more liberally, the actions said State may take during the actual interdiction might appear beyond the scope of the framework.

On the other hand, a State may interpret a specific provision as an enforcement gap and seek to remedy that gap through other rules of international law or its domestic law.

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[152] The candidates selected for the interviews incorporated into the thesis agreed to be interviewed under a strict condition of anonymity as many of them presently hold or previously held sensitive law enforcement or military posts in State governments. Those individuals selected to provide this data are or were in specialised positions directing a state's interdiction practice, commanding and conducting government enforcement vessels engaged in high seas interdictions, working in coalition partner states to implement or developing cooperative measures addressing international drug trafficking, conducting general international drug trafficking enforcement in bilateral partner nations, directing and conducting international drug trafficking prosecutions, and directing or developing national interdiction policy and procedures. The persons selected for the interviews provided the information based on their personal views based on their personal experiences, not that of any specific government.

Indeed, and as will be established, this is often the case surrounding many U.S. DTV interdictions on the high seas. The problem with domestic legislation or rather when States do not implement it regarding DTV interdictions, is an important matter the thesis takes up, especially in its concluding observations. The absence of specific domestic legislation combined with the evident gaps in the existing enforcement framework often means drug traffickers are not prosecuted. However, this also links to international cooperation more broadly, especially in cases of flagged DTV interdictions and authorisations, since these interdictions involve the flag state waiving its exclusive jurisdiction. The interviews shed light on how States cooperate in this practice, which usually involves bilateral agreements, capacity building and training exercises, asset sharing, information and intelligence sharing, and criminal prosecutions. Therefore, these interviews provided this supplementary data on practice that could not be obtained through a strictly doctrinal methodology.

1.5 The Structure of the Thesis

The thesis is divided into two parts. Part I consists of Chapters 2, 3, and 4, setting out the applicable rules of international law, specifically the types and bases of jurisdiction in international law and the treaty regime applicable to DTV interdictions on the high seas. Chapter 2 sets out and analyses the types and bases of jurisdiction in international law. Chapter 2 also considers the applicability of the bases of jurisdiction to a DTV interdiction on the high seas. Chapters 3 and 4 contain the analysis of the international legal regime created by treaties applicable to DTV interdictions on the high seas. Chapter 3 analyses the LOSC, with specific focus on how jurisdiction is addressed in the convention, the DTV enforcement regime contained within, and the *right of visit*. Chapter 3 also begins to flush out two overarching legal gaps considered throughout the thesis, and these gaps centre on a vessel's *nationality*. The two main legal gaps concern flag state ship boarding authorisations and the question of jurisdiction over *vessels without nationality*. Furthermore, Chapter 3 specifically analyses the only article dedicated to drug trafficking on the high seas, Article 108, to draw out the gaps in the law and consider how the article creates a foundation for cooperation to suppress DTVs on the high seas. Chapter 4 completes Part I by engaging with the international drug control framework, primarily the 1988 Vienna Convention. The specific focus in this regard will be the enforcement mechanisms created in the Convention, notably Article 17. Still, the chapter will also look to Article 4, which focuses specifically on jurisdiction under the Convention.

Part II of the thesis transitions from the core international legal regime to begin analysing the possible methods for addressing the gaps in the treaty regime in Part I. Chapter 5 looks to 'international cooperation' through the regional and bilateral agreements concluded by the U.S., primarily in the Caribbean area. The regional agreement, the 2003 Caribbean Region Maritime Agreement [CRMA], is analysed, especially the ship-boarding provisions of the treaty, which, as will be seen, is a strong influence in the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The U.S. bilateral agreements are then explored, focusing on the enforcement provisions, and modes of cooperation set out in these agreements. Chapter 5 also makes a comparison between the U.S. agreements and the 1995 Council of Europe Agreement which is an implementing agreement of Article 17 of the 1988 Vienna Convention. Chapter 6 then shifts the focus from regional and bilateral agreements to consider the U.S. approach to DTV interdictions. The chapter sets out the evolution of the U.S. domestic anti-drug and maritime interdiction laws and then shifts to the interpretation and application of these laws by U.S. Courts. The chapter then surveys U.S. case law related to high seas DTV interdictions to determine how the interpretation and application of the law address the gaps in the international legal framework. Ultimately, this analysis of the U.S. practice is done to situate the practice within international law and thus demonstrate how the approach addresses the gaps in the international legal regime.

Chapter 7 then explores other agreements that address different issues of maritime security. These agreements are considered in the thesis for several reasons. Firstly, these agreements address different types of prohibited conduct at sea that affects maritime security. Secondly, these agreements are included for analysis to consider if similar gaps in the law manifest with regard to the interdiction of non-drug-related conduct on the high seas. Thirdly, these agreements are considered to determine how or if they have overcome the overarching gaps that affect the legal regime for DTV interdictions and any lessons learned in achieving this objective. Lastly, these agreements are included in order to discuss their cooperative elements, and these elements may serve as possible models applicable to DTV interdictions on the high seas. The agreements the chapter considers are the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation [SUA Convention] and its 2005 Protocol, looking specifically to the enforcement and cooperative measures as possible models to address the gaps in the legal regime for DTV interdictions. Building on this, the chapter looks to the 1995 Straddling Fish Stocks agreements provisions on cooperation and enforcement, concluding with the

Proliferation Security Initiative [PSI]. The chapter looks to the initiative's voluntary nature and the underlying principles of international law upon which it is based, namely the right of visit. The final chapter of the study, Chapter 8 provides the concluding remarks and observations of the study.

Part I
Chapter 2: Jurisdiction in International Law

Introduction

Chapter 2 concerns jurisdiction in international law, specifically identifying and considering the types and bases of jurisdiction in international law. The purpose of chapter is to begin the overall analysis of jurisdiction over DTVs on the high seas. The chapter explores to what extent States are permitted to exercise their domestic criminal jurisdiction over events taking place outside of their territory. In other words, as the thesis concerns the interdiction of DTVs on the high seas, significant jurisdictional elements are factoring into these interdictions. For example, such actions may involve establishing and exercising domestic criminal jurisdiction on the high seas.

The chapter begins with a discussion on the principles of domestic jurisdiction, also known as the types of jurisdiction in international law, which are prescriptive, enforcement, and adjudicative jurisdictions. Furthermore, the principles of jurisdiction, as will be seen, may form the foundation for a State's ability to bring drug traffickers from the high seas into its domestic courts. The chapter then explores the bases of domestic criminal jurisdiction in international law: territorial, nationality, passive personality, protective, and universal principles. Through this analysis, the bases of jurisdiction in international law are explored for their applicability to DTV interdictions on the high seas.

2.1 Types of Jurisdiction in International Law

A State's jurisdiction comes from its sovereignty. Sovereignty is the State's 'power or authority over all individuals living in the territory'.[1] Jurisdiction forms a critical component of a State's sovereignty.[2] Jurisdiction is the State's authority to regulate its citizens, property, conduct, or other States' nationals inside the forum state's territory. In international law, jurisdiction becomes a concern when a 'State, in its eagerness to promote its sovereign interests abroad, adopts laws that govern matters of not purely domestic concern'.[3] As Ryngaert concludes:

> [t]he public international law of jurisdiction guarantees that foreign nations' concerns are also accounted for, and that sovereignty-based assertions of jurisdiction by one State do not unduly encroach upon the sovereignty of other States.[4]

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[1] Antonio Cassese, *International Law* (2nd edn, University Press 2005) 49.
[2] Malcolm Shaw, *International Law*, (Ninth Edition, Cambridge University Press, 2021) 555.
[3] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 6.
[4] ibid 6.

States exercise and establish their jurisdiction through the *types* of jurisdiction in international law. These are the *jurisdiction to prescribe*, *the jurisdiction to enforce*, and the *jurisdiction to adjudicate*. *Prescriptive jurisdiction* concerns the legislative character, scope, creation, or limits of a State's ability to establish and create legal obligations.[5] E*nforcement jurisdiction* affects a State's ability to enforce the laws that it prescribes. *Adjudicative jurisdiction* is also the State's ability to enforce its laws through conducting trials and making decisions concerning violations of the law.[6] Each type of jurisdiction may be exercised according to one of the five accepted bases of jurisdiction in international law.

2.1.1 A note on terminology and 'Extraterritorial Jurisdiction'

The term 'extraterritorial' jurisdiction appears in various scholarly works and court decisions alike, and as will be seen, frequently in U.S. appellate cases concerning DTV interdictions. Yet, it has varied definitions and applications. For example, Shaw notes that extraterritorial jurisdictional 'claims have arisen in the context of economic issues whereby some states, particularly the [U.S.] seek to apply their laws outside their territory'.[7] The 'economic context' is not strictly limited; however, as even the trafficking in persons for sexual crimes is considered to have an economic impact on U.S. foreign commerce.[8] Alternatively, Staker contends that 'extraterritorial jurisdiction' is 'concerned with exceptional circumstances in which a State is entitled to exercise its enforcement jurisdiction [and with it, necessary implications of its legislative jurisdiction] in the territory of another state'.[9]

While these are accepted uses of the term 'extraterritorial jurisdiction' others, such as Ryngaert have reasoned that "[e]xtraterritorial jurisdiction' ought to imply that a State exercises its jurisdiction without any territorial link ('extra-territorial'),' thus the term 'extraterritorial jurisdiction' is only accurate if it refers to assertions of jurisdiction over persons, property, or activities which have no territorial nexus whatsoever with the regulating State, i.e. assertions based on the personality, protective, or universality principle of jurisdiction'.[10] Against the backdrop of U.S. practice, mainly where the interpretation of international law and jurisdiction

[5] Christopher Staker, 'Jurisdiction,' in Malcolm D Evans, *International Law* (4th edn, Oxford University Press 2014) 312-313.
[6] ibid 312-313.
[7] Shaw (n 2) 592.
[8] *US v. Baston*, On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit no. 16–5454. Decided March 6, 2017, Thomas J. Dissenting at 1-2.
[9] Staker (n 5) 313.
[10] Ryngaert (n 3) 7.

is undertaken substantially at the U.S. appellate judicial level, the thesis adopts extraterritorial jurisdiction as defined by Ryngaert.

The reason for adopting this view is seen in the 2020 Eleventh Circuit Court of Appeals case of *U.S. v. Davilia-Mendoza et al.* In this case, the appellants argued the lack of a territorial connection or effect between their conduct [a DTV *without nationality* on the high seas] and the U.S., implies the U.S. lacks jurisdiction over the interdiction on the high seas.[11] In support of their argument, the appellants cited a precedent case, *U.S. v. Baston*, which concerned the application of a extraterritorial U.S. criminal statute for forced sex trafficking which affects U.S. interstate or foreign commerce.[12] The appellate court disagreed as it applies to drug trafficking on the high seas, focusing on the differential nature of the DTV interdiction, which is not inside the territory of any state, but in an area subject to no state's sovereignty.

According to the court [and citing the relevant statute] the act of 'trafficking in controlled substances aboard vessels is a serious international problem (…)'.[13] The sex trafficking statute, on the other hand, envisions a direct link to the U.S. whereby 'the defendant is "a national of the United States," "an alien lawfully admitted for permanent residence," or otherwise "present in the United States, irrespective of the nationality of the alleged offender."' The drug trafficking statutes 'do not include any findings on the existence or extent of an economic impact, aggregate or otherwise, of the international drug trade on United States commerce with foreign nations'.[14]

Thus, citing its case law further, the court concluded that '[w]e have always upheld extraterritorial convictions' for drug trafficking occurring on the high seas'.[15] Furthermore, according to the court, 'extraterritorial jurisdiction over vessels on the high seas that are engaged in conduct that has a potentially adverse effect and is generally recognised as a crime by nations that have reasonably developed legal systems' is an accepted exercise of jurisdiction.[16] Thus, in light of the above, the thesis adopts 'extraterritorial jurisdiction' applying it to 'persons and activities' with no nexus [territorial or national].

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[11] *US v. Davila-Mendoza et al,* Eleventh Circuit Court of Appeals, case no. 17-12038, August 26, 2020, at 21.
[12] *US v. Baston* (n 8) 2.
[13] *US v. Davila Mendoza et al* (n 11) at 20-21.
[14] ibid 21.
[15] *US v. Campbell,* 743 F.3d 802, 810 (11th Cir. 2014).
[16] *US v. Davila Mendoza et al* (n 11) 21 citing *US v. Tinoco*, 304 F.3d at 1108.

2.1.2 Prescriptive Jurisdiction

P*rescriptive jurisdiction* [legislative] is the ability of a State, 'to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court'.[17] Prescriptive jurisdiction is also the geographic reach of a State's domestic laws.[18] A State's sovereignty permits its recognised organs to create binding laws applying in its territory, territorial sea [if claimed], and airspace.[19] The principle of sovereign equality of all States and non-interference in domestic affairs generally means States cannot legislate within the territory of another state.[20] However, international law recognises States may prescribe laws extending beyond their territory, for example over nationals abroad.[21]

Although any State can prescribe extraterritorial legislation, there is as Shaw observes, the possibility it 'may be challenged'.[22] Shaw identifies one avenue for such challenges, including a 'State adopting a law contrary to the provisions of international law (…) which will render [the prescribing State] liable for a breach of international law'.[23] However, this does not mean that States may not change their views on jurisdiction as international law develops. Staker, for example, has taken note of what appears to be a shift in this doctrine concerning jurisdiction, specifically from the U.S., where he observes jurisdiction is becoming 'an aspect of the substantive topic that is regulated'.[24] Such change, is in his view, becoming liable to fragment the principles of jurisdiction, and '[s]hould this happen, and should the assertions be recognised in international law, the near-inevitable result is that jurisdictional claims will steadily expand,' especially in areas where States are keen to address a specific type of conduct.[25] Indeed, the actual question is whether there are any existing limitations on prescriptive jurisdiction found in general rules international law and in answering this query, the thesis explores the *Case of the S/S Lotus*.[26]

The *Case of the S/S Lotus* from the Permanent Court of International Justice [PCIJ] in 1927 dominates many jurisdictional debates both past and present. The reason this case endures is its

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[17] § 401(a) Restatement (Third) of US Foreign Relations Law.
[18] Ryngaert (n 3) 9.
[19] Shaw (n 2) 561.
[20] Ryngaert (n 3) 6.
[21] Shaw (n 2) 567. For example, a state can legislate against the conduct of a foreign national abroad for certain crimes such as terrorism, counterfeiting of the national currency, or attempting to avoid a state's immigration laws.
[22] ibid 567.
[23] ibid 473.
[24] Staker (n 5) 312.
[25] ibid 312.
[26] *The Case of the S.S. Lotus*, Publications of the Permanent Court of International Justice, Series A, No. 10, September 7th, 1927, Judgment No. 9, 18-20. *See* James L. Brierly, 'The Lotus Case,' [1928] 44 L. Q. Rev. 133, 156.

position on prescriptive and enforcement jurisdiction, which continues to spark discussion about how and where a State may exercise its domestic jurisdiction. The *Lotus* case involves a high seas collision between the French vessel *S/S Lotus* and the Turkish vessel *Boz-Kourt*. The collision caused the death of several people on the *Boz-Kourt*.[27] The first officer on the *S/S Lotus* [Lt. M. Daemons, a French national] was subsequently arrested and tired for manslaughter after the *Lotus* made port in Turkey.[28] A dispute arose between France and Turkey, and France submitted the case to the PCIJ. The majority opinion took the view that the collision was, in effect, between two pieces of each State's territory.[29] In other words, the criminal act began on the French vessel, and the collision, which resulted in the Turkish nationals' death was, in effect, inside Turkish territory.[30]

The case sparked a jurisdictional conflict and has become a legal standard, especially in debates concerning a State's jurisdiction. According to the majority in the *Lotus* decision:

> [t]he first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[31]

Consequently, this view means a State may exercise its jurisdiction as it wishes to absent a prohibitive rule of international law.[32] According to the PCIJ:

> [s]uch a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present.[33]

This view, according to Ryngaert, remains dominant and 'constitutes the basic framework of reference for questions of jurisdiction under international law' and so as will be explained by reference to a competing view on jurisdiction below, and the above view on jurisdiction is adopted by the thesis.[34]

The *Lotus* case has sparked much criticism from others like Staker, who argues that the above dicta created 'a tiresome and oddly persistent fallacy' maintaining that a 'State may extend the

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[27] ibid 5-6.
[28] ibid 5-7.
[29] The PCIJ contradicted itself by clearly observing that vessels on the high seas are subject to the exclusive jurisdiction of the flag state, which is national in character not territorial. *Lotus* (n 26) 25.
[30] ibid 9.
[31] Ryngaert (n 3) 18-19.
[32] ibid 21.
[33] *Lotus* (n 26) 19.
[34] Ryngaert (n 3) 23.

reaches of its prescriptive jurisdiction as it chooses, except in circumstances where it can be shown that some rule of international law specifically prohibits it from doing so'.[35] Indeed, there is a line of reasoning that a majority of States generally accept a need for a permissive rule before exercising their jurisdiction.[36] Furthermore, this view on jurisdiction has appeared in recent International Court of Justice [ICJ] cases, for example, the 2010 *Advisory Opinion on the Unilateral Declaration of Independence* [Kosovo].[37] However, this position itself is debatable, especially in the context of the thesis, since such a contention blurs the lines between extraterritorial prescriptive jurisdiction and territorial enforcement jurisdiction.

Returning to consider expressly what the PCIJ emphasised in the *Lotus* case, as it relates to prescriptive and enforcement jurisdiction, the court noted that:

> [i]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.[38]

The majority went on to say that:

> [i]t does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.[39]

Here the PCIJ's distinction between territorial enforcement jurisdiction and extraterritorial prescriptive jurisdiction manifests.[40] As the majority in the *Lotus* case observed:

> [t]he first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory.[41]

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[35] Staker (n 5) 313-314.
[36] Kathleen Hixson, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States, [1988] 12 Fordham International Law Journal 1, 6, 130-135.
[37] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports 2010, p. 403 at 37. The ICJ observing '[i]n no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence'. The opinion went on to acknowledge that '[a] great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases'.
[38] *Lotus* (n 26) 23.
[39] ibid 19.
[40] Ryngaert (n 5) 23.
[41] *Lotus* (n 26) 19.

Yet, as will be seen, the overall question of jurisdiction against DTVs centres on the high seas. Furthermore, as the high seas are not subject to one State's sovereignty, this is not territorial enforcement jurisdiction, it is extraterritorial.[42] Thus, in keeping with what the *Lotus* case has established, a State may prescribe a law that extends beyond its physical [land, sea, or air] boundaries; however, the question then becomes a matter of enforcement of those prescribed laws.

2.1.3 Enforcement Jurisdiction

Enforcement jurisdiction is 'the power to ensure through coercive means that legal commands and entitlements are complied with' and as, Chapter 1 detailed, is central to the legal regime concerning DTVs on the high seas.[43] Enforcement jurisdiction is primarily territorial because international law generally prohibits States from exercising enforcement jurisdiction in another State's territory without consent, and the *Lotus* case brought out this distinction.[44] For example, the prohibition applies to a State's agents entering another State's territory to arrest an individual.[45] However, States may exercise their enforcement jurisdiction outside of their respective territories via international cooperation through a treaty or other form of agreement.[46]

Another way this is done is through the cooperative framework for DTV interdictions on the high seas as set out in Article 17 of the 1988 Vienna Convention. According to Article 17's framework, a State may, subject to the authorisation of the flag state, interdict a flagged vessel, board, search, and 'take appropriate action with respect to the vessel, persons, and cargo on board'.[47] 'Appropriate action' is, in this regard, the possible exercise of domestic criminal jurisdiction over the 'persons'.[48] Furthermore, and in light of the above discussion on prescriptive jurisdiction, there are cases where extraterritorial enforcement jurisdiction may take place on the high seas absent a treaty, a permissive rule, or a prohibitive rule of international law.

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[42] United Nations Convention on the Law of the Sea (Adopted 10 December 1982, Entry into Force 16 November 1994) UNTS vol. 1833, p. 3, Article 89, which is also recognised as costmary international law.
[43] Cassese (n 1) 49.
[44] ibid 50.
[45] Shaw (n 2) 559.
[46] Staker (n 5) 312.
[47] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Entry into Force 11 November 1990) UNTS vol. 1582 p 95, Article 17(4).
[48] ibid Article 4(1)(b)(ii) Vienna Convention, which states that a Party, '[m]ay take such measures as maybe necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when: The offence is committed on board a vessel concerning which that Party has been authorised to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article'.

Chapter 1 notes that there are two overarching gaps in the legal regime concerning DTVs, specifically about enforcement jurisdiction over DTVs that are also *vessels without nationality*. The specific debate surrounding *vessels without nationality* is taken up more extensively in the next chapter; however, questions remain concerning whether jurisdiction exists to bring individuals interdicted on *vessels without nationality* before the national courts of the interdicting state. Here it will suffice to say that most States absent a specific link [such as a drug trafficker being a national of the interdicting state] do not enforce their domestic criminal law over a DTV *without nationality* on the high seas. This is due generally to the existing legal regime not providing a permissive rule allowing for this action. Conversely, as this and later chapters will discuss, some states, primarily the U.S., have prescribed domestic criminal law that is enforced extraterritorially on the high seas, resulting in drug traffickers coming before U.S. courts for adjudication.

2.1.4 Adjudicative Jurisdiction

Adjudicative or Judicial Jurisdiction is the ability of a state to bring matters before its courts for trial, legal disputes, or administrative sanctions.[49] Generally, a court will only exercise its adjudicative jurisdiction within its territory.[50] However, domestic courts may seek to try individuals based on other factors such as involvement in international crimes or if the victim is a national of the forum state.[51] Some, such as Staker, include judicial jurisdiction as part of a State's ability to enforce its laws; thus, this is not separate from enforcement jurisdiction generally.[52] However, this raises a question about the role of a State's domestic courts in the enforcement or rather, the exercising of enforcement jurisdiction extraterritorially. This specific question, is considered further in Chapter 6 regarding how U.S. domestic courts interpret and apply their domestic jurisdiction over DTVs on the high seas.[53]

Generally, a domestic court is, as Ryngaert reasons, 'not authorised to enact rules but only to settle disputes on the basis of rules enacted by the political branches'.[54] Ryngaert acknowledges though, 'it may occur that the reach of a particular statute is not clear [and] [i]n that situation, the courts might themselves determine the reach of the statute, in light of the international law principles of jurisdiction. In so doing, they exercise prescriptive jurisdiction'.[55] When a domestic

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[49] Cassese (n 1) 50.
[50] ibid 50.
[51] ibid 50.
[52] Staker (n 5) 313.
[53] Chapter 6 will set out the various conditions in which a vessel is subject to the jurisdiction of the US under its domestic criminal laws and how the courts view these interdictions on the high seas.
[54] Ryngaert (n 3) 10.
[55] ibid 10.

court, in effect legislates through its case law, notably in the case of the U.S., it can on the one hand, have the effect of 'conjured up congressional [prescriptive] intent where there was clearly none'.[56] On the other hand, as the thesis will subsequently analyse, it can demonstrate how a court not only interprets international law, but it can shed light on how that law is situated within international law, or if the courts are influencing the state's overall practice. In other words, as in the case of the U.S. [by way of its Courts of Appeals] their interpretations of the relevant international legal regime impact the enforcement actions taken on the high seas by the relevant authorities [i.e., the coast guard]. However, such action is only attainable if the prescription, enforcement, and adjudication are according to an underlying base of jurisdiction in international law.

2.2 Bases of Jurisdiction in International Law

When States exercise their jurisdiction, there must be a foundation for this in international law. In international law there are five accepted bases of jurisdiction forming this foundation permitting states the ability to exercise their jurisdiction.[57] The bases for jurisdiction in international law are the *territorial principle*, *nationality principle [active personality]*, *passive personality principle, protective [security] principle*, and *universal jurisdiction*. The bases of jurisdiction are often discussed as being the bases of *prescriptive jurisdiction.* However, with each of these bases of jurisdiction, a State may prescribe, enforce, and adjudicate against individuals, companies, or events taking place abroad.

How and when States justify an exercise of their jurisdiction under all, one, or none of the bases often depends on a State's national policy.[58] There is no obligation for States to exercise jurisdiction under any of these bases. Although these bases of jurisdiction are 'generally' accepted, States do this to varying degrees in practice.[59] Thus, exercising jurisdiction depends on how controversial the base of jurisdiction is in international law and the effect of the event inside the forum State's territory. The bases of jurisdiction are also linked directly to the ILoS as their underlying principles appear in many articles within this legal regime, including the national and territorial principles of jurisdiction. Territorial jurisdiction is the 'basic principle of international jurisdictional order'.[60]

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[56] ibid 10.
[57] ibid 85-86; Shaw (n 2) 561.
[58] Natalie Klein, Joanna Mossop and Donald Rothwell, *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge 2010) 25.
[59] Shaw (n 2) 557. See also Staker (n 5) 321-322.
[60] Shaw (n 2) 561. See Ryngaert (n 3) 4.

2.2.1 The Territorial Principle of Jurisdiction

The *territorial principle* is the primary ground for the exercise of jurisdiction.[61] In general, States may create, enforce, and adjudicate laws within their land territory, territorial sea, and airspace without interference from other States.[62] Territorial jurisdiction applies to all persons located within these geographic confines, including nationals from abroad. International law can impose limitations on jurisdiction inside a State's territory, such as the immunity of diplomatic staff to criminal jurisdiction.[63] Furthermore, States usually do not exercise their domestic jurisdiction inside the territory of other States absent consent.[64] However, crimes or events may span more than one State, creating multiple territorial jurisdictions. For example, acts of international terrorism such as the Lockerbie Bombing in the U.K. or September 11th, 2001, in the U.S. Such crimes are planned abroad, but the effects of the event are felt in many States. Theoretically, any affected State can exercise jurisdiction over the event, but it 'is more efficient if a single state conducts the prosecution and adjudication'.[65] This means the *territorial principle* has variations, *subjective* and *objective territoriality*.

2.2.1.1 Subjective Territoriality

Subjective territoriality is an exercise of jurisdiction over an event that begins inside the forum State but is completed abroad.[66] Subjective territoriality produces little controversy as a base of jurisdiction because of the direct connection between the offence and the territory.[67]

2.2.1.2 Objective Territoriality

Objective Territoriality concerns a State's exercise of jurisdiction over an event completed within its territory but planned or initiated from abroad.[68] The *Lotus* case is often regarded as the seminal case identifying and 'authorising jurisdiction based on the objective territorial principle'.[69] However, objective territoriality has been incorporated into some domestic courts prior to the

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[61] Shaw (n 2) 561.
[62] James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 458; Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2014) 43.
[63] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) ICJ Reports 2002 3 at 20-21. *See also* Aust (n 62) 43.
[64] Application Instituting Proceedings filed in the Registry of the Court on 9 December 2002 and entered in the Court's General List on 11 April 2003 Certain Criminal Proceedings in France (Republic of The Congo v. France) 7.
[65] Staker (n 5) 317.
[66] Draft Convention on Jurisdiction with Respect to Crime, Appendix 9. Reproduced with permission from [1935] 29 Am. J. Int'lL. (Supp) 439, The American Society of International Law, 480, 484-7.
[67] Staker (n 5) 317.
[68] ibid 317.
[69] Ryngaert (n 3) 30.

Lotus case. Objective territorial jurisdiction was first recognised by U.S. courts in 1911 and continues to be cited as a basis for the exercise of U.S. criminal jurisdiction extraterritorially.[70] The U.S. supreme court in *Strassheim v. Daily* concluded that:

> [a]cts done outside a jurisdiction, but intended to produce and producing effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.[71]

This question of getting the person within the power of the State makes the *Lotus* case influential in this regard, because as discussed above, the difference in extraterritorial prescriptive jurisdiction and territorial enforcement jurisdiction. Although the *Lotus* opinion suggests the exercise of extraterritorial enforcement jurisdiction is a prohibitive rule, such acts are not uncommon in practice. However, as will be seen in later chapters, and specifically in the case of the U.S., the means used to bring the offender into the forum court's territory is often seen as a diplomatic or executive issue.[72] Engaging in this type of enforcement also does not bar the offender's successful prosecution or removal of their personal jurisdiction before a court. Reflective of this approach, the U.S. Supreme Court has held that '[t]he fact of respondent's forcible abduction does not prohibit his trial in a United States court for violations of this country's criminal laws'.[73]

2.2.1.3 The Territorial Principle and DTVs

The ILoS has a specific regime concerning the exercise of a coastal state's jurisdiction over a vessel in its territorial sea. These rules are codified in the LOSC and as it concerns the exercise of domestic criminal jurisdiction over a DTV, located in Article 27. Article 27 stipulates [in part]:

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (…) (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[74]

There is, however, a question regarding the possible application of territorial jurisdiction onto the high seas. Doing so is controversial since the high seas are not subject to the sovereignty of any State, but such an exercise of jurisdiction is theoretically permissible under the *objective territorial principle*.

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[70] *US v. Baker*, United States Court of Appeals for the Fifth Circuit, No. 79-5006, Jan. 2, 1980, at 15.
[71] *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 (1911).
[72] Staker (n 5) 333.
[73] *US v. Alvarez-Machain*, United States Supreme Court, (1992) No. 91-712 Argued: April 1, 1992, Decided: June 15, 1992. Chapter 6 considers this in greater depth with respect to the US approach to DTV interdictions.
[74] LOSC (n 42) Article 27.

The *objective territorial principle* is, at times, invoked by U.S. Circuit Courts of Appeals for high seas DTV cases.[75] According to most U.S. Circuit Courts of Appeals and as reflected by the First Circuit case of *U.S. v. Smith* [1982]:

> [t]he objective territorial principle is distinct from the protective theory in that in the latter all the elements of the crime occur in the foreign country, and jurisdiction exists because these actions have a potentially adverse effect upon security or governmental functions, with no actual effect taking place in the country as would be required under the objective territorial principle.[76]

The exercise of domestic jurisdiction according to *objective territoriality* requires the forum to demonstrate the effect, and U.S. courts reflect this requirement when applying the principle.[77] Objective territoriality is often invoked as a base of jurisdiction primarily when a non-U.S. flagged DTV is found to have a nexus to the U.S.[78] For example, according to the U.S. Fifth Circuit Court of Appeals in *U.S. v. Alvarez-Mena*:

> [t]he Court has on several previous occasions held that the objective territorial principle of international law provides a proper basis for the assertion of jurisdiction over extraterritorial criminal acts committed on foreign flag vessels, provided an appropriate nexus is shown between the acts and the United States (…) [t]he required nexus may be shown by demonstrating that a sufficient effect occurs within the United States as a result of the illicit activity, or by demonstrating an intent that the illegal activity have such an effect, or knowledge that it will.[79]

The hurdle in these cases, is however, identifying and demonstrating the actual 'effect'. On the one hand, the nexus or effect is easily demonstrated in cases where the vessel is flagged to the interdicting state. For example, in *U.S. v Deweese*, the Fifth Circuit upheld the interdiction because the DTV was a U.S. flagged vessel, even though it was 250 miles from the U.S. at the time of the interdiction.[80] On the other hand, as it relates to a non-U.S. flagged vessel, the case of *U.S. v.*

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[75] See *US v. Loalza-Vasquez*, 735 F.2d 153, 156 (5th Cir.1984); *US v. Gray*, 659 F.2d 1296, 1298 (5th Cir.1981); *US v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir.), cert. denied, 454 U.S. 878, 102 S.Ct. 358, 70 L.Ed.2d 188 (1980). Chapter 6 also considers this exercise of jurisdiction by the U.S. in additional detail.

[76] *US v. John M. Smith*, 680 F.2d 255, United States Court of Appeals for the First Circuit, Decided June 8, 1982, at 10-11.

[77] ibid 'The required nexus may be shown by demonstrating that a sufficient effect occurs within the United States as a result of the illicit activity, or by demonstrating an intent that the illegal activity have such an effect, or knowledge that it will'.

[78] *US v. Ibarguen-Mosquera,* 634 F.3d 1370 (11th Cir. 2011) at note 4, '[u]nder the objective principle, Congress may criminalize behaviour that has a 'nexus' to the United States. Section 18 of the Restatement (Second) of Foreign Relations provides: A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognised as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with principles of justice generally recognised by states that have reasonably developed legal systems'.

[79] 765 F.2d 1259 at 11.

[80] *US v. Dewesse*, 632 F.2d 1267, 1984 A.M.C. 2406, December 1980, at 1-9. According to the court, 'the Coast Guard's (…) plenary authority to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and narcotics violations' is reasonable.

Peterson from the Ninth Circuit Court of Appeals aids in demonstrating the 'required link' for objective territoriality to apply. In *Peterson*, a lengthy criminal investigation conducted by the U.S. and the Philippines resulted in the interdiction of the Panamanian flagged *Pacific Star* on the high seas.[81] The defendants in the case had argued the interdiction was unlawful, and there was no right for the U.S. to exercise extraterritorial domestic criminal jurisdiction on the high seas.[82] Disagreeing, the Ninth Circuit reasoned that although the defendants had questioned 'whether boarding the Pacific Star violated [their] rights under international law,' the court argued 'Panama's consent removes international law concerns from the case'.[83] Specifically, the court turned to the communication from Panama, which stated:

> GOVT OF PANAMA HAS AUTHORISED U.S. COAST GUARD TO BOARD, SEARCH AND SEIZURE [sic] SUBJ VESSEL ON THEIR BEHALF IF EVIDENCE WARRANTS THIS ACTION.[84]

Therefore, the Ninth Circuit concluded that based on the consent of the flag state and 'substantial evidence that the drugs were bound ultimately for the U.S.,' a link was established to the interdiction.[85] If a nexus and effect are demonstrable, such an exercise of jurisdiction is not controversial; however, most states only apply the objective territorial principle *inside* the territory of a state.[86]

Several U.K. based interdictions have taken this approach when intercepting DTVs within the territorial waters of the U.K. For example, the 2018 interdiction of a pleasure yacht by U.K. border authorities off the Cornish coast involved the vessel being 'intercepted, taken into port and searched, resulting in [the U.K.] seizing the drugs,' which according to the National Crime Agency (…) were destined for the streets of Europe and the U.K.'.[87] Another such interdiction was in the case of *DPP v Doot*. The offenders [American citizens] sought to import large quantities of marijuana from Morocco into the U.K. to transport it into the U.S. In *Doot*, the court stated that '[t]here could be no breach of any rules of international law if the defendants were

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[81] *US v. Peterson,* 812 F.2d 486, Nos. 85-5167, 85-5168, 85-5173 and 85-5174. Argued and Submitted May 9, 1986. Submission Vacated Aug. 12, 1986. Resubmitted Sept. 30, 1986. Decided March 9, 1987.
[82] ibid 26.
[83] ibid 26.
[84] ibid 32.
[85] ibid 34.
[86] Consider the case of the Lockerbie Bombings, whereby the event was planned abroad and the planting of a bomb on the airliner began in Malta, the effect was felt when the bomb exploded in the airspace over Lockerbie, Scotland. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I. C. J. Reports 1998, 12-13.
[87] Press Release of the National Crime Agency, 'Dutch Man Guilty of Importing £134 million worth of Cocaine,' <https://www.nationalcrimeagency.gov.uk/news/dutch-man-guilty-of-importing-134m-worth-of-cocaine> accessed on 20 June 2020. See also Roisin O'Connor, 'Britain's Biggest Drugs Bust Brins Cocaine Haul Valued over £500 Million,' The Independent, 1 May 2015, <https://www.independent.co.uk/news/uk/home-news/britain-s-biggest-drugs-bust-brings-cocaine-haul-valued-over-ps500m-10216166.html> accessed on 20 June 2020.

prosecuted in this country as under the territorial principle the courts of this country have a clear right, if not a duty, to prosecute in accordance with municipal law'.[88] The next section further considers the *effects doctrine,* which, although like objective territoriality, concerns the creation of an 'effects test' to determine the extent of a harm that may affect the forum state.

2.2.1.4 The Effects Doctrine

The *effects doctrine* is a legal doctrine resulting from the *U.S. v. Aluminium Co. of America [ALCOA]* case. The case involved the U.S. exercising domestic jurisdiction over a non-U.S. business under U.S. anti-trust laws.[89] In ALCOA, the U.S. Second Circuit Court of Appeals reasoned that 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends'.[90]

The ALCOA case created the two-pronged 'effects test'. Under the test, '[j]urisdiction is asserted (1) if the challenged activity was intended to have a substantial effect on interstate or foreign commerce, and (2) if it did have such an effect'.[91] The doctrine contains no provisions creating a 'defined gravity' the effects must produce on the forum state be it substantial, intended, or foreseeable.[92] It also appears that in the U.S. specifically, any effects [real or perceived] permit exercising jurisdiction outside the territory of the state.[93]

Generally, States does not widely accept a broad *effects doctrine.* The doctrine may often be very narrowly interpreted; for example, the Federal Court of Justice in Germany has noted that the doctrine applies, 'only if the effect produced on national territory is sufficient'.[94] There have also been several instances of other European courts taking issue with the effects doctrine.[95] However, the European Court of Justice [ECJ] in the *Wood Pulp Case*, did discuss the 'implementation standard' which is notably similar in language to the ALCOA test.[96] Although

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[88] *Director of Public Prosecutions v Doot*, [1973] 1 All ER 940, [1973] AC 1972 Dec. 4, 5, 6; 1973 March 21.
[89] James J. Friedberg, 'The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine,' [1991] 52 U. PITT. L. REV. 289, 299.
90 *US v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945 U.S. Court of Appeals for the Second Circuit) - 148 F.2d 416 (2d Cir. 1945) March 12, 1945, 443-444.
[91] Friedberg (n 89) at 299.
[92] Hixon (n 36) 134.
[93] ibid 134.
[94] *A. Ahlström Osakeyhtiö and others v Commission of the European Communities.* [Wood Pulp Case] Judgment of the Court of 27 September 1988. Report for the Hearing — Joined Cases 89, 104, 114, 116, 117 and 125 TO 129/85, 5204, 5204.
[95] ibid 5207-5208. For example, see the cases of *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1987] 1 All ER 434 [HL] and *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) C.f. Jurisdiction, [1981-1983] 10 AUST. YBIL 293, 305-315. See also Friedberg (n 89) 299.
[96] Evan Breibart, 'The Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings,' [1989] Vol. 19:149, GA. J. INT'L & CoMP. L, 163.

the ECJ 'did not adopt the 'effects doctrine' outright, it emphasised the case involved conduct restricting competition within the common market because of the activities of subsidiaries which could be imputed to the parent companies'.[97]

2.2.2 The Nationality Principle of Jurisdiction

The *nationality principle* of jurisdiction, or 'active personality principle', is the link between the State and its citizens.[98] The link is a means for a State to regulate and exercise jurisdiction over its citizens at home or abroad.[99] For example, a State may subject its citizens to tax laws or specific criminal laws while those citizens are abroad.[100] Normally, when a State exercises its jurisdiction over a national abroad, numerous concerns are raised. The most important one is acknowledging the domestic jurisdiction of the other State where the national is physically located. However, this is normally remedied through various forms of international cooperation, such as extradition treaties.

The *nationality principle* is also the foundation for *exclusive flag state jurisdiction* over vessels on the high seas. Flag state exclusivity is generally accepted by all states and is customary international law.[101] The principle was recognised in the *Lotus* Case, despite the majority equating the flagged vessel to part of the flag state's territory, and is now codified in Article 91 and Article 92 of the LOSC, which state:

> Article 91: Every 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.
>
> Article 92: Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. [102]

Vessels assume the nationality of the flag, although as Chapter 1 noted and subsequent chapters will expound upon, there is a lingering debate concerning the 'registry' of a vessel and its 'nationality' under the existing international legal regime, which at times appears to be at odds

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[97] *Woodpulp Case* (n 94) 5241 at 6.
[98] Shaw (n 2) 567.
[99] Crawford (n 62) 242
[100] Staker (n 5) 318-19.
[101] Shaw (n 2) 571. Chapter 3 explores the flag in further detail.
[102] LOSC (n 42) at Article 91 and Article 92. See *Lotus* (n 26) 25. See also *M/V Norstar* (Panama v Italy) (Judgement) ITLOS Reports 10 April 2019, 60, 60-61 at 216. ITLOS [citing Lotus] observed, '[i]t is certainly true that – apart from certain special cases which are defined by international law – 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 sea, 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. (Emphasis added by the Tribunal) (Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 25)'.

with this accepted norm. However, the nationality principle governs the vessel and the actions of the persons on board, which is clearly stated in Articles 91 and 92 LOSC as well as customary international law.

2.2.2.1 The Nationality Principle and DTVs

The *nationality principle* of jurisdiction concerns a state's nationals and ships flying its flag.[103] The nationality principle does not affect the exercise of jurisdiction over *vessels without nationality* because such ships do not have a nationality.[104] As it relates to drug trafficking at sea, States may criminalise drug trafficking offences onboard vessels flying their flag.[105] Generally, this falls under the duties of the flag State.[106] Article 94 LOSC states that, '[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[107] Other treaties also complement this obligation. For example, in the 1988 Vienna Convention, Article 4(1)(a)(ii) states that, '[e]ach party shall take such measures as shall be necessary to establish its jurisdiction over the offences, if the offence is committed on board a vessel flying its flag (…) at the time the offence is committed'.[108] However, flag states often do not exercise their jurisdiction over vessels flying their flags.

In general, States have several treaty obligations and customary international law obligating them to exercise their jurisdiction over their vessels.[109] Still, Klein outlines some concerns including that 'a flag state may not be willing, or have the resources, to take action against a particular vessel; or if the flag state does take action, the owner of the vessel may opt to register that vessel elsewhere and avoid investigation or prosecution'.[110] The inability of states to effectively control

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[103] LOSC (n 42) Article 94.
[104] The matter is considered further in Chapter 3 and Chapter 6.
[105] LOSC (n 42) Article 94 LOSC and Article 108(2). See also 1988 Vienna Convention (n 47) Article 4(2)(a)(ii).
[106] ibid Article 94 LOSC. See also 1988 Vienna Convention (n 47) Article 4(2)(a)(ii).
[107] LOSC (n 42) Article 94.
[108] 1988 Vienna Convention (n 47) Article 4(1)(a)(ii).
[109] LOSC (n 42) Article 94; 1988 Vienna Convention (n 47) Article 4(1)(a)(ii); *M/V Norstar* (n 102) 60, 60-61 at 216 and *Lotus* (n 26) at 25. See the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to The Tribunal)*, International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions, and Orders, List of Cases No. 21. Advisory Opinion of 2 April 2015, 40 at para. 129-139. According to ITLOS, these obligations, are 'obligations of conduct,' not 'an obligation 'of result" and they are also a 'due diligence obligation. In other words, the flag state, 'is under the "due diligence obligation" to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag'. In terms of the actual obligation, this stems from the LOSC, including Articles 58 and 62, which 'the flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag (…)'. Furthermore, '[t]he aforementioned provisions of the Convention also impose the obligation on the flag State to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorised by the SRFC Member States,' at para 135. The obligation also applies, 'to a flag State whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal State concerned. The flag State is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action'.
[110] Natalie Klein, *Maritime Security and The Law of the Sea* (University Press 2012) 107.

ships on their registers has also led to the use of flags of convenience and open registries. Flag states operating these enterprises often have an 'inherent lack of oversight, contributing to the problem of transnational crimes such as illegal, unreported, and unregulated (IUU) fishing (…) and other organised crimes such as money laundering or drug trafficking'.[111] Furthermore, as Guilfoyle explains, 'malefactors may seek registration in states known to have inefficient registries in order to frustrate interdiction'.[112] To overcome this deficit, some flag States have concluded bilateral agreements with the U.S. to facilitate maritime law enforcement operations and these are considered in later chapters.[113]

2.2.3 The Passive Personality Principle of Jurisdiction

The *passive personality principle* allows States to exercise their jurisdiction over 'an individual for offences committed abroad which has affected or will affect nationals of the state'.[114] This is not explicitly limited to individuals and has expanded in certain agreements such as the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, to include installations such as an artificial island which is fixed to the seabed and which holds the affected State's nationality. Again, the *Lotus* case is instrumental for setting out the exercise of this base of jurisdiction. The PCIJ noted that States have made 'well known efforts (…) to extend their field of application beyond the purely geographical conception of territorial limits, by causing them as it were to accompany, as a protecting shadow, the persons of a State's nationals on their travels'.[115] However, these actions, 'in so far as they allow a foreign jurisdiction to be exercised over the citizens of a given State, have only been recognised in extreme cases where it has been absolutely necessary or inevitable'.[116]

Although not frequently invoked, in 2000, the ICJ took note of *passive personality* in the *Arrest Warrant* case. The court noted that '[p]assive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries (…) today meets with relatively little opposition, at least so far as a particular category of offences is concerned'.[117] The general lack of opposition is likely due to the passive personality principle's inclusion in

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111 Jessica H. Ford and Chris Wilcox, 'Shedding Light on the Dark Side of Maritime Trade – A New Approach for Identifying Countries as Flags of Convenience,' [2019] 99 Marine Policy 298-303, 298.
112 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 95.
113 Chapter 5 will consider these agreements in more detail.
114 Shaw (n 2) 571.
115 *Lotus* (n 26) *Dissenting Opinion of M. Altamira,* 95.
116 ibid 95.
117 *Arrest Warrant* (n 63) 76-78.

conventions targeting different types of terrorism. For example, Article 5(d) of the International Convention against the Taking of Hostages, 1979 states that:

> [e]ach state party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in Article 1 which are committed: (d) With respect to a hostage, who is a national of that state, if that state considers it appropriate.[118]

Indeed, passive personality jurisdiction has found the most support in cases of international terrorism. In the aftermath of the 1985 hijacking of the cruise ship, *Achille Lauro*, the U.S. sought to extradite the captured terrorists for the murder of an American citizen on board.[119] Additional incidents like the *Achille Lauro* led to the Convention for the Suppression Against Unlawful Acts against the Safety of Maritime Navigation [SUA Convention], which incorporates this principle.[120] Article 6 (2)(b) allows a state to establish jurisdiction when, 'a national of that State is seized, threatened, injured or killed'.[121] However, outside of a terrorism context, passive personality can become contentious or limited in application.[122]

The limitation on *passive personality* jurisdiction is again traced to the *Lotus Case* and its dissenting opinions. In his dissent, Judge Loder criticised passive personality because:

> [t]he criminal law of a State may extend to crimes and offences committed abroad by its nationals, since such nationals are subject to the law of their own country; but it cannot extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction. Nor can such a law extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and the subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the State.[123]

In a similar vein, in his dissent Judge Nyholm also questioned if it is 'possible to hold that an exception is also made as regards acts which are committed by foreigners abroad and by which a national is injured'?[124] In answering the question, a State would require an, 'exception to the territorial principle which must be established to provide a legal sanction for the exercise of

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[118] International Convention Against the Taking of Hostages, 1971(Adopted 17 September 1979, Entry into Force 3 June 1983) UNTS 1316, p.205, Article 5.
[119] George R. Constantinople, 'Towards a New Definition of Piracy: The Achille Lauro Incident,' [1986] 26 Va. J. Int'l L. 723, 747.
[120] Shaw (n 2) 572.
[121] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. UNTS 1678, Entry into Force 1 March 1992. Article 6(2)(b) SUA Convention – 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed: 2. A State Party may also establish its jurisdiction over any such offence when: (b) during its commission a national of that State is seized, threatened, injured or killed.
[122] Shaw (n 2) 572.
[123] *Lotus* (n 26) *Dissenting Opinion by M. Loder,* p. 35.
[124] *Lotus* (n 26) *Dissenting Opinion of M. Nyholm,* p. 62.

jurisdiction (…) which does not exist'.[125] Scholars such as Meyer also have criticised *passive personality* because it 'subjects the perpetrator to a foreign criminal law to which he has no relation whatsoever [and] [i]n many cases, he will not know the victim's citizenship'.[126] Perhaps therefore, *passive personality principle* is not frequently invoked by States, but when it is for grave crimes like terrorism, there is little objection especially when it is incorporated into a treaty.[127]

2.2.3.1 Passive Personality and DTVs

The *passive personality principle* requires the forum state to demonstrate one of its nationals or installations is affected by a harm from a foreign national or company. Applying passive personality jurisdiction to drug trafficking on the high seas may prove exceptionally difficult. The forum state would first need to enact criminal law identifying high seas drug trafficking as a harm directly affecting the forum state's nationals who are also abroad. Although this is theoretically possible as far as prescriptive jurisdiction is concerned, the actual test would be enforcement and adjudication. The passive personally principle, as stated above, relies on the nationality of the victim, be it person or entity. However, the act of a high seas interdiction interrupts the drug trafficking process; thus the drugs never reach their intended destination. Doing this means that those responsible, [e.g., the DTV's crew and DTOs operating abroad] never commit an overt criminal act against an identifiable person. In other words, there is no identifiable personal victim because the interdicted drugs have never arrived at the greater drug market for distribution. The interdiction physically stops this process. Therefore, the *passive personality principle* is not applicable in these situations.

2.2.4 The Protective Principle of Jurisdiction

The *protective principle* of jurisdiction allows a State to exercise its jurisdiction over an entity abroad whose acts are prejudicial to the forum state.[128] These entities are either persons or companies. Their conduct is considered to be so severe or prejudicial to the security of the forum State that the State must exercise jurisdiction to protect itself from harm.[129] Typically, States invoke the *protective principle* to protect themselves against acts contrary to *vital* security interests such as immigration, counterfeiting, or espionage.[130] The list is far from exhaustive and States may

[125] ibid 63. (Nyholm)
[126] Jurgen Meyer, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction,' [1990] 31 Harv Int'l L J 108, 113-114.
[127] Ryngaert (n 3) 95-96; Staker (n 5) 327.
[128] Shaw (n 2) 573.
[129] ibid 573.
[130] Staker (n 5) 321.

amend their security interests, allowing them to claim jurisdiction over any action against their security.[131] However, despite its known existence, scholarly acceptance, especially in pinning down a definition of the *protective principle,* has been mixed.[132]

On the one hand, Garrod has reasoned that '[t]here is no accepted definition of the protective principle either in doctrine or State practice, although it is often suggested to permit States under international law to exercise jurisdiction over crimes committed by foreign nationals outside of their territory which threaten their vital interests'.[133] Garrod reasons, however, that the 'principle's rationale is thus based on the necessity to protect vital State interests, including sovereignty, security, political independence and governmental functions'.[134] Iacob too contends that there is no unified definition of 'acts' and identifiable State practice is often limited to the principle's application in U.S. Federal Courts.[135]

On the other hand, others such as Shaw focus primarily on the 'security of the state' definition, noting that while the principle is an 'established concept' there are 'uncertainties as to how far it extends in practice (…)'.[136] Staker, however, reasons that 'the pressure to expand this principle, and the danger of unshackling it from the protection of truly vital state interests and permitting its use for the convenient advancement of important interests is clear'.[137] In defining the principle, Staker takes the view the 'category' of acts falling under the principle 'is open' but 'its expansion is limited'.[138] Staker also focuses on U.S. practice in this area by taking note of the principle's application by the U.S. in the assertion of jurisdiction 'over foreigners on the high seas' for drug trafficking, even reasoning states acquiesce to the exercise of jurisdiction but chose not to follow the same approach.[139]

Alternatively, Ryngaert takes the view that the protective principle is well documented and 'given the widespread adoption of legislation based on the protective principle, the legality of protective jurisdiction is not in doubt' but 'protective jurisdiction is in practice hardly exercised'.[140] Ryngaert also reasons that much of the scholarly concern seems to centre more on the protective principle

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131 Crawford (n 62) 462.
132 Matthew Garrod, 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality,' [2012] 12 Int'l Crim L Rev 763, 766.
133 ibid 766.
134 ibid 766.
135 Oana Adriana Iacob, 'Principles Regarding State Jurisdiction in International Law,' [2020] LESIJ, XXVII, VOL. 1/2020 25-26.
136 Shaw (n 2) 573.
137 Staker (n 5) 321.
138 ibid 321.
139 ibid 321.
140 Ryngaert (n 3) 97-98.

appearing to be 'political' in nature.[141] In other words, many scholars [especially common law ones] 'whose home countries protective jurisdiction was historically non-existent, have rejected this justification, primarily because it is conceptually fallacious and prone to politicisation and abuse'.[142] Ryngaert concludes that to remedy such matters is the creation of a convention codifying specific acts which give rise to protective jurisdiction, a solution shared by Shaw.[143]

However, there is an argument to be made that there are some accepted definitions of 'conduct' that fall well within the scope of the protective principle, and it is reasoned here that drug trafficking is suitable for inclusion. As will be seen, the existing codification of the protective principle, beginning with the *Harvard Draft on Jurisdiction with Respect to Crime*, creates a suitable foundation for this position, and further support is found in the work of the U.N. and conventions addressing drug trafficking and control. Likewise, there are sufficient instances of domestic courts and State practice, primarily U.S. related, which do provide a suitable definition of the 'protective principle'. These examples show such exercises of jurisdiction are well within the generally accepted scope of matters related to protecting a State's vital security interests, governmental functions, and protection of the public health and welfare.

2.2.4.1 Protective Principle and Drug Trafficking

The *Harvard Draft on Jurisdiction with Respect to Crime*, Article 7 defines 'Protection-Security of the State' as:

> [a] State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity, or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.[144]

Article 8 concerns defining the offense of 'counterfeiting' under 'protection' in the draft.[145] Combined, these articles form what many commentators discuss as the general definition of the *protective principle*. The text is clear that 'any crime' may fall under the definition of protection-security of the state; however, an argument can be made that drug trafficking and, by extension, drug trafficking on the high seas is inclusive of this definition.[146] One way this is determined is

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[141] ibid 97.
[142] ibid 97.
[143] ibid 98; Shaw (n 2) 573.
[144] (1935) 29 Am J Int'l L Sup 435, 440.
[145] ibid 440. Article 8: A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority.
[146] Chapter 6 will take up the matter of the protective principle of jurisdiction and *vessels without nationality* in US practice.

to look at the work of the International Law Commission [ILC] and their approach to the problem of international drug trafficking.

At its Forty Second session, the ILC set out the 'Draft Code of Crimes Against the Peace and Security of Mankind'.[147] The ILC included in this draft code a consideration to establish drug trafficking as an offence against the peace and security of mankind.[148] Taking this approach means assessing drug trafficking on two factual fronts. The first front is addressing drug trafficking as a 'crime against the peace of mankind'.[149] According to the Special Rapporteur on the 'Draft Code of Offences against the Peace and Security of Mankind' drug trafficking affects international peace by giving rise:

> [t]o a series of conflicts, for example between the producer or dispatcher State, the transit State and the destination State. The threat to international peace was even greater when organised groups infiltrated Governments, so that the State itself became, in a way, the perpetrator of the internationally wrongful act.[150]

Furthermore, the financial gains of drug traffickers and the detriment drugs cause to humankind's well-being mean 'humanity' is negatively impacted.[151] Thus, the human factor is the second front because acts of drug trafficking can 'be shocking to the conscience of the world community'.[152] Therefore, the 'State' element makes drug trafficking a 'crime against peace' and the 'human' element makes drug trafficking a 'crime against humanity'.[153]

The ILC proposed two draft articles [Draft Article X and Y] to reflect this as the committee felt drug trafficking could encompass elements of both crimes.[154] Draft Article X concerns drug trafficking as a 'crime against peace' and Draft Article Y as 'crime against humanity'. Draft Article X states:

> [a]ny mass traffic in narcotic drugs organised on a large scale in a transboundary context by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, inter alia, in

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147 UNGA Resolution A/44/29 (1989) UN DOC A/44/29 (1989).
148 A/45/10, UN DOC A/45/10 (1990) 20 July 1990 - Report of the ILC at their 42nd session. Draft Code of Crimes against the Peace and Security of Mankind, at 17.
149 ibid 17.
150 ibid 17.
151 ibid 17.
152 Faiza Patel, 'Crime without Frontiers: A Proposal for an International Narcotics Court,' [1990] 22 N.Y.U. J. INT'L L. & POL. 709, 712.
153 A/45/10 (n 148) 17. The report to the ILC draft noted that: 'Other members, however, supported the Special Rapporteur's preference for two separate articles. In their view, illicit traffic in narcotic drugs as a crime against peace had a State aspect, either on an internal or on an international plane. It was because it threatened the stability of States or jeopardized international relations that it could be characterized as a crime against peace. Those parameters should be set out in the article which defined illicit traffic in narcotic drugs as a crime against peace. In the case of a crime against humanity, on the other hand, the State element was superfluous. Internal illicit traffic, which had grave consequences for the population, could, as a result of those consequences, be assimilated in some respects to a form of genocide'.
154 A/45/10 (n 148) 18.

> brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace.[155]

Draft Article Y added the phrase 'whether in the context of a State or in a transboundary context' because a 'crime against humanity' can only take place solely within the territorial boundaries of a single state.[156] Thus:

> [a]ny mass traffic in narcotic drugs organised on a large scale, whether in the context of a State or in a transboundary context, by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, inter alia, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against humanity.[157]

Several members of the ILC contended that 'internal illicit traffic, which had grave consequences for the population, could, as a result of those consequences, be assimilated in some respects to a form of genocide'; however, the ILC did not ultimately accept this position.[158] Additional support for the inclusion of drug trafficking as an accepted act under the protective principle is seen in the work of the UN General Assembly [UNGA], the U.N. Security Council [UNSC], and ECOSOC.

In 2016, a special session of the UNGA adopted Resolution GA/11773, which recognised that:

> [t]he world drug problem affects virtually every nation and all sectors of society. Drug trafficking and organised criminal networks fed corruption and weakened institutions and the rule of law, while profits from those activities funded terrorism and violent extremism.[159]

The 2019 UNGA Resolution A/Res/73/192 further underscores the dangers of and further need to suppress international drug trafficking to:

> protect the safety and assure the security of individuals, societies and communities by intensifying efforts to prevent and counter (…) the trafficking in narcotic drugs and psychotropic substances, as well as drug-related crime and violence, through, inter alia, more effective drug-related crime prevention and law enforcement measures, as well as by addressing links with other forms of organised crime, including money-laundering, corruption and other criminal activities, mindful of their social and economic causes and consequences.[160]

Concerning drug trafficking at sea, the 2010 UNGA Resolution A/Res/65/37 makes a specific mention of the 'continuing problem of transnational organised crime committed at sea, including

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[155] ibid 18 at 91.
[156] ibid 17-18.
[157] ibid 18 at 91.
[158] ibid 17 at 81.
[159] UNGA Resolution GA/11773, Thirteenth Special Session, 19 April 2016.
[160] UNGA Resolution 73/192, International cooperation to address and counter the world drug problem, 22 January 2019 at 6.

illicit traffic in narcotic drugs and psychotropic substances, (…) and noting the deplorable loss of life and adverse impact on international trade, energy security and the global economy'.[161]

Building on resolutions like this in 2018, the UNSC held a meeting concerning the threat of drug trafficking in West Africa. Addressing the surge in drug trafficking and associated violence, the UNSC took note of:

> the complexity and fragility of all of those situations [which] are compounded when combined with the drug trade, which undermines peacebuilding and sustainable development efforts (…) [t]hat can in turn increase the influence of criminal and narcoterrorist syndicates in certain local Governments, leading to corruption and destroying the social and moral fabric of communities.[162]

The document further notes that '[t]he widespread corruption that is linked to drug trafficking also undermines people's confidence in the rule of law, particularly the justice system' and:

> [t]ransnational organised crime not only finances and fuels conflict but also reinforces corruption and undermines institutions, thereby destabilising already fragile environments. The citizens of the affected societies are the ones paying the price for that. Addressing the root causes of conflicts and instability entails recognising the severe impact of transnational organised crime.[163]

The effects on the general security of States are also a matter the UNSC has considered by noting that:

> profits from drug trafficking are used to destabilise States and also threaten both development and stability. Besides their damaging effects on people, they give rise to corruption and a shadow economy, which are reinforced by money- laundering and transnational crime (…).[164]

ECOSOC has also addressed the matter of drug trafficking as a vital security threat to States. Resolution E/Res/2017/20 encourages States to:

> tackle the related causes and consequences of the illicit cultivation, manufacture and production of and trafficking in drugs by, inter alia, addressing risk factors affecting individuals, communities and society, which may include a lack of services, infrastructure needs, drug-related violence (…) in order to contribute to the promotion of peaceful and inclusive societies.[165]

Other previous ECOSOC and UNGA resolutions, including the *Quito Declaration against the traffic in narcotic drugs* and the *New York Declaration Drug Trafficking and Illicit Use of Drugs,* both call upon

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[161] UNGA Resolution A/Res/65/37 (7 December 2010) at 3.
[162] UNSC Document S/PV.8433 (2018) UN Doc S/PV.8433 (2018). *Drug trafficking in West Africa as a Threat to Stability*. 8433rd meeting, Wednesday, 19 December 2018, 3 p.m. New York, at 6.
[163] ibid 7.
[164] ibid 10.
[165] ECOSOC Resolution E/Res/2017/20 at 4.

the international community for coordinated responses to drug trafficking.[166] For example, Resolution A/Res/39/141 recognises that:

> [t]he wide scope of the illicit traffic in narcotic drugs and its consequences make it necessary to prepare a convention which considers the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments.[167]

Other U.N. General Assembly resolutions followed with requests to member states, generating enough response for the submission of a new draft convention on the illicit traffic in narcotic drugs and psychotropic substances [the 1988 Vienna Convention].[168] *Resolution E/CN.7/1987/2* outlines that the:

> [c]ollective responsibility of all States and that States shall utilise the legal instruments against the illicit production of and demand for, abuse of and illicit traffic in drugs and adopt additional measures to counter the new manifestations of this crime.[169]

Subsequent ECOSOC *Resolutions 1987/28* and *1987/29* aided to set the plenipotentiary conference for the 1988 Vienna Convention, which as Chapter 1 discussed, is the primary treaty addressing drug trafficking.

The preamble to the 1988 Vienna Convention recognises 'the links between illicit traffic and other related organised criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States'.[170] Member states are also aware that 'illicit traffic generates large financial profits and wealth enabling transnational criminal organisations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels'.[171]

Furthermore, the 'traffic in narcotic drugs and psychotropic substances, [poses] a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society'.[172] Therefore, in light of the above, drug trafficking clearly has direct impact on a State's welfare, safety, security, governmental functions, and thus is not controversial when considered in respect of the protective principle. The application of the protective principle to DTV interdictions is reserved for discussion in Chapter 6, as this appears to be unique to U.S. interdiction practice.

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166 A/Res/39/142*, Declaration on the Control of Drug Trafficking and Drug Abuse,* 14 December 1984.
167 Ibid.
168 Document E/CN.7/1987/2, Preparation of a draft convention against the illicit traffic in narcotic drugs and psychotropic substances: report of the Secretary-General, 13 June 1986, 1-2.
169 ECOSOC Resolution 1987/27 (1987). ECOSOC/Res/1987/27 (1987). Preparation of an international convention against illicit traffic in narcotic drugs and psychotropic substances, 14th plenary meeting 26 May 1987.
170 1988 Vienna Convention (n 47) at the Preamble.
171 ibid.
172 Ibid.

2.2.5 Universal Jurisdiction

Universal jurisdiction means any state may exercise its jurisdiction over specific types of offences. *Universal jurisdiction* covers two 'offences,' war crimes [and those associated with them] and piracy.[173] These offences are breaches of customary international law.[174] There remains much debate about universal jurisdiction and whether it truly exists, and this debate exceeds this study; however, it is discussed here as a base of jurisdiction to engage a scholarly debate concerning its applicability to drug trafficking.[175] The oldest offence generally considered subject to universal jurisdiction is piracy at sea.[176]

Piracy offences include murder, theft, armed robbery, kidnapping, rape, and other associated acts of depredation.[177] These acts must be committed for private ends, against another vessel, and on the high seas.[178] On the high seas, pirates may be unpunished or escape detection.[179] Thus, piracy became subject to universal jurisdiction under both customary international law and treaty law.[180] Universal jurisdiction is also said to exist concerning international criminal or humanitarian law.

Post-World War II, universal jurisdiction was said to apply to 'war crimes and those associated with them'.[181] These acts include crimes against humanity, violations of the laws of war, aggression, or crimes against peace. Other acts falling into 'war crimes' include ones created by

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173 Shaw (n 2) at 575. These include Crimes Against Humanity, Genocide, and Aggression.
174 Crawford (n 62) 469.
175 Garrod (n 132) 820; Ryngaert (n 3) 101-102.
176 Shaw (n 2) 575.
177 LOSC (n 42) Article 101 – Definition of Piracy.
178 Staker (n 5) 322.
179 ibid 322. (Staker)
180 LOSC (n 42): Article 100 states that, [a]ll States shall cooperate 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. Article 105 LOSC: 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft 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, aircraft or property, subject to the rights of third parties acting in good faith. See he 1958 Geneva Convention on the High Seas, which also has similar articles concerning piracy. Furthermore, with the persistent and evolving threat of piracy, the U.N. Security Council addressed it in Resolutions including UNSC Resolution S/RES 1816 (2008) [authorising action against piracy in Somalia]; S/RES/1838 (2008) [calling for intensified action against piracy in Somalia]; S/RES/2383 (2017) [Renewed Action to Fight Piracy off the Coast of Somalia].
181 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945*. Charter - II: Jurisdiction and General Principles – Article 6 -The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who…committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against peace: (b) War crimes: (c) Crimes against humanity. *See also* Affirmation of the Principles of International Law recognised by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I), 11 December 1946, 188.

specific conventions.[182] These are torture and genocide; both crimes are also now recognised under CIL.[183] For example, such acts may involve the:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[184]

However, given the nature of these crimes and the location they occur, there is a lingering debate concerning if they are subject to true universal jurisdiction.

One way the debate surrounding such crimes being subject to universal jurisdiction was demonstrated in the *Arrest Warrant Case* before the ICJ. In the case, Belgium attempted to exercise its domestic jurisdiction based on universal jurisdiction under a treaty, inside another State's territory.[185] Unfortunately, the ICJ did not address this issue directly. Instead, the majority engaged with the question of immunity for a serving foreign minister.[186] The *Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal;* did, however, take up this matter concerning universal jurisdiction. The opinion noted that, '[w]e therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory'.[187] Through an examination of various domestic statutes, the judges' conclusion was that such acts envision a link between the offender and the forum court [e.g., territoriality or nationality].[188]

Similarly, the *Declaration of Judge Ranjeva* concluded that, '[t]here would appear to be no other legislation which permits the exercise of criminal jurisdiction in the absence of a territorial or personal connecting factor, active or passive'.[189] Furthermore, '[s]tates have invoked universal jurisdiction to prosecute persons suspected of crimes under humanitarian law (…) however, the individuals in question had first been the subject of some form of proceedings or had been arrested; in other words, there was already a territorial connection'.[190] Thus, if such an exercise

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[182] Kenneth C. Randall, 'Universal Jurisdiction under International Law,' [1988] 66 TEX. L. REV. 785, 789.
[183] The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Adopted 10 December 1984, Entry into force 26 June 1987) UNTS vol. 1465, p. 85; Convention on the Prevention and Punishment for the Crime of Genocide (Adopted 9 December 1948, Entry into Force 12 January 1951) UNTS vol. 78 p. 277.
[184] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (Adopted 12 August 1949, Entry into Force 21 October 1950) 75 UNTS 31. Article 50.
[185] *Arrest Warrant* (n 63) p. 10 at 17.
[186] ibid 2 and 3.
[187] *Arrest Warrant* (n 63), *Joint Sp. Op.* p. 68 at 19.
[188] ibid 69 at 20.
[189] *Arrest Warrant* (n 63), *Declaration of Judge Ranjeva*, p. 55 at 5.
[190] ibid p.55 at 5.

of jurisdiction is truly universal, there would not be a need for the link since universal jurisdiction does not require any. Even the Geneva Conventions, which codify international humanitarian law, rely on a link, and as stated, the link can be national or territorial in nature, so they are not technically an exercise of genuine universal jurisdiction. For example, Article 49 of the First Geneva Convention states that:

> [e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned.[191]

As the *Arrest Warrant Case* notes, this article '[c]ontends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory'.[192] The Genocide Convention also envisions a similar territorial nexus requirement in Article VI. It states that '[p]ersons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed'.[193] Provisions like this are what fuel the debate on the actual existence of true universal jurisdiction.

Furthermore, apart from piracy, no consensus exists concerning the crimes subject to universal jurisdiction.[194] As Rynegaert argues, '[i]t is, indeed, not yet settled what restraining principles should be applied to render actual assertions of universal jurisdiction reasonable'.[195] Perhaps, as Broomhall notes, exercising universal jurisdiction in a treaty is more common than attempting to assert universal jurisdiction through CIL.[196] Treaties create and implement obligations for States party, including criminalising specific conduct, apprehending offenders present in their territory, as well as punishing or extraditing those offenders.[197] Treaties establishing such obligations are often said to create quasi-universal jurisdiction.

2.2.5.1 Quasi-Universal Jurisdiction

Several different conventions aim to address specific prohibited, often criminal conduct, and one such treaty is the 1988 Vienna Convention. The purpose of this convention, as said, is to

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[191] First Geneva Convention (n 184) Article 49.
[192] *Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal* in *Arrest Warrant* (n 63) p.72 at 31.
[193] Genocide Convention (n 183) Article VI.
[194] Ryngaert (n 3) 119.
[195] ibid 119.
[196] Bruce Broomhall, *International Justice and The International Criminal Court* (Oxford Scholarship Online 2010) 100-112.
[197] Shaw (n 2) 579.

implement an agreement dedicated explicitly to the suppression of drug trafficking at the international level. Agreements like the 1988 Vienna Convention are sometimes termed 'suppression treaties' and they include other agreements like the SUA Convention or the *International Convention for the Prevention of Pollution from Ships* [MARPOL].[198] These agreements, according to Shaw, typically 'provide for the exercise of jurisdiction upon a variety of bases by as wide a group of States Parties as possible coupled with an obligation for such States Parties to establish jurisdiction in domestic law'.[199]

Although such obligations are frequently considered universal jurisdiction, they are not. For example, the *Arrest Warrant Case* notes that '[t]he loose use of language (…) has come to be referred to as 'universal jurisdiction', though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere'.[200]
Additionally, as the *Joint Separate Opinion* in the case reasoned:

> [n]ational legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences.[201]

Furthermore, the ICJ concluded that 'all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction'.[202] Jurisdiction of this kind may be considered as *quasi-universal jurisdiction*.

Quasi-universal jurisdiction is included in this discussion because it is found in the 1988 Vienna Convention. Specifically, quasi-universal jurisdiction is found in Article 4 which creates an obligation for the parties to take measures to establish jurisdiction when an offence is committed inside their territory or on board one of their flagged vessels.[203] Quasi-universal jurisdiction is also found in certain articles of the LOSC. For example, the LOSC creates a type of quasi-universal enforcement jurisdiction for the prevention of transport of slaves on the high seas.[204] Another possible form of quasi-universal jurisdiction is reflected in Article 110 LOSC, the *Right of Visit*, and plausibly applies to *vessels without nationality*.

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198 Another example is the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973). The agreement creates obligations for a state party to exercise its jurisdiction when the offence is committed onboard one of its aircraft, inside the territory of a state party, or prosecute the offender in its territory if it does not extradite the offender.
199 Shaw (n 2) 579-580.
200 *Joint Sp. Op* (n 192) p. 75 at 41.
201 ibid 76, 45.
202 ibid 76, 46.
203 1988 Vienna Convention (n 47) Article 4.
204 LOSC (n 42) Article 99 states that [e]very State shall take effective measures to prevent and punish the transport of slaves in ships authorised 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.

Quasi-universal jurisdiction is said to exist in the *right of visit* because any State's warships on the high seas may detain and board a vessel to investigate and determine said vessel's nationality.[205] Although Chapter 3 addresses this in greater detail, it is possible a *vessel without nationality* might be subject to any state's jurisdiction [prescriptive, enforcement, and adjudication] if, during a *right of visit* boarding, the vessel is found to be in violation of the boarding state's domestic criminal law. Some commentators, such as Bennett, argue that exercises of jurisdiction like this potentially end up 'treating the operation of a stateless vessel as if it were a universal crime'.[206] However, as Chapter 3 and the thesis as a whole show, the exercise of jurisdiction over a *vessel without nationality* is not in of itself, universal jurisdiction because the detention and investigation of a vessel's nationality under the *right of visit* concerns the enforcement of the obligation 'all ships shall sail under the flag of one state only' as codified in Article 92 LOSC. Quasi-universal jurisdiction, specifically as it concerns high seas DTV interdictions, has been reasoned by some scholarship as an area for further development, and so it is considered further below.

One type of quasi-universal jurisdiction that has been considered is through what one scholar, Van der Kruit proposed as:

> universal jurisdiction over illicit drug trafficking at sea could be reached by extending the provisions of the LOSC. Other avenues are that states become party to all relevant maritime drug-interdiction treaties and/or to conclude an additional protocol to the 1988 Convention conferring universal jurisdiction and making it possible for any state to stop and search a suspect vessel on the high seas.[207]

Such a proposal is intriguing, especially since it would effectively close all the lacunae in the international legal regime addressing DTV interdictions on the high seas. However, the proposal to adopt universal jurisdiction [total or quasi] over drug trafficking on the high seas is one which several States unsuccessfully proposed during the LOSC negotiations when drafting Article 108, which Chapter 1 set out, is the sole article dedicated to drug trafficking on the high seas in the LOSC. Although Chapter 3 addresses this matter in further detail, it is notable that several states

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[205] ibid at Article 110 LOSC excludes warships and ships on governmental non-commercial service from a Right of Visit boarding and investigation.

[206] Allyson Bennett, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the DTV Interdiction Act,' [2012] 37 Yale J. Int'l L. 440, 445. Bennett examines how domestic law is enforced against 'stateless vessels' on the high seas by examining the US Drug Trafficking Vessel Interdiction Act [DTVIA]. According to Bennett, the DTVIA 'not only uses a vessel's statelessness as a basis for jurisdiction but also includes the operation of a stateless vessel as a key component of the conduct that it proscribes'. See Eugene Kontorovich, 'Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes,' [2009] 93 Minn. L. Rev. 1191, who notes that, 'UJ over stateless vessels is consistent with today's CIL' and observing universal jurisdiction exists 'in piracy, stateless vessels, and perhaps other crimes over which international law allows,' at 1228 and 1251. See also Ann Marie Brodarick, 'High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the DTV Interdiction Act,' [2012] 264 University of Miami Law Review, 67, 270-274.

[207] Peter J.J. van der Kruit, 'Maritime Drug Interdiction in International Law' (PhD Thesis, University of Utrecht 2007) 258.

proposed a draft article that would have created quasi-universal enforcement jurisdiction over a DTV on the high seas. The draft article allowed any state which suspected a vessel is a DTV to detain, board, and search that vessel as long as it was under 500 tons, no matter its flag state.[208] The interdicting state could then seize the illicit cargo and inform the flag state so the flag state could take subsequent action against its vessel and those onboard.[209] However, the adoption of any manifestation of universal jurisdiction over a DTV was not successful as it was seen as to open to abuse.[210]

Indeed, as later chapters will show, any attempts to circumvent the exclusive jurisdiction of the flag state has not succeeded in any subsequent agreement enacted to address drug trafficking on the high seas, including the 1988 Vienna Convention.[211] Additionally, as discussed in Chapter 5, even the U.S. bilateral interdiction agreements as well as the regional agreements all require a form of flag state authorisation before an interdiction.[212] Therefore, in light of this discussion, it can be reasoned that universal jurisdiction or quasi-universal jurisdiction is not presently applicable to DTV interdictions on the high seas.

2.3 Conclusion

The chapter has explored the types and bases of jurisdiction in international law. The types of jurisdiction set the fundamental groundwork for any State's establishment or exercise of jurisdiction. What is also clear is that in some cases, the types of jurisdiction do overlap in how states use them. The overlap often appears when States exercise their jurisdiction extraterritorially, especially when enforcing a prescribed law outside a State's territory. Often, States typically exercise their jurisdiction based on the territorial and nationality principle of jurisdiction as these have the most substantial linking factor to the forum state. However, as discussed, some of the bases of jurisdiction are not as widely relied on in practice as a justification for a State's exercise of jurisdiction, such as the passive personality or protective principles.

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[208] A/Conf.62/C.2/L.54. Belgium, Denmark, France, Germany (Federal Republic of), Ireland, Italy, Luxembourg, Netherlands and United Kingdom of Great Britain and Northern Ireland: working paper on the high seas, 12 August 1974.

[209] ibid.

[210] Douglas Guilfoyle, 'Article 108' in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of the Sea (LOSC): A Commentary* (2017, Verlag CH Beck OHG) 762. See also *LOSC 1982 Commentary, Myron H. Nordquist and others (eds)* (Martinus Nijhoff Publishers 1995) Vol III, 227-228.

[211] Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, European Treaty Series - No. 156, Strasbourg, 31.I.1995, Article 3(4), which states: '[t]he flag State has preferential jurisdiction over any relevant offence committed on board its vessel'.

[212] These agreements include the 2003 CRMA and the 2005 Protocol to the SUA Convention, which are discussed in Chapter 5 and 7 respectively.

What remains to be further considered is how these bases and types of jurisdiction apply in the ILoS, especially on the high seas, which are not part of any state's territory. Indeed, and as the thesis will further consider in Chapters 3 and 4, there is a severe gap in how the international legal regime applies both the bases and types of jurisdiction concerning a DTV on the high seas. It further remains to be seen how or if the types and bases of jurisdiction not included in the legal regime, specifically the protective and objective territorial principle, apply to a high seas DTV interdiction. Additionally, if these types and bases are used, it raises questions if such application of domestic law on the high seas, particularly by the U.S., is appropriately situated within international law.

Chapter 3: Jurisdiction and the International Law of the Sea

Introduction

The purpose of Chapter 3 is to engage with the international legal regime applicable DTVs on the high seas as established in the ILoS. The ILoS includes customary international law, the 1958 Geneva Convention on the High Seas [1958 GCHS] and the 1982 U.N. Convention on the Law of the Sea [LOSC]. Although Chapter 2 has detailed the types and bases of jurisdiction as part of general rules of international law, the establishment and exercise of jurisdiction on the high seas is subject additional rules as set out in the ILoS. The ILoS places certain restrictions on States' jurisdiction, particularly on the high seas where the general principle is vessels are subject to the jurisdiction of their flag state as under the nationality principle, and the freedom to navigate on the high seas without undue interference from other states, unless an exception exists that permits interference with the vessel.

Chapter 3 begins by exploring how coastal states exercise their jurisdiction in the maritime zones under their jurisdiction, primarily as established by the LOSC. Chapter 3 will then turn its analysis to the international legal regime that applies to a DTV [flagged and *without nationality*] on the high seas, again as primarily set out in the LOSC. Specifically, the chapter looks to the treaty articles that address how a non-flag state may exercise its jurisdiction against a DTV on the high seas, primarily by considering flag state authorisations to board, how jurisdiction might be exercised over *vessels without nationality*, and which gaps in the law can impact interdictions in practice. As there is no customary international law which is recognised specifically addressing DTV interdictions on the high seas, any relevant and recognised provisions of customary international law that could apply to enforcement against delinquent vessels on the high seas is examined to determine if they too may apply to a DTV on the high seas.[1]

The study is also concerned with international cooperation and how states cooperate as part of their obligation to do so in the suppression of DTVs on the high seas as Chapter 1 set out. The chapter will explore this obligation concerning cooperation and DTV interdictions, especially since international cooperation is a recuring obligation established in the LOSC and other agreements addressing DTVs and maritime security more generally. Thus, this discussion will

[1] Peter J.J. van der Kruit, 'Maritime Drug Interdiction in International Law' (PhD Thesis, University of Utrecht 2007) 18. See also *U.S. v. Bellaizac–Hurtado*, Nos. 11–14049, 11–14227, 11–14310, 11–14311, Decided: November 06, 2012, the court observing that '[d]rug trafficking was not a violation of the law of nations during the founding period' and '[d]rug trafficking is not a violation of customary international law today'.

serve to define cooperation with respect to a DTV interdiction, identify the role of cooperation in those interdictions, and aid to inform the remaining chapters of this thesis.

3.1. Maritime Zones under National Jurisdiction

The thesis is primarily concerned with the high seas and how states exercise jurisdiction over vessels that are on the high seas. However, this does not mean that areas under a state's national jurisdiction will not enter the overall discussion concerning high seas DTV interdictions. Indeed, DTV interdictions can be quite dynamic and there exists a very real possibility a high seas DTV interdiction may terminate inside a maritime zone under a third state's jurisdiction.[2] Therefore, these zones, the territorial sea, contiguous zone, and Exclusive Economic Zone [EEZ] are considered in the scope of this chapter to set out the jurisdictional rights that coastal and interdicting states have within these zones as well as to determine to what extent the ILoS provides a jurisdictional framework applicable to DTVs in these maritime zones.[3]

3.1.1 The Territorial Sea

International law has long recognised the waters adjacent to a State's coast are subject to that State's sovereignty.[4] These waters form a coastal state's territorial sea, which presently is limited to a maximum breadth of 12 nm from the shore.[5] As Chapter 2 discussed, the coastal state possesses sovereignty in its territorial sea, but this sovereignty is exercised subject to the provisions set out in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone [GCTSCZ], the LOSC, and from other rules of international law.[6] One such limitation is the *Right of Innocent Passage*, which is also customary international law.[7] The *Right of Innocent Passage* permits a ***foreign flagged vessel*** the right to sail without undue interference through other States' territorial seas.[8] This right is one reserved for use by States, and so its protections do not

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[2] For example, consider the case of *U.S. v Carvajal,* 924 F. Supp. 2d 219 (D.D.C. 2013) Decided Feb 20, 2013, where the court heard 'it is possible the go-fast vessel skirted the coasts of Colombia, Panama, Costa Rica, and Nicaragua, then traveled from island to island, never traveling outside of the territorial seas of those nations at any point prior to being interdicted,' at 14.

[3] The continental shelf is also subject to coastal state jurisdiction; however, it is not considered in this chapter.

[4] Tullio Treves, 'Historic Developments in the Law of the Sea' in in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 5-7; John E. Noyes, 'The Territorial Sea and Contiguous Zone,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 92-93. See Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2014) 4.

[5] United Nations Convention on the Law of the Sea (Adopted 10 December 1982, Entry into Force 16 November 1994) UNTS vol. 1833, p. 3 at Article 2 and 3. See Convention on the Territorial Sea and Contiguous Zone (Adopted 29 April 1958, Entry into Force 10 September 1964) UNTS vol.516 p. 205, at Article 1 and 2.

[6] LOSC (n 2) Article 2. Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil.

[7] *Corfu Channel Case* (U.K. v Albania) Merits [1949] Rep 4, 30-31.

[8] ibid 28.

apply to a *vessel without nationality*.[9] Coastal states may suspend *innocent passage*, 'temporarily in specified areas of its territorial sea (…) if such suspension is essential for the protection of its security'.[10] Thus, as Noyes reasons, the *right of innocent passage* balances 'navigation, communication, and global mobility' with coastal State's security.[11]

Insofar as the interdiction of a DTV in a coastal state's territorial sea is concerned, the *right of innocent passage* does not shield a DTV from the plenary jurisdiction of the coastal state. Since the purpose of innocent passage is the protection of 'innocent' passage [acts], drug trafficking is excluded from such activity by virtue of the coastal state's sovereignty to prevent and protect itself against acts prejudicial to its peace, good order, and security. Indeed, as will be seen, the rules concerning *innocent passage* and the rules concerning coastal state criminal jurisdiction in the territorial sea are mutually supportive, existing in codification since the 1958 GCTSCZ entered into force.[12] This is also reflected in Article 19(2)(l) LOSC, which states that 'any other activity not having a direct bearing on passage' can be non-innocent passage.[13] Drug trafficking specifically as 'any other activity' is derived from Articles 21 and 27 LOSC.[14]

Article 21 states that, '[t]he coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea'.[15] Article 21(h) concerns 'the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State'.[16] Drug trafficking is component of customs laws and administration.[17] Domestic customs laws usually

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[9] LOSC (n 5) Article 17 – The Right of Innocent Passage applies to: ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. Vessels without Nationality and their entitlement to the right to freedom of navigation is elaborated further in this chapter in Part II. A 'Vessel without Nationality' includes the terms 'unregistered' or 'stateless vessel' unless otherwise noted.

[10] LOSC (n 5) Article - Rights of protection of the coastal State.

[11] Noyes, 'The Territorial Sea and Contiguous Zone' (n 4) 98-100.

[12] 1958 GCTSCZ (n 5) at Article 16 states, [in part] that: [t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent'. Article 17 1958 GCTSCZ states that: '[f]oreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation. Article 19(d) 1958 GCTSCZ states [in part] that: [t]he criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases, If it is necessary for the suppression of illicit traffic in narcotic drugs. See Richard Barnes, 'The Territorial Sea and Contiguous Zone,' in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of the Sea (LOSC): A Commentary* (Verlag CH Beck OHG) 235. See also Natalie Klein, *Maritime Security and The Law of the Sea* (University Press 2012) 75-76.

[13] LOSC (n 5) Article 19- LOSC - Meaning of Innocent Passage.

[14] The 1958 GCTSCZ (n 5) does not have a delineated list of acts in Article 16, rather it simply indicates the coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent'.

[15] LOSC (n 5) Article 21 LOSC.

[16] ibid Article 21 LOSC.

[17] World Customs Organisation, Resolution of the Customs Co-Operation Council Encouraging Members or Economic Unions to become Contracting Parties to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 5 July 1989, TE38010111, 2.

address drug trafficking as import into the forum state.[18] Customs administrations are, according to World Customs Organisation, 'responsible for controlling the cross-border movements of goods, means of transport and persons, and that it is their role to protect the national territory and ensure the security of their populations'.[19] Furthermore, and as Klein notes, customs violations are 'relevant to drug trafficking'.[20] Still, as noted in Chapter 2, drug trafficking is specifically addressed with respect to a coastal state's territorial jurisdiction in Article 27 LOSC.

Article 27's primary aim concerns exercising coastal state territorial criminal jurisdiction over 'ships in innocent passage not proceeding from or to internal waters of the coastal State, i.e., in 'lateral' passage'.[21] The relationship between Article 27 and the articles such as Article 19, addressing acts prejudicial to *innocent passage* does appear to have significant overlap, especially when considering the text of Article 27(1)(b).[22] However, this is not coincidental and as Shearer explains, '[i]t may be that the coastal State would choose, in such cases, to expel [a vessel] rather than to prosecute, and it is entitled to make that choice'.[23] Often the choice between expelling a vessel or prosecuting those on board depends on the coastal state's domestic law, the type of crime committed, and a vessel's travel path.[24] Thus, the extent the ILoS provides an enforcement

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[18] ibid 2.

[19] World Customs Organisation, Brussels Declaration, Declaration of the Customs Co-Operation Council, June 2003.

[20] Klein 'Maritime Security' (n 12) 75. *See* Official U.N. Commentary, Henri Mazaud and others, *Commentary on The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1st edn, United Nations 1998) observing that 'State practice shows, and the discussions that took place during the conference generally support the assumption that the illicit traffic in narcotic drugs and psychotropic substances is accepted as constituting an infringement of the customs and fiscal laws within the territory and territorial sea of a Coastal State', at 327. For example, the U.K. Customs and Excise Management Act 1979; U.S. Food and Drugs Acts under Title 21 of the US Code, **or** the Chinese Fifth Session of the Eighth NPC; the Criminal Law of the PRC providing serious punishments up to and including death for distribution and smuggling of dangerous drugs; or Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

[21] Article 111 LOSC (n 5) – Hot Pursuit. The *right of hot pursuit* may be undertaken when authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone. See Ivan A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquency Vessels,' [1986] 35 Int'l & Comp. L.Q. 320, 330, 326. See also Klein (n 12). Klein notes that 'the designated instances for exercising criminal jurisdiction on board foreign ships are only relevant for ships that are in lateral passage, that is, leaving the internal waters of the coastal state, and do not affect the coastal state's right to exercise enforcement jurisdiction against a ship leaving its internal waters', 76-77. The right to exercise of jurisdiction over *outward bound* vessels remains in place because the coastal state's jurisdiction extends up to or upon leaving the territorial sea as part of the *right of hot pursuit.*

[22] LOSC (n 5) Article 27(1)(b): if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.

[23] Shearer (n 21) 325.

[24] Rothwell/Stephens (n 4) 220; Klein (n 12) 76-77. See Yoshifumi Tanaka, *The International Law of The Sea* (Cambridge University Press 2013) 94-95

framework for exercising criminal jurisdiction over DTVs in the territorial sea is well established based on the territorial jurisdiction of the coastal state.[25]

3.1.2 The Contiguous Zone

The contiguous zone is an additional 12 nm belt of sea extending beyond the 12nm limit of the territorial sea up to 24 nm.[26] In the contiguous zone, a coastal state may exercise its *Control* in order 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'.[27] Insofar as this applies to DTVs on the high seas, this is relevant because as noted above, drug trafficking is generally part of a state's customs laws and some states do exercise enforcement jurisdiction over drug traffickers in their contiguous zone, notably the U.S.[28] This is further relevant because DTVs do not always enter inside costal state's territorial seas. For example, the discovery of the new 'Ghost-Glider' design of 'narco-sub' by Spanish authorities shows the vessel's purpose was likely intended to be used as an offshore pick-up vehicle whereby it would meet with a larger distribution vessel, collect drugs, in this case suspected cocaine, and then bring the drugs to shore undetected.[29] The use of larger support vessels is common not only in high seas smuggling, but cases of piracy. This type of conduct, known as *constructive presence*, is discussed throughout this section, remains a significant threat to coastal states, and has been a driving factor in the subsequent recognition and codification of the contiguous zone.

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[25] Barnes 'The Territorial Sea' (n 12) 236. See Rothwell/Stephens (n 4) 74 noting that there has been a 'more vigorous approach taken towards policing and law enforcement within the territorial sea as a result of the rise of transitional crime resulting in an upsurge of drug smuggling'; Shearer (n 21) 327 who notes that the inclusion of drug trafficking in Article 27 is 'a self-contained exception (assuming no territorial element to be present), [and] can be explained only on the basis of an increasing tendency to 'universalize' jurisdiction in such matters as narcotic drugs'. See also Klein (n 12) 76; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 12. See further Tanaka (n 24) 95. But cf Gerald Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea: Part I--The Territorial Sea and Contiguous Zone and Related Topics,' [1959] 8 Int'l & Comp. L.Q. 73, 105 who [citing the same provision in the 1958 Geneva Convention] argued that 'Sub-head (d) is quite another matter. It represents an addition made at the Geneva Conference at the instance of a number of Asian States'. According to Fitzmaurice '[t]his addition was morally impossible to object to, but it is none the less technically unfortunate. It does not reflect current international practice and does not have the same features as are common to the other cases'.

[26] LOSC (n 5) Article 33 - The Contiguous Zone.

[27] Ibid., Article 33 – LOSC – The Contiguous Zone. The text of Article 33 is identical to Article 24 1958 GCTSCZ as it concerns subsections (a) and (b) of the article.

[28] 1988 Commentary (n 20) 327. *See also* United Nations Conference for the Adoption of a Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, Vol. II, Summary Records of Plenary Meetings, Summary Records of Meetings of Committee I and Committee II. 25 November-20 December 1988, 34-35.

[29] H.I. Sutton, 'Completely New Type of Narco Submarine Discovered in the Atlantic,' Aerospace and Defense, Forbes, 31 August 2020, <https://www.forbes.com/sites/hisutton/2020/08/31/completely-new-type-of-narco-submarine-discovered-in-the-atlantic/?sh=64cd9abd633b> accessed on 31 August 2020.

The identification and subsequent codification of the contiguous zone, which is a *sui generis* area, has proven controversial and contentious because the contiguous zone is, in effect, an area of the high seas where the coastal state continues to exercise limited 'control' over certain subject matter offences as detailed above.[30] The exact limits of what this entails as far as true coastal state enforcement and adjudicative jurisdiction is concerned remains under debate. However, and as will be discussed below, there are recognised principles of international law concerning the contiguous zone and it is reasoned here coastal states do possess limited subject matter enforcement jurisdiction for acts taking place solely within the contiguous zone.

Regarding DTV interdictions, this is crucial because this area provides an additional 12nm of high seas where an exception to the exclusive jurisdiction of the flag state technically exists over customs related criminal acts. This makes the contiguous zone an area *which must be better utilized* by coastal states but is also an area where as Gilmore observes, 'is of interest in this regard [because] U.S. legislation continues to reach hovering vessels in the contiguous zone; a facility not infrequently relied upon in drug smuggling cases,' and so factors into the overall primary research objective of the thesis.[31] Therefore, some clarification on the juridical nature of the contiguous zone is warranted.

To begin with, the Contiguous zone, or rather its 'concept,' has long been recognised with respect to the ILoS and the *doctrine constructive presence.* Evidence for this position can be seen in the 18th century *British Hovering Acts,* which recognised a coastal state's criminal jurisdiction could be exercised over smuggling vessels 'lingering about or around the waters off the coast'.[32] Similarly, in 1804 the U.S. Supreme Court in, *Church v. Hubbart,* held ' [t]he right of a nation to seize vessels attempting an illicit trade is not confined to its harbors (…) [i]ts power to secure itself from injury, may certainly be exercised beyond the limits of its territory (…) if the means used (…) are reasonable and necessary to secure their laws from violation (…)'.[33] Certainly, this past practice of states enforcing against customs laws violations outside of the territorial sea, and which have

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[30] Daniel-Erasmus Khan, 'Contiguous Zone,' in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of The Sea (UNCLOS): A Commentary* (Verlag CH Beck oHG) 270. See also Gerald Fitzmaurice (n 25) 111-112; Shearer (n 21); Rothwell/Stephens (n 4) 80; Guilfoyle (n 25) 12-13; Malcolm D. Evans in Malcolm D. Evans, *International Law* (4th edn, Oxford University Press 2014) 660; Noyes (n 4) 107-108. But cf Tanaka (n 24) 123; Shigeru Oda, The Concept of the Contiguous Zone, 11 Int'l & Comp. L.Q. 131 (1962) 1060; Klein (n 30) 88; René Jean Dupuy and Daniel Vignes, *A Handbook of The New Law of the Sea* (Martinus Nijhoff 1991) 857.

[31] William C. Gilmore, 'Hovering Acts,' Oxford Public International Law Online, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1177> accessed on 06 May 2019.

[32] ibid.

[33] *Church v. Hubbart,* 6 U.S. 2 Cranch 187, 187 (1804), the Syllabus.

an effect on the coastal state, can be seen as a general rule of customary international law.[34] As Shearer notes:

> [i]t is arguable, however, and probably sustainable on the history of the British Hovering Acts and similar legislation elsewhere, that a coastal State might lawfully legislate to make it an offence to hover or to tranship dutiable cargoes in the contiguous zone and to carry out an arrest there, because these activities are within the connotations of "prevention".[35]

The enforcement against vessels hovering or transhipping goods outside of a coastal state's territorial sea, as stated, forms part of the *doctrine of constructive presence*. Vessels constructively present use 'mother ships' that are aided by smaller vessels to complete criminal conduct.[36] Criminal conduct includes offloading of illicit cargoes or acts of piracy.[37] The smaller vessels transport the illicit goods to shore or are used to commit other criminal acts.[38] The 'mother ship' typically does not enter the territorial sea of a coastal State. Instead, they 'hover' outside the territorial sea but their conduct is 'constructively present' in the territory of the coastal State.[39] In other words, they never commit an actual violation of coastal State law within its territorial sea; however, their actions may create a negative effect inside the coastal state's territory or threaten its security, and so the coastal state may arrest, escort the vessel to port, seize its cargos, and prosecute those on the mother ship and the support vessels.[40] It is generally held that the case of the *Araunah* in 1888 is the starting point for recognizing constructive presence in international law.[41]

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[34] Keener C. Frazer, 'The "'I'm Alone" Case and the Doctrine of "Hot Pursuit,' [1928-1929] 7 N.C. L. Rev. 413, 413-18, 420.

[35] Shearer (n 21) 330. See also Gilmore 'Hovering Acts' (n 31) who notes that, '[t]here is also an echo of the early hovering acts in the formulation and interpretation of the doctrine of constructive presence for the purposes of the exercise of the right of hot pursuit in the modern law of the sea. In its orthodox manifestation this permits pursuit of a vessel which had not been in the zone of national jurisdiction in question, but which had used its boats to carry out prohibited activities there'.

[36] James L. Brierly in Humphrey Waldock (ed.), *The Law of Nations*, (6th edn, London: Oxford University Press, 1963) 205.

[37] Om Parkash Sharma, *The International Law of The Sea: India and the UN Convention of 1982,* (Oxford University Press 2012) 105.

[38] ibid 105.

[39] Gilmore, 'Hovering Acts,' (n 31). See also the British Hovering Acts or the Tariff Act of 1930 [U.S.]. For example, the 1930 U.S. Tariff Act defines a hovering vessel as: Any vessel which is found or kept off the coast of the United States within or without the customs waters, if, from the history, conduct, character, or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the United States in violation of the laws of the United States; and any vessel which has visited a vessel described in paragraph (1).

[40] Dupuy/Vignes, (n 30) 857.

[41] Gilmore, 'Hovering Acts,' (n 31). For example, it is noted that '[w]hile in their original 18th century British legislative form hovering acts were enactments which purported to subject vessels in specified areas of the sea to anti-smuggling measures when found to be hovering or lingering about or around waters off the coast the concept eventually came to embrace a much wider set of exercises of coastal state jurisdiction and the protection of a broader range of interests. As was noted earlier, hovering acts are legislative enactments applying a coastal State's criminal jurisdiction to ships, including foreign ships, and persons thereon, including foreigners, when the ships are outside the State's territory or the territorial sea'. See also the Tariff Act of 1930 [U.S.] (n 39).

The British/Canadian hunting vessel *Araunah* used small canoes as part of an illegal seal hunting operation near Russia in 1888.[42] The vessel, small canoes, and crew were arrested by Russian authorities.[43] A more contentious early example is the international arbitration of the *I'm Alone* sinking.[44] The U.S. Coast Guard attempted to arrest the rum-runner, *I'm Alone,* while when it was 'within one hour's sailing distance from the shore', but instead ended up sinking the vessel and causing the death of some crewmembers.[45] Two important concepts came from the arbitration. First, both the U.S. government and the British/Canadian governments agreed that '[i]f there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States (…) the vessel may be seized and taken into a port'.[46] Second, despite no recognised contiguous zone, the enforcement of coastal state laws concerning revenue [customs] enforcement outside the territorial sea was not seen as excessive.[47]

Indeed, the overall practice of exercising customs enforcement beyond the limits of the territorial sea is recognised in early codification attempts including the Hague Codification Conference [1930]. At the Eighth meeting of the conference, it was reasoned that:

> in regard to certain rights, or more correctly certain powers, which States at present exercise beyond the limits of the coastal sea. We found that what it was proposed to call the "contiguous zone" could cover powers at present exercised outside the coastal sea, and other powers which might be described as a form of 'disguised sovereignty'.[48]

The ILC also recognised there existed a possibility that coastal states could exercise their jurisdiction outside their territorial sea for limited purposes. To support this conclusion, the ILC considered that a violation of certain coastal state laws such as customs laws outside of the territorial sea further impacted coastal state security even in cases where the offending vessel never enters the territorial sea.[49] According to the ILC at their Eighth Session in 1956:

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[42] 811.114/1182, Letter to the British Ambassador, Jan 18, 1923, Foreign Relations 1922 Volume 1, 593.
[43] Craig H. Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices,' [1989] 20 Ocean Dev. & Int'l L. 309, 314.
[44] Andrew Norris, 'Rum Row: The Sinking of the Rum Runner - I'm Alone,' [2015] 24 Tul. J. Int'l & Comp. L. 1, 2.
[45] *Reports of International Arbitral Awards*, S.S. "I'M Alone" (Canada, United States) VOLUME III pp. 1609-1618, 30 June 1933 and 5 January 1935, 1614.
[46] ibid 1611.
[47] William C. Dennis, 'The Sinking of the I'm Alone,' [1929] 23 Am. J. Int'l L. 351, 361-362.
[48] C. 351.M.145 1930 V. Acts for the Conference for the Codification of International Law, 1930, 8th Meeting at 53.
[49] Ibid., The ILC, citing Fitzmaurice noted that, 'foreign vessels in the territorial sea were subject to the laws of the coastal State, whereas in the contiguous zone international law recognised that the coastal State had a right to enforce certain of its laws if it could, but also that foreign vessels had no actual obligation to obey. The position was, in some respects, analogous with that of the rights of warships of belligerent States to enforce laws concerning contraband in respect of neutral vessels. If the doctrine he had expounded was correct, it was logical to allow hot pursuit against an infringement of the law of the coastal State committed within its territorial sea, but the situation was not the same in the contiguous zone, where it was legitimate for foreign vessels to avoid, if they could, the enforcement of laws by vessels of the coastal State'. Again, the ILC did not accept this argument and observed

> [i]nternational law accords States the right to exercise preventive or protective control (…) over a belt of the high seas contiguous to their territorial sea…this power of control does not change the legal status of the waters (…) [t]hese waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State.[50]

Furthermore, during the debate concerning the rights of the coastal state in its contiguous zone, and according to the ILC:

> [m]any States have adopted the principle that in the contiguous zone the coastal State may exercise customs control in order to prevent attempted infringements of its customs and fiscal regulations within its territory or territorial sea (…) [t]he Commission considered that it would be impossible to deny to States the exercise of such rights.[51]

However, this position did little to clarify the actual juridical nature of the contiguous zone.[52] This ambiguity led to an alternative view by Fitzmaurice, who argued that:

> [t]he contiguous zone is, and remains, part of the high seas. It is not (like the territorial sea) under the general jurisdiction, sovereignty and dominion of the coastal State, or indeed under such jurisdiction, sovereignty or dominion at all, in any sense; nor do the laws and regulations of the coastal State run there in the way that they do in the territorial sea (as in the land territory of that State).[53]

In other words, this is what Khan describes as 'no right whatsoever to extend to or enact specific regulations for the contiguous zone itself let alone enforce such regulations against ships suspected of having violated those regulations' outside of the territorial sea'.[54] Furthermore, according to Khan, this implies that while protective measures against *inward bound vessels* are necessary to protect 'onshore public order' whereas vessels only in transit beyond (…) the territorial sea are unlikely to have a 'negative impact' on the coastal state.[55]

Still, this reasoning is not convincing because as discussed above, customary international law has long recognised limited coastal state enforcement jurisdiction outside its territorial sea, which the ILC clearly agreed. Some scholars, such as Oda concur with this position and note that 'Fitzmaurice's interpretation may be regarded as possessing considerable authority (…) however

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'[t]he majority of the Commission showed that it did not support Sir Gerald's views, by rejecting a proposal to delete the words "if the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against any interest for the protection in which said zone was established,' 6.

[50] Report of the International Law Commission, 8th Session (A/3159), Commentary, II YB ILC 1956, 294.

[51] ibid 294.

[52] ibid 123-124. It was noted that '[o]ther States were of opinion that in Customs matters bilateral or regional agreements would be preferable to the making of collective conventions, in view of the special circumstances which would apply in each case. These States were opposed to granting the Coastal State any right of exercising Customs or other control on the high seas outside the territorial sea, unless the right in question arose under a special convention concluded for the purpose. The opposition of these States to the establishment of such a zone was further strengthened by the possibility that, if such rights were accorded, they would eventually lead to the creation of a belt of territorial sea which included the whole contiguous zone'.

[53] Gerald Fitzmaurice (n 25) 112.

[54] Khan (n 30) 264.

[55] ibid 264.

such an approach had seldom been presented by any scholar before 1954, does not well reflect past practice'.[56] Furthermore, it should be noted that the ILC rejected Fitzmaurice's argument.

The ILC observed that '[i]t was thus the majority opinion that the rights exercised by the coastal State in the contiguous zone are not essentially different from the rights exercised in the territorial sea'.[57] In taking this view, it was reasoned that:

> [t]he idea underlying the institution of contiguous zones was that in present circumstances, especially having regard to the speed of vessels, a belt of sea of three, four, six or even eight miles was no longer sufficient to enable States to exercise certain powers necessary for the protection of their interests (…) [and] apart from some qualifications and reservations, the principle underlying this article encountered no opposition on the part of Governments. The Commission believes this principle to be in accordance with a widely adopted practice.[58]

Additionally, according to the Special Rapporteur, J. P. A. François:

> the correct view is that the coastal State enjoys certain specified rights (…) even where that belt extends beyond its territorial sea into the high seas, and that it can exercise control over that zone, in customs and sanitary matters, in the same manner as in the territorial sea.[59]

Further support for the existence of enforcement jurisdiction in the contiguous zone for acts taking place solely inside it can be found in the ILC's work on the *right of hot pursuit*.[60] During the drafting of the 1958 GCHS, the ILC reasoned that '[i]f the foreign ship is within a contiguous zone (…) pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established'.[61] As the ILC further clarified:

> [t]he majority of the Commission was of the opinion that the right of hot pursuit should also be recognised when the ship is in a zone contiguous to the territorial sea, provided such pursuit is undertaken *on the ground of violation of rights for the protection of which the zone was established* (…) [although] [s]ome members of the Commission were of the opinion that since the coastal State does not exercise sovereignty in the contiguous zone, no pursuit commenced when the ship is already in the contiguous zone can be recognised. The majority of the Commission did not share that opinion.[62]

In other words, as the ILC debates evidence, enforcement jurisdiction outside of the territorial sea for customs law violations in the contiguous zone exists and this is further supported by the

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[56] Oda (n 30) 132.
[57] 8th session (n 50) 6.
[58] 8th session 'Regime of the High Seas and Territorial Sea' (n 50) 5.
[59] ibid 6.
[60] The right of hot pursuit is set out below in the next part of the chapter.
[61] 8th Session (n 50) 285.
[62] ibid.

right of hot pursuit.[63] It should also be added that the ITLOS has also engaged with this debate to some degree in the *M/V Saiga (no. 2)* judgement.

The case concerns Guinea's arrest of the *M/V Saiga* [flagged to St. Vincent and the Grenadines] in the Guinean EEZ. The vessel was arrested for alleged Guinean customs law violations committed while the *Saiga* was inside Guinea's contiguous zone and EEZ. Guinea argued it was entitled to engage in hot pursuit of the *Saiga* for violations of its customs laws because those violations took place inside the Guinean contiguous zone.[64] ITLOS, did not address this issue directly. Instead ITLOS reasoned that 'by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the [LOSC]'.[65] However, this question of enforcement jurisdiction was considered in two separate opinions in the case. In his dissent, Judge Warioba observed that:

> [t]he Contiguous zone (…) may be relevant to the *application of the criminal law*. The relevant area here is the customs radius. This is a functional zone established by…customs law within the realm of the contiguous zone (...). One can describe it as a limited customs protection zone based on the principles of customary international law.[66]

Furthermore, in his separate opinion, Judge Laing specifically addressed the contiguous zone as an area where there exists 'protective jurisdiction'.[67] According to Judge Laing, 'the power to prescribe such exercises of control cannot be categorically deemed to be excluded'.[68] These exercises of control are distinguished based on the:

> conduct occurring in the contiguous zone which is part of the jurisdictional facts or *actus reus* of conduct intended or due to occur or actually occurring in the territorial sea or other territorial areas can be punished as long as the vessel is apprehended in the course of the exercise of some legitimate means of control.[69]

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[63] Article 23 1958 Geneva Convention on the High Seas – The article states [in part]: [i]f the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established(...). Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. Similarly, Article 111 LOSC states [in part] that: Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted (…) If the foreign ship is within a contiguous zone, as defined in [A]rticle 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established'. But cf 8th session (n 50) statements made by the U.K Representative that, '[t]his cannot be the position in the contiguous zone and consequently the doctrine of hot pursuit should have no application to a vessel within the contiguous zone', 82.

[64] Counter-Memorial, *M/V Saiga (No. 2) St. Vincent and the Grenadines v Guinea*, (Merits) Judgment, 1 July 1999, (3).

[65] *M/V Saiga (No. 2) St. Vincent and the Grenadines v Guinea,* (Merits) Judgment, 1 July 1999, 10, 136.

[66] Dissenting Opinion of Judge Warioba, *M/V Saiga (No. 2)* 223.

[67] Separate Opinion of Judge Laing, *M/V Saiga (No. 2),* 158.

[68] ibid 161-162.

[69] ibid 162-163.

Indeed, scholars such as Lowe have taken similar views that the coastal state may have the right to 'claim both jurisdictions to enforce and jurisdiction to prescribe in the contiguous zone'.[70] Other leading scholars such as Allen, Klein, Dupuy and Vignes have also presented similar points of view.[71] Therefore, in light of the above, it is reasoned the costal state does possess enforcement jurisdiction over vessels in its contiguous zone and so the costal state may exercise limited enforcement jurisdiction.

3.1.3. The Exclusive Economic Zone [EEZ]

The coastal state may extend its *sovereign rights* up to 200nm from its baselines to form an EEZ.[72] Within their EEZ, coastal states, generally, have limited enforcement jurisdiction for violations of resource, conservation, and environmental laws.[73] Article 73 of the LOSC sets out the limits, it states [in part]:

> 1. The coastal State may, in the exercise of its sovereign rights (…) take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
>
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.[74]

Coastal states cannot enforce customs, fiscal, or immigration laws in the EEZ unless such laws are violated on artificial installations.[75] The question of customs law enforcement in the EEZ was addressed in the *M/V Saiga (No. 2*) case. After the *M/V Saiga's arrest,* St. Vincent and the Grenadines argued that Guinea's pursuit of the *M/V Saiga* for customs violations in the EEZ violated Articles 56(2) and 58 of the LOSC.[76] ITLOS agreed, stating that:

> by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the Saiga, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.[77]

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[70] Alan V. Lowe, 'The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, International Law Studies Volume 64, in *The Law of Naval Operations*, Horace B. Robertson jr (Editor) 112.
[71] Craig H. Allen, *International Law for Seagoing Officers*, (United States Naval Institute Press, 6th Edition, Annapolis, Maryland 2014) 120-121. See Oda (n 30) 1060; Lowe, 'The Commander's Handbook' (n 70) 112; Klein (n 12) 88; Dupuy and Vignes (n 30) 857.
[72] LOSC (n 5) Article 56. *Sovereign Rights* include for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living (…) and with regard to other activities for the economic exploitation and exploration of the zone.
[73] Other acts that permit enforcement are set out under Article 58(2) and these concern the High Seas section discussed below. Enforcement is permitted over pirate vessels, vessels engaging in the transportation of slaves, vessels engaged in unauthorized radio broadcasting, vessels trafficking in narcotic drugs and psychotropic substances, and stateless vessels.
[74] LOSC (n 5) Article 73 - Enforcement of laws and regulations of the coastal State.
[75] ibid Article 60.
[76] *Memorial*, *M/V Saiga (No. 2) St. Vincent and the Grenadines v Guinea,* (Merits) Judgment, 1 July 1999, 28 (1).
[77] *M/V Saiga (No. 2)* (n 65) 56.

Thus, coastal state jurisdiction exists in the EEZ, but only over activities related to specific subject matter listed in Article 56(1) or Article 60.[78] However, this does not mean that DTVs cannot be interdicted in the EEZ by the coastal state or another state. The EEZ is a *sui generis* area with the residual nature of the high seas.[79] Therefore, the interdiction of a DTV in the EEZ is possible under the legal regime for the high seas.[80]

3.2 Jurisdiction on the High Seas

The chapter thus far has explored the ILoS and the legal regime appliable to a DTV in areas under coastal state jurisdiction or control. However, as the study is primarily concerned with the high seas and how states exercise their jurisdiction over vessels engaged in drug trafficking located there, it first necessitates a discourse on the high seas and its specific legal regime. The following section sets out this legal regime including, the exclusive jurisdiction of the flag state, the registration and nationality of vessels, exceptions to the exclusive jurisdiction of the flag state, non-flag state enforcement actions, drug trafficking on the high seas, and jurisdiction over *vessels without nationality*.

The high seas are open for use by all ***States*** and they include, '[a]ll parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State'.[81] No state may claim sovereignty over the high seas and all States enjoy the right to sail their ships on the high seas.[82] Apart from these rights, States are granted certain freedoms, known as *freedom of the high seas,* which include the:

> freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines, subject to Part VI; freedom to construct artificial islands and other installations

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[78] Guilfoyle '*Shipping Interdiction'* (n 25) 14; Gemma Andreone, 'The Exclusive Economic Zone,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 162.

[79] Article 55 LOSC states: '[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention'. See Rothwell/Stephens (n 4) 84.

[80] States do continue to make excessive EEZ claims whereby they may possibly engage in enforcement actions not specified in Part V of the LOSC. The 2020 U.S. Department of Defense, Freedom of Navigation Report notes the following excessive maritime claims: 1) South China Sea and East China Sea: **China:** Criminalization of surveying and mapping activities by foreign entities which do not obtain approval from or cooperate with the People's Republic of China (PRC). [Surveying and Mapping Law of the People's Republic of China, Apr. 27, 2017.], Jurisdiction over all surveying and mapping activities "in the territorial air, land, and waters, as well as other sea areas under PRC jurisdiction," without distinction between marine scientific research and military surveys. [Surveying and Mapping Law of the People's Republic of China, Apr. 27, 2017]. 2) Caribbean Sea: **Venezuela:** Attempted enforcement of a security zone beyond the lawful limit of the territorial sea. [Actions and statements implying such a claim, contrary to the repeal of article 3 of the Territorial Sea, Continental Shelf, Fisheries Protection and Airspace Act of 27 July 1956.], <[https://policy.defense.gov/Portals/11/Documents/FY20%20DoD%20FON%20Report%20FINAL.pdf> accessed on 08 August 2021.

[81] LOSC (n 5) Article 86 - Application of the provisions of this Part.

[82] ibid Articles 89 and 90.

> permitted under international law, subject to Part VI; freedom of fishing, subject to the conditions laid down in [the LOSC].[83]

The fundamental freedom on the high seas is *freedom of navigation*. Generally, freedom of navigation, according to the ITLOS in *M/V Norstar*, prohibits 'not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas'.[84] This is not to say that the high seas are 'totally' free and without any type of order or rule of law in cases of unlawful activities.[85] Order on the high seas is maintained through *exclusive flag state jurisdiction*. Exclusive flag state jurisdiction exists under customary international law, the 1958 GCHS, and the LOSC.[86] Insofar as DTVs and where they fall into the regime of 'freedom of navigation,' depends almost solely on the DTV. In other words, how the ILoS treats jurisdiction against a DTV will depend on if it is flagged. However, before specifically turning to this point, the flagging of vessels must be discussed as it will inform the remainder of the study.

3.2.1 The Flag

In Chapter 2 the nationality principle established that a vessel flagged to a State becomes subject to that state's jurisdiction as do the persons on said vessel. This procedure, or the *Flagging a ship to a State* exists as customary international law and treaty law, and is used to determine what ships are associated with what community.[87] 'The Flag' also provides ways to determine a ship's allegiance during hostilities.[88] Flagging ships can be traced to antiquity in the Greek and Roman periods through the period of Italian city-states, and into the emergence of the modern political state after the Peace of Westphalia.[89] The concept continued to evolve into the 20th century as a means for 'determining which States were responsible for and entitled to control the activities of ships at sea'.[90] As the ILoS developed, the ILC eventually considered the role of the flag and ships on the high seas. According to the ILC:

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[83] ibid Article 87 - Freedom of the high seas.
[84] *M/V Norstar* (Panama v Italy) (Judgement) ITLOS Reports 10 April 2019, 225.
[85] Douglas Guilfoyle, 'The High Seas,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 204.
[86] Article 4 1958 GCHS and Article 92 LOSC. See *The Case of the S.S. Lotus*, Publications of the Permanent Court of International Justice, Series A, No. 10, September 7th, 1927, Judgment No. 9 25. *See M/V Norstar* (n 158) 60-61 at 216-218; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to The Tribunal)*, International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions, and Orders, List of Cases No. 21. Advisory Opinion of 2 April 2015, 40 at para. 129-139.
[87] Richard A. Barnes, 'Flag States,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 305.
[88] ibid 305.
[89] ibid 305.
[90] ibid 305.

> [t]he absence of any authority over ships sailing the high seas would lead to chaos. One of the essential 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.[91]

The obligation to fly a flag and attach a nationality to a ship is what establishes the rule of law on the high seas.[92] In other words, as Reuland states, 'the order of the high seas exists because of a ship's nationality'.[93] So strong is this link that according to ITLOS in *M/V Saiga (no. 2)*, 'the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag state (…) [and] the nationality of these persons is not relevant'.[94] Thus, attaching a nationality to vessels serves two purposes which prevents undue interference with shipping by other states and ensures flag states regulate their vessels.[95] The principle is now codified in Articles 91 and 92 LOSC.[96]

Article 91 states [in part], that 'Ships have the nationality of the State whose flag they are entitled to fly' and States shall set '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'.[97] In examining Article 91, it can be seen to contain three separate obligations for establishing the 'nationality of ships'. These are the right of a State to (1) fix conditions for the grant of nationality to ships, (2) fix the conditions for the registration of ships, and (3) fix conditions for the right to fly its flag. By viewing Article 91 this way, a 'ship may hold a nationality different from its registration'.[98] This is because, generally, vessel registration and flagging usually involves the national law of individual flag states.[99] For example, some States allow for the use of their flag based on the nationality of the ship's owner, and in other cases it can be based on individual local registries, such as in a federated system of States [e.g., the U.S.].[100] The registering of a vessel to one state

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[91] ILC 8th Session (n 50) at 279.
[92] See *Case of S/S Lotus* (n 86) 25. See also LOSC (n 5) Article 91. See further Tanaka (n 24) 155.
[93] Robert F. Reuland, 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction,' [1989] 22 Vand. J. Transnat'l L. 1161, 1196.
[94] *M/V Saiga (no. 2)* (n 65) 106.
[95] Tanaka (n 24) 153.
[96] LOSC (n 5) Article 92: Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. See Chapter 2 and Malcolm N. Shaw, *International Law*, (Ninth Edition, Cambridge University Press, 2021) 571.
[97] LOSC (n 5) Article 91.
[98] Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing Limited 2013) 54.
[99] ibid 54. See the *Muscat Dhows case* (France v. Great Britain), 1916 Hague Ct. Rep. 93-109 (Perm. Ct. Arb. Aug. 8, 1905). According to the Permanent Court of Arbitration, '[t]he Tribunal ruled that each sovereign was free to decide to whom to accord the right to fly its flag and to prescribe the rules governing such grants'. However, the Tribunal found that 'the exercise of this right was limited by The General Act of the Brussels Conference, article 32 of which limited the right of the signatory powers to grant their flag to their own subjects or to persons protected by them (*protégés*). The term *protégé* had to be understood in the sense best corresponding to the aims of the Brussels Conference and the principles of the law of nations', [https://pca-cpa.org/en/cases/93/]. See also Allen 'Sea Officers' (n 71) 182.
[100] Daniel P. O'Connell and Ivan Anthony Shearer (ed), *The International Law of The Sea, Vol II* (Clarendon Press 1988) 753. See Papastavridis (n 99) 54. See also Guilfoyle 'Shipping Interdiction' (n 25) 95. For example, under

and flagging to another is common with some cruise ships companies, who often do this to escape strict labour laws and other restrictions.[101] Such practices are known as using 'flags of convenience' or 'open registries' where there is little to no regulation of these vessels by their flag states.[102] The use of a flag of convenience and the general lack of oversight for States that are known to engage in this practice remains a serious issue for maritime law enforcement and jurisdiction over vessels on the high seas.[103] However, Article 91 places an additional obligation on the flag state by requiring there to be a 'genuine link' between the vessel and the flag state.[104]

The question of a 'genuine link' under Article 91 is, as many commentators have observed, difficult to determine since Article 91 and the LOSC as a whole do not address it specifically.[105] Guilfoyle notes 'that no definition of 'genuine link' has ever been internationally agreed'.[106] On the other hand, Klein says that the genuine link requirement 'in relation to ships, the minimal content is that if a vessel can meet a state's requirement for registration then there is a genuine link'.[107] In the *M/V Saiga (no. 2) case* and the *Grand Prince Case*, ITLOS has considered the 'genuine link' question and focused on the efforts of the flag state in maintaining a link to a vessel. For example, in the *M/V Saiga (no. 2)* case, ITLOS recognised that the extensive effort the flag state [St. Vincent and the Grenadines] who argued that 'under its laws, preference is given to Vincentian nationals in the manning of ships flying its flag (…) [and] further drew attention to the vigorous efforts made by [Vincentian] authorities to secure the protection of the Saiga on the international plane'.[108] Ultimately, the question of the flag state and its link to its vessels is of

US federal law, 46 USC 12303, '[w]hen a State is the issuing authority, it may exempt from the numbering requirements of this chapter a vessel or class of vessels exempted under subsection (a) of this section or otherwise as permitted (…)'.

[101] Asia N. Wright, 'Beyond the Sea and Spector: Reconciling Port and Flag State Control Over Cruise Ship Onboard Environmental Procedures and Policies,' Duke Environmental Law & Policy Forum [Vol. 18:215] 219-220.

[102] Barnes (n 87) 314-321.

[103] Supplementary data collected for the study concluded that the lack of flag oversight and the lack of more specific rules for the issuance of a flag by a state is considered to be problematic from a high seas law enforcement and jurisdictional point of view. Interview Transcript T-001 at 2; Interview Transcript T-002 at 11-13; Transcript T-005 at 3-5.

[104] LOSC (n 5) Article 91(1).

[105] Douglas Guilfoyle, 'Article 91' in in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of The Sea (UNCLOS): A Commentary* (Verlag CH Beck oHG) 695.

[106] ibid 699. See Andrew Murdoch, 'Ships without nationality: Interdiction on the High Seas,' in Malcolm D Evans and Sofia Galani, *Maritime Security and The Law of The Sea: Help or Hindrance?* (Edward Elgar Publishing 2020) 162 who also states, 'it should be noted that state practice has not established any generally accepted conditions that must exist to establish a genuine link'.

[107] Klein (n 12) 106.

[108] *M/V Saiga (no. 2)* (n 65) 40 at Para 78. See the *Grand Prince* Case where ITLOS noted that '[i]n the view of the Tribunal, the assertion that the vessel is "still considered as registered in Belize" contains an element of fiction and does not provide sufficient basis for holding that Belize was the flag State of the vessel for the purposes of making an application under article 292 of the Convention' further noting that '[t]he Tribunal finds that the Applicant did not act "at all times material to the dispute" on the basis that the Grand Prince was a vessel of its nationality. To the contrary, on 4 January 2001, Belize communicated to France, by means of a note verbale from the Ministry of Foreign Affairs, its decision to de-register the Grand Prince with effect from 4 January 2001', p. 42 at para 85 and 43 at 89. *"Grand Prince"* (Belize v. France), Prompt Release, Judgment, ITLOS Reports 2001, p. 17.

practical concern for high seas DTV interdictions, primarily as it relates to which state exercises its exclusive jurisdiction over the vessel and if that state can authorise a non-flag state interdiction.

According to Article 91 a vessel has the nationality of its flag state, not its state of registry. This is an important differentiation because as noted, a vessel may have registry that is different from its flag state. This raises a practical concern because, as Chapter 4 will discuss, the authorisations to board a flagged vessel under the 1988 Vienna Convention would appear to run counter to Article 91.[109] The practical problem is summarised by Guilfoyle, who states that 'malefactors may seek registration in states known to have inefficient registries in order to frustrate interdictions'.[110] Murdoch, in discussing such methods to frustrate interdictions notes that:

> dhows flagged to the Republic of Yemen or the Islamic Republic of Pakistan engaged in trafficking drugs across the Indian Ocean have been known to switch flags, such as to that of the Islamic Republic of Iran, to avoid interdictions by U.S.-led coalition warships. This practice is almost an inverse of the well-known practice of merchant ships flagging to major maritime powers, such as the United States (U.S.), in order to be subject to their protection during times of conflict or escalated risk.[111]

Thus, according to Murdoch, the true test is not confirmation of a vessel's registry, which is what the 1988 Vienna Convention incorporates as part of the authorisation procedure in Article 17, rather '[t]he critical condition by which a grant of nationality to a ship must be assessed is whether the ship has an entitlement to fly the flag of the state in question'.[112] Should the vessel not have such entitlements, it will be *without nationality*. However, if the vessel is entitled to fly the of its flag state, it is the flag state which must first and foremost exercise its jurisdiction over that vessel.

Article 92 LOSC, as stated previously, codifies the exclusive jurisdiction of the flag state over its vessels on the high seas. The article states [in part] that '[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'.[113] Since a ship on the high seas is subject to its flag state's exclusive jurisdiction, it also means ships are not permitted to fly more than one flag at a time.[114] The prohibition against switching flags is also customary

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[109] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Entry into Force 11 November 1990, UNTS vol. 1582 p. 95. Article 17(3) of the 1988 Vienna Convention states: A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.
[110] Guilfoyle 'Shipping Interdiction' (n 25) 95.
[111] Murdoch (n 106) 159.
[112] ibid 162.
[113] LOSC (n 5) Article 92.
[114] Reuland (n 93) 1206.

international law and codified in Article 92 LOSC as well.[115] The strong stigma attached to changing flags exists because when vessels change flags without cause, they effectively undermine the purpose of exclusive flag state jurisdiction. According to the ILC discussions on this topic:

> [any] changes of the flag during a voyage are calculated to encourage the abuses stigmatized by this article. The Commission also realizes that the interests of navigation are opposed to total prohibition of change of flag during a voyage or while in a port of call. (…) the Commission intended to condemn any change of flag which cannot be regarded as a *bona fide* transaction.[116]

There are legitimate reasons ships may change flags and the ship 'would not be stripped of her nationality unless she failed to fly one of them consistently'.[117] A vessel may also be stripped of its nationality under certain exceptional actions such as those undertaken by the U.N. Security Council [UNSC] under its Chapter VII authority. In its 2016 resolution 2321 in response to ongoing sanctions against the North Korea [DPRK], the UNSC prohibited, 'the following activities: all leasing, chartering or provision of crew services to the DPRK; registering vessels in the DPRK; obtaining authorisation for a vessel to use the DPRK's flag'.[118] The resolution can, in effect, strip vessels of its nationality and the protection of the flag state's exclusive jurisdiction.[119] Apart from such exceptional cases, generally vessels must have a single flag state so there is an entity to exercise its jurisdiction and regulate the conduct of its flagged vessels on the high seas. This is one reason the jurisprudence of the PCIJ, ICJ, and ITLOS, in the *Lotus Case*, the *Constitution of IMCO Case*, *the M/V Saiga no. 2*, and *M/V Norstar,* focuses on the position that jurisdiction over a vessel concerns *nationality* not registration since only a single state can fulfil its obligations to 'exercise its jurisdiction and control over ships flying its flag'.[120]

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[115] ILC 8th Session (n 50) at 279. See LOSC (n 5) Article 92. See also Article 6 of the 1958 Geneva Convention on the High Seas: 1. 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. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership change of registry. 2. 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.

[116] ILC 8th Session (n 50) 279.

[117] Reuland (n 93) 1206.

[118] S/Res 2321/2016 30 Nov 2016.

[119] Murdoch (n 106) 159.

[120] *S/S Lotus* (n 86) 25, noting that '[i]t is certainly true that-apart from certain special cases which are defined by international law-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'. See *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960:* ICJ Reports 1960, p. 150, 167, noting that 'it has been submitted by certain States that the proper interpretation of the Article requires that ships should belong to nationals of the State whose flag they fly'; *M/V Saiga (No. 2)* (n 65) concluding that, 'Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law'; *M/V Norstar* (n 85) 38 observing that '[o]ne such provision is contained in article 92 of the Convention, as regards the principle of exclusive jurisdiction of the flag State over its vessels on the high seas'. See also Article 94 LOSC.

These obligations are set out in Article 94 LOSC which states [in part] that '[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[121] The flag state must 'assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship'.[122] These obligations are what ITLOS has said are 'obligation[s] of conduct' which is also a 'due diligence' obligation, and this means flag states must have effective measures in place to sanction delinquent vessels.[123] Thus, this can only be achieved if a single flag state is responsible for ensuring compliance from a vessel.

There is also a lingering practical question which commentators such as Guilfoyle and Barnes take note of regarding the flagging and registration of vessels. The question here concerns the size of a vessel and whether it needs to be flagged and registered to sail on the high seas.[124] Murdoch too highlights this problem, especially for small craft potentially being 'without nationality' on the high seas by noting that:

> [w]hile the existence of vessels without nationality on the high seas is a recognised reality, it is less clear how enforcement agencies can, in practice, determine that this is the case, particularly as regards small ships on the high seas. This is of critical significance for the potential interdiction of ships suspected of being engaged in unlawful activity.[125]

The use of small craft on the high seas is noteworthy, especially when many DTVs and other delinquent vessels include small GFVs or pleasure craft.[126]

3.2.1.1 The Flagging of Small Craft on the High Seas

Article 94(2)(a) has an exception to registration requirement of vessels, which means some ships 'are excluded from generally accepted international regulations on account of their small size'.[127] In practice, there exists the likelihood these smaller vessels may be unregistered since a local authority does not require it and if visited on the high seas by a governmental enforcement vessel, there may be no record of the vessel with its claimed flag state. This can happen despite Article 94(2) LOSC requiring flag states to 'maintain a register of ships containing the names and

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[121] LOSC (n 5) Article 94 - Duties of the flag State.
[122] ibid Article 94 - Duties of the flag State.
[123] *Advisory Opinion Sub-Regional Fisheries Commission* (n 86) 40 at para. 129-139.
[124] Guilfoyle 'Article 91' (n 105) 694; Barnes (n 87) 309-310.
[125] Murdoch (n 106) 160.
[126] Barnes (n 87) 309.
[127] LOSC (n 5) Article 94(2)(a).

particulars of ships flying its flag'.[128] Additionally, this exception means States may also lack the requisite legislation for registering smaller craft.[129]

Small, unregistered craft pose a practical problem for enforcement on the high seas because the lack of registry can create an inability to confirm the vessel's nationality. Scenarios such as this are very common in DTV interdictions because GFVs or smaller yachts are frequently used for drug trafficking.[130] Often in these cases, such small craft are found to be *without nationality* because of this lack of registration, despite flying a flag. For example, in the English interdiction case of *R. v. Bolden and Dean [1998],* the U.S. flagged *Battlestar*, a pleasure yacht, owned by U.S. citizens, possessed a Certificate of American Ownership issued by a U.S. consulate when the vessel was acquired in the Netherlands, and technically was 'entitled' to fly the U.S. flag based on the certificate.[131] However, the English court found the vessel to be *without nationality* because no attempt had been made to register the smaller vessel in the U.S.[132] This link between registration and the flag is what Judge Wolfrum focused on in his declaration concerning the case of *The Grand Prince* before the ITLOS. The declaration observed that in Article 91(1) 'there must be a genuine link between the flag State and the ship [and] [t]his means the registration cannot be reduced to a mere fiction (…)'.[133] In the absence of such a link, it can mean what McDormann suggests as these vessels being treated as 'stateless' in a 'technical sense,' especially if encountered by a government enforcement vessel while on the high seas.[134]

Furthermore, as Attard and Mallia note in the IMLI Manual on International Maritime Law, 'registration remains the sole indicator of nationality, a lack of registration could render the vessel devoid of nationality, and consideration of ships too small to register may bolster this argument'.[135] In other words, since there may be no registration involved with small ships, in

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[128] ibid Article 94(2).
[129] Ted L. McDorman, 'Stateless Fishing Vessels, International Law, and the U.N. High Seas Fisheries Conference,' [1994] 25 Journal of Maritime Law and Commerce 4, 531, 533. See Papastavridis (n 98) 54.
[130] Press Release of the National Crime Agency, 'More than two tonnes of cocaine seized and six arrested after swoop on luxury yacht' 13 September 2021, <https://www.nationalcrimeagency.gov.uk/news/more-than-two-tonnes-of-cocaine-seized-and-six-arrested-after-swoop-on-luxury-yacht>, accessed on 13 September 2021. Press Release of US Southern Command, 'Coast Guard Cutter Harriet Lane Crewmembers Interdict $16 Million Worth of Illicit Drugs' US Coast Guard 5th District, Southern Atlantic, July 2021, <https://www.southcom.mil/MEDIA/NEWS-ARTICLES/Article/2710339/coast-guard-cutter-harriet-lane-crewmembers-interdict-16-million-worth-of-illic/> accessed on 31 July 2021.
[131] *R. v Bolden and Dean* (the 'Battlestar') (1998) 2 Cr App R 171. See also Nigel P. Ready, 'Nationality, Registration, and Ownership of Ships,' in *The IMILI Manual of International Maritime Law: Shipping Law*; David Joseph Attard, Malgosia Fitzmaurice and Norman A. Martinez Gutierrez, *The IMLI Manual on International Maritime Law* (Oxford University Press 2014) 23.
[132] *R. v Bolden and Dean* (n 131) 171.
[133] *Declaration of Judge Wolfrum*, "The Grand Prince" (n 108) p. 49 at 3.
[134] McDorman, (n 129) 533.
[135] IMLI (n 131) 255.

order for the flag state to maintain its obligations under Article 94 and exercise its 'jurisdiction and control' over vessels flying its flag, according to Attard and Mallia:

> [s]uch unregistered vessels are not permitted to leave the territorial seas of the State in which they are berthed. The reason for this could well be that beyond this zone, the territorial jurisdiction of the State ceases, and the State would thereby have no further means of control over these unregistered and therefore stateless vessels.[136]

Agreeing, Murdoch observes that:

> [i]t is, therefore, inaccurate to equate an 'unregistered ship' with a ship 'without nationality'. Instead, Article 91(1) makes clear that a ship possesses the nationality of the state whose flag it is 'entitled to fly'. The critical condition by which a grant of nationality to a ship must be assessed is whether the ship has an entitlement to fly the flag of the state in question. If there is no such entitlement then the ship can properly be categorized as being 'without nationality'.[137]

Thus, should these small, unregistered craft leave the territorial sea of the flag state it claims, this means they could be found to be *without nationality* and as Barnes concludes, they 'are not beyond the law and (…) are susceptible to the jurisdiction of any state,' subject to possible diplomatic protection for the nationals on board; however, this may ultimately prove difficult when trying to identify which state[s] are entitled to exercise such protections when visited by a non-flag state warship on the high seas.[138]

3.2.2 The Right of Visit

The exclusive jurisdiction of the flag state, as said, is the primary means for the regulation of a state's vessels on the high seas. However, a non-flag state's warship [or duly authorized enforcement vessels], on the high seas, do have the right to interfere with other state's 'flagged vessels or to exercise jurisdiction over those vessels,' and as later chapters discuss, 'certain treaties can extend the power of non-flag states even further' and flag states may also consent to another state exercising its jurisdiction by authorising an interdiction.[139] Indeed, these exceptions to the exclusive jurisdiction of the flag state can also exist as customary international law.[140] The reason non-flag states need the ability to investigate vessels on the high seas is necessary because, as Haines explains the:

> 1982 U.N. Convention on the Law of the Sea (UNCLOS) led to substantial increases in both the extent and nature of coastal State jurisdiction, most notably through the extension of territorial seas from three to twelve nautical miles, the creation of contiguous zones beyond the territorial sea, and the introduction of the exclusive

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[136] ibid 255.
[137] Murdoch (n 106) 161-162.
[138] Barnes (n 87) 310.
[139] Allen 'Sea Officers' (n 71) 160.
[140] Reuland (n 93) 1167-1168.

> economic zone extending to 200 nautical miles from the coast. Each of these zones has caused the domestic coastal law enforcement task to increase (…).[141]

In other words, as Klein observes, 'despite the considerable emphasis placed on the pre-eminence of a flag state's exclusive jurisdiction, it is apparent that this principle is not immutable'.[142] The focus of this section, *the right of visit*, explores how the exclusive jurisdiction of the flag state is not always absolute when it comes to suppressing criminal acts on the high seas.

The *right of visit*, in the context of drug trafficking on the high seas, is a law enforcement or constabulary function which, as Kraska observes, 'is not be confused with the belligerent right of visit and search of neutral vessels in order to search for contraband or determine the enemy character of the ship or its cargo under the law of neutrality,' and which is an element of the laws of armed conflict.[143] Furthermore, and as will be considered, the *right of visit* is not an outright assertion of jurisdiction because any such assertions are subject to specific rules of customary international law, articles set out in existing treaties as taken up in Chapters 4 and 5, or extraterritorial assertion of domestic law as examined in Chapter 6.

The *right of visit* is effectively the minimum police powers provided to all states to maintain order on the high seas.[144] According to Guilfoyle, the exercise of these minimum police powers on the high seas is also where interdictions usually begin.[145] As stated, the *right of visit* must be conducted on the high seas and by a state's warships [or enforcement vessels on government service].[146] It is recognised as customary international law and is now codified in Article 22 1958 GCHS and Article 110 LOSC.[147] Per Article 110(1) LOSC, a *right of visit* may be triggered if there are suspicions 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 under article 109; (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.[148]

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[141] Steven Haines, 'War at Sea: Nineteenth Century Laws for Twenty First Century Wars,' [2016] ICRC 98, War and Security at Sea (2), 422-423.
[142] Klein (n 12) 115.
[143] James Kraska and Raul Pedrozo, *International Maritime Security Law*, (BRILL, 2013) ProQuest Ebook Central, 19. See Douglas Guilfoyle, 'Article 110' in in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of The Sea (UNCLOS): A Commentary* (Verlag CH Beck oHG) 769; Haines (n 141) 422-423.
[144] Douglas Guilfoyle, 'Article 110' (n 143) 769.
[145] Guilfoyle 'Shipping Interdiction' (n 25) 23.
[146] LOSC (n 5) at Article 110(4) and (5) LOSC. The right of visit also applies to military aircraft.
[147] Guilfoyle, 'Article 110' (n 143) 768-769.
[148] LOSC (n 5) Article 110 LOSC.

The above list appears to be fairly rigid in terms of which 'suspicions' may trigger a visit from a non-flag state warship. However, Article 110 does permit states to enact other treaties to confer additional powers under the right of visit, and Chapters 4 and 5 specifically consider how such treaties implement this rule. Still, in looking at the list of suspicions in Article 110 which may trigger a right of visit, drug trafficking on the high seas is notably absent from this list. As will be further considered, this omission appears to discount the obligation which as Chapter 1 established, all states have a duty to cooperate in the suppression of drug trafficking on the high seas per Article 108 LOSC. Indeed, as Allen has observed:

> the right of visit is not necessarily triggered by suspicions relating to all of the activities that states have an obligation to suppress and/or prohibit. For example, all states have an obligation to suppress illicit traffic in narcotic drugs and psychotropic substances; however, there is no right of visit against vessels suspected of engaging in such trafficking.[149]

This specific problem is taken up in the next section and as will be seen, is a significant gap in the LOSC for the interdiction of DTVs on the high seas. Additionally, exercising a right of visit boarding is not only the first step in what could be the possible exercise of enforcement jurisdiction against a vessel on the high seas since there are a number of 'factual, legal, and operational,' factors that go into the overall process of the *right of visit*.[150] The *right of visit* is generally conducted in two parts, the first part is the *right of investigation of the flag,* and the second part is the *right of search*.[151]

3.2.2.1 The Right of Investigation of the Flag

The right of investigation of the flag, which may also be known as *right of approach* or *right of reconnaissance*, forms the first element of the *right of visit*. Historically, the *right of approach* granted a warship the right to approach another vessel on the high seas to observe its flag/indicia of nationality.[152] Oppenheim observes that there 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 (…) 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 (…) show a flag, she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag.[153]

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[149] Allen 'Sea Officers' (n 71) 166.
[150] ibid 253.
[151] Guilfoyle, 'Article 110' (n 143) 770. *See also* Klein (n 12) 114-115; Guilfoyle, 'Shipping Interdiction' (n 25) 9.
[152] Correspondence with the United States Government on the Question of Right of Visit 1859, Presented to both Houses of Parliament, House of Parliament Papers Online 2005, 5
[153] Lassa Oppenheim, *International Law: A Treatise, Volume 1, Peace*, ed. H. Lauterpacht (Eighth Edition, Longmans London, 1955) 604.

The right to identify a vessel's flag or indicia of nationality and subsequently verify the claimed nationality is recognised as customary international law.[154] Identifying a flag or some other indicia of nationality is the first step in determining if a right of visit may be triggered against a suspicious vessel; however, it may not involve boarding the suspicious vessel. According to Reuland:

> [t]he 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 colours, which are prima facie evidence of nationality. Without evidence to counter this showing of nationality, a warship may not board the encountered vessel (…).[155]

The inquiring [hailing] warship may also be satisfied through the displaying of a flag or other types of official confirmation. With the advances in technology, verification of the flag may be done from afar, no longer requiring the traditional close 'approach'.[156] Indeed, even a failure to respond to the hailing vessel may not always trigger a right of visit boarding.[157] However, there are some important caveats with respect to a failure to respond, DTVs, and vessels where suspicion already exists that there are criminal acts taking place.

The first caveat is that in situations if the visiting warship remains suspicious of the unknown vessel's right to fly its flag, a more in-depth investigation will be attempted, especially if there are reasonable grounds to suspect the hailed vessel is engaged in the substantive conduct set out in Article 110 LOSC, customary international law, or another treaty.[158] The second caveat, which Chapter 6 takes up further, is the fact most DTV interdictions are intelligence driven and so there is likely already information concerning the acts taking place on the suspicious vessel, which means the failure to respond to a warships hail or order to heave to [stop] for investigation may possibly result in force being used to disable the suspicious vessel.[159] Either way, once the suspicious vessel is detained, the in-depth investigation forms the second element of the *right of visit* and is an intrusive *ship-boarding* procedure.

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[154] Klein (n 12) 114.
[155] Reuland (n 93) 1170.
[156] According to the IMO, AIS Transponders are required under 'SOLAS regulation V/19 - Carriage requirements for shipborne navigational systems and equipment - sets out navigational equipment to be carried on board ships, according to ship type. In 2000, IMO adopted a new requirement (as part of a revised new chapter V) for all ships to carry automatic identification systems (AISs) capable of providing information about the ship to other ships and to coastal authorities automatically, <https://www.imo.org/en/OurWork/Safety/Pages/AIS.aspx> accessed on 03 May 2021. *See further* Guilfoyle 'Article 110' (n 142) 770; Papastavridis (n 98) 55.
[157] Kraska (n 143) 19.
[158] LOSC (n 5) Article 110(2).
[159] Allen 'Sea Officers' (n 71) who notes that uses of force are also common when a fleeing vessel is non-compliant and actively engages in acts that attempt to prevent boardings by the pursing authorities, 267.

3.2.2.2 The Right of Visit: Visit, Boarding, Search, Seizure, or Release

Boarding the suspect vessel is investigatory and more invasive than the right of approach.[160] This overall process, known as Visit, Boarding, Search, and Seizure [VBSS] is, according to Klein, 'viewed as permissible only by reference to specific instances under customary international law or treaty'.[161] For example, one such customary exception would be the right to visit, board, search, seize, and possibly arrest persons/vessels engaged in constructive presence, on the high seas, as discussed above.[162] Commentators such as Shearer also observe there is an expanded treaty right of visit to board, search, or possibly arrest in connection to certain prescribed offences in the EEZ, especially those related to protecting the marine environment from environmental damage, serious pollution, or fisheries management.[163] There are also expanded treaty rights concerning the right of visit and DTVs on the high seas, which is taken up specifically in Chapters 4 and 5.

The decision to move from the right of approach and verification of an unknown vessel's flag to the boarding of the vessel has additional practical, legal, and factual considerations. For example, the hailing warship will need to determine under what legal authority it will board, which of course is generally pursuant to the subject matter set out in Article 110 LOSC; piracy, slave transport, unauthorized broadcasting, a *vessel without nationality*, or is the same nationality as the warship. Legal authority may also exist pursuant to another agreement, such as the 1988 Vienna Convention, a bilateral interdiction agreement as discussed in Chapter 5, or possibly under the boarding state's domestic law. This legal authority, is generally seen as the basis for and beginning of the exercise of jurisdiction over the suspicious vessel.[164] Should the hailing state warship determine the suspicious vessel is to be boarded, it may pursuant to Article 110(2) LOSC, 'send a boat under the command of an officer to the suspected ship' which may be boarded by military or law enforcement officers from the visiting warship.[165]

Once on board, an investigation commences by examining the vessel's documents and verifying its claimed flag [nationality].[166] If further suspicion remains, 'after the documents have been

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[160] *LOSC 1982 Commentary, Myron H. Nordquist and others (eds)* (Martinus Nijhoff Publishers 1995) Vol III, 244.
[161] Klein (n 12) 114. See Reuland (n 93) who also notes that, '[u]nder 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 non-interference' at 1170. See also James T. Conway, Gary Roughead, and Thad. W. Allen, 'Naval Operations Concept, 'Implementing the Maritime Strategy,' 2010 Report at 43.
[162] Andrew W. Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law,' [1982] 13 J. Mar. L. & Com. 323, 341-342.
[163] Shearer (n 21) 333-341.
[164] Allen 'Sea Officers' (n 71) 253.
[165] LOSC (n 5) Article 110(2).
[166] Reuland 'Interference' (n 93) 1171.

checked, [the boarding party] may proceed to a further examination on board the ship (...)'.[167] Such an examination may be done to locate other nationality or registration identifiers such as a main beam number, which is one possible way to verify a vessels registration, or additional documentation.[168] The examination and search of the vessel should not run counter to the purpose of conducting the initial boarding.[169] In other words, under the LOSC, the search of the vessel should not be for other reasons beyond verifying nationality or investigating the vessel for its use in piracy, slave transport, or unauthorized broadcasting.[170] If the search finds evidence the vessel is engaging in such conduct, then the relevant articles in the LOSC [Article 99: Transport of Slaves, Article 105: Piracy, or Article 109: Unauthorized Broadcasting] will determine what measures the visiting warship may take.[171] Should the suspicions of the investigating warship's boarding party prove unwarranted, the detained vessel must be released, and any damage caused by the investigation or search must be compensated by the boarding warship's state.[172] The question is; however, what actions may be taken if the boarding party from the visiting warship discovers evidence of criminal acts not explicitly provided for in Article 110 LOSC.

As discussed above, Article 110 LOSC sets out three circumstances where a non-flag state might potentially exercise enforcement jurisdiction under subsections 1(a)-(c). These are the acts of piracy, slave trading, and unauthorized broadcasting. In situations of piracy and unauthorized broadcasting, the interdicting warship may seize a vessel and arrest its crew. These acts each have specific provisions in the LOSC [Article 105: Piracy and Article 109: Unauthorized Broadcasting] permitting this exercise of jurisdiction whereby the non-flag state may seize the vessel and bring the offenders before its national court for criminal prosecution.[173] In cases of

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167 LOSC (n 5) Article 110(2).
168 The main beam number of a vessel is a unique identifying number that remains unchanged no matter the vessel registry or change in ownership. It is often etched or stamped along a ships main beam.
169 Nordquist (n 159) 245.
170 LOSC (n 5) Article 110(1) (a-d).
171 ibid Article 99 LOSC states: Every State shall take 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. Article 105 LOSC states: On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft 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, aircraft or property, subject to the rights of third parties acting in good faith. Article 109 (3) and (4) LOSC states: (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 transmissions 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.
172 Klein (n 12) 116.
173 LOSC (n 5) Article 105 – Seizure of a Pirate Ship or Aircraft and Article 109 – Unauthorized Radio Broadcasting.

slave transport, the seizure of those vessels and individuals engaged in the criminal conduct remains exclusive to the flag state [Article 99].[174] In situations where the suspicious vessel is the same nationality as the warship, then any criminal conduct taking place on board may be prosecuted under the domestic laws of that state. However, should the suspicious vessel prove to be one that is *without nationality,* or one engaged in criminal conduct not specified in Article 110 LOSC, a question concerning jurisdiction over that vessel arises.

According to Article 110 (1)(d), which concerns *vessels without nationality*, the only action permitted in the article is that the suspicious vessel may be visited if said vessel is suspected of being without nationality in order to confirm it is with or *without nationality*.[175] In other words, Article 110 LOSC does not contain any text which would permit a boarding state's warship to exercise any jurisdiction against criminal acts taking place on board a *vessel without nationality*. The article also does not address criminal acts which are not specifically included in the LOSC, such as the smuggling of migrants or drug trafficking. Indeed, the fact that Article 110 LOSC contains a very limited substantive list is a gap in the law which, as will be seen, is especially evident with respect to drug trafficking on the high seas by both flagged and *vessels without nationality*. It should be further noted here that a right of visit is not the only possible means for enforcement against vessels on the high seas. The *right of hot pursuit*, which was previously discussed above within the context of the *doctrine of constructive presence*, also allows for a very limited exercise of enforcement jurisdiction against a flagged vessel on the high seas.

3.2.3 The Right of Hot Pursuit

The *right of hot pursuit* is an interdiction of a delinquent vessel on the high seas which is pursued by a coastal state for violations of the costal state's domestic law inside its territorial sea, contiguous zone, or EEZ.[176] The right of hot pursuit is relevant to certain types of DTV interdictions, namely those engaged in constructive presence as well as GFVs that are traversing the coastline of coastal states and then attempt to escape to the high seas.[177]

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[174] ibid Article 99 - Prohibition of the transport of slaves.
[175] ibid Article 110(d) and (2). *See also* Guilfoyle, 'Shipping Interdiction' (n 25) 24.
[176] LOSC (n 5) Article 111 – Right of Hot Pursuit. The article stipulates the 'competent authorities of the coastal State'. Reuland (n 94) 557.
[177] For example, see The Guardian, 'Spanish police plucked from ocean by drugs smugglers they were chasing,' Agence France-Presse, 5 October 2019, <https://www.theguardian.com/world/2019/oct/05/spanish-police-plucked-from-ocean-by-drugs-smugglers-they-were-chasing>, accessed on 5 October 2019. See Rosaleen Fenton and Rita Sobot, 'Stunned sunbathers watch as suspected speedboat smugglers crash onto beach in police chase,' The Mirror, 10 June 2020, <https://www.mirror.co.uk/travel/news/stunned-sunbathers-watch-suspected-speedboat-22170375> accessed on 10 June 2020; BBC News, 'High speed chase nets $37 million Cocaine Haul,' 28 Jan 2014, <https://www.bbc.co.uk/news/av/world-us-canada-25934570> accessed on 10 June 2020; VOA News, 'Boat Chase Ends with Seizure of more than $2 Million of the Coast of Puerto Rico,' 16 June 2020,

The *right of hot pursuit* is customary international law and codified in Article 111 LOSC.[178] The *right of hot pursuit* may be undertaken when:

> [t]he competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone.[179]

According to ITLOS in the *M/V Saiga (no. 2)* case, 'the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention'.[180]

The *Right of Hot Pursuit* is vital to prevent the use of the high seas as a haven for criminal conduct.[181] The result of hot pursuit includes the detention of the fleeing vessel(s), ship-boarding by the coastal state's enforcement officers, and the possible search, arrest, and prosecution of the offenders.[182] Article 111 also does not specifically limit the subject matter for which a state may pursue. Theoretically, any violation of the coastal state's law could justify hot pursuit.[183] However, hot pursuit is generally only undertaken for the more serious violations of the coastal state's domestic law so 'the impingement on exclusive flag state authority is contained'.[184] Most cases of hot pursuit involve illegal fishing, severe pollution, or violent crimes [e.g., murder, weapons crimes, or human trafficking].[185] Criminal attempt or conspiring to commit a crime also justify the *right of hot pursuit*.[186]

When coastal states engage in hot pursuit, there are a number of practical/operational issues which can develop as well as matters related to international cooperation with regard to a pursuit.[187] However, as Chapter 5 will discuss, many bilateral interdiction agreements create the

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<https://www.voanews.com/usa/boat-chase-ends-seizure-more-2-million-coast-puerto-rico> accessed on 16 June 2020.

[178] The *doctrine of constructive presence* also forms part of the right of hot pursuit. The doctrine of constructive presence was examined above concerning the exercise of coastal state enforcement jurisdiction in the contiguous zone. See also Tanaka (n 2) 163.

[179] LOSC (n 5) Article 111 – Hot Pursuit.

[180] *M/V/ Saiga (no. 2)* (n 65) 59.

[181] Reuland (n 93) 557-589, 559.

[182] Klein (n 12) 109-114. *See Also* Allen 'Sea Officers' (n 71) 267.

[183] D. P. O'Connell (n 100) 1079-1080.

[184] Klein (n 12) 114.

[185] Allen 'Hot Pursuit' (n 43) 315-16.

[186] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn, Martinus Nijhoff Publishers 2002) 155-6.

[187] For example, in the *M/V Saiga (no. 2)* case, it was argued that 'Guinea used excessive and unreasonable force in stopping and arresting the Saiga'.[187] The use of force in this case was excessive because the Guinean officers:

possibility that the pursuit may be commenced by one state and 'handed over' to another state for continuance.[188] Additionally, the *right of hot pursuit* does not address a coastal state requesting assistance from other states' warships or aircraft in stopping a fleeing vessel, in other words 'multilateral hot pursuit'.[189]

A multilateral hot pursuit is one where more than one State may be engaging in the hot pursuit of a delinquent vessel. Such pursuits can take place when a state makes a request for assistance from another state, or more than one state has an interest in pursuing a vessel onto the high seas. These multilateral hot pursuits can also be undertaken at the request of states who may lack the capacity to engage in a protracted or difficult pursuit on the high seas. For example, in Australia's hot pursuit of the *Viarsa 1* and *South Tome*,[190] the pursuit vessel lacked any armaments and 'the (…) only option is therefore to order the [pursued] vessel to proceed to port for inspection'.[191] Klein also points out that 'the existence of an RFMO may also give rise to occasions where a pursuit may be continued by another vessel (…) particularly if the [original] (…) pursuing vessel lacks the capability to bring the pursuit to an end'.[192]

Additionally, in situations such as this, the pursuing state could request assistance from another more capable state, and such practice is often seen in bilateral maritime interdiction agreements, which are discussed further in Chapter 5, and has been seen in bilateral fishing enforcement agreements between France and Australia.[193] It is also necessary to mention here that there are cases of 'reverse' hot pursuit or 'cold pursuit' which are not considered within the scope of the *right of hot pursuit*. These are cases where the suspect vessel is seen on the high seas and then turns

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'[h]aving boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board (…) [a]nd, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board'. *See also* Allen 'Sea Officers' (n 71) 267-269.

188 Erik Jaap Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi '[2004] 19 Int'l J Marine & Coastal L 19, 31. Molenaar notes that, '[t]he LOS Convention does not use the concept and also does not otherwise refer explicitly to the involvement of vessels or aircraft with nationalities other than that of the coastal State. In fact, when referring to "a ship or another aircraft" taking over from the aircraft that commenced hot pursuit, paragraph (6)(b) explicitly adds the words "of the coastal State". See also Klein (n 22) 112.

189 ibid Molenaar at 31.

190 Australian Antarctic Program 'Poachers Pursued over 7000km' [2004] 6 Australian Antarctic Magazine, <https://www.antarctica.gov.au/magazine/issue-6-autumn-2004/feature/poachers-pursued-over-7-000-kilometers/> accessed on 16 June 2020.

191 Molenaar (n 187) 35.

192 Klein (n 12) 112.

193 The 2007 agreement is the Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands. See Klein (n 12) 112. See also Warwick Gullett and Clive Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22 Int'l J Marine & Coastal L 545, 561-562.

back inward and attempts to escape toward land. This tactic is very common in cases of piracy and drug trafficking, especially in cases where the escaping vessel may enter a coastal state's internal waters.[194] Chapter 5 will also consider this further as such pursuits are addressed in other agreements at a regional level, such as the 2003 Caribbean Region Maritime Agreement [CRMA] or at the bilateral level such as the U.S. 'six part' agreements.[195]

3.3 Drug Trafficking on the High Seas

The following section explores how the LOSC addresses the interdiction of DTVs on the high seas. As considered, drug trafficking on the high seas is both noticeably absent from the list acts which may trigger a *right of visit* from a non-flag state warship. The LOSC only has one substantive article concerning drug trafficking on the high seas, Article 108, which states that:

> 1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
>
> 2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.[196]

Article 108 imposes two legal requirements.[197] The first is an obligation to engage in international *cooperation* in the suppression of illicit drug trafficking contrary to international conventions.[198] The second legal requirement is that no interdiction of another State's flagged vessel may take place, even where there is a suspicion the vessel may be a DTV, without the flag state first requesting 'cooperation of other states' to suppress the DTV.[199] Overall, the approach taken in Article 108 LOSC for the interdiction of DTVs on the high seas raises many questions concerning its utility in providing states with jurisdiction over DTVs on the high seas.

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[194] See generally the case of *U.S. v Bellaizac-Hurtado*, 700 F.3d, Nos. 11–14049, 11–14227, 11–14310, 11–14311. Decided: November 06, 2012. See UNSC Resolution 1846 (2008) UN Doc S/RES/1846 (2008) for issues in piracy. The security council addressed the this in the resolution, which provided advanced authorisation based on the consent of the Somali Transitional Federal Government for non-flag states to '[e]nter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law'. The resolution itself is exceptional and specifically limited in that: '[t]he authorisations provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law'. See also Aaron Casavant, 'In Defense of the U.S. Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach,' [2017] 8 Harvard National Security Journal, 114, 119.

[195] These agreements are explored in Chapter 5.

[196] LOSC (n 5) Article 108 - Illicit traffic in Narcotic Drugs or Psychotropic Substances.

[197] Article 108 and its obligations, per Article 58(2) also applies in the EEZ.

[198] Douglas Guilfoyle, 'Article 108' in in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of The Sea (UNCLOS): A Commentary* (Verlag CH Beck oHG) 760.

[199] Nordquist (n 162) 225.

There is consensus among commentators including Guilfoyle, Gilmore, and the Nordquist Commentary to the LOSC, that Article 108 is significantly lacking.[200] The article is lacking because Article 108 does not contain any type of language like the articles in the LOSC addressing piracy, slave transport, or unauthorized broadcasting.[201] Comparatively, for example, Article 109(3) and (4), which addresses unauthorized broadcasting, states that:

> [a]ny 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 transmissions 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.[202]

Furthermore, as stated, drug trafficking is not one of the conditions which may trigger a right of visit ship boarding under Article 110 LOSC. Thus, as summarized by Papastavridis, '[A]rticle 108 falls short of providing any enforcement mechanism to compliment the obligation to cooperate in paragraph 1 [and] in conjunction with the absence of any explicit reference to drug trafficking in article 110 entails in principle that the LOSC and the respective customary international law fail to furnish any basis for boarding drug smuggling vessels on the high seas'.[203] In other words, as Guilfoyle concludes, Article 108(2) is 'manifestly defective as a general instrument of international counter narcotics cooperation'.[204]

Kraska, however, notes that although Article 108 'does not provide any enforcement mechanism, [it] sets out a basic obligation to cooperate against trafficking that is "contrary to international conventions" (…) [t]hus, UNCLOS, as an umbrella agreement, draws additional multilateral treaties into the law of the sea framework, and nowhere is this better illustrated than in the area of counter-drug cooperation'.[205] How this is achieved through the 1988 Vienna Convention is addressed in Chapter 4 and how it has been subsequently modified further through regional and bilateral agreements is discussed in Chapter 5.

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[200] William C. Gilmore, *Combating international drugs trafficking: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances / explanatory documentation prepared for Commonwealth jurisdictions*, (London, Commonwealth Secretariat, 1991) 30-32; Guilfoyle 'Article 108' 761-762; Nordquist (n 159) 228. See Klein (n 12) 130-131; Papastavridis (n 99) 207-209.
[201] Klein (n 12) 131.
[202] LOSC (n 5) Article 109. Noting that Article 109(1) contains the same obligation to cooperate in the suppression of unauthorized broadcasting on the high seas.
[203] Papastavridis (n 98) 207.
[204] Guilfoyle 'Article 108' (n 198) 762.
[205] Kraska (n 143) 523.

3.3.1. The Obligation to Cooperate in Article 108(1)

Article 108 places heavy emphasis on "cooperation" as the obligation appears both in Article 108(1) and subsection (2). Still, even though Article 108(1) creates this obligation, it does little to say how states are to cooperate in this endeavour or what it entails.[206] Thus, a discussion is warranted as each of the subsections entail an entirely different obligation to cooperate. Indeed, the obligation to cooperate in the text of Article 108(1) is in the 'suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions'. Some commentators such as Rothwell and Stephens have reasoned that the purpose of Article 108 is to 'complement existing international law dealing with drug trafficking as in the 1961 Single Convention and the 1971 Convention on Psychotropic Substances'.[207] However, as will be examined, the primary aim of those two conventions is not the suppression of drug trafficking in the same way the 1988 Vienna Convention now does.[208]

In Chapter 1, the general obligation to cooperate in international law was laid out, which includes the obligation for States to cooperate in addressing 'social and health related problems' as per Article 56 of the U.N. Charter. One way this has been addressed with respect to international drug trafficking is under the umbrella of ECOSOC, and specifically through the 1961 Single Convention as amended by the Protocol of 1972, and the 1971 Convention on Psychotropic Substances. These conventions were the only two multilateral conventions in force at the time of the LOSC's drafting; however, neither convention addresses drug trafficking at sea generally and they do not consider drug trafficking on a party's flagged ship either. The reason these conventions do not address drug trafficking at sea is because it was not an issue when those agreements were concluded.[209]

The 1961 Single Convention as amended is a consolidation of the pre-existing international drug control efforts and a way to control newly developed or identified narcotic drugs.[210] The 1971 Convention on psychotropic substances has a similar function as the 1961 Single Convention and its focus is on psychotropic substances.[211] Combined, these conventions aim, according to ECOSOC and the UNODC, is to:

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206 Guilfoyle 'Article 108' (n 198) 762.
207 Rothwell/Stephens (n 4) 165.
208 Single Convention on Narcotic Drugs, 1961 (Adopted 30 March 1961, Entry into Force 13 December 1964) UNTS vol. 520, p. 151.
209 1988 Commentary (n 20) 2.
210 *The Official U.N. Commentary to the 1961 Single Convention*, (New York, United Nations Publication 1973) Sales No. E.73XI.1. 74.
211 Consideration of the revised draft Protocol on Psychotropic Substances adopted by the Commission on Narcotic Drugs, in accordance with Economic and Social Council resolution 1474 (XLVIR) of 24 March 1970 (E/4785, chap. III) 6.

> codify internationally applicable control measures in order to ensure the availability of narcotic drugs and psychotropic substances for medical and scientific purposes, and to prevent their diversion into illicit channels. They also include general provisions on illicit drug trafficking and drug abuse.[212]

The general provisions on illicit drug trafficking, as per Article 36 of the 1961 Single Convention as amended are addressed under each party's domestic law and 'shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction'.[213] These conventions primary aim is creating the cooperative framework for an international regulatory system which is evidenced in the preamble to the 1961 Single Convention, and which [in part] states the desire of the parties to 'conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives'.[214] In turn, this regulatory framework creates the schedules of substances that are placed under control because new drugs can become problematic, subject to abuse, or not scientifically/medically necessary.[215]

Furthermore, some new drugs may be extremely addictive and/or have dangerous effects on consumers.[216] These *schedules* do not criminalize the substances under control. The drugs are *controlled* as to their cultivation, production, transport, trade, and possession.[217] In other words, 'contrary to international conventions' is in effect, the means for states to determine which drugs are presently under control and which schedule they are placed in. "Cooperation" in the suppression of illicit traffic is the same general obligation set out in each of the other three criminal acts addressed by the LOSC, which are piracy, unauthorized radio broadcasting, and slave transport, but with two important caveats.

The first caveat is that with the 1988 Vienna Convention entering into force, it is now recognised as an agreement falling under the scope of Article 108(1).[218] This means, as Chapter 4 and 5 will further discuss, that under the framework created in the 1988 Vienna Convention, states can enter into regional or bilateral agreements, which can, and have, greatly expanded and defined

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212 UNODC Legal Framework: Drug Trafficking, accessed on 16 January 2019, <https://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html>.

213 Single Convention (n 207) Article 36(3). Article 36 also notes that '[n]othing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party'. Article 22 of the 1971 Psychotropic Convention has identical language.

214 ibid Preamble 1961 Single Convention.

215 UNGA Resolution 211 (III). Official Records of the General Assembly, Third Session, Part I, Resolutions (A/810) 62.

216 ibid 62.

217 David Bewley-Taylor and Martin Jelsma, 'Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation,' [2011] Series on Legislative Reform of Drug Policies, Nr. 12, 11.

218 Norquist (n 160) 225. *See also* Guilfoyle 'Article 108' (n 198) 762.

the general obligation to cooperate in Article 108(1).[219] The second caveat is the limitation created by Article 108(2) which concerns cooperation and a request from a flag state to suppress its flagged vessel suspected of being a DTV on the high seas.[220]

3.3.2. The Obligation to Cooperate in Article 108(2)

Unlike the general obligation for all states to suppress piracy, unauthorized broadcasting, or the transport of slaves, Article 108(2) LOSC reflects the general principle that only the flag state may grant its authorisation to suppress a DTV on the high seas; however, this must be done through 'cooperation'.[221] The differential treatment of DTVs as compared to vessels engaged in piracy or unauthorized broadcasting is puzzling because it stands in stark contrast to the extensive provisions each was afforded in the LOSC; however, as will be discussed, the specific language used in Article 108(2) is very much deliberate and this can be traced to a 1972 meeting of the Seabed Authority and a proposal by Malta to address drug trafficking on the high seas.

In the 1972 Seabed Authority meeting for the Draft Treaty on Ocean Spaces, in a working paper submitted by Malta, a proposal was put forward for the adoption of draft Article 16, which stated that: '[e]very State has the obligation to adopt effective measures to prevent and punish the illicit transport of narcotic drugs in vessels authorized to fly its flag'.[222] The proposal was not ultimately advanced, however, some commentators such as Guilfoyle suggest this initial effort was a driving factor in how the question of addressing drug trafficking on the high seas was later considered at the LOSC drafting negotiations.[223]

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[219] Similar cooperative obligations already exist in other parts of the LOSC. For example, in Part XII, Article 197 encourages cooperation on a 'global or regional basis'. Article 243 encourages states to 'cooperate, through the conclusion of bilateral and multilateral agreements, to create favourable conditions for the conduct of marine scientific research in the marine environment (…)'.

[220] Supplemental interview data showed that the process of obtaining flag state consent to board a vessel is extremely difficult and time consuming. In many cases it was not possible to even obtain consent. The overall process of obtaining flag state consent combined with the problems of flags of convenience remains a critical hurdle to high seas interdictions. Interview Transcript T-001; Interview Transcript T-002; Interview Transcript T-005.

[221] LOSC (n 5) Article 99 LOSC states: Every State shall take 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. Article 105 LOSC states: On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft 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, aircraft or property, subject to the rights of third parties acting in good faith. Article 109 (3) and (4) LOSC states: (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 transmissions 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.

[222] A/AC. 138/53, Draft Article 16. 23 August 1971.

[223] Guilfoyle 'Article 108' (n 198) 762.

When the topic of drug trafficking was revived at the LOSC drafting, an initial working paper was put forward from a group of states which would have added a third subsection to what would become Article 108 in the LOSC. The third subsection was to include the following text:

> [a]ny State which has reasonable grounds for believing that a vessel is engaged in illicit traffic in narcotic drugs may, whatever the nationality of the vessel but provided that its tonnage is less than 500 tons, seize the illicit cargo. The State which carried out this seizure shall inform the State of nationality of the vessel in order that the latter State may institute proceedings against those responsible for the illicit traffic.[224]

However, the proposed draft created some dissent among the working group. The primary problem, according to Oxman, concerned creating any exception to exclusive flag state jurisdiction over DTVs on the high seas.[225] In other words, as Guilfoyle has reasoned, the consensus at the time was that this exception for vessels less than 500 tons, would likely foster an environment in which non-flag states might abuse the right to detain any vessels for supposed drug-related conduct.[226] Even if non-flag states were conducting interdictions based on good faith, it might still lead to overuse.[227]

There was also a parallel attempt to include adding similar text concerning a *right of visit* for DTVs on the high seas directly in to what would become Article 108.[228] Again, this failed and further attempts to differentiate any type of enforcement jurisdiction whereby a non-flag state could interfere with a suspected flagged DTV absent a specific request from the flag state, were not included in the final draft.[229] The specific wording in Article 108(2) is reflective of this concern where there could be undue interference or seizure of large commercial vessels based on suspicions for minor drug offences. Thus, only the flag state can request assistance from other

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[224] A/Conf.62/C.2/L.54. Belgium, Denmark, France, Germany (Federal Republic of), Ireland, Italy, Luxembourg, Netherlands and United Kingdom of Great Britain and Northern Ireland: working paper on the high seas, 12 August 1974.

[225] Bernard H. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea,' [1984] 24 Va. J. Int'l L. 809, 829.

[226] Guilfoyle 'Article 108' (n 198) 762. See Nordquest (n 159) 227-228.

[227] Guilfoyle 'Article 108' (n 198) 761. See also Oxman (n 223) 829.

[228] In the early drafting phases of the LOSC, several draft proposals were put forward which sought to include *inter alia* a right of visit. One such draft stated, '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: (c) that ship is engaged in the illicit traffic of narcotic drugs or psychotropic substances. (6) When the arrest takes place in the Exclusive Economic Zone of a State, that state shall be immediately notified of such action'. C.2/Informal Meeting/9, 27 April 1978, Informal Suggestion by Peru, Article 108, in, Renate Platzöder, *Third United Nations Conference on The Law of the Sea* (Oceana Publications 1982) Vol V, 17. See also Guilfoyle, 'Article 108' (n 197) 762; Nordquist (n 159) 243-244.

[229] C.2/Informal Working Paper No. 7, Provision XXXIV; No 7/Rev.1, Provision XXXIX and No.7/Rev2, Reproduced in in Renate Platzöder, *Third United Nations Conference on The Law of the Sea* (Oceana Publications 1982) Vol III, 413. See Also C.2/Informal Meeting/9, 27 April 1978, Informal Suggestion by Peru, Article 108, in Renate Platzöder, *Third United Nations Conference on The Law of The Sea* (Oceana Publications 1982) Vol V, 17 and C.2/Informal Meeting/64, 5 August 1980, Informal Suggestion by Peru, Article 108, in Renate Platzöder, *Third United Nations Conference on The Law of The Sea* (Oceana Publications 1982) Vol V, 67-68.

states through cooperative measures. However, the text in Article 108(2) leaves two important practical questions unresolved, which are, what can these cooperative measures include and what happens in situations where a non-flag state suspects a flagged vessel is a DTV and is not 'requested' to suppress it by the flag state?

As to the first question, Article 108(2) does not provide any detail about what requesting 'the cooperation of other states to suppress' implies or allows. Klein, for example, notes 'all that is anticipated is that the flag state may request the assistance of other states, rather than another state initiating action or undertaking more precise measures against foreign-flagged vessels involved in drug trafficking on the high seas'.[230] Seemingly, this is up to the requested state to determine, should it agree to assist the flag state; however, Article 108(2) LOSC does not make this explicit. Furthermore, the flag state would still be permitted to attach any conditions or limitations in its request for assistance based solely on its exclusive jurisdiction. However, as Chapter 4 will discuss in the context of a similar request pursuant to the 1988 Vienna Convention, flag states should generally avoid attaching any conditions which are overburdensome or too limiting as this may deter States from initiating or assisting in the request.[231]

With respect to the second question above, there is a practical matter which Article 108(2) does not address, and this is what rights [if any] non-flag states have when encountering a flagged DTVs on the high seas without a request for assistance.[232] In other words, a random encounter. These scenarios are much more common than a flag state requesting a third-party state's assistance, although this does still might happen.[233] Presumably, the non-flag state could then make a request to the flag state, providing it with details of the situation, and requesting its authorisation; however, Article 108(2) also does not make this explicit. Of course, there is no obligation on the flag state to respond to such a request and it also raises concerns about the method used to request authorisation [e.g., official radio channel, diplomatic channels, or other means], a timely response, the authority providing authorisation, use of force, and the setting of conditions for the interdiction. Chapters 4 and 5 take up this situation in further detail in their discourses on boarding authorisations.

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[230] Klein (n 12) 131.
[231] 1988 Vienna Convention (n 109) Article 17(6).
[232] Klein (n 12) 131.
[233] William C. Gilmore 'Drug trafficking by sea: The 1988 United Nations convention against illicit traffic in narcotic drugs and psychotropic substances,' [1991] 15 Marine Police 3, 183, 185.

Nevertheless, this does not mean it is not permissible, as it is clear in Article 92(1) LOSC that the flag state has exclusive jurisdiction over its vessels and may waive said jurisdiction in favour of another state. Likewise, Article 110 also accounts for the use of a treaty to confer additional rights to non-flag states in conducting right of visit boardings and investigations. However, as Article 108(2) does not account for such a scenario as a non-flag state request for authorisation, this failure to address this situation in Article 108(2) is serious gap in the LOSC. From a practical perspective, this gap is well documented in a contentious decision by the European Court of Human Rights [ECtHR] and the case has impacted interdiction practice.[234]

The *Case of Medvedyev and Others v. France*, considered if a non-flag state could request consent from the flag state to interdict a DTV. The case involved the interdiction of the Cambodian vessel *Winner* by French authorities in 2002. The vessel was known to 'American, Spanish and Greek anti-drug services' as a likely DTV.[235] The French authorities contacted Cambodian authorities via diplomatic note requesting authorisation to interdict the *Winner*.[236] Authorisation was granted to the French navy.[237] The interdiction was resisted and an exchange of gunfire commenced between the crew of the *Winner* and the French boarding party; however, it was eventually boarded and the crew of the *Winner* were arrested and transported to France for prosecution.[238]

Ultimately, a question was raised concerning the arrest of the crew under Article 5(1) ECHR within the context of Article 92 LOSC and Article 108 LOSC [i.e., the flag states exclusive jurisdiction and the request by France to the flag state to interdict a DTV on the high seas]. The first factor the ECtHR considered was that:

> in cases concerning drug trafficking on the high seas public international law upholds the principle that the flag State – in this case Cambodia – has jurisdiction.[239]

The court went on to observe in this case that:

> Article 108(2) specifically authorises a State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in drugs to request the cooperation of other States. It does not provide in general for States to request cooperation whenever they suspect a ship not flying their flag of such trafficking.[240]

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[234] Interview Transcript T-001 at 3; Interview Transcript T-002 at 10; Interview Transcript T-004 at 2-3.
[235] *Case of Medvedyev and Others v. France* (Application no. 3394/03) Judgment Strasbourg 29 March 2010, 3.
[236] ibid 3.
[237] ibid 3. Citing the diplomatic note of 7 June 2002, 'The Ministry of Foreign Affairs and International Cooperation presents its compliments to the French embassy in Phnom Penh and, referring to its note no. 507/2002 dated 7 June 2002, has the honour formally to confirm that the royal government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship Winner, flying the Cambodian flag XUDJ3, belonging to 'Sherlock Marine' in the Marshall Islands'.
[238] *Medvedyev and Others v. France* (n 235) 4.
[239] ibid 27.
[240] ibid 28.

The ECtHR concluded that:

> [t]his lacuna in Article 108 of the Montego Bay Convention vis-à-vis the fight against illicit trafficking in drugs is also reflected in the rest of the text: not only are the provisions concerning the fight against drug trafficking minimal (…) but fighting drug trafficking is not among the offences, listed in Article 110, suspicion of which gives rise to the right to board and inspect foreign vessels.[241]

In other words, according to the ECtHR's interpretation of Article 108(2), this means the article does not contemplate non-flag states making requests to flag states, and despite Article 92 explicitly allowing the flag state to waive its jurisdiction by agreement, the actions by France, as those in the interdiction of the *Winner*, were not consistent with the either the LOSC or Article 5(1) ECHR.[242] The court's opinion raises many practical and legal questions, especially since the court only partially considered that the diplomatic note whereby the flag state [Cambodia] provided its authorisation for the interdiction, is indeed a form of ad hoc agreement. Although the ECtHR found the note is an ad hoc agreement for the purposes of boarding the vessel and seizing the drugs; the note did not provide France with personal jurisdiction over the drug traffickers.[243] In other words, the note permitted the vessel be interdicted, boarded, searched, and the drugs and ship seized, the crew could not.[244]

The decision by the ECtHR is not without some scholarly and practical criticism, especially in the way the court approached the question of jurisdiction over a flagged DTV on the high seas.[245] Guilfoyle, for example, has noted that '[a]ll State practice in (…) counter-drug operations is to the contrary: where a flag State waives its exclusive jurisdiction, the interdicting State is competent to apply its laws to the foreign vessel'.[246] Guilfoyle also notes that:

> even if the diplomatic note had dealt with the crew expressly, it would not have met the "foreseeability" requirement that the suspects be given notice that they might be subjected to French law. In fact, the Grand Chamber effectively held that in such cases only a bilateral or multilateral treaty could ever suffice to give adequate notice and prevent the application of foreign law being arbitrary.[247]

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[241] ibid 28.
[242] ibid 28.
[243] ibid 28.
[244] ibid 96. See Douglas Guilfoyle, 'European Court of Human Rights,' [2010] 25 Int'l J. Marine & Coastal L. 437, 440; Efthymios Papastavridis, 'European Court of Human Rights Medvedyev et al v France (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010', [2010] 59 Int'l & Comp. L.Q. 867, 874-875.
[245] Interview Transcript T-002 at 10-11. Interview Transcript T-005 at 2-3. The conclusions here were that the case of *Medvedyev* has impacted how states conduct and continue to conduct their interdictions. The fact that a flag state could provide an authorisation but still be found to lack personal jurisdiction over drug traffickers on board a vessel is something that is considered by states, even outside of a European context. There is agreement by the interviewees that discussed this case that the reasoning by the ECtHR likely did not fully understand the practical nature of a high seas interdiction.
[246] Guilfoyle 'European Court of Human Rights' (n 244) 440.
[247] ibid 440. The matter of 'foreseeability' as an element of due process and DTV interdictions is further addressed in Chapter 6, as this has been a frequent element of appellate arguments before US Courts.

As Papastavridis further explains 'by virtue of articles 92 and 110(1) of LOSC, such interference with the freedom of the high seas in cases of drug smuggling may be authorised pursuant to a treaty'.[248] Papastavridis further critiques the ECtHR's focus on the diplomatic note by concluding that:

> [t]he consent of the flag State, *in casu* Cambodia, conveyed by the diplomatic note, functions not only as a circumstance precluding the wrongfulness of the infringement of the freedom of the high seas, but also as a circumstance of precluding the wrongfulness of the exercise of enforcement jurisdiction on board the foreign vessel (…) thus (…) not only the right of visit but also the exercise of enforcement jurisdiction was afforded a legal basis under general international law.[249]

In other words, when the flag state grants its permission to conduct the interdiction, it is generally held that such permission includes the waiver of its jurisdiction over the persons on board the detained vessel, unless any specific conditions are provided by the flag state for the persons.[250] Yet, as noted above, states should avoid attaching too many limitations or conditions to the grant of authorisation, something it appears the ECtHR apparently did not consider when analysing the diplomatic note. Furthermore, despite the note failing to specify the crew as being subject to French enforcement jurisdiction the ECtHR clearly did not understand the real practical challenges and issues that arise during a high seas interdiction.[251] Thus, as Guilfoyle concludes, 'many ECtHR judges would apply the Strasbourg case law on point strictly, irrespective of the practical challenges that could present in many maritime law-enforcement operations'.[252]

Ultimately, the ECtHR's very literal reading of Article 108(2) seems to exclude the possibility of non-flag state making a request for authorisation, which clearly stands outside of established rules in the text of Article 92(1) and 110(1) LOSC that such actions are entirely permissive under both the LOSC and customary international law. Indeed, the use of ad hoc consent to interdict DTVs on the high seas is a very common and practical means of cooperation among states, especially in the 1988 Vienna Convention under Article 17.[253] Taking note of this, a seven-judge

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[248] Papastavridis 'Medvedyev et al v France' (n 244) 874.
[249] ibid 875.
[250] 1988 Vienna Convention (n 109) Article 17(6) which states that: '[t]he flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorisation to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility'.
[251] Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Birsan, Garlicki, Hajiyev, Sikuta and Nicolaou, *Medvedyev et al v France* (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010 p. 43 at 7 which states that: "[i]t can, of course, be argued that Cambodia's diplomatic note did not explicitly mention the fate of the ship's crew; this is pointed out in paragraph 99 of the judgment. It would not be logical, however, to interpret this note so narrowly as to exclude the possibility for the French authorities to take control of the ship and its crew were the inspection to reveal (as it did) the presence of a consignment of drugs. A less literal interpretation was not only confirmed by Cambodia in an explanatory note in 2008 – which there is no reason to believe was mendacious or spurious'.
[252] Guilfoyle 'European Court of Human Rights' (n 244) 442.
[253] Klein (n 12) 131, 136-137; Papastavridis (n 98) 61.

dissent instead looked to the practical nature of high seas DTV interdictions and international cooperation when they take place.

According to the seven-judge dissent, 'the dual framework of international cooperation' with respect to 'the fight against international drug trafficking,' had in fact, been demonstrated through the exchange of diplomatic notes in which the French government had made their request to the flag state [Cambodia].[254] In other words, this exchange of diplomatic notes between France and Cambodia formed what both the majority and the dissent agree is effectively an ad hoc bilateral agreement for the authorised interdiction of the *Winner*, and which is indicative of what international cooperation in the suppression of a DTV on this high seas entails.[255] Building on this, the dissent went on to discuss that with respect to defining what international cooperation entails, especially where a request is made to the flag state, not vis a versa as in Article 108(2) LOSC, that:

> all civilised nations clearly agree that drug trafficking is a scourge, that States must work together to combat it, and that offenders must be arrested and punished, at least where the applicable domestic law so provides, which is evidently the case here. Cambodia' s diplomatic note reflects this will to cooperate and to take legal action against a ship flying its flag but sailing a long way from its coastline.[256]

The dissent, however, went further to discuss not only the above with respect to international cooperation, but they also expounded on this through a discussion of practical matters taking place during a DTV interdiction on the high seas. For example, it was observed that:

> the ship was flying no flag; it suddenly changed course and began steering a course that was dangerous for the French vessel and armed forces; attempts to contact it by radio received no reply; a number of packages were thrown overboard, one of which was recovered and found to contain about 100 kilos of cocaine; and finally, the resistance put up by the crew obliged the French forces to use their weapons.[257]

Thus, '[w]hen there is sufficient concurring evidence to suspect that a ship on the high seas (…) is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an interpretation on the legal basis as one would inside the territory of the State concerned'.[258] The rationale and discussion of the seven-judge dissent in the *Medvedyev* case is telling of what lengths States go to cooperate within the limits of the DTV legal regime. Indeed, as Chapter 5 further considers, the use of bilateral and regional agreements

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[254] Dissenting Opinion (n 251) 42-43 at 6.
[255] ibid 44 at 9.
[256] ibid 43 at 8.
[257] ibid 43-44 at 9.
[258] ibid 44 at 10.

to expand jurisdiction over DTVs on the high seas as well as strengthen international cooperation is an ongoing endeavour, especially with respect to U.S. bilateral maritime security agreements.

The above argument has drawn out the lacunae in the LOSC regarding jurisdiction over a DTV on the high seas and provide some scope concerning the obligation to cooperate in Article 108 LOSC. The *Medvedyev* case is also demonstrative of a 'perfect storm' where all the gaps in the legal regime applicable to DTVs under the LOSC manifest in a single interdiction. Indeed, as data collected for this study shows, the case has had a lingering impact on interdiction practices both in a European context as well as those conducted by the U.S.[259] Still, there is one aspect of DTV interdictions noticeably absent from Article 108, *vessels without nationality*. As discussed, the only mention of action against a *vessel without nationality* that appears in the LOSC is in Article 110, which may trigger a right of visit against the vessel. Article 108 does not address them nor their use as a DTV, thus it is necessary explore this matter further with respect to jurisdiction over these vessels on the high seas.

3.4 Jurisdiction over Vessels without Nationality on the High Seas

Chapter 3 has primarily focused on the legal regime concerning the exclusive jurisdiction of the flag state and the limited number of exceptions to that principle, which are the crimes of piracy, unauthorized broadcasting, and the transport of slaves. However, as mentioned, there are circumstances when a vessel lacks a flag and this might mean the vessel is *without nationality*.[260] As Chapter 1 defined, a *vessel without nationality* is one where the conditions contained within Article 91 LOSC are not satisfied by the ship. The conditions include registration and the possession of documents which confirm the vessel's right to fly the flag it shows.[261] When a vessel fails to satisfy the requirements of Article 91 LOSC, it raises many questions concerning the use of that vessel on the high seas and ultimately who exercises jurisdiction over the vessel and those on board. The use of a vessel without nationality is a serious problem for matters of transnational crime, and according to several officials interviewed for this study, remain a critical threat to the safety of maritime navigation.[262]

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[259] Interview Transcripts (n 234).
[260] Although the thesis uses the term 'vessel without nationality' the term 'stateless vessel' will also be used in this section as some scholarship uses this term. Unless otherwise indicated, they are synonymous in this regard.
[261] LOSC (n 5) Article 91(2).
[262] Interview Transcript T-001 at 2; Interview Transcript T-002 at 5-7; Interview Transcript T-005 at 5.

According to Churchill and Lowe, 'ships without nationality are in a curious position' and they pose several legal and practical challenges to the order of the high seas.[263] Furthermore, as Murdoch observes, 'the use of ships without nationality for criminal conduct can significantly hamper the ability of law enforcement authorities to counter such activity [and] it seems likely that those engaged in illicit activity at sea are aware of this potential law enforcement gap and may seek to exploit it when undertaking activities such as drug trafficking'.[264]

The primary reason a *vessel without nationality* poses such a significant challenge to maritime security is the LOSC does not address any specific right for states to exercise jurisdiction over them on the high seas. In other words, simply being a *vessel without nationality* is 'as a matter of treaty law, unclear (…) and [n]o treaty fully addresses the issue of whether a ship may be subjected to the national law of the interdicting state simply by virtue of being' without nationality.[265] However, this does not mean that there is a general prohibition against states exercising jurisdiction over a *vessel without nationality* in international law. Indeed, the interdiction of *vessels without nationality* on the high seas is quite common.[266] Still, there are a number of questions regarding how jurisdiction over them is addressed in the existing legal regime. Therefore, two competing views on jurisdiction have arisen in this regard.

3.4.1 Jurisdiction over 'Vessels Without Nationality' on the high seas: A Narrow View

A 'narrow view' to jurisdiction over *vessels without nationality* on the high seas reasons States cannot take further enforcement action [against the vessel or crew] for conduct not specified the LOSC or other treaty. According to Klein, '[t]here must be a separate basis of authority to exercise this enforcement jurisdiction' since '[t]here is an important distinction drawn between the right of visit and the rights associated with the exercise of enforcement jurisdiction (such as detention and arrest)'.[267] Furthermore, there must be a linking factor [nexus] between such exercises of jurisdiction and the vessel. A nexus in this case might include the persons on board a *vessel without*

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263 Robin. R. Churchill and Alan V. Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 214.
264 Murdoch (n 106) 158.
265 ibid 166.
266 For example, see Richard Gray, 'The Hunt for the Pirates that Exploit the Sea,' BBC Future, 5 June 2020, <https://www.bbc.com/future/article/20190213-the-dramatic-hunt-for-the-fish-pirates-exploiting-our-seas> accessed on 10 August 2020; Press Release Combined Maritime Force, 'HMS Montrose Seizes Third Drugs Haul in Five Weeks' 22 March 2021, <https://combinedmaritimeforces.com/2021/03/22/hms-montrose-seizes-third-drugs-haul-in-five-weeks/> accessed on 22 March 2021; US Coast Guard, Southern Command, Press Gallery, Coast Guard Cutter Bertholf Interdicts LPV in Eastern Pacific Ocean, February 1, 2021, < https://www.southcom.mil/MEDIA/IMAGERY/igphoto/2002584306/> accessed on 3 May 2021.
267 Natalie Klein, 'Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants,' [2004] 15 MELB. J. INT'L L. 1, 9. See also Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law,' [2009] 36 Syracuse J. Int'l L. & Com. 145, 159, 161-162.

nationality being nationals of the boarding state, evidence suggesting any contraband on board is destined for the boarding state, evidence the criminal acts were intended to affect the boarding state, hot pursuit of the vessel, or the vessel is engaged in constructive presence. In other words, the status of the vessel as *without nationality* in of itself is not a sufficient nexus.[268]

A primary proponent of this view is Papastavridis, who argues that the 'stronger legal footing seems to be (…) in general (…) that the right to visit to [vessels without nationality] does not *ipso facto* entail the full extension of the jurisdictional powers of the boarding state'.[269] Papastavridis grounds this view in Article 110 LOSC since, 'nowhere does the Convention provide for any further assertion of jurisdiction with regard to, vessels without nationality'.[270] In circumstances where a vessel is *without nationality*, it may be escorted to port where further investigations may take place to inquire as to the status of the vessel and those on board, but this 'does not substitute for the full scope of the jurisdiction of the flag state,' and, 'in no circumstances would the vessel in question be equated to *res nullius* and thus be susceptible to appropriation or other enforcement measures'.[271] Guilfoyle, similarly concurring, has suggested that while the LOSC does 'not address the question of whether, if indeed, a 'stateless' vessel can be seized (…) treaty practice' would seem to indicate a further 'jurisdictional nexus or permissive rule is needed to justify a seizure'.[272] To support this view, Guilfoyle notes that even the 1988 Vienna Convention, while contemplating suppressing the use of *vessels without nationality* for drug trafficking on the high seas, the convention does not indicate there is 'a grant of corresponding permissive jurisdiction to proscribe and prosecute those on board'.[273] Guilfoyle concludes that although the 1988 Vienna Convention does not exclude a party exercising its criminal jurisdiction pursuant to its domestic law over such vessels, 'this could not allow the assertion of a jurisdiction prohibited at general international law'.[274] Other commentators have taken a similar, yet less ardent view of this question of jurisdiction vessels without nationality on the high seas.

Bennett notes that '[a]lthough Article 110 of UNCLOS grants warships a right of visit when they suspect that a ship is without nationality, the Convention specifically authorizes the boarding state only to verify the registration of the ships'.[275] Thus, Bennett reasons that '[n]ot only is operating a stateless vessel generally absent from lists of universal crimes, but even those who

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[268] Allyson Bennett, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act,' [2012] 37 Yale J. Int'l L. 440, 445.
[269] Papastavridis (n 98) 265.
[270] ibid 265.
[271] ibid 266.
[272] Guilfoyle 'Shipping Interdiction' (n 25) 17.
[273] ibid 17.
[274] ibid 17.
[275] Bennett (n 268) 449.

argue that all states can extend their criminal laws to stateless vessels usually do not claim that using an unregistered vessel is a universal crime'.[276] Barnes, however, considers that:

> UNCLOS does not detail how States are to treat stateless vessels. Article 110 is silent on the consequence of statelessness. Certainly, warships may take further action where the flag is found to be the same as the warships, or the vessel is engaged in one of the [acts in Article 110]. However, contrary to the views of some commentators, the rule is not a permissive one that allows all States to exercise jurisdiction over such vessels.[277]

Barnes, bases this view on what Churchill and Lowe have put forward regarding their position on jurisdiction over *vessels without nationality* on the high seas.[278] According to Churchill and Lowe, when a vessel is *without nationality*, it:

> will not, of itself entitle each and every state to assert jurisdiction over them, for there is not in every case any recognised basis upon which jurisdiction could be asserted over stateless ships on the high seas (…) [t]he better view appears to be that there is a need for some jurisdictional nexus in order that a state may extend its laws to those on board a stateless ship and enforce the laws against them.[279]

Thus, Barnes agrees that '[a]part from diplomatic protection, any other jurisdictional nexus should be one that is provided for under international law, such as jurisdiction according to the objective territorial principle,' that requires the forum state to evidence an effect inside its territory.[280] In support of this, Barnes considers the differential practice of the U.S., concluding that:

> it should be noted that much U.S. jurisprudence is concerned with the suppression of drug trafficking (…) [d]espite some academic support for the treatment of stateless vessels as subject to any jurisdiction as 'international pariahs', there is in fact little non-U.S. jurisprudence or general State practice on the matter. Indeed, the fact that right of visit and matters of enforcement are treated separately in the UNCLOS suggests that a positive right of visit does not imply wider enforcement powers.[281]

In practice, the 'narrow view' is often seen in non-U.S. interdictions. For example, the CMF interdictions in the Arabian Sea usually involve only the seizure of drugs, not the DTV or prosecution of the crew.[282] The primary reason this practice appears to have been adopted

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[276] ibid 450.
[277] Richard Barnes, 'The International Law of the Sea and Migration Control' in *Extraterritorial Immigration Control: Legal Challenges*, edited by Bernard Ryan, and Valsamis Mitsilegas, BRILL, 2010. *ProQuest Ebook Central*, 131.
[278] Bennett (n 264) 453; Guilfoyle 'Shipping Interdiction' (n 25) 17; Barnes (273) 131.
[279] Churchill/Lowe (n 263) 214.
[280] Barnes (n 277) 132. See Chapter 2 on the objective territorial principle.
[281] ibid 132-133.
[282] Press Release Combined Maritime Force, 'HMS Montrose Seizes Third Drugs Haul in Five Weeks' 22 March 2021, <https://combinedmaritimeforces.com/2021/03/22/hms-montrose-seizes-third-drugs-haul-in-five-weeks/> accessed on 22 March 2021. See also Lucia Bird, Julia Stanyard, Val Moonien and Riana Raymond Randrianariosa, 'Changing Tides: The Evolving Illicit Drug Trade in the Western Indian Ocean,' Global Initiative Against Transnational Organized Crime, June 2021, accessed on 30 July 2021, <https://globalinitiative.net/wp-content/uploads/2021/05/GITOC-Changing-Tides-The-evolving-illicit-drug-trade-in-the-western-Indian Ocean .pdf.> 48.

concerns the lack of a nexus between the States conducting interdictions to the drug traffickers in the region, complex interdiction mandates, and varying degrees of political will.[283] However, interdictions frequently take place when there is no nexus and a State does exercise jurisdiction over the DTV and the persons on board.

Indeed, as Churchill and Lowe, highlight 'some states, notably the U.S., have made a similar claim [regarding jurisdiction] in relation to drug trafficking, which is regarded as constituting a grave threat to targeted states of importation; and this reasonable claim would therefore include the assertion of jurisdiction over stateless ships on the high seas engaged in drug trafficking'.[284] They further accede that such claims to jurisdiction over ships on the high seas are being 'received by states with apparent equanimity and [a]rrests are taking place against a background of international cooperation'.[285] Murdoch, however, observes that '[a] key problem with the 'narrow' view is that it is based on an assumption that there needs to be a clear permissive statement that stateless ships may be interdicted and prescriptive and enforcement jurisdiction exercised (…)'.[286] Ultimately this raises further questions regarding if a contrasting argument can be made permitting States the right to exercise enforcement and prescriptive jurisdiction over DTVs and their crews on the high seas.

3.4.2 Jurisdiction over 'Vessels Without Nationality' on the high seas: A Broad View

The 'broad view' of jurisdiction to *vessels without nationality* on the high seas argues that 'international law forbids [these] vessels from the high seas and severs from them the bundle of rights and freedoms that ordinarily attach to ships sailing there'.[287] Oppenheim has said that 'a vessel not sailing under the flag of any State does not enjoy any protection whatever'.[288] In other words, according to Tanaka, '[a] ship without nationality is without protection under customary law'.[289] The rationale behind the 'broad view' centres on the high seas and their use by States, not individuals.

Thus, since States are the primary recipients of the high seas freedoms, vessels without 'nationality do not benefit from the rights or freedoms conferred by international law [and] [s]imilarly, individuals do not directly benefit from these freedoms'.[290] Reuland argues that the

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283 Bird (n 282) 48.
284 Churchill & Lowe (n 263) 214.
285 ibid 217.
286 ibid 172.
287 Murdoch (n 106) 168-171. *See also* Reuland (n 93) 1198.
288 Oppenheim (n 153) 598-96.
289 Tanaka (n 24) 162.
290 Murdoch (n 106) 173.

'[h]arsh treatment of stateless vessels is justified by the danger that stateless vessels pose to the international regime of the high seas'.[291] In other words, the 'broad view' is, according to Murdoch, based on a '[a] public order rationale [because it] seeks to address what would otherwise be an absence of flag state control over such vessels and, as a result, they would be operating beyond the control of any state on the high seas'.[292] However, according to several commentators, including, Guilfoyle, Barnes, Klein, and Papastavridis, the 'broad view' is the primary practice of the U.S.[293] Still, despite this observation, the 'broad view' is arguably firmly situated in both custom and treaty law.

According to the ILC in its Eighth Session, the use of the high seas is one that is part of the 'Rights of States'.[294] The rights States are entitled includes the general freedoms of the high seas, but specifically the freedom of navigation. Freedom of navigation is recognised as customary international law and set out in Article 87 LOSC.[295] However, in setting out the freedoms of the high seas, Article 87 specifies that while '[t]he high seas are open to all States' (…) '[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas (…)'.[296] Building on Article 87, Article 90 LOSC states that '[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas'.[297] These articles, combined with the regime of exclusive flag state jurisdiction as set out in Articles 91, 92, and 94 LOSC, make it clear that States are the beneficiaries of these protections which are extended to the vessel when it assumes the flag state's nationality.[298]

Furthermore, since only the flag state can exercise these rights, when a vessel is *without nationality*, Churchill and Lowe have reasoned that no state may later protest exercises of jurisdiction against that vessel.[299] Thus, as Shaw concludes, the absence of a flag is the absence of nationality and deprives the ship of the benefits and rights that are part of the high seas legal regime, which includes the general freedom of navigation.[300] Indeed, as the interdiction of the *Asya*, in the case

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[291] Reuland (n 93) 1198.
[292] Murdoch (n 106) 170.
[293] Guilfoyle 'Shipping Interdiction' (n 25) 17; Klein (n 12) 108; Barnes (n 277) 132-133; Papastavridis (n 98) 257-258; Kraska/Pedruzo (n 143) 606. Guilfoyle notes the U.K. has too taken this view occasionally. See Murdoch (n 106) 175-177.
[294] ILC 8th Session (n 50) 278.
[295] LOSC (n 5) Article 87: 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation (…). See Douglas Guilfoyle, 'Article 87' in in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of The Sea (UNCLOS): A Commentary* (Verlag CH Beck oHG) 678-680.
[296] LOSC (n 5) Article 87.
[297] ibid Article 90.
[298] Guilfoyle (n 105) 693; Barnes (n 87) 306-310.
[299] Churchill/Lowe (n 263) 214.
[300] Shaw (n 96) 443.

of *Molvan v. Attorney-General for Palestine* in 1948 shows, it is only the flag that provides any protection for a vessel under international law.

The case of *Molvan v. Attorney-General for Palestine,* is generally seen as laying the foundation for the 'broad view' to jurisdiction over *vessels without nationality*.[301] In *Molvan*, the U.K. Privy Council noted that '[i]n the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State'.[302] According to the Privy Council, the ship:

> [h]aving 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.[303]

The approach of the Privy Council to a *vessel without nationality* on the high seas has also been adopted by and directly influenced U.S. case law concerning DTV interdictions of *vessels without nationality* on the high seas.

In U.S. case law, specifically the Eleventh Circuit Court of Appeals case of *U.S. v. Marino Garcia* [1982], the *Molvan* decision factored heavily into the court's interpretation and application of existing rules of international law against *vessels without nationality*, noting that '[n]o question of comity nor any breach of international law can arise if there is no State under whose flag the vessel sails'.[304] Using this reasoning, the Eleventh Circuit concluded that:

> international law permits any nation to subject stateless vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation's affairs. (…) Jurisdiction exists solely as a consequence of the vessels status as stateless.[305]

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[301] Guilfoyle 'Article 110' (n 143) 742. See also Papastavridis (n 98) 265; Reuland (n 93) 1198; Anderson (n 162) 336. See further McDorman (n 128) 534; Rolf Einar Fife, 'Elements of Nordic Practice 2006: Norwegian Measures Taken against Stateless Vessel Conducting Unauthorized Fishing on the High Seas,' [2007] 76 Nordic J Int'l L 301, 302.

[302] *Niam Molvan v. Attorney General for Palestine* [1948] A.C. 351, 369-370.

[303] ibid 351.

[304] *U.S. v. Esteban Marino-Garcia et al*, Nos. 81-5551, 82-5284. 679 F.2d 1373 73 A.L.R.Fed. 144, 1985 A.M.C. 1815. July 9, 1982, at 13-14, citing 'in *Molvan v. Attorney-General for Palestine*, A.C. 351 (1948), the British seized a stateless vessel on the high seas. The appellants contended that Great Britain violated the internationally recognised right of "freedom of the seas" by asserting jurisdiction over a stateless vessel on the high seas. The English Court rejected the argument. The 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 (stateless vessel in this case) 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 (...) (court's emphasis added)'.

[305] ibid 12.

The overall analysis of the Eleventh Circuit must be considered in light of two questions posed to the court. The first question that court had to consider was the question of the nexus between the DTV and the U.S. The second question is whether the proscribed U.S. statute situates within the permitted exercises of jurisdiction in international law. According to the court this also means considering if 'international law imposes any substantive restrictions upon this country's right to extend jurisdiction to all stateless vessels on the high seas'.[306] In answering these questions, the court first considered the bases of jurisdiction in international law, approaching them as permissive rules allowing for the exercise of domestic jurisdiction over a *vessel without nationality* on the high seas.[307] The court found that the bases of jurisdiction; however, are instead restrictions only applicable to the exercise of jurisdiction against flagged vessels.[308] The rationale is based in part on the *Lotus Case*. According to the Eleventh Circuit [citing the *Lotus Case]*, only flagged vessels are entitled to the protection of the flag and only States 'have an equal and untrammelled right to navigate on the high seas'.[309] Thus, no nexus is needed between a state exercising its jurisdiction over a *vessel without nationality* because their 'status makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions'.[310] Ultimately, this raises further questions with respect to proscribed conduct on the high seas.

According to UNODC, there exists a general right of visit against a *vessel without nationality* pursuant to Article 110 LOSC. However, the article 'does not make comment regarding prescriptive jurisdiction. Thus, UNODC maintains that 'States must have enacted prior legislation that provides for the assertion of jurisdiction over' *vessels without nationality*.[311] Indeed, as noted in the *Lotus Case* and as Chapter 2 considered, the true issue is not the prescribing of domestic law to apply to extraterritorial conduct on the high seas, it is a question of extraterritorial enforcement against the proscribed conduct. Having said this, the *M/V Norstar* case before ITLOS provides some additional clarification in this regard and supports for the assertion of extraterritorial jurisdiction over *vessels without nationality*.

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306 ibid 8.

307 ibid 11. According to the court, '[j]urisdiction will lie where a nexus exists between a foreign vessel and the nation seeking to assert jurisdiction. Thus, under the objective principle, a vessel engaged in illegal activity intended to have an effect in a country is amenable to that country's jurisdiction.[13] Similarly, the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions. Jurisdiction may also be obtained under the passive personality principle over persons or vessels that injure the citizens of another country. Finally, all nations have jurisdiction to board and seize vessels engaged in universally prohibited activities such as the slave trade or piracy'. See Chapter 2 for the discussions on the bases of jurisdiction in international law.

308 ibid 10 and 12.

309 ibid 10 and 12.

310 ibid 17.

311 *Combating Transnational Organized Crime Committed at Sea*: Issue Paper, United Nations 2013, 34.

The *M/V Norstar Case* concerns the arrest of the *M/V Norstar* for 'supplying gasoil to mega yachts in the Mediterranean Sea (…) and [a]t the request of Italy, the vessel was seized by Spanish authorities when anchored in the bay of Palma de Mallorca, Spain'.[312] According to the majority opinion, freedom of navigation 'protects the free movement of vessels primarily from the exercise of enforcement jurisdiction by non-flag States on the high seas' and so protects against states extending 'their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas' by virtue of Article 87 LOSC.[313]

The seven-judge dissent, however, opined that a State may extend its prescriptive jurisdiction to the high seas, including its criminal law:

> to any activity and in particular an activity beyond its territory, that State must target the activity as a criminal one extending rules of criminal law to this activity and not just mentioning or describing it. The activity must be criminally prosecutable under the law of that State.[314]

To support this conclusion, the dissent cites Guilfoyle's commentary concerning Article 92 LOSC, noting that the '[e]xclusivity of jurisdiction (…) creates only a prohibition on exercising enforcement jurisdiction over foreign vessels on the high seas; multiple States may still attach legal consequences to acts committed on a vessel on the high seas as a matter of prescriptive jurisdiction'.[315] The dissent also reasoned that nothing in the LOSC, 'in its travaux préparatoires, in other international treaties, in customary international law, or in the practice of States suggests that Article 87 and its corollary Article 92 altogether excludes the right of non-flag States to exercise their prescriptive criminal jurisdiction' on the high seas.[316]

Indeed, states could extend their prescriptive jurisdiction over circumstances where 'the alleged crimes (…) originate in [the forum State's] territory, or if it was completed in its territory and, at least in some cases, when the alleged crime produces harmful effects in the State's territory [and said] activity must be criminally prosecutable under the law of that State'.[317] In other words, according to the dissent, the majority narrowed its focus to 'lawful' activities and the exercise of prescriptive/enforcement jurisdiction over such activities on the high seas correlating this to an infringement of freedom of navigation under Article 87 LSOC. The dissent focused instead on

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[312] ITLOS Press Release, 'The M/V Norstar Case, The Tribunal Delivers its Judgement,' ITLOS/Press 279, 10 April 2019.
[313] *M/V Norstar* (n 84) Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge ad hoc Treves, 4-5 at 15 & 17.
[314] ibid 18.
[315] *M/V Norstar* (n 84) at 19, citing Guilfoyle in United Nations Convention on the Law of the Sea. A Commentary, ed. by A. Proelss, 2017, 700-701. See further G. Gidel, Le droit international public de la mer: le temps de paix, vol. I (1932), p. 261; "Lotus", Judgment № 91927, P.C.I.J. Series A, No 10, p. 4.
[316] ibid p.5 at 19.
[317] ibid p. 8 at 31 and 5 at 18

the position that 'a non-flag State is not excluded from extending, in conformity with international law, its prescriptive jurisdiction to the unlawful activities of foreign vessels or of persons on the high seas'.[318] Ultimately, the dissent again relying on the *Lotus* case, concluded that:

> [A] State may exercise its prescriptive criminal jurisdiction with respect to conduct on the high seas where such conduct is integral to an alleged crime committed in the State's territory, not when it is justified or allowed by international law to do so, but when it is not prohibited by international law to do so.[319]

The *M/V Norstar Case* and its dissenting opinion, while centred on States and how states exercise their jurisdiction, prescriptive and enforcement on the high seas, with respect to a flagged vessel, is informative from a general international law perspective concerning jurisdiction on the high seas over acts criminalized under a state's domestic law. Chapter 6 will take up this matter further with respect to how this has been done under U.S. domestic law, but it should be noted that other states, the UNSC, and some treaties have adopted the broad view to *vessels without nationality*.

As Chapter 6 will show, the U.S. has enacted specific legislation concerning *vessels without nationality*, much of which is dedicated to various DTVs and drug trafficking related conduct on the high seas. However, other states have also enacted legislation adopting the broad view and jurisdiction over *vessels without nationality*.[320] For example, Norway's Marine Resources Act of 2008 states that '[t]he Act applies to foreign nationals and foreign undertakings in areas outside the jurisdiction of any state if this follows from an international agreement. In such areas, the Act also applies to stateless vessels and for vessels that are assimilated to stateless vessels'.[321] According to Fife, the agreements this act covers include the LOSC and the 1995 Fish Stocks Agreement, and:

> where evidence so warrants, the inspecting State may take against a vessel without nationality such action as may be appropriate in accordance with international law. In conformity with the principle reflected in the decision of the British Privy Council in *Naim Molvan v. Attorney General for Palestine* (…).[322]

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[318] ibid p. 6 at 20.
[319] *M/V Norstar* Dissenting Opinion (n 313) 10 at 36.
[320] The need for specific legislation addressing the problem of vessels without nationality on the high seas is something those officials interviewed for this study all agreed. Furthermore, those persons interviewed concluded that states should amend existing legislation to address these types of vessels if they had not already done so. Interview Transcript T-001 at 2-3; Interview Transcript T-002 at 3-6; Interview Transcript T-005 at 5-6.
[321] The Marine Resources Act of Norway, English Translation, Fisheries Regulations, <https://www.fiskeridir.no /English/Fisheries/Regulations/The-marine-resources-act> accessed on 19 August 2021.
[322] Fife (n 297) 301-302. Noting that Fife is referencing a predecessor statute, the Saltwater Fisheries Act of 3 June 1983 No. 40, Section 1, Paragraph 4(3), cf. Paragraph 1(b). These elements of the 1995 Fish Stocks Agreements are considered further in Chapter 7.

Similarly, Australia's Maritime Powers Act 2013 denotes that when a vessel is *without nationality* the act permits the 'boarding, search, detention, and this may include [a]rrest for indictable offences (…) if the officer suspects, on reasonable grounds, that the person has committed an indictable offence against an Australian law'.[323] The U.K. has also amended several statutes to include specific language addressing *vessels without nationality*. The 2017 Policing and Crime Act applies to a 'ship without nationality' when 'a law enforcement officer has reasonable grounds to suspect that an offence under the law of England and Wales has been, or is being, committed, on such a vessel'.[324] Other statutes include the Criminal Justice Cooperation Act of 1990 and the Modern Slavery Act of 2015.[325] With respect to enacting specific domestic legislation concerning acts on vessels without nationality, the UNSC has also considered this issue in relation to migrant smuggling.

UNSC Resolution 2240 (2015) calls on states who are engaged:

> in the fight against migrant smuggling and human trafficking to inspect, as permitted under international law, on the high seas off the coast of Libya, any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts and dinghies.[326]

The resolution also '[c]alls upon all States, with relevant jurisdiction under international law and national legislation, to investigate and prosecute persons responsible for acts of migrant smuggling and human trafficking at sea'.[327] Other international bodies, such as the European Commission, in a Commission Staff Working Document on illegal immigration at sea have said the following concerning vessels without nationality and jurisdiction over them:

> [t]he flagless ships generally used in practice for the irregular transportation of migrants cannot invoke freedom of navigation in the high seas. Any country can intervene against such ships and can prevent them from passage, proceed to arrest or escort the flagless ship to a port.[328]

Indeed, these views on *vessels without nationality*, according to Allan, have generally met 'without apparent objection as they are supported by suggestive treaty provisions'. [329] For example, Article 17(2) of the 1988 Vienna Convention provides that '[a] Party which has reasonable grounds to

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[323] Australia Maritime Powers Act 2013.
[324] The U.K. Policing and Crime Act 2017.
[325] Criminal Justice Cooperation Act of 1990, Section 19(1) states jurisdiction includes 'a ship not registered in any country or territory'. The Modern Slavery Act 2015 lists enforcement authority in Section 35(1) against 'a ship without nationality in England and Wales waters or international waters'. See Murdoch (n 105) 175.
[326] UNSC Resolution 2240 (2015) UN Doc S/Res/2240 2015.
[327] ibid.
[328] Commission of the European Communities, Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC (2007) 691, Section 2.2. See also Murdoch (n 106) 171.
[329] Allen 'Sea Officers' (n 71) 191.

suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose'.[330] Article 8(1) of the Protocol Against the Smuggling of Migrants uses identical language as the 1988 Vienna Convention, stating '[a] State Party that has reasonable grounds to suspect that a vessel that is flying its flag or that is without nationality is engaged in the smuggling of migrants by sea, it (…) may request the assistance of other parties suppressing the use of the vessel for this purpose'.[331] What is further noteworthy about these two agreements, is that both agreements when addressing the interdiction of a flagged vessel, use the words 'reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag (…) of a party' whereas the words freedom of navigation are removed from the subparagraphs concerning *vessels without nationality*.[332] Such an omission further supports that a *vessel without nationality* is not entitled to exercise freedom of navigation on the high seas, which as Allan concludes means a 'state may then, as a matter of international law, exercise jurisdiction over the *vessel without nationality*'.[333]

Regional agreements, such as the 1995 CoE Agreement, and the CRMA, both of which are discussed in Chapter 5, also have adopted the broad view approach to *vessels without nationally*.[334] Article 3 of the 1995 CoE Agreement provides that 'each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a *vessel without nationality* under international law'.[335] Article 23(c) of the CRMA states that '[e]ach Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3, paragraph 1, of the 1988 [Vienna] Convention, when: the offence is committed on board a *vessel without nationality* or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State'.[336] Although the section has discussed

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330 1988 Vienna Convention (n 109) Article 17(2). The Convention is set out further in the next Chapter.
331 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Adopted 15 November 2000, Entry into Force 28 January 2004) UNTS 2241, p.507, Doc/A/55/383, Article 8(1).
332 1988 Vienna Convention (n 108) Article 17(3) and Protocol Against the Smuggling of Migrants (n 326) Article 8(2).
333 Allen 'Sea Officers' (n 71) 191. Chapter 4 explores this in the context of Article 17 of the 1988 Vienna Convention.
334 ibid 191.
335 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, European Treaty Series - No. 156, Strasbourg, 31.I.1995, Entry into Force 1 March 1992, Article 3.
336 Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean area. Signed at San Jose April 10, 2003. Entered into force September 18, 2008. TIAS Depositary: Costa Rica, Article 23(c).

the exercise of enforcement and prescriptive jurisdiction over a *vessel without nationality*, it merits mentioning the status of the persons on board such vessels.

A *vessel without nationality* is, as Article 92 LOSC states, a 'status' of the ship.[337] The fact a vessel is *without nationality* does not deprive those on board of their respective nationalities nor general protections established in existing international law, it subjects them to the jurisdiction of the interdicting state. In other words, those on board a *vessel without nationality* may be engaged in criminal conduct, which might be a violation of the interdicting state's domestic law, but they are also entitled to certain diplomatic protections, human rights considerations, and the possible jurisdiction of their state of nationality.[338] However, as Barnes discusses, there may some difficulty 'in trying to identify the States entitled to exercise diplomatic protection and entrusting them to do so with due regard for the human rights of those aboard an interdicted vessel'.[339] Furthermore, in practice, as Chapter 6 notes with respect to U.S. interdictions, often States will refute a vessel's claim of nationality thereby denying those aboard any further protections, which can mean what Allen concludes as, '[n]o state [having] standing to assert diplomatic protection on behalf of a truly stateless vessel'.[340] Indeed, Churchill and Lowe have suggested that with respect to DTVs on the high seas, 'it seems quite possible that the law will develop so as to give states a jurisdiction over ships engaged in drug smuggling similar to that which they enjoy over unauthorized broadcasters on the high seas'.[341]

Given the above considerations concerning the exercise of jurisdiction, prescriptive and enforcement, against a *vessel without nationality* on the high seas, there exists the general right of visit to investigate these ships on the high seas under Article 110(d) LOSC. Although it may appear to be less clear concerning any further exercise of jurisdiction against a *vessel without nationality*, the argument has been put forward that under the Broad View, this right exists, but it is one that exists outside Article 110(d) LOSC, and it includes the right to exercise both prescriptive and enforcement jurisdiction against these vessels. The right exists even in the absence of a nexus between the interdicting state and the *vessel without nationality*. As will be further examined in Chapter 6, the driving force behind this practice, does at present appear to be the U.S. with respect to DTV interdictions on the high seas. Furthermore, as also noted in

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337 LOSC (n 5) Article 92 being titled 'Status of Ships'.
338 Barnes (n 87) 315; Guilfoyle (n 25) 18; Murdoch (n 105) 173-174; Papastavridis (n 98) 257-258; Guilfoyle 'High Seas' (n 85) 224.
339 Barnes (n 87) 315.
340 Allen 'Sea Officers' (n 71)156.
341 Churchill & Lowe (n 263) 218.

this section, the broad view has been incorporated into multilateral and regional agreements, which are discussed further in Chapters 4 and 5.

3.5 Conclusion

Chapter 3 has set out how the ILoS addresses jurisdiction. Specifically, this chapter has established how States exercise their jurisdiction over vessels on the high seas, which is done through the exclusive jurisdiction of the flag state. Chapter 3 also explored the exceptions to the flag state's exclusive jurisdiction. These exceptions include piracy, the transport of slaves, and unauthorised broadcasting. However, the LOSC, does not, create exception for vessels suspected of being DTVs on the high seas. This gap in the law was shown to be significant, especially from a practical perspective.

As it relates to DTVs, the LOSC only establishes a cooperative framework though Article 108 whereby the flag state may request the assistance of another state to suppress the flag state's vessel suspected of being a DTV on the high seas. In practice, these scenarios are very unlikely, and usually it is a non-flag state engaging in cooperation by requesting authorisation from the flag state to conduct an interdiction. However, the LOSC appears to exclude this possibility that a non-flag state may request authorisation from the flag state to interdict a suspected DTV on the high seas creating a serious gap in the law. Furthermore, this gap is compounded due to Article 110 LOSC and absence of the *right of visit* against DTVs on the high seas.

In a similar vein, Article 110 LOSC leaves open the matter of *vessels without nationality* and jurisdiction over these vessels on the high seas. Two competing views were put forward, with the broad view to jurisdiction against *vessels without nationality* being argued as the appropriate exercise of jurisdiction. On a general note, it was seen that the broad view has been, to varying degrees, incorporated into some treaties. These treaties include the 1988 Vienna Convention, discussed further in the next chapter, and regional agreements, the 1995 CoE Agreement and CRMA, which are discussed in Chapter 5. The extent to which these agreements address the gaps identified in the law throughout this chapter remains to be seen, as the LOSC is only one half of the overall legal regime addressing DTVs on the high seas. The second half of this regime consists of the 1988 Vienna Convention. Chapter 4 explores how jurisdiction and cooperation are addressed in the 1988 Vienna Convention as well as the nature and significance of any gaps in the Convention within the context of contemporary interdiction practice.

Chapter 4: The 1988 Vienna Convention

Introduction

Chapter 4 examines the second part of the international legal regime addressing DTVs on the high seas, the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* [1988 Vienna Convention]. The 1988 Vienna Convention, as previously noted, contains an enforcement framework for the interdiction of DTVs on the high seas, which Article 17 sets out. This enforcement framework in Article 17 is also a cooperative framework, which, as Chapter 3 noted, is central to the suppression of DTVs on the high seas. Chapter 4 begins with a note on the evolution of international drug control. This discussion aims to provide a foundation for international drug control and situates the role of international cooperation in achieving this objective. The note also provides some history as to why the 1988 Vienna Convention was needed to specifically address drug trafficking as a transnational crime requiring the cooperation of States to suppress. Chapter 4 then explores the 1988 Vienna Convention specifically and a practical analysis of the enforcement framework addressing DTV interdictions on the high seas in Article 17. This analysis will also look to Article 4 of the 1988 Vienna Convention, which concerns prescriptive jurisdiction. Finally, the chapter moves from the enforcement framework in Article 17 to consider international cooperation within the context of the 1988 Vienna Convention.

4.1 Background to International Cooperation and Drug Control

There are specific treaties dedicated to controlling drugs, both legal and illegal. These conventions are the *Single Convention on Narcotic Drugs of 1961 (as amended in 1972)*, the *Convention on Psychotropic Substances of 1971*, and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*. These conventions originate with the first attempt at international cooperation and suppressing a narcotic drug, opium, under the Shanghai Opium Commission. The 1909 Shanghai Opium Commission's purpose was to control opium at the international level.[1] The commission also considered opium cultivation, smuggling, production, and opium/opium-derived substances apart from legitimate medical purposes.[2] The delegations

[1] *This day in history: The Shanghai Opium Commission*, 1909. 26 February 2009. UNODC, Accessed 13 June 2019, <https://
www.unodc.org/unodc/en/data-and analysis/Bulletin /bulletin_1959-01-01_1_page006.html>.
[2] *Report of Dr. Hamilton Wright*, 3 Am. Soc'y Int'l L. Proc. [1909] 61 (23) 91-92.

to the commission were the United States, Great Britain, France, Germany, Austria-Hungary, Italy, Russia, Japan, the Netherlands, China, Persia, and Siam.[3] The 'commission' is not an international conference as 'the delegates did not have the authority to sign a diplomatic act'.[4] The Shanghai Opium Commission was instrumental in recognizing drug control, through international cooperation, is necessary and possible in international law. Such cooperation directly led to the Hague Opium Convention of 1912.[5]

In 1911 the Hague Opium Convention was convened by the Shanghai Commission to codify the Commission's recommendations into a treaty.[6] Although this conference was originally convened to further international opium control, cocaine and heroin were included as part of the overall debate.[7] The result of the 1911 conference was the *Hague Opium Convention of 1912*. The convention is the first international instrument creating obligations controlling the trade, manufacture, smuggling, and possession of a narcotic drug.[8] Additional obligations included 'cooperation' to effectively address the suppression of raw and prepared opium.[9] The convention was also influential in fostering international cooperation in drug control, advocating the suppression of non-medical trading of cocaine, opium, and heroin, and is the first 'universally' ratified drug control convention.[10] However, the convention does not address punishing criminal acts relating to activities prohibited in the convention.[11]

The first convention to do this is the *Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs* [1936 Convention], which, as mentioned in Chapter 1, was also a very early attempt at cooperation to suppress drug trafficking at the international level.[12] The 1936 Convention creates the first definition of international drug trafficking and this is found in Article

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[3] ibid 89.
[4] Shanghai Opium Commission (n 1).
[5] ibid.
[6] James H. Mills, 'Cocaine and the British Empire: The Drug and the Diplomats at the Hague Opium Conference, 1911–12,' [2014] The Journal of Imperial and Commonwealth History, 42:3, 400, 402.
[7] The 1912 Hague International Opium Convention, 23 January 2009, UNODC. [https://www.unodc.org/unodc/en/frontpage/the-1912-hague-international-opium-convention.html].
[8] United Nations Office on Drugs and Crime, Chronology: 100 Years of Drug Control. Accessed 13 June 2019 <[https://www.unodc.org/documents/wdr/WDR_2008/timeline_E_PRINT.pdf]>. See International Opium Convention [Adopted 23 January 1912, Entry into Force 28 June 1919] LNTS, vol 8, p. 187. Article 1 – The contracting parties shall enact effective laws or regulations for the control of the production and distribution of raw opium. Article 6 – The contracting parties shall take measures for the gradual and effective suppression of the manufacture of, internal trade in, and use of prepared opium. Article 10 – The contracting parties shall use their best endeavours to control, or cause to be controlled, all persons manufacturing, importing, selling, distributing, and exporting morphine, cocaine, and their respective salts.
[9] ibid Opium Convention, Articles 15-19.
[10] Chronology (n 8).
[11] Martin Jelsma, 'The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future,' [2011] Working Paper, First Meeting of the Global Commission on Drug Policies, 2.
[12] J. G. Starke, 'The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs,' [1937] 31 Am. J. Int'l L. 31, 31-32.

2.[13] The Convention also introduced innovative forms of international cooperation.[14] For example, Article 11 obligates the parties to create central offices for the 'supervision and coordination of all operations necessary to prevent the offences specified in Article 2'.[15] The 1936 Convention was potentially a vital agreement for the suppression of drug trafficking. Still, several key states did not become a party to the 1936 Convention. For example, the U.S. refused to sign it as it was not far-reaching enough.[16] Other States were concerned with the divergent legal and domestic criminal law of the individual parties, which the convention does not consider.[17] The most considerable setback for the 1936 Convention was timing. The Convention was drafted just before the second world war. It was never part of further consideration once the war broke out.[18] The control and suppression of illicit drugs remained unchanged until the conclusion of the second world war and the creation of the U.N.

The U.N. became the first international organization responsible for facilitating international drug control and cooperation through ECOSOC. Furthermore, as Chapter 1 established, ECOSOC's primary function is to conduct studies and produce reports on international economic, social, cultural, educational, health, and related matters.[19] ECOSOC also administers subsidiary organs, which foster cooperation among member states, other international organizations, and the U.N.[20] In 1946, ECOSOC *Resolution E/20* established the Commission on Narcotic Drugs [CND] and the drug control secretariat.[21] The resolution provides the commission with 'the machinery whereby full effect may be given to the international conventions relating to narcotic drugs and (…) review of progress for the international control

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[13] Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (Adopted 26 June 1936, Entry into Force 10 October 1947) LNTS, vol 198, p.301. Article 2: Each of the High Contracting Parties agrees to make the necessary legislative provisions for severely punishing, particularly by imprisonment or other penalties of deprivation of liberty the following acts, (a) [t]he manufacture, conversion, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of narcotic drugs, contrary to the provisions of the said Conventions; (b) Intentional participation in the offences specified in this Article; (c) Conspiracy to commit any of the above-mentioned offences; (d) Attempts and, subject to the conditions prescribed by national law, preparatory acts.

[14] ibid Article 9. The article considers extradition of offenders between parties. Article 11 creates an obligation for international cooperation by establishing central offices for the 'supervision and coordination of all operations necessary to prevent the offences specified in Article 2'. Article 12 obliges the 'central offices' of each state to cooperate with those in other states party, to the maximum extent possible, concerning prevention and punishment of the offences specified in Article 2'.

[15] ibid Article 11 1936 Convention.

[16] World Drug Report 2008, United Nations Office on Drugs and Crime 2008, 196.

[17] *The Official UN Commentary to the 1961 Single Convention*, (New York, United Nations Publication 1973) Sales No. E.73XI.1. 426.

[18] 2008 WDR (n 16) 196.

[19] The Charter of the United Nations (Adopted 26 June 1945, entered into force 24 October 1945), see Article 62.

[20] ibid Article 57 and Article 6.

[21] 2008 WDR (n 16) 196.

of such drugs'.[22] The CND's function is to assist ECOSOC and supervise the application of the international drug control treaties.[23] Another mandate of the CND is to consolidate global narcotics control and cooperate with other international organizations' efforts to do the same. The CND works closely with the World Health Organization to consider and regulate new or developing dangerous drugs. New drugs can become problematic, subject to abuse, or not scientifically/medically necessary.[24] These problems can arise since new drugs may be extremely addictive and/or have dangerous effects on consumers.[25] The CND also serves as the governing body to the UNODC.[26]

As stated, UNODC is responsible for assisting U.N. member states in their 'struggle against illicit drugs, crime, and terrorism'.[27] Furthermore, it is UNODC that maintains the legal framework addressing international drug trafficking, which are the 1961 Single Convention as amended, the 1971 Psychotropic Convention, and the 1988 Vienna Convention, [and they] 'are mutually supportive and complementary'.[28] However, it is the 1961 Single Convention, its subsequent Protocol, and the 1971 Psychotropic Convention that are the drug control conventions that form the core framework for international drug control and cooperation today.

4.1.1 The Drug Control Conventions

The 1961 Single Convention as amended and the 1971 Psychotropic Convention continue to form 'the basis for international efforts in the control of narcotic drugs and psychotropic substances, and that strict implementation both by Governments and by the international control organs of the United Nations of the obligations arising from the Conventions is essential to achieve their aims'.[29] To achieve these objectives, the Single Convention on Narcotic Drugs of

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[22] ECOSOC Resolution E/20 of 15 February 1946. ECOSOC/Res/E20 - Establishment of a Commission on Narcotic Drugs, supplemented by the action taken 18 February 1946 concerning the appointment of representatives of fifteen members of the United Nations as Members of this commission.

[23] The Commission on Narcotic Drugs, Vienna, UNODC, Accessed on 08 April 2019, <http://www.unodc.org/unodc/en/commissions/CND/index.html>.

[24] UNGA Resolution 211 (III). Official Records of the General Assembly, Third Session, Part I, Resolutions (A/810) 62.

[25] ibid 62.

[26] The Commission on Narcotic Drugs (n 23).

[27] UNODC, 'About UNODC,' Accessed on 08 April 2019, <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop>.

[28] Legal Framework for Drug Trafficking, Accessed on 08 April 2019, <https://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html>.

[29] Resolution 3, Provision of Necessary Resources to the Division of Narcotic Drugs and the Secretariat of the International Narcotics Control Board to Enable them to Discharge the Tasks Entrusted to them under the International Drug Control Treaties, Resolutions Adopted by the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

1961 (as amended in 1972) created the International Narcotics Control Board [INCB].[30] The INCB operates independently of national governments in ensuring the implementation of these conventions.[31] The INCB may identify weaknesses in national and international control systems and make recommendations to correct deficiencies facilitating illicit drug trafficking.[32] They also serve as the international body of experts working to determine which drugs and precursor chemicals are included in the control *schedules*.[33] These *schedules* do not criminalize the substances under control. The drugs are *controlled* as to their cultivation, production, transport, trade, and possession.[34]

The convention categorizes substances into four schedules [Schedules I – IV] based on various criteria. For example, *Schedule I* controlled substances are the most restricted.[35] Schedule I controlled substances include:

Table 1: Sample of Schedule I Controlled Substances from the 1961 Single Convention as amended in 1972 [36]

Cannabis and Cannabis resin	Extracts and Tinctures of Cannabis
Coca leaf	
Cocaine	methyl ester of benzoylecgonine
Concentrate of poppy straw	the material arising when poppy straw has entered into a process for the concentration of its alkaloids when such material is made available in trade

In 1972, the Protocol to amend the 1961 Single Convention was adopted. The protocol does not fundamentally change the 1961 Single Convention. The Protocol to the 1961 Single Convention amends the above schedules and implements methods for improving them. It also clarifies and strengthens areas concerning cooperation to suppress illicit trafficking of controlled drugs.[37] For example, the Protocol encourages additional cooperation between States party with the INCB.[38] The protocol came about because shortly after becoming a party, the U.S. started, 'a period of unusually intense diplomatic activity designed to bolster the U.N. drug control

[30] Single Convention on Narcotic Drugs, 1961 (Adopted 30 March 1961, Entry into Force 13 December 1964) UNTS vol. 520, p. 151. Article 9. These conventions are set out below.
[31] ibid Article 17 of the 1961 Single Convention.
[32] ibid Article 14 and Article 15 of the 1961 Single Convention.
[33] ibid Article 12 of the 1961 Single Convention.
[34] David Bewley-Taylor and Martin Jelsma, 'Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation,' [2011] Series on Legislative Reform of Drug Policies, Nr. 12, 11.
[35] 1961 Single Convention (n 30) Schedules of Controlled Substances.
[36] ibid Schedules of Controlled Substances.
[37] 2008 WDR (n 16) 200.
[38] Protocol Amending the Single Convention on Narcotic Drugs, 1961 (Adopted 25 March 1972) UNTS, vol. 976, p. 3. Article 2, Amendments to the title of article 9 of the Single Convention and its paragraph 1 and insertion of new paragraphs 4 and 5, Paragraph 3 to Amend Article 9.

framework'.[39] One of the main concerns for the U.S. was the need to provide the INCB with greater authority to 'embargo non-compliant states'.[40] Amid this diplomatic activity, the U.S. pushed to 'initiate a plenipotentiary conference in Geneva to amend the Single Convention; a procedure permitted under Article 47' of the 1961 Single Convention.[41] The U.S. State Department argued that 'there are a great many more kinds of psychotropic substances than there are of narcotic drugs, and the quantities of psychotropics manufactured are much greater than the quantities of narcotics manufactured'.[42] Growing international concern soon followed and it became likely that the 1961 Single Convention would require further amendments.

The rapidly expanding drug culture of the 1960s-1970s led to the development of very potent psychotropic drugs.[43] Drugs such as Lysergic Acid Diethylamide [LSD], amphetamines, and barbiturates fell outside the existing agreements' scope of control.[44] One reason for this was, '[m]ost of these drugs were not subject to international control, and because national systems of regulation differed widely, trafficking and smuggling flourished'.[45] The CND recognized the need to convene a second protocol to address these problems.[46] ECOSOC requested the Secretary-General to call a conference in 1971 for a protocol on psychotropic substances.[47] The CND and the WHO had previously debated 'the issue of control of psychotropic drugs at regular meetings and made various recommendations to member states concerning the national control of particular substances, including stimulants, sedatives and LSD'.[48] No mutual consensus on a new Protocol for psychotropic substances was reached between the CND, individual states, and the WHO.[49] Accordingly:

> [c]onsideration had been given to the control of the psychotropic substances under the Single Convention on Narcotic Drugs, 1961, or to amending that Convention for the purpose, but it was the view of nearly all of the countries concerned that a completely new international instrument regarding those substances was necessary.[50]

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[39] David Bewley-Taylor and Martin Jelsma, 'A 'Single' Convention?' in 'Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs,' [2012] International Journal of Drug Policy, Volume 23, Issue 1, 72-81.
[40] ibid 72-81.
[41] ibid 72-81.
[42] The Department of State Bulletin, Secretary Rogers' Report to the President, [1971] 65 Dep't St Bull [iii] 141.
[43] Psychotropic drugs as defined by the U.N. Schedules of Control include both synthetic and naturally occurring substances listed within Schedules I-IV. This includes substances such as Cathinones, Lysergic Acids, Psilocybin [commonly known as 'mushrooms'], Methylenedioxyamphetamine [MDA], Methylenedioxymethamphetamine [MDMA], and Phencyclidine [PCP]. ST/CND/1/Add.2/Rev.3. Schedules of the Convention on Psychotropic Substances of 1971, 18 October 2017.
[44] Bewley-Taylor 'A 'Single' Convention' (n 40) 72-81.
[45] Jay Sinha, 'The history and development of the leading international drug control conventions'. [2001] Parliamentary Research Branch Report Prepared for the Canadian Senate Special Committee in Illegal Drugs, 24.
[46] E/CONF.58/7/Add.l, Summary Records of Plenary Meetings, First Plenary Meeting, January 1971, 24 p.3.
[47] ECOSOC Resolution 1474 (XLVIII) 3 at 3.
[48] Sinha (n 45) 24.
[49] David Bewley-Taylor et al., 'Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs, International Journal of Drug Policy,' [2011] Volume 23, Issue 1, 72 – 81, Part IV.
[50] US DoS Bulletin (n 42) 141.

The 1971 Convention specifically addresses *psychotropic substances* by reducing their production and trafficking.[51] The Convention expands the CND and increases international cooperation to address psychotropic substances. The 1971 Convention is like the 1961 Single Convention, including four schedules aimed at controlling psychotropic substances, restricting the use of such substances to medical/scientific use, and adopting a similar method for adding or amending the schedules as new drugs are developed.[52] However, as with the 1961 Single Convention, several factors led to the re-examination of the drug trafficking problem.

Throughout North America in the 1970s-1980s, there was a marked increase in cocaine consumption.[53] In response, the CND in 1981 launched its *Drug Abuse Control Strategy*, which acknowledged conditions were suitable for addressing global drug abuse and trafficking.[54] The *Drug Abuse Control Strategy* recognises that States must:

> [g]ive a firm impetus to the battle of the world community against international drug traffickers, that Member States initiate or increase contributions to the United Nations Fund for Drug Abuse Control[55] [and] there was an [u]rgent need for an effective, comprehensive, co-ordinated global strategy to prevent and control drug trafficking, illicit demand and drug abuse, as well as for comprehensive, co-ordinated strategies at regional and national levels.[56]

Other U.N. foundational efforts include the *Quito Declaration against the traffic in narcotic drugs* and the *New York Declaration Drug Trafficking and Illicit Use of Drugs*. Both call upon the international community for coordinated responses to drug trafficking.[57] For example, Resolution A/Res/39/141 recognizes:

> [t]he wide scope of the illicit traffic in narcotic drugs and its consequences make it necessary to prepare a convention which considers the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments.[58]

U.N. General Assembly resolutions followed with requests to member states, generating enough response for the submission of a new draft convention on the illicit traffic in narcotic drugs and psychotropic substances.[59] *Resolution E/CN.7/1987/2* outlines the:

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[51] Consideration of the revised draft Protocol on Psychotropic Substances adopted by the Commission on Narcotic Drugs, in accordance with Economic and Social Council resolution 1474 (XLVIR) of 24 March 1970 (E/4785, chap. III) 6.
[52] US DoS Bulletin (n 42) 141.
[53] 2008 WDR (n 16) 203.
[54] ibid 203.
[55] A/Res/36/168, *International Drug Abuse Control Strategy*, 16 December 1981.
[56] ibid A/Res/36/168.
[57] A/Res/39/142*, Declaration on the Control of Drug Trafficking and Drug Abuse,* 14 December 1984.
[58] Ibid.
[59] Document E/CN.7/1987/2, Preparation of a draft convention against the illicit traffic in narcotic drugs and psychotropic substances: report of the Secretary-General, 13 June 1986, 1-2.

> [c]ollective responsibility of all States and that States shall utilize the legal instruments against the illicit production of and demand for, abuse of and illicit traffic in drugs and adopt additional measures to counter the new manifestations of this crime.[60]

Subsequent ECOSOC *Resolutions 1987/28* and *1987/29* encouraged states to engage in the maximum amount of international cooperation [and information sharing] between all U.N. member states, the drug control bodies of the U.N., and the General Assembly in setting a plenipotentiary conference to address the international drug trafficking problem.[61]

A new conference was also required because the existing agreements do not address the evolving complexities of large-scale drug trafficking.[62] The 1961 Single Convention and the 1971 Convention provide a sound international framework for the control of narcotic drugs and psychotropic substances, but their criminal provisions are very limited.[63] Furthermore, governments were often acting in isolation to combat the threat of drug trafficking and engaging in relatively minimal cooperation.[64] The result of the 1988 Conference was the 1988 Vienna Convention, which has 191 States party.[65]

4.2 The 1988 Vienna Convention

The 1988 Vienna Convention 'focuses on establishing measures to combat illicit drug trafficking and related money-laundering, as well as strengthening the framework of international cooperation in criminal matters, including extradition and mutual legal assistance'.[66] The Convention is also the first multilateral Convention creating a framework for the interdiction of DTVs on the high seas. According to the Convention's preamble, the purpose of the Convention is to also:

> reinforce and supplement the measures provided in the Single Convention on Narcotic Drugs, 1961, that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, and the 1971 Convention on Psychotropic Substances, in order to counter the magnitude and extent of illicit traffic and its grave consequences.[67]

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[60] ECOSOC Resolution 1987/27 (1987). ECOSOC/Res/1987/27 (1987). Preparation of an international convention against illicit traffic in narcotic drugs and psychotropic substances, 14th plenary meeting 26 May 1987.
[61] ECOSOC Resolution 1987/28 (1987). ECOSOC/RES/1987/28 (1987). Education and information on drug abuse and illicit traffic in narcotic drugs and psychotropic substances and 1987/29. Role of the drug control bodies of the United Nations at Vienna, 14th plenary meeting 26 May 1987.
[62] Henri Mazaud and others, *Commentary on The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1st edn, United Nations 1998) 1.
[63] ibid 1.
[64] ibid 1.
[65] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Entry into Force 11 November 1990) UNTS vol. 1582 p 95.
[66] Legal Framework for Drug Trafficking (n 28).
[67] 1988 Vienna Convention (n 65) Preamble.

As the previous section notes, the substances controlled under the 1961 Single Convention, its Protocol, and the 1971 Convention are also under control within the scope of the 1988 Vienna Convention. Furthermore, as noted, the 1961 Single Convention as amended and the 1971 Psychotropic Convention have articles dedicated to suppressing drug trafficking, but they are limited in scope, for example, to:

> [s]erious offences (…) committed either by nationals or by foreigners [that] shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable (…).[68]

Therefore, to improve on these enforcement and cooperative frameworks created in the 1961 Single Convention as amended, and the 1971 Psychotropic Convention, the 1988 Vienna Convention attempts to 'attack more forcefully, through cooperation and concerted action, the complex problem of drug trafficking and all its implications'.[69] The Convention is designed to be one of the most comprehensive law enforcement and drug control conventions ever to enter into force.[70] For example, one way the 1988 Vienna Convention is more 'comprehensive' is because 'consideration was drawn to such areas as the interdiction of drug smuggling in aircraft and vessels' and 'cooperation across frontiers to enable drug law enforcement agencies to collect and exchange information'.[71] In this regard, as Gilmore concludes, 'the 1988 Convention has established both a framework for cooperation and a common minimum standard for implementation'.[72]

As stated, Article 17 creates a framework for the interdiction of DTVs on the high seas. However, before Article 17 is specifically examined, Article 4, which addresses jurisdiction under the 1988 Vienna Convention, must be considered. Article 4 has certain provisions concerning jurisdiction that are linked to the interdiction framework in Article 17. Furthermore, these two articles are grounded on Article 3(1)(a)(i), which sets out that the parties to the 1988 Vienna Convention 'shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, including:

> [t]he production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.[73]

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[68] 1961 Single Convention (n 30) Article 36.
[69] 1988 Commentary (n 62) 1-2.
[70] William C. Gilmore, *Combating international drugs trafficking: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances / explanatory documentation prepared for Commonwealth jurisdictions*, (London, Commonwealth Secretariat, 1991) 3.
[71] 1988 Commentary (n 62) 2.
[72] Gilmore '1988 Convention' (n 70) 3.
[73] 1988 Vienna Convention (n 65) Article 3.

The purpose of Article 4 is the regulation of prescriptive jurisdiction. According to the Convention's official U.N. Commentary, it was 'necessary to regulate the issue' because of the 'uncertainty and controversy surrounding the limits imposed by rules of customary international law on the rights of states to legislate extraterritorially'.[74] These limits are the bases of jurisdiction, and the 1988 Vienna Convention restricts the establishment of jurisdiction to the territorial and nationality principles of jurisdiction.[75]

Article 4 does this through the obligatory and optional establishment of prescriptive jurisdiction. Generally, a state party is obligated to establish jurisdiction over offences that are committed inside its territory, and as noted in Chapter 2 and 3, this includes the rights of coastal states to suppress drug trafficking within the State's territorial sea.[76] The second obligation to establish jurisdiction for a party under Article 4 is when an 'offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed'.[77] Again, as Chapters 2 and 3 considered, flag states have a general obligation to establish and exercise jurisdiction over their vessels as part of the nationality principle and as codified in Article 94 LOSC. However, as will be seen, this obligatory establishment of jurisdiction in Article 4(1) has a notable practical omission in the text and this is the exercise of jurisdiction established under Article 4.

In considering the text of Article 4(1), there is no obligation that a party exercises its jurisdiction in its territory or on its flagged vessels, only that it establishes jurisdiction per the offences set out in Article 3. According to the Convention's official commentary, this exclusion is intentional, but this begs the question as to why it was intentionally worded this way with no further explanation in the text of Article 4.[78] The Convention's drafting history offers insight into why the drafters felt there needed to be a specific differentiation between the 'establishment' and the 'exercise' of jurisdiction under Article 4.

The Summary Records of the 18th Meeting show that when considering the question of jurisdiction in Article 4, it was the primary view that States must first be obligated to *establish* jurisdiction over an offence, especially since there were lingering concerns that states, in general,

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[74] 1988 Commentary (n 62) 100.
[75] See Chapter 2 for the types and bases of jurisdiction.
[76] 1988 Vienna Convention (n 66) Article 4(1)(a)(i). See Chapter 2 regarding the territorial principle of jurisdiction and Chapter 3 concerning the jurisdiction of the coastal state in its territorial sea.
[77] ibid Article 4(1)(a)(ii) 1988 Vienna Convention. See Chapter 2 regarding the nationality principle and Chapter 3 for the discussions on the obligation of the flag state to exercise its exclusive jurisdiction over its flagged vessels on the high seas.
[78] 1988 Commentary (n 62) 102.

had not established any domestic legislation addressing drug trafficking.[79] Furthermore, some states were of the view that by establishing jurisdiction, the exercise of jurisdiction was axiomatic, and did not need to be specifically placed in the text of Article 4.[80] Additional consideration was given to the fact that states also exercise their jurisdiction differently; however, it was noted by Mr. Polimeni of Italy, the committee chairman that,

> the convention should not permit derogation from the obligation to establish jurisdiction with regard to offences of the specified kind committed within national territory, whether the offender was a national or a foreigner.[81]

In other words, as Gilmore explains, the wording in Article 4(1) is likely due to 'a recognition that, while many states, particularly those of a civil law tradition, utilised the nationality principle either as a matter of course or with great frequency, others including many common law jurisdictions were firmly wedded to the territorial principle (…)'.[82]

Similarly, the proposal from Mauritania regarding an obligation to exercise jurisdiction noted that it was better to obligate the state to establish its jurisdiction and 'exercise its jurisdiction at its own discretion'.[83] Recalling Chapter 3, this matter was also considered with respect to the obligations of the flag state to exercise its jurisdiction under the ILoS generally. However, it has been established that many flag states lack effective legislation and are often unwilling or unable to enforce their prescribed legislation against vessels flying their flags. Such concerns make this a practical gap in the law. Regarding a DTV flying another party's flag on the high seas, the Convention takes a permissive approach to establish jurisdiction.

Article 4(1)(b)(ii) permits a state to establish its jurisdiction over another party's flagged DTV if an:

> offence is committed on board a vessel concerning which that Party has been authorised to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article.[84]

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[79] United Nations Conference for the Adoption of a Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, Vol. II, Summary Records of Plenary Meetings, Summary Records of Meetings of Committee I and Committee II. 25 November-20 December 1988, Summary of the meetings of the Committees of the Whole, 18th Meeting, 19 December 1988, 120.

[80] ibid 120. Statement of the Chinese Representative who noted that 'the establishment of jurisdiction was a precondition for its exercise which itself was subject to various other factors'. See statement of the Bulgarian Representative, noting 'said that the fundamental issue was the establishment of jurisdiction, the consequences of which were exercise and a number of other acts'.

[81] 1988 Vienna Conference Official Records (n 79) 122.

[82] ibid 122. See the statement of the Jamaican Representative who noted that 'just because a country had established jurisdiction, it should not feel obliged to exercise it in cases where an assessment of the facts indicated that a prosecution was doomed to failure or, constitutionally, might preclude a further prosecution'. See Gilmore '1988 Convention' (n 71) 10-11.

[83] 1988 Vienna Conference Official Records (n 79) 120-121.

[84] 1988 Vienna Convention (n 65) Article 4(1)(b)(ii).

The chapter explores Article 17 in further detail below; however, it is necessary to consider some elements here for clarification. The conditions for the establishing jurisdiction in Article 4(1)(b)(ii) are linked to Article 17, sub-paragraph (4). Sub-paragraph (4) sets out the 'actions' a non-flag state may take against another party's flagged DTV on the high seas once the flag state has authorised the interdiction. It states that:

> [i]n accordance with [Article 17] (3) or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, inter alia: a) Board the vessel; b) Search the vessel; c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.[85]

When the two articles are read in conjunction, a significant practical gap appears. Article 4(1)(b)(ii) does not obligate a non-flag state to establish any prescriptive jurisdiction over a DTV it has interdicted on the high seas under Article 17(3). According to the 1988 Vienna Convention's U.N. Commentary, while Article 17 facilitates the exercise of enforcement jurisdiction against a DTV on the high seas, Article 17 of the Convention will not function effectively without the necessary prescriptive jurisdiction.[86] In other words, according to Papastavridis, although a non-flag state may conduct an interdiction of a suspected DTV on the high seas, it does not have to establish its jurisdiction under its domestic law to prosecute those on board the DTV.[87] This gap in the law is considered below in the next section within the context of Article 17.

4.2.1 Article 17: Illicit Traffic at Sea

The purpose of Article 17 of the 1988 Vienna Convention is to establish a practical working legal framework for DTV interdictions on the high seas.[88] Article 17 includes a means for the exercise of enforcement jurisdiction over DTVs on the high seas, something Article 108 LOSC does not provide. The first two subsections of Article 17 closely follow Article 108 LOSC, but with some differences. Article 17(1) states that, '[t]he Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea'.[89]

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[85] ibid Article 17(4).
[86] 1988 Commentary (n 62) 109-110.
[87] Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing Limited 2013) 213. See also 1988 Commentary (n 62) sections on Article 4 and Article 17 generally.
[88] 1988 Commentary (n 62) 325-328. See Natalie Klein, *Maritime Security and the Law of The Sea* (University Press 2012) 131; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 83-85; Papastavridis (n 87) 209-213.
[89] 1988 Vienna Convention (n 65) Article 17(1).

Article 17(2) of the Vienna Convention is similar to Article 108(2) LOSC, but with one notable difference. Article 17(2) states that:

> [a] Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.[90]

The additional text, '[a] Party which has reasonable grounds to suspect that a vessel (…) not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose,'[91] in effect, permits a party to request assistance from another party to suppress a suspected DTV *without nationality*.[92] Although Article 17(2) allows states to make such a request, this is 'hortatory'.[93] As Papastavridis observes, there is no obligation created under the subsection since the flag state may only exercise this type of authority over its own vessels, and 'in the case of vessels of no nationality, the authority to request such cooperation is not so manifest'.[94] As stated, Article 17 also creates an enforcement framework for non-flag states.

Article 17(3) and (4) of the 1988 Vienna Convention sets out this framework.[95] Article 17(3) states:

> [a] Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.[96]

From a practical perspective, Article 17(3) integrates an authorisation request procedure for non-flag states over suspected foreign-flagged DTVs on the high seas. Indeed, commentators such as Guilfoyle, Gilmore, and Rothwell and Stephens generally agree that Article 17(3) closes the gap concerning a non-flag state authorisation request in Article 108(2) LOSC.[97]

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[90] ibid Article 17(2).
[91] ibid Article 17(2).
[92] 1988 Commentary (n 62) 325.
[93] Papastavridis (n 87) 210-211.
[94] ibid 210.
[95] As with the *right of visit* in Article 110 LOSC, any interdiction action taken under Article 17 in the 1988 Vienna Convention must be done by a warship or government enforcement vessel. Article 17(10): Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.
[96] 1988 Vienna Convention (n 65) Article 17.
[97] Guilfoyle 'Shipping Interdiction' (n 88) 83. See also Gilmore '1988 Convention' (n 71) 30; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2014) 165. Cf Klein (n 88) 131-132; Papastavridis (n 87) 210-211.

Guilfoyle, for example, notes that when considering Article 108(2) in the LOSC, 'it omits the more usual situation where a state seeks to interdict a suspected smuggler flying another state's flag (…) the [1988 Vienna] Convention addresses this lacuna' in Article 17(3).[98] Gilmore observes that Article 17 'is primarily concerned with making a detailed provision for procedures designed to provide maximum opportunities for parties to obtain enforcement jurisdiction with the consent of the flag state'.[99] Furthermore, Rothwell and Stephens also note that since the LOSC is 'silent as to a right of high seas boarding, a state would need to point to its acceptance of the 1988 Convention if it undertook such measures' against a DTV on the high seas.[100] However, not all commentators agree with these views on Article 17(3) of the 1988 Vienna Convention.

Klein concludes that although Article 17(3) 'improves on the situation set forth in UNCLOS by allowing the interception of a ship suspected of illicit trafficking by a state other than the flag state (…) the 1988 Vienna Convention does not ultimately provide a general grant of authority for the right to visit foreign vessels suspected of involvement in drug trafficking'.[101] According to Klein, this is due to the procedure that Article 17 requires, which is 'a state party may request permission to board a vessel of another state party when the ship is outside the territorial sea of any state'.[102] In other words, there is still the need to obtain positive authorisation from the flag state before a non-flag state may engage in a *right of visit* under the 1988 Vienna Convention. Papastavridis makes two important observations in this regard.

First, he notes that although Article 17(3) requires 'explicit authorisation of the flag state,' this also means it is the flag state 'who solely holds the authority to decide about the existence and gravity' of the 'reasonable grounds' which triggered the non-flag state to initiate a request to the flag state.[103] Papastavridis also observes that the length of the process to obtain the authorisation from the flag state is burdensome. The process requires the 'requesting party to notify the flag state, then request confirmation of the registry, and lastly receive authorisation'.[104] This observation is an operational or practical matter, and as will be seen, it likely runs in contravention of Article 91 LOSC.

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[98] Guilfoyle 'Shipping Interdiction' (n 88) 83.
[99] Gilmore '1988 Convention' (n 71) 35.
[100] Rothwell/Stephens (n 97) 165.
[101] Klein (n 88) 131.
[102] ibid 131.
[103] Papastavridis (n 87) 210-211
[104] ibid 211.

Article 17(7) outlines a procedural framework for the overall authorisation process in Article 17. Article 17(7) obligates the parties to 'designate an authority or, when necessary, authorities to receive and respond to [authorisation] requests'.[105] The designated authority's purpose is to 'determine whether a vessel that is flying its flag is entitled to do so, and to address requests for authorisation made pursuant to paragraph 3'.[106] A flag state, according to Article 17(7) must respond to the request 'expeditiously;' however, it does so at its discretion, and there is no obligation to grant authorisation to the requesting state.[107] However, as established in Chapter 3, drug traffickers often do not seek to register and flag their DTVs. Even in cases where the vessel is registered, registration is often done in states with inefficient or minimal registry requirements.[108] States of registry may also lack of domestic legislation concerning vessels on their register or may not require vessels of a certain size to register.[109] When this happens, non-flag states may not get the appropriate authorisation.

There is also the other matter which Chapter 3 took up concerning a ship's flag, nationality, and registration. As Chapter 3 demonstrated, a ship can possess a registration in a State that is different from the State granting its flag, and this has to do with Article 91 LOSC and the nationality of ships. Should a non-flag state be forced to make multiple inquiries because registration and the flag do not match, drug traffickers may have time to destroy valuable evidence or place the safety of all involved parties in jeopardy.[110] Similarly, the operational time factor noted above means that several hours or days might pass before the authorisation is returned from a requested State. In other words, Article 17(3) contains a significant practical gap in the law because it runs counter to Article 91 LOSC.

Generally, Article 17 concerns the high seas and this is affirmed in the text 'vessel exercising freedom of navigation'. According to Chapter 3, this is a right associated with the high seas, and so those provisions relate to the high seas, including the nationality of ships per Article 91 LOSC.[111] According to Article 17(3) of the 1988 Vienna Convention, a non-flag state party may

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[105] 1988 Vienna Convention (n 65) Article 17(7).
[106] ibid Article 17(7) 1988 Convention.
[107] ibid Article 17(7). See 1988 Commentary (n 62) 339-340.
[108] Guilfoyle (n 88) 95.
[109] *Combating Transnational Organized Crime Committed at Sea*: Issue Paper, United Nations 2013 34. The paper observes that 'there might be cases that small vessels, such as recreational boats, may be unregistered but still enjoy nationality, e.g., derived from the owner. Bearing in mind that narcotic drugs are frequently trafficked by such small, unregistered vessels'. See Papastavridis (n 87) 54; Guilfoyle 'Shipping Interdiction' (n 88) 95.
[110] U.N. Issue Paper (n 109) 35.
[111] United Nations Convention on the Law of the Sea (Adopted 10 December 1982, Entry into Force 16 November 1994) UNTS vol. 1833, p. 3, Article 87: Freedom of the High Seas: The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation.

request authorisation from another party to interdict that party's flagged vessel suspected of being a DTV on the high seas. The flag state's authorisation in Article 17(3), is first contingent on a 'confirmation of registry'.[112] Article 17(3) assumes that a request will be to confirm the registry, which is, according to the Convention's U.N. Commentary, equitable to 'the nationality' of the vessel.[113] However, as Chapters 2 and 3 argued, the flag concerns the nationality of the vessel, not the registry of the vessel. Furthermore, it is only the flag state that has the authority to grant authorisation to non-flag states, not the state of registry, as reflected in Article 92 LOSC, which sets out the flag state has exclusive jurisdiction over its vessels.[114]

During the drafting of Article 17, several delegations took note of this practical concern and a possibility that the state of registry and the state of nationality may be different. These states had argued that the flag state should be the primary authority to confirm the registry.[115] For example, the U.S. delegation offered the alternate text with the:

> addition in paragraph 3, between the word "flag" and the words "of another Party", of the words "or displaying marks of registry" and, as a consequential change, the replacement of the words "notify the flag State and request" by the words "notify the flag State, request confirmation of registry and, if confirmed, request authorisation.[116]

Similarly, the German Democratic Republic observed that:

> proof of the link between the ship and the flag State was not the registration of the vessel under the national law of the flag State but its nationality. According to article 91, paragraph 1, of the Convention on the Law of the Sea, a ship had the nationality of the State whose flag it was entitled to fly.[117]

It is possible Article 17(7) mitigates the problem because it requires states to establish a central authority for processing requests under Article 17(3), thereby negating the need to confirm registry first and obtain authorisation from the flag state second.[118] What is more curious is Article 17(7) does not use the word 'registry' for the grant of authorisation, it uses the term 'flag

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[112] 1988 Vienna Convention (n 65) Article 17(3).
[113] 1988 Commentary (n 62) 336.
[114] LOSC (n 111) Article 92: Status of Ships: [s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.
[115] 1988 Official Records (n 79). The US, Jamaica, and German Democratic Republic observed the difference between nationality and registration with Bulgaria and Nigeria accepting the proposed amendments. Cf. the statements from the U.K. noting: 'the reference to marks of registry in paragraph 3 was probably involuntary, but he had doubts as to whether it was really necessary to include a reference to confirmation of registry, and considered that the reference in paragraph 7' would suffice', Australia concurring: '[t]he proposal concerning marks of registry and the request for information was constructive and should be adopted, although 'he agreed with the United Kingdom representative that the question of confirmation was adequately covered by paragraph 7' at 312-314.
[116] ibid 309.
[117] ibid 311.
[118] 1988 Vienna Convention (n 65) Article 17(7) [in part]: [a]t the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

state'. Disagreeing with the U.N. Commentary to the Convention, a more recent UNODC Issue Paper on Transnational Crime provides that, '[t]he wording of the provision [in Article 17(3)] seems to equate the State of registry with the State of nationality, which is not accurate. In the light of article 91(1) of UNCLOS, nationality is not contingent on registration'.[119] Guilfoyle too concludes that 'requiring confirmation of *registry* is inconsistent with Article 91'.[120] Therefore, in light of this, and as argued in Chapter 3, there is a practical gap in the law that may impact a State's ability to obtain a ship boarding authorisation. Still, should the flag state grant its authorisation, Article 17(4) sets out a list of 'actions' the non-flag state may take against the suspected DTV on the high seas.

Article 17(4) sets out a ship-boarding procedure. Article 17(4) states that:

> [i]n accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, inter alia: a) Board the vessel; b) Search the vessel; c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.[121]

As Chapter 3 highlighted, there is no explicit *right of visit* against a suspected flagged DTV on the high seas in the LOSC. Article 17(4) of the 1988 Vienna Convention addresses this gap to some degree by permitting a non-flag state the ability to 'board' a suspected DTV on the high seas subject to authorisation from the flag state.[122] Article 17 (4) also sets out a means for the boarding state to 'take action' against another party's vessel.[123] According the U.N. commentary, 'action' against a DTV is indicative of 'a range of possibilities,'[124] and the article makes it 'clear the disjunctive nature of the various processes which might be taken against the vessel concerned'.[125] The open-ended nature of the provision also creates flexibility for the flag state and the

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[119] U.N. Issue Paper (n 109) 4.

[120] Guilfoyle 'Shipping Interdiction' (n 88) 95. Consider the *Battlestar* case in Chapter 3, where the U.K. Court of Appeals found that merely flying a flag with associated documents was not sufficient to establish nationality because the vessel's owners did not also attempt to register the vessel, *R v Bolden and Dean* (the 'Battlestar') (1998) 2 Cr App R 171. Chapter 6 explores this further when examining US appellate court cases concerning DTVs interdictions, which have often reached similar conclusions. For example, *US v Hernandez*, Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:13-cr-20911-BB-4. July 28, 2017. According to the Eleventh Circuit Court, 'statelessness does not turn on actual statelessness, but rather on the response of the foreign government. Arguing actual registry against the certification therefore misses the mark. This conclusion is supported by our decision in *United States v. Campbell,* 743 F.3d 802 (11th Cir. 2014). In that case, as in this case, the Commander of the US Coast Guard (at the time, Commander Deptula) certified in writing that the ship's captain claimed foreign registry, that the Coast Guard asked the foreign government whether the claim was true, and that the foreign government responded that it 'could neither confirm nor deny' the claimed registry'.

[121] 1988 Vienna Convention (n 65) Article 17(4).

[122] Papastavridis (n 87) 212-213.

[123] ibid 212-213.

[124] 1988 Commentary (n 62) 330.

[125] ibid 330.

requesting state to agree on a range of actions against the illegal drug traffickers both agree may be necessary.

If a boarding state acts against another party's vessel under Article 17(4), Article 17(5), (6), and (8) set out safeguards, primarily focused on protecting flag state interests over its vessels, cargo, and those on board. Article 17(6) allows the flag state to attach any number of conditions to its authorisations. For example, the flag state could impose certain requirements regarding the treatment of its nationals or concerning the disposition of the seized vessel.[126] However, States should be cautious because 'international cooperation' as set out in Article 17(1) implies States do not attach unreasonable or overly complicated conditions to their authorisations as this may in practice, cause States to avoid cooperating and engaging in interdictions.[127] Article 17(5) and (8) follow more traditional safeguards established in the LOSC. The primary safeguard in this regard is the duty not to endanger life at sea, reflecting customary international law.[128] Article 17(8) also reflects the similar obligations set out in the LOSC, which states that any state taking 'action in accordance with this article shall promptly inform the flag State concerned of the results of that action'.[129] However, there are some additional questions this framework seems to leave

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[126] ibid 338-339.

[127] ibid 338.

[128] LOSC (n 111) Article 94(4)(c) [in part]: Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Subsection (3): Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, (4) Such measures shall include those necessary to ensure: that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea. See *M/V Saiga (no 2),* 'the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is 'reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered'. Para 155-156; *Reports of International Arbitral Awards*, S.S. "I'M Alone" (Canada, United States) VOLUME III pp. 1609-1618, 30 June 1933 and 5 January 1935; *The Red Crusader* case (Commission of Enquiry, Denmark - United Kingdom, 1962), I.L.R, Vol. 35, p. 485). *See further*, Klein (n 88) 116; I. A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquency Vessels,' [1986] 35 Int'l & Comp. L.Q. 320, 330, 341-342. Cf William C. Gilmore, 'Narcotics Interdiction at Sea: UK-US Co-operation,' [1989] 15 Commw. L. Bull. 1480, 1495. Gilmore observes that '[t]he 1981 Agreement, like the 1958 Geneva Conventions and the 1982 U.N. Convention on the Law of the Sea, does not directly address this issue. The question, here as elsewhere, is left to be governed by customary law. This had been done in spite of the fact that the few relevant precedents involving armed force in time of peace, such as the I'm Alone" and "The Red Crusader" are somewhat controversial and, to that extent, of questionable value in framing rules of engagement'.

[129] A similar obligation exists in LOSC Article 27(5) for coastal states exercising criminal jurisdiction at the vessel mater's consent. The article states: In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

unanswered, especially regarding matters of prescriptive jurisdiction under Article 4 of the 1988 Vienna Convention.

As stated, Article 4 of the 1988 Vienna Convention generally addresses prescriptive jurisdiction against drug trafficking. The first is the obligatory establishment of prescriptive jurisdiction, and this requires States to enact domestic legislation establishing their jurisdiction over drug trafficking offences on vessels flying their flag and offences within their territory.[130] The second is the optional establishment of prescriptive jurisdiction over DTVs interdicted under Article 17(3).[131] Again, this is a practical gap in the law because if a flag state grants authorisation there is the possibility that, 'a state party will be authorised to seize the suspect vessel on the high seas by the flag state, yet it will lack the requisite jurisdiction to seize the cargo, try the offenders in its courts and (…) [u]ndoubtedly, this question of compliance and implementation undermines the effective application of Article 17' in practice.[132]

In other words, according to the U.N. Commentary, there is little point in interdicting another state's vessel, on the high seas, boarding the vessel, and searching the vessel unless there is a way to take further legal action.[133] This weakens the entire purpose of Article 17, which is that a non-flag state exercises its jurisdiction on the high seas and bring the offenders of another party's flagged vessel before its courts for prosecution as well as seizure of the vessel and any illicit drugs.[134] When considering this gap, it should be noted that states had not considered this issue in Article 17. The drafting history of Article 17, as it relates to Article 17(3) is almost collectively focused on where the scope of the article applies with respect to the maritime zones of jurisdiction as codified in the LOSC, in which it was concluded that the article applies to any maritime zone outside of the territorial sea.[135]

Furthermore, as Gilmore concludes, 'it will suffice to say that such an assertion of jurisdiction over offences taking place on foreign flagged vessels on the high seas, though optional, will in fact be needed if states are to make full and effective use of the provisions of [Article 17]'.[136] Papastavridis too notes that 'this lack of mandatory establishment of jurisdiction undermines the effective application of Article 17' of the 1988 Vienna Convention.[137] However, other

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[130] 1988 Vienna Convention (n 65) Article 4(1)(a)(i) and (ii).
[131] ibid Article 4(1)(b)(ii).
[132] U.N. Issue Paper (n 109) 33-34. *See also* Papastavridis (n 87) 213.
[133] 1988 Commentary (n 62) 110.
[134] ibid at 110. See Papastavridis (n 87) 213.
[135] 1988 Vienna Conference Official Records (n 79) 267-274.
[136] Gilmore '1988 Convention' (n 70) 11.
[137] Papastavridis (n 87) 213.

commentators, such as Guilfoyle have identified what appears to be an overlooked perspective on this gap between Article 4 and Article 17.[138]

According to Guilfoyle, a state 'may' 'establish national prescriptive jurisdiction over offences committed aboard foreign-flagged vessels upon which they have been authorised to take action pursuant to Article 17'.[139] Yet, Article 4(1)(b)(ii), as it concerns a DTV on the high seas, references both Article 17(4) and (9). In other words, according to Guilfoyle, while Article 4(1)(b)(ii) appears to be optional, instead of creating an obligation for the parties to establish and exercise their jurisdiction under Article 17(4), a state 'may' do so based on those procedures, or it may do so according to Article 17(9), which emphasises the use of regional or bilateral agreements.[140] Indeed, as Chapter 5 will show, these types of agreements have greatly expanded how States establish and exercise their jurisdiction over DTVs on the high seas. Nonetheless, the gap in the law exists between Article 4 and 17 regarding the establishment and exercise of a non-flag state's jurisdiction over a flagged DTV on the high seas. Furthermore, this gap is also seen regarding the interdiction of a DTV *without nationality* on the high seas.

The gap in this regard is the approach of the Convention which presumes that most ships are registered, flagged, and have nationality. Indeed, as one U.S. official has noted, it is evident that states drafted the article with this approach in mind.[141] However, in taking this approach to DTVs, it also means that the convention cannot address a *vessel without nationality* in any meaningful way.[142] In other words, although DTVs suspected of being *without nationality* on the high seas is acknowledged in Article 17(2) of the 1988 Vienna Convention, there is no enforcement mechanism beyond a party 'requesting the assistance of other Parties in suppressing' the vessel.[143] Additionally, DTVs *without nationality* are not contemplated in Article 4 this means that there is no basis for establishing or exercising domestic jurisdiction over them.

The U.N. Commentary highlights this deficit and notes that Article 4 is 'silent about the assumption of legislative powers over stateless vessels'.[144] Therefore, as the commentary concludes:

> [w]hile Article 4 treats both the issue of a party's jurisdiction in respect of offences taking place on board its own flag vessels and on those of other parties, it remains silent about the assumption of legislative powers over stateless vessels involved in the international

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138 Guilfoyle 'Shipping Interdiction' (n 88) 85.
139 ibid 84.
140 ibid 84.
141 Transcript T-002 at 11-12.
142 Transcript T-002 at 11-12.
143 1988 Vienna Convention (n 65) Article 17(2).
144 1988 Commentary (n 62) 110.

> traffic in narcotic drugs and psychotropic substance. The absence of specific treatment of this topic is somewhat curious (…) [s]ubsequent international practice has identified this as a matter requiring attention, given the extent to which stateless vessels, have in fact, been used by trafficking networks.[145]

In other words, although Article 17(2) allows a party to request the assistance of another party to interdict a DTV that is *without nationality* on the high seas, the Convention provides no means to accomplish this objective. As a result, another significant practical gap in the law exists. However, it is also possible that this gap is mitigated through the provisions of Article 17(9) of the 1988 Vienna Convention. Sub-paragraph (9) concerns the use of regional or bilateral agreements to enhance the general provisions of Article 17.

Article 17 (9) of the 1988 Vienna Convention states that '[t]he Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article'.[146] The interdiction of DTVs or any vessel on the high seas is a complex, costly, and time-consuming endeavour for states to undertake.[147] There are other substantial costs and time related to the training of personnel, maintaining of equipment, building capacity, enacting relevant domestic legislation, and other efforts needed for high seas law enforcement actions.[148] The primary way states have sought to alleviate these gaps in the law and increase their capacity in high seas law enforcement is through international cooperation. Specifically, this is often though regional and bilateral drug interdiction agreements. For example, and according to the U.N. Commentary, states may use such agreements to better implement Article 17 by establishing better procedures for the exchange and granting of authorisations to board flagged vessels of the parties.[149] Indeed, as Chapter 5 will show, these agreements are used to close some of the practical gaps identified in the previous chapters

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[145] ibid 110.
[146] 1988 Vienna Convention (n 65) Article 17(9).
[147] 1988 Commentary (n 62) 342.
[148] UNODC, the Commission on Crime Prevention and Criminal Justice (CPCJ), Resolution 20/5 (2011) observing in paragraphs: 'the CPCJ (3) Encourages the United Nations Office on Drugs and Crime to continue to provide Member States with technical assistance, upon request, in the areas of capacity-building in the criminal justice sector and the implementation of the relevant conventions for combating organized crime committed at sea and (10) Requests, to that end, the United Nations Office on Drugs and Crime to convene an expert meeting with an advisory role towards the United Nations Office on Drugs and Crime, with due regard to proportional regional and geographic participation and focusing on the central authorities of Member States and their maritime and other law enforcement experts, to survey the significant and multifaceted challenges to the criminal justice system in the investigation and prosecution of cases arising from organized criminal activities at sea, within the mandates of the United Nations Office on Drugs and Crime, that are not already addressed in other forums or mechanisms, with a view to identifying specific areas where the Office and its resources may facilitate the investigation and prosecution of such cases by Member States, including by identifying gaps or possible areas for harmonization, and measures to strengthen national capacity, in particular in developing countries, to more effectively combat transnational organized crime'.
[149] 1988 Commentary (n 62) 333.

including how States authorise non-flag states to board and exercise jurisdiction over vessels on the high seas.

4.3 Conclusion

This chapter set out the foundations for international drug control: the 1961 Single Convention as Amended, the 1971 Psychotropic Convention, and the 1988 Vienna Convention. The evolution of these three conventions also demonstrates how States have become more aware of drug trafficking at the international level. This evolution ultimately shows the difficulty states have faced, and indeed continue to face, in addressing drug trafficking internationally. Likewise, these conventions also demonstrate the difficulty in creating an enforcement framework, encouraging the prescribing of domestic statutes, and accounting for the rapid evolution of drug trafficking methods. As the chapter illustrated, the shift in drug trafficking methods, especially to drug trafficking on the high seas, is one of the driving forces behind the drafting of the 1988 Vienna Convention.

Article 17 of the 1988 Vienna Convention creates a cooperative enforcement high seas interdiction framework. The framework includes a flag state requesting assistance from another party to suppress one of its vessels suspected of being a DTV in Article 17(2). Article 17(2) also allows a party to request assistance from another party to suppress a suspected DTV *without nationality* on the high seas. Regarding other parties' vessels, Article 17(3) and (4) contains a cooperative framework for a non-flag state party to request authorisation from the flag state to interdict its vessels on the high seas. In this regard, Chapter 4 considered how or if this framework addresses the gaps in Article 108 LOSC. Although the framework in Article 17 of the 1988 Vienna Convention does expand on Article 108 LOSC, there were several practical gaps in Article 17. For example, when Article 17 is read in conjunction with Article 4, there was an evident gap in the law concerning the establishment and exercise of jurisdiction by a non-flag state against another party's flagged vessel. This same gap was also shown concerning a DTV *without nationality* on the high seas.

Other practical gaps highlighted in the chapter include Article 17(3) and ship boarding authorisation requests to a flag state. The discussion centred on if the state of registry or the flag state is the focal point of Article 17(3), which, as Chapter 3 identified, can be two different states. Thus, since an authorisation to interdict another party's vessel under Article 17 can only come from the flag state, a 'confirmation of registry' in Article 17(3) is likely not constant with existing rules of international law, especially those codified in Article 91 LOSC, which concerns the

nationality of ships. What remains to be seen is how or if these gaps in the international legal regime can be further addressed. In this regard, Article 17(9) of the 1988 Vienna Convention is one method for addressing some of these gaps in the law. Article 17(9) concerns the use of regional or bilateral agreements to enhance or carry out the effectiveness of Article 17. Chapter 5 takes up this matter in Part II of the thesis.

Part II

Chapter 5: Regional and Bilateral Drug Interdictions Agreements

Introduction

Part II of the thesis explores approaches to remedy the gaps in the international legal regime addressing DTVs on the high seas. As stated in Chapter 1, the interdiction of a DTV on the high seas, especially a flagged DTV, usually requires significant international cooperation between the flag state and the non-flag state conducting the interdiction. Chapters 3 and 4 engaged in several discourses on how states can cooperate, which generally involves a non-flag state obtaining the flag states authorisation to board the suspected DTV on the high seas. However, these chapters also identified a series of gaps in the law. From a practice-oriented perspective, some of these gaps directly affect how states cooperate and so impact interdiction practice. These gaps also raised questions surrounding flag state authorisations and the extent DTVs *without nationality* are subject to the jurisdiction of an interdicting state.

In addressing such gaps this chapter explores how States engage with and use the obligation to cooperate established in Article 108 LOSC and Article 17 of the 1988 Vienna Convention to conclude regional and bilateral drug interdiction agreements. The regional agreements surveyed in this chapter are the *1995 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* [1995 CoE Agreement] and the *2003 Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean area, also known as the* Caribbean Regional Maritime Agreement [CRMA]. The chapter then examines bilateral interdiction agreements, specifically the U.S. bilateral 'Six-Part' [model ship rider] interdiction agreements and how they address many of the gaps in the international legal regime.

5.1 Regional Drug Interdiction Agreements

In general, there are very few regional maritime drug interdiction agreements in force. The primary geographic areas where regional agreements have been implemented are Europe and the Caribbean. Furthermore, despite attempts to reconsider drug trafficking at sea more generally

under the European Union treaty, this has not met with any success at present.[1] There are regional cooperative agreements in place in the Caribbean area, such as the Regional Security System [RSS]; however, this agreement primarily functions to build capacity, provide intelligence, and technical/administrative support.[2] There are no regional maritime drug interdiction agreements currently in place in Asia, Oceania, or Africa.[3] The agreement that is presently in place in Europe in the 1995 CoE Agreement and the primary maritime interdiction agreement in the Caribbean Area is the CRMA.

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[1] Initiative of the Kingdom of Spain concerning a draft Convention on suppression by Customs authorities of illicit drug trafficking on the high seas, 15449/01 ENFOCUSTOM 53, 5382/02 ENFOCUSTOM 2, 5563/02 ENFOCUSTOM 5, by letter, dated 16 January 2002, the Kingdom of Spain sent to the General Secretariat of the Council an initiative with a view to the adoption of a Convention on suppression of illicit drug trafficking on the high seas, based on Article 34(2) of the Treaty on the European Union. See Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing Limited 2013) 220. See also Peter J.J. van der Kruit, 'Maritime Drug Interdiction in International Law' (PhD Thesis, University of Utrecht 2007) 137.

[2] The Regional Security System does provide for maritime drug interdictions as part of its core function, but it is not a regional maritime interdiction agreement. The RSS treaty states that one of the purposes of the agreement is 'to promote co-operation among the Member States in the prevention and interdiction of traffic in illegal narcotic drugs (…)'. Under this mandate, '[a] vessel was tasked to patrol each sector on a weekly basis in order to enforce the areas of cooperation but with special emphasis on the interdiction of illegal drugs; [h]owever, these patrols have been scaled down due to manpower and equipment shortages'. Additionally, the agreement does contain a provision allowing 'the Member States shall have the right of "hot pursuit" within each other's territorial sea and exclusive economic zone'. Treaty Establishing the Regional Security System, Done at St. Georges, Grenada, March 5, 1996, Entry into Force 6 August 1999. See also The Regional Security System, 'About Us,' 'Maritime Operations' and 'Core Functions', Accessed on 08 May 2019, < https://www.rss.org.bb/maritime/>.

[3] In Asia, there are bilateral cooperative efforts such as the National Coast Watch Center, which is a US cooperative and capacity building endeavour with the Philippines. According to the US State Department, '[t]he National Coast Watch Center is a multi-year partnership funded by the Defense Threat Reduction Agency as part of the WMD Proliferation Prevention Program's Maritime Security project. The project, when complete, will tie together more than a dozen stations and sensors, as well as ships of the Coast Guard, to provide a more comprehensive picture of ships and vessels operating in or near Philippine waters'. Accessed at: [https://ph.usembassy.gov/us-ambassador-helps-open-national-coast-watch-center-to-enhance-philippine-maritime-domain-awareness/]. See the *Regional report on Central Asia* by the Dublin Group, 10291/13, 16 September 2013. The report noted the general difficulties in regional drug control and issues of general transnational law enforcement in the region. Some states in the region have entered into the Central Asian Regional Information and Coordination Centre for combating the illicit trafficking of narcotic drugs, psychotropic substances and their precursors), established within the Memorandum of Understanding on sub-regional drug control cooperation dated May 4, 1996. However, there are significant problems with funding and other technical assistance. See also UNODC 'West and Central Asia' only observing that 'maritime regional cooperation is strengthened to address the growing use of maritime routes for trafficking illicit drugs originating in Afghanistan as well as precursors destined for illicit drug manufacture in Afghanistan', accessed on 9 September 2020, <https://www.unodc.org/unodc/en/drug-trafficking/central-asia.html>; the Final Independent Project Evaluation of the 'Support to the ECOWAS Regional Action Plan on illicit drug trafficking, related organized crime and drug abuse in West Africa' XAW/Z28, Western Africa June 2020. The report notes that '[j]oint training events and operations have been instituted among law enforcement agents within and between countries Benkadi (Burkina Faso, Mali, Côte d'Ivoire); Ninibo (Niger, Nigeria borders); Open Roads (Senegal, Gambia, Guiné Bissau) in order to increase the effectiveness of law enforcement in curbing transnational drug issues. There is a 'proposed 'supplementary act' to the 2008 Praia Convention, when presented and assented to by Member States' Governments, should provide renewed strong commitment and funding for the fight against drug trafficking and organized crime, 26. See further James Kraska and Raul Pedrozo, *International Maritime Security Law*, (BRILL, 2013) ProQuest Ebook Central, 555; Van der Kruit (n 1) 13.

5.1.1 The 1995 CoE Agreement

The 1995 CoE Agreement is the result of the ongoing work of an intergovernmental working group on drugs, the Pompidou Group, established by France, Germany, Netherlands, Belgium, Italy, Luxembourg, and the United Kingdom.[4] The Pompidou Group researched drug use, trafficking, and trends within the context of the Council of Europe and under the scope of the 1988 Vienna Convention. The group then used this data to aid in forming a new regional agreement according to Article 17(9) of the 1988 Vienna Convention, but within the Council of Europe member states.[5] The agreement's purpose was to 'contain all the necessary administrative and legislative provisions to give effect to the relevant provisions of that convention'.[6] The agreement also seeks to address some lacunae in the 1988 Vienna Convention, but in a regional context only.[7] Thus as Papastavridis summarises, the 1995 CoE not only enriches the general framework of the 1988 Vienna Convention, but it tackles some practical hurdles identified after the Convention entered into force.[8]

As with the general framework created under Article 108(1) LOSC and Article 17(1) of the 1988 Vienna Convention, Article 2 of the 1995 CoE Agreement restates the obligation to cooperate in the interdiction of DTVs on the high seas.[9] Article 2 states [in part] that:

> [t]he Parties shall co-operate to the fullest extent possible to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea.[10]

The 1995 CoE Agreement does not deviate from the principle of exclusive flag state jurisdiction or the general framework established by the 1988 Vienna Convention.[11] Indeed, as Gilmore explains, 'Article 17 and other relevant provisions of the Vienna Convention text acted as a

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[4] Pompidou Group, 'History' Council of Europe, Accessed at [https://www.coe.int/en/web/pompidou/about/history.]

[5] Explanatory Report to the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, European Treaty Series - No. 156, Strasbourg, 31.1.1995, General Considerations, Introduction, para 2. The report notes that, 'the agreement could also be seen as implementing other articles of the Vienna Convention, such as Article 4, the committee agreed that the draft agreement should be seen in the light of Article 17, paragraph 9, of that convention. The final paragraph of the preamble accordingly uses the same language as Article 17, paragraph 9, of the Vienna Convention', 4.

[6] ibid Introduction, para 3.

[7] Papastavridis (n 1) 218.

[8] ibid 219. See also William C. Gilmore, 'Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement,' [1996] 20 Marine Policy 1, 8, 8; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 86.

[9] Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, European Treaty Series - No. 156, Strasbourg, 31.I.1995, Article 2(1) and (2).

[10] ibid Article 2.

[11] ibid Article 3(4).

constant frame of reference for the drafters'.[12] Therefore as Gilmore notes, '[i]t was accepted from the outset, for example, that solutions which were contrary to the letter or spirit of the Vienna Convention would not be acceptable'.[13] Reflecting this framework, the basis for all interdictions of flagged DTVs under the 1995 CoE Agreement is the explicit authorisation from the flag state on a *case-by-case basis*, but there is no obligation to interdict a DTV.[14]

Should a party to the 1995 CoE Agreement engage in enforcement against another party's vessel, a process comparable to the one outlined in the 1988 Vienna Convention is set out in Articles 4, 5, and 6. Article 4 is very similar in context to Article 108(2) LOSC and Article 17(2) 1988 Vienna Convention.[15] Article 4(1) states that:

> [a] Party which has reasonable grounds to suspect that a vessel flying its flag is engaged in or being used for the commission of a relevant offence, may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.[16]

Article 6 is similar in content and purpose to Article 17(3) and (4) of the 1988 Vienna Convention. Article 6 states that:

> [w]here the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorisation of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement. No such actions may be taken by virtue of this Agreement, without the authorisation of the flag State.[17]

Regarding the above, the underlying principle is that an interdicting state may take no actions without the flag state's authorisation, which also reflects the same obligations set out in Article 92 LOSC and Article 17(3) of the 1988 Vienna Convention. This obligation links to Article 3(4) and Article 14 of the 1995 CoE Agreement.

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[12] Gilmore '1995 CoE Agreement' (n 8) 4. Gilmore served as a member of the Committee of Experts which drafted the 1995 Agreement.
[13] ibid 4.
[14] 1995 CoE Report (n 4) 8; Guilfoyle 'Shipping Interdiction' (n 8) 86.
[15] United Nations Convention on the Law of the Sea (Adopted 10 December 1982, Entry into Force 16 November 1994) UNTS vol. 1833, p. 3. Article 108(2) LOSC: Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Entry into Force 11 November 1990) UNTS vol. 1582 p 95. Article 17(2) 1988 Vienna Convention: A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
[16] 1995 CoE Agreement (n 9) Article 4(1).
[17] ibid Article 6.

Article 3(4) provides that '[t]he flag State has preferential jurisdiction over any relevant offence committed on board its vessel'.[18] Article 14 sets out the flag state's preferential jurisdiction. Furthermore, the flag state may also attach conditions or limitations on its grant of authorisation in a way similar to Article 17(6) of the 1988 Vienna Convention.[19] Under this combined framework, the flag State may decide for any reason that its interests are better served by acting itself, and so request the interdicting state to cease further actions against its flagged vessel and the crew.[20] Should the flag state choose to exercise its preferential jurisdiction it must do so within 14 days of the interdiction.[21] The 14-day limit cannot be extended.[22] There is no obligation on the flag state to continue with any prosecution or further action after exercising its preferential jurisdiction, only that the flag state 'deal with the case as if it were a domestic case and proceed accordingly'.[23] The flag state may also relinquish its preferential jurisdiction to the interdicting state at any time.[24] Should it do so, under the agreement, the intervening state takes primary responsibility for the disposition of detained persons and vessels.[25] Still, even if a State does intervene, it does not have to take any further actions, opting instead to inform the suspected DTV's next port of call, and so any further action may be taken when the vessel ports.[26] However, should the intervening state act, Article 9 then addresses the actions the non-flag state may take.

Article 9 concerns 'Authorised Actions' and functions like the framework in Article 17(4) 1988 Vienna Convention. Article 9 states [in part] that a party '[h]aving received the authorisation of the flag State, and subject to the conditions or limitations (…) may take the following actions':

> a) stop and board the vessel;
>
> b) establish effective control of the vessel and over any person thereon;
>
> c) take any action provided for in sub-paragraph ii of this article which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;

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[18] ibid Article 3(4).
[19] ibid Article 8: 1. If the flag State grants the request, such authorisation may be made subject to conditions or limitations. Such conditions or limitations may, in particular, provide that the flag State's express authorisation be given before any specified steps are taken by the intervening State. 2. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that, when acting as an intervening State, it may subject its intervention to the condition that persons having its nationality who are surrendered to the flag State under Article 15 and there convicted of a relevant offence, shall have the possibility to be transferred to the intervening State to serve the sentence imposed.
[20] 1995 CoE Report (n 5) 17.
[21] 1995 CoE Agreement (n 9) Article 14.
[22] 1995 CoE Report (n 5) 17.
[23] ibid 18.
[24] 1995 CoE (n 9) at Article 14.
[25] 1995 CoE Report (n 5) 17.
[26] ibid 10.

> d) require the vessel and any persons thereon to be taken into the territory of the intervening State and detain the vessel there for the purpose of carrying out further investigations.[27]

Once effective control is established, the interdicting state may:

> a) search the vessel, anyone on it and anything in it, including its cargo;
>
> b) open or require the opening of any containers, and test or take samples of anything on the vessel;
>
> c) require any person on the vessel to give information concerning himself or anything on the vessel;
>
> d) require the production of documents, books or records relating to the vessel or any persons or objects on it, and make photographs or copies of anything the production of which the competent authorities have the power to require;
>
> e) seize, secure and protect any evidence or material discovered on the vessel.[28]

When considering the list of actions set out above in Article 9(1) of the 1995 CoE Agreement, Van der Kruit suggests that 'the actions enumerated under Article 9(1) of the 1995 Agreement are apparently exhaustive'.[29] However, it can be argued that the permissive word 'may' in Article 9(1) is indicative of a list of actions which are potentially available to an interdicting non-flag state.[30]

Furthermore, according to Article 11 of the 1995 CoE Agreement, it states that any actions taken under Article 9 are subject to the domestic law of the interdicting state.[31] One such action in Article 9 is that the interdicting state *may* 'require any person on the vessel to give information concerning himself or anything on the vessel' which will be done pursuant to the national law of the interdicting state.[32] Indeed, according to the 1995 CoE's explanatory report to the Agreement, 'the committee felt that it would be sufficient to enumerate in paragraph 1 the types of action which *may* be taken by the intervening State (…) and to refrain from any attempt to provide full details thereof'.[33] Thus, the list of possible actions in Article 9, combined with the word 'may' is indicative of a 'catch all' rather than an exhaustive list. However, to engage in any of the above actions, the intervening state must have established its jurisdiction.

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[27] 1995 CoE Agreement (n 9) Article 9(1)(i).
[28] ibid Article 9(1)(ii).
[29] Van der Kruit (n 1) 119.
[30] 1995 CoE Report (n 5) 13.
[31] 1995 CoE Agreement (n 9) Article 11(1).
[32] ibid Article 9.
[33] 1995 CoE Report (n 5) 13.

Should the interdicting state act, the agreement imposes some new jurisdictional obligations on the parties not previously seen in the 1988 Vienna Convention. For example, jurisdiction under the 1995 CoE Agreement states [in part] that:

> 1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences when the offence is committed on board a vessel flying its flag.
>
> 2. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of any other Party to this Agreement. Such jurisdiction shall be exercised only in conformity with this Agreement.
>
> 3. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law.[34]

The principal difference between the 1988 Vienna Convention and the 1995 CoE Agreement in this regard is the obligation to establish prescriptive jurisdiction over flagged vessels of other States party and *vessels without nationality*.[35] However, the domestic law and jurisdiction of each state party raises a further practical question.

There are fifteen ratifications/accessions to the 1995 CoE Agreement.[36] Four parties have attached reservations [Austria, Czech Republic, Hungary, and the Slovak Republic] because they do not have government vessels in service allowing them to act as an interdicting state, so the actual number of potential interdicting parties is eleven.[37] This creates the possibility of any of those eleven parties to the agreement exercising its jurisdiction over another party's flagged vessel. In other words, the question that arises is, as Guilfoyle explains, 'the potential problem [of] the law applicable during boardings'.[38]

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[34] 1995 CoE Agreement (n 9) Article 3.
[35] Papastavridis (n 1) 219.
[36] Chart of signatures and ratifications of Treaty 156. Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS no. 156, accessed on 9 September 2020, <https://www.coe.int/en/web/conventions/full-list/ /conventions/treaty/156/signatures?p_auth=2eUga fiQ>.
[37] Reservations under Article 3(2) and (3) for reasons set out in Article 3(6) which states, '[a]ny State which does not have in service warships, military aircraft or other government ships or aircraft operated for non-commercial purposes, which would enable it to become an intervening State under this Agreement may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe declare that it will not apply paragraphs 2 and 3 of this Article. A State which has made such a declaration is under the obligation to withdraw it when the circumstances justifying the reservation no longer exist.
[38] Guilfoyle 'Shipping Interdiction' (n 8) 87.

As noted above, Article 14 allows the flag state's preferential jurisdiction to remain in effect up to fourteen days from the time of boarding.[39] In this regard, if the flag state exercises its preferential jurisdiction later, a suspected DTV may have been 'boarded, searched, evidence seized, and witnesses interviewed under (…) different sets of police powers, possibly compromising subsequent prosecutions (...)'.[40] The agreement itself and the explanatory report do little to address this problem. The explanatory report seems to indicate this long delay is necessary because:

> it would not be in the interests of criminal justice if the time were so short that the flag State would almost automatically claim preferential jurisdiction. It must therefore be sufficiently long to enable the flag State to evaluate the summary of evidence and generally assess the situation together with involved authorities and, possibly, shipowners or operators.[41]

Still, another question materialises should the flag state decide to exercise its preferential jurisdiction. In such cases, Article 14 states that action 'against the vessel and persons on board may be deemed to have been taken as part of the procedure of the flag State'.[42] In other words, the interdicting state is permitted to exercise its enforcement jurisdiction, which is apparently on a 'loan' from the flag state.[43] As the explanatory report indicates, '[t]he jurisdiction which the intervening State exercises is thus fragile and totally dependent on whether the flag State exercises its preferential jurisdiction'.[44] Furthermore, as noted in the explanatory report,

> [t]he committee created in paragraph 5 a legal fiction which would come into effect only in the case where the flag State has notified the intervening State of its intention to exercise its preferential jurisdiction. In that case, measures taken against the vessel and persons on board may be deemed to have been taken as part of the proceedings of the flag State (…) The legal fiction would in no manner change the principle embodied in Article 11, paragraph 1, that action taken by the intervening State would be governed by the law of that State.[45]

Ultimately, despite the flag state retaining its preferential jurisdiction and the possibility of a party's flagged vessel is subject to any number of different national laws, the 1995 CoE Agreement is not dissimilar to the already existing provisions of the LOSC or the 1988 Vienna Convention in this regard. There is, however, one aspect of the 1995 CoE Agreement where a key difference between it and the LOSC is observable, and this concerns a reoccurring question of the verification of a vessel's registration and nationality. Thus, the method to verify a vessel's

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[39] 1995 CoE Agreement (n 9) at Article 14(2).
[40] Guilfoyle 'Shipping Interdiction' (n 8) 88.
[41] 1995 CoE Report (n 5) 17.
[42] 1995 CoE Agreement (n 9) Article 14(5).
[43] 1995 Coe Report (n 5) Paragraph 70 at 18.
[44] ibid Paragraph 70 at 18.
[45] ibid Paragraph 70 at 18.

nationality to grant ship boarding authorisation under the 1995 CoE Agreement warrants further consideration.

The 1995 CoE Agreement takes a unique approach to a vessel's nationality, flag, and registration. A possibility exists that a vessel could fly the flag of one party and have the marks of registry or other indications of nationality of another party.[46] In other words, as the 1995 CoE Agreement explanatory report indicates:

> [i]f the vessel were flying the flag of a State, but was in fact of another nationality, it would in any case have lost the protection of the "true" flag State (…) Each flag State has the power to exercise its jurisdiction and control over any ships flying its flag (…).[47]

Such a scenario creates practical gap when an authorisation is requested. This issue was also discussed in the previous chapter concerning Article 17(3) of the 1988 Vienna Convention. However, the 1995 CoE Agreement mitigates this gap by encouraging a time limit for flag states to respond to the authorisation requests.[48] In this regard, it shares characteristics with the CRMA, and the U.S. bilateral interdiction agreements set out below.[49] Still, unlike those agreements, if the flag state does not respond to the request, the requesting state cannot interdict the suspected DTV.[50] Apart from these considerations, there remains a lingering question concerning the application of the 1995 CoE Agreement in practice.

The 1995 CoE Agreement entered into force in 2000 but is not widely ratified. According to Guilfoyle, the lack of ratification may be due to either the advancement in cooperation by European law enforcement agencies or problems with national implementation due to specific provisions of the agreement, namely extradition.[51] Furthermore, as said, some of the parties lack

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[46] ibid 11.
[47] ibid 11.
[48] 1995 CoE Agreement (n 9) Article 9: The flag State shall immediately acknowledge receipt of a request for authorisation under Article 6 and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request.
[49] Papastavridis (n 1) 219. Cf Gilmore '1995 CoE Agreement' (n 8) 7. Gilmore observes that, '[a] number of alternative ways of dealing with the requirement of Flag State authorisation were discussed. First, that prior authorisation to stop and board a vessel could be contained in the Treaty. This was the approach which, in somewhat modified forms, lay at the heart of both the 1981 UK-US Exchange of Notes and the Spanish Italian bilateral treaty to combat illicit drug trafficking at sea of March 1990. Second, authorisation could be required from the Flag State in each case. Here two principal variants presented themselves: (i) that failure to respond to a request in a timely fashion would constitute tacit consent; and (ii) that express authorisation could be required'. According to Gilmore, '[t]he latter option is what Article 6 was drafted to reflect'. Tacit consent will be further examined in the next sections as an element of the CRMA and US bilateral drug interdiction agreements.
[50] There was consideration for attaching legal consequences for states that do not reply to requests. Further consideration was given to including a provision allowing the requesting state to interdict a suspected DTV in cases where the flag state did not reply. In those cases, the failure to reply would imply tacit consent and the ship boarding could continue. However, the explanatory report indicates that the failure to reply is a refusal of the request and so no further action may be taken against the flag state's vessel. See 1995 CoE Report (n 5) 12; Gilmore '1995 CoE Agreement' (n 8) 7.
[51] Guilfoyle 'Shipping Interdiction' (n 8) 86.

the capability to conduct high seas interdictions, thus limiting its use.[52] There are also a few Council of Europe member states who have signed but not ratified the agreement.[53] The question of the 1995 CoE Agreement as being relatively underutilised is, according to a 2015 white paper on Transnational Organized Crime published by the CoE, unanswered and a matter of further investigation. The recommended actions of the paper focus 'on identifying to what extent national legal systems have implemented the Council of Europe's conventions and recommendations and the UN conventions (…) and that identifying [t]he reasons for non-implementation or lack of adequate implementation of existing legal instruments on combating Transnational Organized Crime should be further analysed'.[54]

In summary, the 1995 CoE Agreement does demonstrate one approach in strengthening cooperative efforts to suppress DTVs on the high seas through a regional agreement. To that end, the 1995 CoE Agreement does address specific gaps in the 1988 Vienna Convention and the LOSC. For example, the agreement creates the obligation for the parties to establish domestic law addressing jurisdiction over a DTV interdicted on the high seas, something the 1988 Vienna Convention does not. In a similar vein, the 1995 CoE Agreement creates the same obligation ensuring the parties have domestic legislation establishing jurisdiction over DTVs *without nationality* on the high seas. However, the agreement leaves some practical questions unanswered. One of these practical questions concerns the possibility of a non-flag state beginning legal proceedings against a DTV and its crew, which may, up to fourteen days after an interdiction, be halted and then transferred to the DTVs flag state if requested. The other practical question concerns the implantation of the agreement by CoE member states and its general underutilization as a basis for DTV interdictions.

5.1.2 The 2003 Caribbean Regional Maritime Agreement

The 2003 CRMA originates with several U.N.-facilitated meetings in the 1990s following reports concerning the increasing level of violence and drug trafficking within the Caribbean area.[55] One of these reports, the *1992 Report of the West Indian Commission* concluded that a significant and growing threat to regional security was the Caribbean region's drug trafficking problem.[56] Another report followed the *Report of the West Indian Commission*, the 1996 *Plan of Action for Drug*

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[52] See (n 37) concerning reservations to the agreement based on a lack of enforcement vessels.
[53] List of Signatures (n 36) Bulgaria, Croatia, Estonia, Greece, Italy, Malta, Sweden, and the U.K. have all signed but not ratified the agreement.
[54] White Paper on Transnational Organized Crime, 2015, Council of Europe Publication, 39.
[55] A/53/275, para 15. Cooperation between the United Nations and the Caribbean Community, 18 August 1998.
[56] Sir Shridath Ramphal, *Time for Action: The Report of The West Indian Commission* (West Indian Commission 1992) 343-352.

Control Coordination and Cooperation in the Caribbean [1996 Barbados Plan of Action], and this report concluded that:

> [o]ne of the main problems facing the Caribbean region was that of illicit drug trafficking from South America to Europe and North America. Caribbean countries formed a geostrategic arc of democracy which was fundamental to the maintenance of peace and security in the western hemisphere. The transit traffic in illicit drugs, however, was undermining and threatening their peace and security.[57]

In response to these reports, two regional bodies, the Caribbean Community [CARICOM] and the Regional Security System [RSS] started collaborating to create a regional interdiction framework applicable to the specific issues of drug trafficking in Caribbean area.[58] These groups also conducted a series of meetings that focused specifically on the practical and technological concerns associated with the increased use of GFVs.[59] GFVs can quickly flee larger warships and so they were actively being used to take advantage of the slow boarding procedures created by Article 17(3) of the 1988 Vienna Convention.[60]

In light of these considerations an initiative by the Netherlands soon followed with the ultimate objective of increasing law enforcement cooperation, capacity, and suppressing DTVs in the Caribbean region in a new agreement.[61] There were also hopes that States whose geographic locations made their territorial waters heavily used smuggling routes, such as Mexico and Cuba, would possibly become a party to this new regional agreement, which in turn could address those States refusals to enter into a U.S. bilateral agreement.[62] The initiative culminated in the CRMA, which as will be seen, contains many 'stark departures'[63] from the other enforcement frameworks set out in the 1988 Vienna Convention, the 1995 CoE Agreement, and the LOSC.

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[57] The United Nations International Drug Control Programme Sub-Regional Strategy in the Caribbean, Bridgetown, Barbados on 17th May 1996, 1.

[58] Ibid; *1996 Plan of Action for Drug Control Coordination and Cooperation in the Caribbean,* 57 and 58. See the Regional Security System (n 2), which is established under a treaty and is composed of Antigua and Barbuda, Barbados, The Commonwealth of Dominica, Grenada, Saint Christopher, and Nevis, Saint Lucia, and Saint Vincent and the Grenadines. Specifically, one of their key functions is to promote cooperation among member states in the prevention and interdiction of illicit narcotic drugs. Article 4 of the RSS Treaty – Purposes and Functions of the System states that '[t]he purposes and function of the System are to promote cooperation among the member states in the prevention and interdiction of traffic in illicit drugs (…) customs and excise control, maritime police duties, combating threats to national security, the prevention of smuggling, and the protection of offshore installations and the exclusive economic zones'.

[59] William C Gilmore, *Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 2003* (The Stationery Office, 2005) 4.

[60] ibid 4.

[61] Van der Kruit (n 1) 145-146 and 167-168. Cf. Transcript T-002 at 2. One US official notes that the US was not involved in the initial drive to create the CRMA because the US almost always prefers to use bilateral interdiction agreements.

[62] Transcript T-001 at 1; Transcript T-002 at 2. See also Papastavridis (n 1) 221.

[63] Papastavridis (n 2) 222-223.

One of the main objectives of the agreement is to make it more 'comprehensive and innovative' by focusing on the practical nature of high seas interdictions, bearing in mind the actual challenges of high seas law enforcement such as sending and receiving requests for authorisation to board while simultaneously balancing the obligations in the existing international legal regime.[64] Additionally, one U.S. official notes that many of the 'innovative provisions' included in the CRMA were actually already under development in 2003 within the U.S.-led drafting work taking place for the 2005 SUA Protocol.[65] Thus, the agreement is 'based less on the [1988 Vienna Convention] and more on the bilateral agreements already in place in the region'; however, states becoming a party to the CRMA must also be a party to the 1988 Vienna Convention.[66] Furthermore, the CRMA addresses many of the vague jurisdictional provisions of the 1988 Vienna Convention while increasing the possibilities for international cooperation in the region.[67]

Article 2 sets out the CRMA's principal objective, which is cooperation to the 'fullest extent possible in combating illicit maritime (…) traffic in and over the waters of the Caribbean area (…) in conformity with the international law of the sea and applicable agreements'.[68] 'Cooperation' is further defined in Articles 3 and 4. Article 3 defines regional cooperation, sub-regional cooperation, and what actions the parties should do to cooperate. For example, cooperation can be increased by strengthening capacity and development through:

> competent international, regional or sub-regional organisations, to assist and support States party to this Agreement in need of such assistance and support, to the extent possible, through programmes of technical co-operation on suppression of illicit traffic. The Parties may undertake, directly or through competent international, regional or sub-regional organisations, to provide assistance to such States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.[69]

Another area where the CRMA expands international cooperation is in Article 19. Article 19 concerns the creation of regional and sub-regional bodies whose purpose is law enforcement

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[64] Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean area. Signed at San Jose April 10, 2003. Entered into force September 18, 2008. TIAS Depositary: Costa Rica, Article 25. See also Gilmore Note (n 59) 8; Papastavridis (n 1) 221.

[65] Transcript T-001 at 4; Transcript T-002 at 3. The 2005 SUA Protocol is examined in Chapter 7.

[66] CRMA (n 64) Article 35. The requirement to be a party to the 1988 Vienna Convention is also stated in the CRMA's preamble, which states [in part]: '[r]ecognising that the Parties to this Agreement are also Parties to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; [h]aving regard to the urgent need for international co-operation in suppressing illicit traffic by sea, which is recognised in the 1988 Convention; [r]ecalling that the 1988 Convention requires Parties to consider entering into bilateral or regional agreements or arrangements to carry out, or enhance the effectiveness of the provisions of Article 17 of that Convention (…)'. Papastavridis (n 1) 221. The bilateral interdiction agreements are discussed in the next section.

[67] Van der Kruit (n 1) 167.

[68] CRMA (n 64) Article 2.

[69] ibid Article 3.

coordination and cooperation between the parties to the CRMA.[70] Such efforts include the Caribbean Basin Security Initiative and the Organization of American States [OAS] Model Operating Procedure for Combined Maritime Drug Operations.[71] The purpose of the OAS Model is to supplement the CRMA, for example, to 'serve as a reference by those member States to the extent that their respective national laws and regulations allow them to engage in such international cooperation'.[72] The OAS Model also aids by creating a 'framework of elements that countries should consider when contemplating entering into agreements to carry out combined counterdrug operations', which can be bilateral or regional such as the CRMA.[73] Article 4 of the CRMA builds on this cooperative framework by addressing a practical element of high seas interdictions. As part of the obligation to cooperate, states must 'accelerate the authorisations for law enforcement vessels and aircraft, aircraft in support of law enforcement operations'.[74]

Article 4 is also one of the first notable deviations from the previous conventions analysed thus far in the thesis. Article 4 encourages the parties to *accelerate authorisations* permitting other states entry into the territorial sea or ports of the parties so that States can fulfil the law enforcement objectives of the agreement.[75] Article 4 takes a further new approach to 'cooperation' by setting out specific examples of how the parties can engage in cooperation and 'capacity building'. Capacity building includes assistance to:

> plan and implement training of law enforcement officials in the conduct of maritime law enforcement operations covered in this Agreement, including combined operations and boarding, searching and detention of vessels.[76]

Building on Article 4, Article 31 of the Agreement reflects a similar cooperative obligation as Article 17(9) 1988 Vienna Convention. Article 31 states [in part] that:

> [t]he Parties are encouraged to conclude bilateral or multilateral agreements with one another on the matters dealt with in this Agreement, for the purpose of confirming or supplementing its provisions or strengthening the application of the principles embodied in Article 17 of the 1988 Convention.[77]

Apart from defining and enhancing cooperation, as said, the CRMA focuses on the more practical law enforcement elements of maritime interdictions. The primary practical element

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[70] ibid Article 19.
[71] Model Operating Procedures Guide for Combined Maritime Counter Drug Operations, Interamerican Drug Abuse Control Commission, Secretariat for Multidimensional Security, accessed on 29 September 2021, <http://www.cicad.oas.org/reduccion_oferta/resources/maritime/Combined%20Ops_Eng.pdf>. See also Kraska/Pedrozo (n 3) 569-570.
[72] OAS Model Operating Procedures (n 71) at Purpose.
[73] ibid at Purpose and Jurisdiction.
[74] CRMA (n 64) Article 4.
[75] ibid Article 4(1).
[76] ibid Article 4(4).
[77] ibid Article 31.

here are the procedures for ship boarding authorisations to board another party's vessel. In this regard, it was observed that generally, such procedures might unnecessarily delay or hamper an interdiction. The question of the flag and registration is also a recurring issue that impacts ship boarding authorisations because vessels may have registration different from the nationality [i.e., flag].[78] Thus, unlike the previously discussed agreements, Article 6 CRMA succinctly clarifies the matter by stating that:

> [f]or the purpose of this Agreement, a vessel or aircraft has the nationality of the State whose flag it is entitled to fly or in which the vessel or aircraft is registered in accordance with domestic laws and regulations.[79]

In other words, a vessel has the *nationality* of either the claimed flag *or* its claimed state of registry, and this keeps the wording of the article consistent with Article 91 LOSC.[80] Article 6(5) also clarifies that, '[i]f the claimed flag State Party refutes the claim of nationality made by the suspect vessel, then the Party that requested verification may assimilate the suspect vessel to a ship without nationality in accordance with international law'.[81] It is important to note that Article 6 does not use the words 'claimed registry' but instead uses the term 'claim of nationality'. The 'claim of nationality' in effect, also reflects the *doctrine of presumptive flag state authority*.[82] Presumptive flag state authority means that 'when a ship claims a nationality, it is assumed that the claimed state of nationality can authorise the boarding'.[83] The doctrine reflects a U.S. operational procedure whereby the primary burden of establishing the flag state is often incumbent on the vessel's master, identifying marks, or documents found on the vessel.[84] The doctrine is considered further in the next chapter, and few States, apart from the U.S., use *presumptive flag state authority*.[85]

Unlike the 1995 CoE Agreement or 1988 Vienna Convention, Article 6 of the CRMA creates an obligation for a timeframe for flag states to respond to authorisation requests from other parties

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[78] The Flag and Registry are considered in Chapter 3. Chapter 4 also noted this issue as a practical legal gap under Article 17(3) of the 1988 Vienna Convention.
[79] CRMA (n 64) Article 6.
[80] LOSC (n 15) Article 91. Article 91 states: 1. Every 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. There must exist a genuine link between the State and the ship. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.
[81] CRMA (n 64) Article 6.
[82] Guilfoyle 'Shipping Interdiction' (n 8) 96.
[83] ibid 96.
[84] 46 USC 70502 (e) – Definitions: Claim of Nationality or Registry. A claim of nationality or registry under this section includes only 1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas; 2) flying its nation's ensign or flag; or 3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.
[85] Guilfoyle 'Shipping Interdiction' (n 8) 96.

to the agreement. A flag state shall respond 'expeditiously' but within a four-hour timeframe.[86] The CRMA also creates the possibility of other means to obtain ship boarding authorisations in situations where there may not be a response from a flag state. Article 16 creates a ship-boarding authorisation procedure that states [in part] that:

> 1. When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State's territorial sea, this Agreement constitutes the authorisation by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board (…) except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this Article.
>
> 2. Upon signing, ratification, acceptance or approval of this Agreement, a Party may notify the Depositary that vessels claiming the nationality of that Party located seaward of any State's territorial sea may only be boarded upon express consent of that Party (…).
>
> 3. Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depositary that Parties shall be deemed to be granted authorisation to board a suspect vessel located seaward of the territorial sea of any State that flies its flag or claims its nationality and to search the suspect vessel, its cargo and question the persons found on board (…) if there is no response or the requested Party can neither confirm nor deny nationality within four (4) hours following receipt of an oral request pursuant to Article 6 (…).[87]

Article 16 of the CRMA also potentially removes the need to request consent on a case-by-case basis.[88] Article 16(1) provides the possibility for the agreement to function as standing consent for the parties to board vessels of the other parties; however, in this case it only applies inter-parties much in the same way the enforcement procedures work in an RFMO as per the 1995 Straddling Fish Stocks Agreement, or in the U.S. Bilateral agreements.[89]

Many of the above changes in the ship boarding authorisation procedures included in the CRMA are due, primarily to what Klein considers is Article 17 of the 1988 Vienna Convention 'being overly restrictive in this [the Caribbean] region, due to the use of [GFVs] that could escape boarding proceedings when outside the territorial sea of a state by fleeing to such an area while the law enforcement officials waited for consent of the flag state to board'.[90] Papastavridis too

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[86] CRMA (n 64) Article 6. Cf the 1995 CoE Agreement where Article 7 states: The flag State shall immediately acknowledge receipt of a request for authorisation under Article 6 and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request. The 1995 CoE Explanatory Report further notes that: 'it was appreciated that some governments might have considerable difficulties, both of a legal and practical nature, to communicate a decision within an extremely short time, although it was recognised by all experts that, so far as practicable, the parties should make arrangements whereby the authority referred to in Article 17 of the agreement may receive and respond to requests on a twenty-four hour basis [and] (…) communicate a decision as soon as possible'.

[87] CRMA (n 64) Article 16.

[88] Natalie Klein, *Maritime Security and The Law of The Sea* (University Press 2012) 137.

[89] See Chapter 7 for this enforcement framework.

[90] Klein (n 88) 137.

has noted that the boarding authorisation procedures such as the one in Article 16(1) of the CRMA 'certainty enjoys the merit of expediency and efficiency and (…) also takes into account the operational problems posed by the use of so-called [GFVs]'.[91] However, since not all States are willing to give up the explicit right of authorisation, under the CRMA a Party can opt to attach specific declarations under subsections (2) or (3) of Article 16.

Article 16(2) allows a party to retain the right to require the prior authorisation for boardings on a case-by-case basis. In Article 16 (3), once the four-hour timeframe established in Article 6 passes without a response or confirmation from the flag state, authorisation is deemed to be granted based on the agreement. Currently, all the parties have indeed put in place various declarations related to Article 16.[92] Thus, the parties must be cognizant that the use of three different methods for boarding authorisation under Article 16 creates a complicated web of rules for ship boarding authorisations.

Currently, Nicaragua, the Dominican Republic and Costa Rica permit boarding under Article 16(1) of the CRMA.[93] The U.S., France, and the Netherlands all permit boarding if the four-hour period has elapsed under Article 16(2) of the CRMA.[94] Guatemala and Belize require their explicit authorisation before any boarding takes place under Article 16(3) CRMA.[95] For example, the declaration made by Belize states that:

> [t]he Government of Belize declares that in accordance with Article 16 (2) of the Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area vessels claiming the nationality of Belize located seaward of any State's territorial sea may only be boarded upon express written consent of the Government of Belize.[96]

As Gilmore explains, the divergent ship boarding procedures set out within both the CRMA and the declarations of each state serve to highlight how individual states remain in conflict over freedom of the high seas and exclusive flag state jurisdiction while being mindful of the need to reduce illicit drug trafficking at sea.[97] Agreeing, Papastavridis highlights that since these differential authorisation procedures are 'such a radical departure from past multilateral treat[ies],

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[91] Papastavridis (n 1) 223.
[92] Treaty Database for the Kingdom of the Netherlands, Treaty Data, States Party to the Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area 2003, accessed on 7 March 2019, <https://verdragenbank.overheid.nl/en/Treaty/Details/010467.html>.
[93] ibid.
[94] ibid.
[95] ibid.
[96] ibid Declaration of Belize.
[97] Gilmore '2003 Agreement' (n 59) 30-39.

it might pose police, legal or other difficulties for some states (…)'.[98] Thus, as Papastavridis reasons, the inclusion of 'a priori authorisation is the rule'; however, the agreement balances this through the inclusion of alternative models based on the 1988 Vienna Convention.[99] In addition to the ship-boarding authorisation procedures set out in Article 16, the CRMA also permits ship boardings undertaken through *ship-riders*.

A *ship-rider* is a designated law enforcement official of one party who is authorised to embark on a law enforcement vessel of another party to aid in investigations, prosecution of persons detained, and providing ship boarding authorisations.[100] Their authority includes authorizing the entry of a vessel on which they are embarked into their sending state's territorial sea, authorising such vessels to conduct counter-narcotic patrols within their sending state's territorial sea, and/or granting boarding permission to ships flagged to the ship-rider's sending state.[101] Should the ship-rider make an authorisation, any subsequent boardings, arrests, searches, or seizures are typically conducted under the domestic law of the ship-rider's sending state.[102]

The use of ship-riders is a valuable practical asset because they can expedite the time-consuming process of requests for authorisation. The CRMA creates an obligation to designate specific personnel as an 'embarked law enforcement officer,' but states are not required to embark or receive a ship-rider on their enforcement vessels.[103] Furthermore, the use of ship-riders is not uncontroversial as questions of responsibility or questions of uses of force can arise.[104] However, in any event, it appears that the use of ship-riders under the CRMA is minimal due to the agreements general underutilisation.[105] Ship-rider embarkation is more common under the U.S. bilateral agreements discussed in the next section of this chapter.

As noted, the CRMA is often discussed as being the product of extensive practical experience in issues affecting DTV interdictions more unique to the Caribbean area.[106] Indeed, one of the main practical issues noted are the problem of [GFVs] and their ability to escape interdictions by entering into other State's territorial seas or internal waters.[107] One way the CRMA addresses

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[98] Papastavridis (n 1) 223.
[99] ibid 223.
[100] UNSC Resolution S/RES/1851 (2008) U.N. Doc S/RES/1851 (2008) at para 3. The CRMA uses the term 'Embarked Law Enforcement Officer'; however, unless otherwise indicated, this is synonymous with 'Ship-Rider'.
[101] CRMA (n 64) Article 9.
[102] ibid Article 9. There are exceptions to this rule; however, these usually manifest under bilateral ship rider agreements. See the next section for further detail on this issue.
[103] ibid Article 9(1) and (2). See also Klein (n 88) 137.
[104] Papastavridis (n 1) 234-235.
[105] Transcript T-001 at 3; Transcript T-002 at 2-3
[106] Kraska (n 3) 555-556; Papastavridis (n 1) 220-221; Klein (n 88) 136-137; Gilmore (n 59) 4.
[107] Klein (n 88) 136.

this practical problem is it considers the possibility of third state interdictions within the territorial sea of another party. Territorial sea interdictions such as these can raise some important legal questions, and this brings into question the role of such interdictions within the scope of the general high seas enforcement regime applicable to DTV interdictions.

Recalling the *right of hot pursuit* in Chapter 3, there are circumstances when a 'reverse or cold' pursuit occurs whereby a suspicious vessel on the high seas attempts to escape interdiction by leaving the high seas for the protection of a coastal state's territorial sea or internal waters. According to the *right of hot pursuit*, in Article 111 LOSC, these types of pursuits are not contemplated. Indeed, as Chapter 3 noted, *the right of hot pursuit* only applies to delinquent vessels outward bound from a coastal state's territorial sea, contiguous zone, or EEZ. The CRMA to some degree addresses this gap in the LOSC because it considers the possibility that an enforcement vessel of one party may need enter the territorial sea of another party; however, this is subject to the authorisation of the coastal state.[108] Still, despite the usefulness of such practical provisions, some commentators criticise these operational provisions.

Van der Kruit notes that Article 11 of the CRMA implies that '[o]nly the coastal state shall conduct operations to suppress illicit traffic in waters under its sovereignty'.[109] Having noted this; however, with respect to conducting a territorial sea interdiction it should be first observed that any interdiction undertaken by a party in another party's territorial sea is subject to explicit authorisation, direction, and conditions set by the respective coastal state.[110] These are the conditions reflect the coastal state's sovereignty.[111] Furthermore, according to Article 12, the coastal state may grant authorisation for another party to, 'follow a suspect vessel into the waters of another Party and take actions to prevent the escape of the vessel, board the vessel and secure the vessel and persons on board awaiting an expeditious response from the other Party'.[112]

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[108] CRMA (n 64) Article 11 states: 1. Law enforcement operations to suppress illicit traffic in and over the waters of a Party are subject to the authority of that Party. 2. No Party shall conduct law enforcement operations to suppress illicit traffic in the waters or air space of any other Party without the authorisation of that other Party, granted pursuant to this Agreement or according to its domestic legal system. A request for such operations shall be decided upon expeditiously. The authorisation may be subject to directions and conditions that shall be respected by the Party conducting the operations. 3. Law enforcement operations to suppress illicit traffic in and over the waters of a Party shall be carried out by, or under the direction of, the law enforcement authorities of that Party. 4. Nothing in this Agreement shall be construed as authorising a law enforcement vessel, or law enforcement aircraft of one Party, independently to patrol within the waters or air space of any other Party.

[109] Van der Kruit (n 1) 149-15.

[110] CRMA (n 64) Article 11.

[111] See Chapter 2 for the territorial principle of jurisdiction. Chapter 3 considered this under Article 2 LOSC - Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil.

[112] CRMA (n 64) Article 12.

Thus, the coastal state may authorise such interdictions in its territorial sea; however, these interdictions should be considered as very limited exception as Article 11 makes clear that the 'agreement itself is not an authorisation for authorising a law enforcement vessel (…) of one Party, independently to patrol within the waters (…) any other Party'.[113] Ultimately, under the CRMA, the entry into another State's territorial sea by a party can be done under one of two conditions.

The first condition is the default option, and it permits entry into the territorial sea when, 'the Party has received authorisation from the authority or authorities of the other Party defined in Article 1 and notified pursuant to Article 7'.[114] The second condition, is a more exceptional clause for entry, and is permitted when:

> on notice to the other Party, when no embarked law enforcement official or law enforcement vessel of the other Party is immediately available to investigate. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.[115]

Once a response comes from the requested party, the DTV may be taken into port for further investigation or jurisdiction may be waived in favour of the interdicting state.[116] In cases where the DTV is not addressed under Article 12 or Article 16, Article 17 considers other possibilities for interdictions.

Article 17 is a catch-all article in the CRMA, and it provides that:

> [e]xcept as expressly provided herein, this Agreement does not apply to or limit boarding of vessels, conducted by any Party in accordance with international law, seaward of any State's territorial sea, whether based, inter alia, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, or an authorisation from the flag State to take law enforcement action.[117]

In other words, Article 17 is open-ended to allow for any possible actions or interdictions to occur if they conform to existing international law. Such measures could include deferring to a bilateral agreement between the parties. Other types of actions could possibly include operational procedures not specifically considered within the scope of international law. For example, consideration was given to the inclusion of a text permitting 'consensual boarding' under Article 17.[118] Consensual boarding or 'Master's Consent' is usually done by requesting the master of a flagged vessel on the high seas for their consent to board and search the vessel. This

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[113] ibid Article 11.
[114] ibid Article 12.
[115] ibid Article 12.
[116] ibid Article 12; Article 14.
[117] ibid Article 17.
[118] Van der Kruit (n 1) 150.

operational procedure is another predominantly U.S. method for obtaining a ship boarding authorisation. However, it seems at present that the U.S. is moving away from such practice against flagged DTVs in general, and this is further considered in Chapter 6.[119] Reflective of this, Van der Kruit explains that 'the vessel's master, who is not an official representative of the state his vessel is registered in, does not possess the authority to consent to enforcement action'.[120] While it is possible that the words 'inter alia' do not exclude consensual boarding, specific 'consensual boarding' provisions were ultimately omitted from the text in Article 17 of the CRMA.[121] Apart from addressing these practical concerns, the CRMA addresses a gap in the legal framework of the 1988 Vienna Convection, the establishment of prescriptive jurisdiction over DTVs on the high seas.

Recalling Chapter 4, one of the gaps in the framework of the 1988 Vienna Convention was that a party was not obligated to establish prescriptive jurisdiction over vessels it has interdicted under Article 17(3) of the Convention. Thus, a State could interdict a suspected DTV [flagged or *without nationality*] but not have domestic legislation in place to take further enforcement action or adjudication against the vessel or its crew.[122] Article 23 of the CRMA requires that the parties establish prescriptive jurisdiction over the offences set out in Article 3 of the 1988 Vienna Convention. It further obligates the parties to establish prescriptive jurisdiction over vessels interdicted pursuant to the CRMA. This obligation includes both flagged and *vessels without nationality*. Article 23 of the CRMA states that the parties shall establish their respective jurisdiction if:

> a) the offence is committed in waters under its sovereignty or where applicable in its contiguous zone;
>
> b) the offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
>
> c) the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State;
>
> d) the offence is committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of another Party, which is located seaward of the territorial sea of any State.[123]

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[119] Transcript T-001 at 5; Transcript T-002 at 6.
[120] Van der Kruit (n 1) 150.
[121] ibid 150.
[122] See Chapter 4 concerning Article 4 and Article 17 of the 1988 Vienna Convention.
[123] CRMA (n 64) Article 23.

In this regard, the CRMA is comparable the obligations created under the 1995 CoE Agreement noted above.

To summarise, the CRMA, as a regional agreement reflects a more 'practical' approach to DTV interdictions. Indeed, this section shows that the CRMA was developed to address many of the practical law enforcement challenges that are present during DTV interdictions and unique challenges that are also more prevalent in the Caribbean area.[124] The CRMA has several components of its enforcement framework that address many of the gaps in the 1988 Vienna Convention and the LOSC. The above section established that by incorporating a fixed time frame obligation for authorisation responses, the addition of ship-riders, contemplating inward bound pursuits, and territorial sea interdictions all address the associated gaps in the international legal regime. The CRMA also includes several options for the parties to provide ship boarding authorisation consent to another party, and obligations to establish prescriptive jurisdiction. However, as with the 1995 CoE Agreement, the CRMA's underutilization and ratification negates its potential practical benefits in the region. Still, the origin of many of the provisions and 'innovations' the CRMA incorporates into its enforcement framework originates with the U.S. Six-Part Bilateral Agreements.

5.2 U.S. Bilateral Drug Interdiction Agreements ['Six-Part Agreements']

The U.S. has been using bilateral maritime interdiction agreements to address smuggling since the 1900s; however, the use of bilateral drug interdiction agreements began in the early 1990s.[125] Entering into bilateral agreements is also the favoured method of the U.S. to address issues of maritime security more generally, including migrant smuggling, IUU Fishing, and WMD non-proliferation.[126] The most prominent type of bilateral interdiction agreement [BILAT] is the U.S. 'Six Part Model' or *Ship-Rider Agreement*.[127] These agreements have come about for several reasons, including the need to address vessels flagged to States like Jamaica and the Bahamas, which are primary stopping-off points for DTVs in route to the U.S.[128] The agreements are also vital for addressing practical complications such as the use of *flags of convenience* issued by states in

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[124] Papastavridis (n 1) 221; Klein (n 88) 136-137.
[125] See Chart 1 at the end of this chapter.
[126] Transcript T-001 at 2; Transcript T-002 at 13.
[127] Klein (n 88) 134.
[128] Suzette A. Haughton, 'Bilateral Diplomacy: Rethinking the Jamaica-US Ship-rider Agreement,' [2008] 3 Hague J. Dipl. 253, 257. Supplemental interview data also concludes that the use of bilateral agreements has led to a large increase in US led interdictions in the Caribbean area. Interview Transcript T-002 at 2-3; Interview Transcript T-005 at 4-5.

the Caribbean area.[129] Thus, as Papastavridis observes, '[t]hese agreements, based upon the consent of the states involved, are designed to surmount the legal obstacles that state sovereignty places on such operations and guarantee the maximum effectiveness in suppressing drug trafficking'.[130] Furthermore, as Klein notes the U.S. has not 'sought to alter exclusive flag state jurisdiction (…) but instead uphold it through the conclusion of a series of treaties'.[131] Davenport, however, concludes that under these bilateral agreements, the U.S. Coast Guard has not only dramatically improved their own but also their bilateral partners:

> capability and capacity to conduct maritime narcotics interdiction operations within their territorial seas. Some partner nations benefit greatly from training provided by Coast Guard law enforcement experts, (…) benefit from combined operations and logistics support. The Coast Guard's bilateral agreements with partner nations, including foreign militaries and law enforcement agencies, expand the jurisdictional reach of maritime narcotics interdiction operations.[132]

Indeed, as will be considered, these agreements not only overcome legal obstacles including, obtaining ad hoc authorisation to board another State's ship, but they are also vital for increasing international cooperation and capacity building [e.g., law enforcement, legal, prosecutorial, judicial, technical, information sharing, training, etc.]. Additionally, the agreements are widely adaptable to address other maritime security issues such as IUU Fishing, Migrant Smuggling, and the non-proliferation of WMDs. Presently, the U.S. has concluded at least forty BILATS, although not all of them utilise the full 'Six-Part' model.[133]

The agreements have two main objectives. The first objective of these agreements concerns facilitating ship boarding authorisations and general maritime law enforcement/security operations. The agreements do this through comprehensive provisions on ship boarding procedures and authorisations to board. As Klein explains, improving the process of obtaining flag state authorisations will render 'law enforcement efforts more effective, especially in saving time at critical moments, as well as minimising disruption to maritime navigation'.[134] The second objective of these agreements is *international cooperation*. For example, the agreements often include clauses on technical assistance, information sharing, asset forfeiture, and law

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[129] Klein (n 88) 134. See Joseph E. Kramek, 'Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future,' [2000] 31 U. Miami Inter-Am. L. Rev. 121, 129. See Interview Transcript T-002 at 2-3; Interview Transcript T-005 at 4-5.
[130] Papastavridis (n 1) 236.
[131] LOSC (n 15) Article 91; Article 110. See Klein (n 88) 134.
[132] Aaron C. Davenport, 'Lessons from Maritime Narcotics Interdiction,' 2020 Rand Publications, accessed on 08 July 2021, <https://www.rand.org/content/dam/rand/pubs/external_publications/EP60000/EP68327/RAND_EP68327.pdf.>, 7.
[133] List of US Treaties in Force, 2018. [https://www.state.gov/documents/organization/282222.pdf]. See also Appendix 1 Chart.
[134] Kramek (n 129) 134.

enforcement assistance and training.[135] Data suggests that one of the main points of the U.S. engaging with bilateral partners is developing those partners' capacity to engage in maritime security more effectively. Bilaterally, these agreements allow States to engage in training which, 'supports U.S. counter-narcotics priorities worldwide and focuses on encouraging foreign law enforcement agency self-sufficiency'.[136] According to Davenport, '[t]he overarching goal of U.S. counter-narcotics training is to support the development of effective host country enforcement institutions that are capable of removing drugs from circulation before they can reach the arrival zone'.[137] To understand how these agreements function, the enforcement framework they create, and how they address the gaps in the international legal regime, the agreements are broken down into their constituent 'six-parts' (1) Ship-boarding, (2) Ship-Riders, (3) Entry to Investigate, (4) Pursuit, (5) Overflight, and (6) Order to Land.[138]

5.2.1 Ship Boarding

Obtaining consent or authorisation from a flag state to board one of its vessels suspected of being a DTV on the high seas is a complicated matter, as noted.[139] In practice, it has also been established that this is a very time-consuming process as there is no international standards for requests, general length of time for responding to requests, or even a general obligation to respond to a request.[140] Even in cases where a flag state does provide authorisation to board its vessel, as Chapter 1 considered, questions may arise concerning the authority or source granting the authorisation, as in the cases of *R. v. Charrington,* and *Medvedyv v. France.*[141] The BILATS

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[135] *Agreement between the United States of America and Jamaica*, signed at Kingston August 22, 2001, with Exchange of Letters, *Entered into force August 22, 2001.* "Cooperation" shall mean any assistance, including intelligence and operational assistance or legal and judicial assistance which has been given to one Party by the other Party and which has led to, or significantly facilitated, the forfeiture or confiscation of assets. See Davenport (n 132) 10.

[136] Davenport (n 132) 10.

[137] ibid 10.

[138] Kramek (n 129) 133.

[139] *U.S. v. Zapata*, No. 20-10385, 2021 WL 4947103 (11th Cir. Oct. 25, 2021). The case involves the interdiction of a Panamanian flagged DTV on the high seas by the U.S. Coast Guard. The U.S. and Panama are party to a six-part bilateral agreement that requires a response within two hours of the ship boarding authorisation request. If the response is not provided within this timeframe, then permission to board is considered granted. However, the two-hour window for a response does not necessarily mean that the authorisation request cannot be a protracted matter. The background to the interdiction shows that there was a ten hour 'back and forth' delay between the U.S. Coast Guard and the Panamanian Government before the authorisation was eventually granted by Panama. Even after the authorisation was granted, there was a further six-day delay before the Panamanian Government consented to U.S. domestic criminal jurisdiction over the crew.

[140] 1988 Vienna Convention (n 15). Article 17(7) requires that States should respond 'expeditiously'.

[141] In *R v. Charrington* [1997] QCA 215, in 1997, the 'Simon de Danser' was boarded by the Royal Marines and agents from the U.K. Office of Customs and Excise based on consent provided by Malta under Article 17 of the 1988 Convention. The contents and authority behind the request as well as errors attributed to the U.K. government's method for obtaining consent were brought into question. Ultimately, the case was dismissed, which prompted a large-scale inquiry into the interdiction. See generally William Gilmore, 'Drug Trafficking at Sea: The Case of R. v. Charrington and Others,' [2000] 49 Int'l & Comp. L.Q. 477. Similarly, in *Medvedyv v. France* (Application no. 3394/03) Judgment 29 March 2010 at 39, the ECtHR 'disagreed with the French courts' approach in so far as they referred to international conventions to which Cambodia was not party and relied on legal provisions which, at the

address this gap by incorporating a specific *ship boarding* clause in the agreements. Ship-boarding is often formulated into three types of authorisations: tacit authorisation, authorisation provided for by the agreement itself, and case-by-case authorisation.

Tacit authorisation is demonstrated in Article 5 of the *Agreement Between the Government of the United States of America and the Government of the Republic of Malta Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea.* The tacit consent provision requires that requested party shall reply within four hours of the request, and if they do not respond:

> the requested Party will be deemed to have been authorised to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic.[142]

The agreement serving as standing authorisation from the flag state can be seen in *the Agreement Between the United States of America and Costa Rica concerning cooperation to suppress illicit traffic.* The agreement states that the government of Costa Rica considers '[t]his Agreement constitutes the authorisation of the Government of the Republic of Costa Rica for the boarding and search of the suspect vessel and the persons found on board (…)'.[143] However, even where this type of consent is included in an agreement, the flag state retains its exclusive jurisdiction as a safeguard. For example, the *Agreement between the Government of the United States and the Government of the Republic of Nicaragua concerning cooperation to suppress illicit traffic by air and sea*, Article 10 states sets out this restriction by noting that:

> [i]n all cases arising in the Nicaraguan territorial sea or concerning Nicaraguan flag vessels seaward of the Nicaraguan territorial sea, the Government of the Republic of Nicaragua shall have the right to exercise jurisdiction over a detained vessel, cargo or persons on board (including seizure, forfeiture, arrest, and prosecution).[144]

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material time, provided for extraterritorial intervention by the French authorities only on French ships, "ships flying the flag of a State Party to the Vienna Convention of 20 December 1988 [which Cambodia has not ratified, as mentioned previously] (...) or lawfully registered in such a State, at the request or with the agreement of the flag State', and on ships flying no flag or having no nationality'. See generally Douglas Guilfoyle, 'European Court of Human Rights,' [2010] 25 Int'l J. Marine & Coastal L. 437 and Efthymios Papastavridis, 'European Court of Human Rights Medvedyev et al v France (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010,' [2010] 59 Int'l & Comp. L.Q. 867.

[142] *Agreement Between the Government of the United States of America and the Government of the Republic of Malta Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea* 08-24, Article 5(2) – Operations in International Waters.

[143] *Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning cooperation to suppress illicit traffic*, signed at San Jose December 1, 1998; entered into force November 19, 1999. Amended by the Protocol signed at San Jose July 2, 1999; entered into force on November 19, 1999. TIAS, Section V.

[144] *Agreement between the Government of the United States of America and the Government of Nicaragua concerning cooperation to suppress illicit traffic by sea and air*, signed at Managua June 1, 2001; entered into force November 15, 2001. TIAS, 2001 UST. LEXIS 63.

Although these forms of ship boarding authorisations address the overarching problem of authorisation, these tacit consent models are also not unproblematic from a law of the sea perspective.

A vessel can be mistaken as flying the flag of one state but may actually be flagged to another State.[145] The interdicting state may presume consent is granted once the time-period has passed based on identifying and querying the wrong flag state. If an interdiction is subsequently conducted under the wrong agreement, this puts that interdiction into serious legal jeopardy since the interdicting state did not actually have authorisation.[146] A similar problem is noted concerning *presumptive flag state authority*. However, regarding U.S. practice under these agreements, the claim of nationality typically lies with the ship's master or from evidence found during the initial *right of visit* boarding. Therefore, it is more likely that a claim of nationality will be refuted by the claimed flag state and the vessel declared to be a *vessel without nationality*. In this regard, the BILATS do not take a uniform approach to the question of a *vessel without nationality* suspected of being a DTV on the high seas. However, the inclusion of specific clauses on *vessels without nationality* in the BILATS does not mean it is a gap under the agreements.

A *vessel without nationality* on the high seas is one without a flag state to assert its exclusive jurisdiction over the vessel. Engaging in enforcement actions against *vessels without nationality* suspected of being a DTV under the LOSC or 1988 Vienna Convention is an open question since these agreements do not address this issue.[147] Many of the BILATS do not specifically mention *vessels without nationality* or if they are mentioned, it is often in general terms such as '[o]perations to suppress illicit transnational maritime activity shall be carried out only against suspect vessels, including vessels without nationality and vessels assimilated to vessels without nationality'.[148] Still, this exclusion in the agreements is not a gap in the same way it is in the international legal regime, and this is due to two factors.

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[145] *US v Obando*, D.C. Docket No. 1:16-cr-20962-FAM-3, No. 17-11202, US 11th Circuit Court of Appeals, June 1, 2018. Here the vessel master claimed nationality in Ecuador. The US Coast Guard observed what they presumed to be the flag of Colombia painted on the vessel. The vessel's master claimed the flag was Ecuadorian. Both the flag of Ecuador and flag of Colombia are very similar in colour and design. Ecuador refuted the claim of nationality, and the crew was arrested and brought to the US for prosecution. On appeal, it was argued that the Colombian flag was an assertion of nationality and the Coast Guard failed to contact the correct flag state. The appeal was rejected in this case as the vessel was *without nationality*.

[146] Guilfoyle 'Shipping Interdiction' (n 8) 96.

[147] See Chapter 3 and Chapter 4.

[148] *Agreement between the United States of America and Vanuatu,* Maritime Matters: Law Enforcement, signed at Port Vila October 31, 2016, Treaties and other International Acts Series 16-1031, Entered into force October 31, 2016, Purpose and Scope (5).

The first factor is that the agreements usually all contain a general 'high seas clause' which may include a statement that the '[a]greement does not apply to or limit boardings of vessels conducted by either Party in accordance with international law, seaward of any State's territorial sea, whether based on, inter alia, the right of visit (…)'.[149] Recalling Chapter 3, the general *right of visit* applies to any vessel suspected of being *without nationality* on the high seas, and this relates to the second factor as to why this is not a gap in the agreements. Since these agreements are bilateral, they are only binding on the U.S. and the other party. Therefore, in cases when a suspected DTV of the other party is interdicted by the U.S. on the high seas and the other party refutes a claim of nationality, the DTV is 'without nationality' making any further claim of nationality immaterial.[150] Furthermore, there is data suggesting many of the States party to BILATS will intentionally refute claims of nationality, rendering the vessel *without nationality* since States often prefer the drug traffickers face prosecution by U.S. courts.[151] Therefore, the inclusion of a specific article addressing *vessels without nationality* is unnecessary as they fall outside the scope of a bilateral agreement.

5.2.2 Ship-riders

A *ship-rider* is, '[a] law enforcement official of one Party authorised to embark on a law enforcement vessel or aircraft of the other Party'.[152] Embarking a ship-rider is a valuable tool for obtaining boarding authorisations of flagged vessels.[153] For example, an embarked ship-rider can:

> [a]uthorize the pursuit by the law enforcement vessels on which they are embarked, of suspected vessels and aircraft fleeing into or over (…) territory and waters, authorise the law enforcement vessels on which they are embarked to conduct counter-drug patrols in territorial waters of the other party, enforce the laws of the other party in the waters, or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law, or authorise the law enforcement officials to assist in the enforcement of the laws of the other party.[154]

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[149] ibid Section VI (1).

[150] Chapter 6 explores this process further this and how these vessels are subject to US domestic criminal jurisdiction on the high seas.

[151] Transcript T-001 at 4; Transcript T-002 at 6; Transcript T-004 at 1-2; Transcript 005 at 4-5; Transcript T-007 at 3-4.

[152] *Agreement between the Government of the United States of America and the Government of* ***The Bahamas*** *concerning cooperation in maritime law enforcement*, signed at Nassau June 29, 2004; entered into force June 29, 2004. TIAS, Article 2-Definitions.

[153] Kramek (n 129) 123.

[154] *Combined Law Enforcement Programme, Agreement between the Governments of The Co-Operative Republic of Guyana and the Government of The United States of America Concerning Cooperation to Suppress Illicit Traffic by Sea and Air*, done at Georgetown, Guyana, this 10th day of April 2001, in duplicate, each text being duly authentic. 2766, Article 4.

Ship-riders can also authorise the pursuit of a fleeing vessel into the ship rider's State's territorial sea.[155] It has been noted that States employing ship-riders have successfully interdicted illicit drugs within the Caribbean region.[156] However, Ship-riders are not unique to counter-narcotic operations. They are used in counter-piracy, IUU Fishing, and weapons non-proliferation agreements.[157]

On the one hand, embarking ship-riders is critical to accomplishing maritime security goals set out by the UNSC concerning organised crime at sea.[158] However, on the one hand, ship-riders are as Guilfoyle concludes, 'the exception rather than the rule'[159] noting States such as Jamaica and the Bahamas still from time to time embark a ship-rider on U.S. Coast Guard [USCG] Vessels.[160] On the other hand, the U.S. regularly embarks U.S. Coast Guard law enforcement detachments [LEDTs] on bilateral partners' warships. For example, the U.S. frequently embarks USCG officers on U.K. vessels in the Caribbean region as part of the *Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda*, which is also known as the U.K. Overseas Territory [UKOT] agreement.[161]

What is also unique about how these cooperative endeavours function in practice is that they usually do not concern bilateral parties using U.S. LEDTs to grant consent to board U.S. vessels. Rather the purpose of their deployment is so the USCG can exercise U.S. criminal jurisdiction over drug traffickers on the high seas and make use of the U.S. BILATS for ship boarding purposes. For example, in 2013, the HMS Lancaster [U.K.] was in the Caribbean area and interdicted a DTV. The U.K. warship:

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155 Benjamin Bowling, *Policing the Caribbean* (Oxford University Press 2010) 220.

156 *'Ship-Riders': Tackling Somali Pirates at Sea*, UNODC Publication. 20 Jan 2009 accessed 13 August 2019, <https://www.unodc.org/unodc/en/frontpage/ship-riders-tackling-somali-pirates-at-sea.html>. See David Freestone and Clive Schofield, 'The Caribbean Sea and Gulf of Mexico,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 692. See also William C. Gilmore, 'Counter-Drug Operations at Sea: Developments and Prospects,' [1999] 25 Commw. L. Bull. 609, 612.

157 For example, UNSC Resolution 1851 [2008] states that it, '[i]nvites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("shipriders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia'.

158 ibid para 3.

159 Guilfoyle 'Shipping Interdiction' (n 8) 91.

160 ibid 91.

161 *US v Aybar-Ulloa*, Jan 9, 2019, No. 15-2377, First Circuit Court of Appeals. See *Agreement between the Government of the United States of America and the Kingdom of Great Britain and Northern Ireland for Maritime Matters: Shiprider in the Caribbean and Bermuda*, Agreement signed at Washington July 13, 1998; Entered into force October 30, 2000, Treaties and other International Acts Series 00-1030. See also Transcript T-002 at 7; Transcript T-006 at 3.

> launched a small boat in order to conduct a right-of-visit approach. Law enforcement personnel aboard the small boat [USCG personnel] conducting the approach then determined that the vessel was 'without nationality,' the men on board the vessel (…) were transferred to HMS Lancaster along with the [suspected drugs] and at this point, they were then transferred to a United States Coast Guard vessel and (…) held in custody by United States law enforcement.[162]

Scenarios like these are not uncommon. They serve as a practical example of how the BILATS foster international cooperation through ship-riders and addresses the gaps in obtaining authorisations to board a flagged DTV on the high seas.

Ship-riders also highlight a practical shortcoming affecting interdictions, exercising domestic criminal jurisdiction over drug traffickers on the high seas. There is data suggesting many high seas interdictions conducted by States and the U.S. is included here, are done through naval military forces, not civilian law enforcement.[163] In other words, domestic law enforcement and military forces exercise jurisdiction differently in many cases. Thus, interdictions conducted by naval military forces may lack sufficient authority under domestic law to exercise national criminal jurisdiction. In the U.K., for example, often special operatives from the Royal Navy act as a boarding party to secure a vessel and crew; however, the investigation and prosecution of any drug traffickers is conducted by a civilian law enforcement agency such as the National Crime Agency [NCA].[164] Thus, a ship-rider streamlines this process by providing authorisation to board, but for example, in the case of the USCG, it provides domestic criminal jurisdiction. According to some commentators, ship-riders can also raise important practical and legal questions.

Papastavridis notes that there may be a 'ship rider interdiction operation, in which on the one hand there would be a disproportionate use of force by the officers of the host state's warship in violation of the relevant legal framework and on the other, a subsequent human rights violation committed under the authority of the ship rider and under directions of the sending state'.[165] Therefore, 'both the sending state and the host state will be responsible for different violations in the course of the interdiction operation'.[166] Agreeing, Guilfoyle notes that:

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[162] *US v Aybar-Ulloa* (n 161) Background.
[163] Press Release Combined Maritime Force, 'FAA Jean Bart Seizes over 6500 lbs of Narcotics in the Arabian Sea,' accessed on 07 March 2021, <https://combinedmaritimeforces.com/2021/03/07/faa-jean-bart-seizes-over-6500-lbs-of-narcotics-in-the-arabian-sea/>; Press Release Combined Maritime Force 'HMS Montrose Seizes over $15 Million Worth of Narcotics in Arabian Sea,' accessed on 17 February 2021, <https://combinedmaritimeforces.com/2021/02/17/hms-montrose-seizes-over-15-million-worth-of-narcotics-in-arabian-sea/>. See also Interview Transcript T-002 at 9-10.
[164] Interview Transcript T-006 at 1.
[165] Papastavridis (n 1) 235
[166] ibid 235. See Klein (n 88) 134-136; Guilfoyle 'Shipping Interdiction' (n 8) 89-94, 285-286, and 336-337.

> it is submitted that the 'host' state may be held responsible not only for 'complicity' under Article 16 [ILC Draft Articles on State Responsibility], but also on an individual basis. It is possible that there will be a joint commission of an internationally wrongful act and the individual responsibility both of the sending state and the host state will be engaged under Article 47 of the ILC Articles.[167]

Additionally, embarking a ship-rider often entails sizeable financial costs for both the sending and receiving state.[168] Furthermore, uses of force and exercising relevant domestic criminal law on the high seas can complicate their use; however, as it stands for their ability to authorise a ship boarding against vessels from their home state, ship-riders affectively address this gap in the law.[169]

5.2.3 Entry to Investigate

The entry to investigate provision allows a bilateral party to enter the other party's territorial sea for limited law enforcement purposes. For example, the 'entry to investigate' clause in the U.S. / Nicaragua agreement stipulates [in part] that:

> [i]f a suspect vessel (…) flees into the waters (…) of the first Party and, if no law enforcement vessel of the first Party is immediately available to investigate, the law enforcement vessel of the other Party (…) may pursue the suspect vessel (…) into the waters or airspace of the first Party. Suspect vessels may be stopped, boarded and searched, and, if the evidence warrants, detained pending expeditious instructions from the law enforcement authority of the first Party.[170]

These provisions exist in the realm of counter-narcotics operations for practical purposes because an enforcement vessel may encounter a DTV on the high seas and need to follow it inward toward land as the investigation mounts. It is also possible that vessels patrolling areas of known drug trafficking may observe DTVs within the territorial sea of another state.[171] In these situations, an enforcement vessel may not be able to wait for permission to board from the coastal state, so it may need to enter another state's territorial sea to detain the DTV.[172] However, there are often specific conditions must be satisfied before or during entry to investigate operation by a bilateral partner. For example, for the 'entry to investigate' to apply to a fleeing DTV, other means of obtaining consent must be exhausted.

In other words, if there is no reply from the flag or coastal state, no embarked ship-rider, or no enforcement vessel from the other Party available, then the 'entry to investigate' provisions may

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167 Guilfoyle 'Shipping Interdiction' (n 8) 89-94, 285-286, and 336-337.
168 ibid at 91.
169 Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea* (Oxford University Press 2011) 90-92.
170 US/Nicaragua Agreement (n 144) Article 6 – Operations in the Territorial Sea.
171 Kramek (n 129) 133-134.
172 Drug Budget, United States Department of Homeland Security, United States Coast Guard, Performance Summary 2016, United States Office of Inspector General, February 1, 2017, OIG-17-33, 3-4.

apply.[173] However, given recent developments in U.S. case law, it is uncertain that these provisions will result in the U.S. exercising any domestic criminal jurisdiction over drug traffickers in the territorial sea of a bilateral party absent an inward bound pursuit from the high seas.[174] Instead, they will likely continue function as cooperative tools for the USCG to provide assistance and intelligence to the respective coastal states and encourage the affected coastal state to prosecute drug traffickers.[175] Entry to investigate will also typically apply to overflight of pursuit/patrol aircraft, but not all of the U.S. bilateral agreements contain a provision for overflight.[176]

5.2.4 Overflight

Aircraft are an effective tool in counter-narcotics operations on land and at sea.[177] Helicopters are also frequently used in high seas interdictions.[178] They are used to spot GFVs and narco-submarines which can quickly go otherwise unnoticed or destroy evidence.[179] Once spotted, it is also not uncommon for these vessels to attempt to flee.[180] Aircraft in pursuit of these vessels may need to enter the airspace of other states, so some BILATS contain a provision for overflight. Additionally, as with policing vast areas of coastline, effectively policing the airspace above a state is taxing for many states, requiring cooperative assistance from more capable States.[181] Most overflight provisions authorise the use of airfields, permit overflight of land and territorial waters, and include unplanned pursuit operations.[182] Similarly, a high seas pursuit of a vessel into a state's territorial sea can happen, so the agreements typically have a 'pursuit clause'.

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173 US / Costa Rica Agreement (n 143) Article 6(b) and 6(c).

174 *US v. Davila-Mendoza et al*, case no. 17-12038, August 26, 2020. See Chapter 6 on this issue.

175 Qualitative data would suggest that as States are developing their criminal justice systems and bringing more domestic law into effect, the US has been very encouraging of those states prosecuting drug trafficking and transnational criminal cases.

176 For example, the US / Panama agreement does not include the use of aircraft in the original text. It was subsequently modified in 2002 to include overflight procedures.

177 Office of Counternarcotics Enforcement Fiscal Year 2010 Annual Report, US Department of Homeland Security March 2011, 6-10. See also Transcript T-004 at 2-3.

178 2010 DHS Report (n 177) 6-10. See U.S. Government Accountability Office, Report to the Ranking Member, Committee on Foreign Affairs, House of Representatives, Counternarcotics, Overview of Efforts in the Western Hemisphere, October 2017, 25-30.

179 2010 DHS Report (n 177) 6-10. See Transcript T-001 at 1; Transcript T-002 2. See also Ann Marie Brodarick, 'High Seas, High Stakes: Jurisdiction Over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act,' [2012] 67 U. MIAMI L. REV. 255, 255.

180 *US v. Ibarguen-Mosquera*, 634 F.3d 1370 (11th Cir. 2011).

181 Michelle Williams, 'Caribbean Shiprider Agreements: Sunk by Banana Trade War,' [2000] 31 U. Miami Inter-Am. L. Rev. 163, 190.

182 *Agreement between the United States of America and the Republic of Honduras concerning cooperation for the suppression of illicit maritime traffic in narcotic drugs and psychotropic substances*, signed at Tegucigalpa March 29, 2000; entered into force January 30, 2001. TIAS, Article 5.

5.2.5 Pursuit

Pursuing fleeing DTVs is not uncommon for high seas interdiction operations, as has been highlighted throughout the thesis. DTVs frequently abscond back toward the safety of shallow waters and land territory of coastal states to escape arrest.[183] These pursuits can involve both enforcement vessels and aircraft needing to enter the territory of a third state to affect the interdiction.[184] As stated, there is no clause under the LOSC permitting this type of pursuit.[185] The *right of hot pursuit* is only permissible when an offence has taken place within the territory of the coastal state, and the suspect vessel is fleeing outward onto the high seas.[186] The 1988 Vienna Convention also does not anticipate this scenario. The lack of an 'inward' bound or 'cold' pursuit clause is a significant practical lacuna under the present international legal regime.[187] However, the BILATS often address such gaps in the law by including pursuit clauses.

A 'Pursuit' clause does not authorise one party to routinely police the territorial sea of the other party.[188] Instead, a 'pursuit' clause makes use of either a 'ship rider' or a delineated procedure outlined by the specific BILAT. For example, Article 2(b) of the U.S./Costa Rica agreement states that, '[t]he government of Costa Rica may assign 'ship riders,' who may in appropriate circumstances, authorise the pursuit, by the U.S. law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into Costa Rican waters'.[189] However, such actions are always based on 'expeditious' instructions from the flag or coastal state.[190] In other words, should a state make entry into the bilateral party's territorial sea in the course of a pursuit under a BILAT, the warship must get explicit instructions on what actions it may then take once the DTV is interdicted. In the U.S./Honduran Agreement, such actions may include that when:

> in those exceptional occasions when a suspect vessel enters the Honduran territorial sea and no Honduran ship rider is embarked on a U.S. law enforcement vessel, and no Honduran law enforcement vessel is immediately available to investigate, the U.S. law enforcement vessel may follow the suspect vessel into the Honduran territorial sea and

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183 See generally the case of *US v Bellaizac-Hurtado*, 700 F.3d, Nos. 11–14049, 11–14227, 11–14310, 11–14311. Decided: November 06, 2012.

184 Aaron Casavant, 'In Defense of the US Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach,' [2017] 8 Harvard National Security Journal, 114, 119.

185 LOSC (n 15) Article 111(3). The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

186 ibid Article 111. *See also* Robert C. Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention,' [1993] 33 Va. J. Int'l L. 557, 557.

187 Article 7 of the Harvard Draft on Piracy contemplated the scenario of a pursuit entering the territorial sea of another state. The commentary indicated, 'The language shifts the burden to the territorial sovereign to prohibit the chase, rather than limiting the authority of the policing state to pursuit of a "pirate," but that seems to be as far as the Harvard Researchers were willing to go to meet the British position in principle'. John P Grant and J. Craig Barker, *The Harvard Research in International Law* (William S Hein Publishing, 2007) 238. See Also Douglas Guilfoyle, 'High Seas,' in in Alexander Proelss and Amber Rose Maggio, *United Nations Convention on the Law of The Sea (UNCLOS): A Commentary* (Verlag CH Beck oHG) 776.

188 Williams (n 181) 189.

189 *US/Costa Rica Agreement* (n 143).

190 *US/Honduras Agreement* (n 182).

> internal waters, in order to monitor or board the suspect vessel and secure the scene, while awaiting expeditious instructions from Honduran law enforcement authorities and the arrival of Honduran law enforcement officials.[191]

Thus, pursuit clauses aid in addressing a DTV possibly escaping into a State's territorial sea or internal waters.

5.2.6 Order to Land

The order to land provision aims to address and suppress illicit traffic by air. Drug trafficking organisations frequently use aircraft to increase the likelihood of their illicit cargo reaching its destination.[192] Additionally, as with maritime operations, not all states can police their airspace for drug traffickers.[193] The BILATS account for this modality, for example, under the U.S. / Columbia Air Bridge Denial Agreement [ABD], Interception (Phase I), a pursuit aircraft may, 'order the intercepted aircraft to land at the nearest suitable airfield, if factors continue to support a determination the aircraft is primarily engaged in illicit drug trafficking'.[194] The ABD is not specifically a maritime agreement; however, it is concluded under Article 17(9) of the 1988 Vienna Convention.[195] The inclusion and use of aircraft by enforcement authorities depends on each state's capacity to engage in such interdiction activities and allot the resources necessary for an interdiction effort. Still, not all the U.S. bilateral agreements contain a provision for allowing U.S. enforcement aircraft the right to order a suspicious aircraft to land in the host nation.

5.2.7 Safeguards in the U.S. 'Six Part' Model Agreements

All U.S. BILATS have safeguards that may apply to any number of circumstances arising during interdictions conducted under these agreements. The primary safeguard is *preferential jurisdiction* for flag states, which means the flag state will always have the right to exercise its exclusive jurisdiction regardless of whether it has conducted the interdiction itself or authorised a bilateral party to do so. For example, under the U.S./Costa Rica Agreement:

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191 ibid *U.S./Honduras Agreement*.
192 Transcript T-004 at 3-4.
193 Williams (n 181) 190.
194 Agreement Between the Government of the United States of America and the Government of The Republic of Colombia Concerning the Program for the Suppression of Illicit Aerial Traffic in Narcotic Drugs and Psychotropic Substances (Air Bridge Denial), Done this 14th day of March 2007, at Bogota, in duplicate in the English and Spanish languages, each text being equally authentic, 07-89.
195 Preamble of the U.S. / Columbia ABD, '[r]ecalling that the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the "1988 Convention") requires the Parties to consider entering into bilateral agreements to carry out, or to enhance the effectiveness of, its provisions; Recognising that the illegal trafficking in drugs and psychotropic substances has had major negative impacts on Colombian efforts to achieve economic and social progress, under the democratic rule of law'. It should be noted in this case, the U.S. and Columbia do have a separate bilateral maritime interdiction agreement.

> [i]n all cases arising in Costa Rican waters or concerning Costa Rican flag vessels seaward of any State's territorial sea, the Government of the Republic of Costa Rica shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board.[196]

Additionally, if the flag state relinquishes its jurisdiction, it must do so within the limits of its domestic and constitutional legal framework.[197] In practice, this is common for States to relinquish their jurisdiction to the U.S. and is often the preferred method for drug prosecutions, which is often done through flag states refuting a claim of nationality. [198] It is also common for a flag state to grant its permission to the U.S. to search a suspected DTV on the high seas, for example, when:

> the HMS Northumberland, on board which there was a United States Coast Guard law enforcement detachment, intercepted the *Adriatik* north of Trinidad and Tobago. Upon observing signs suggesting narcotics smuggling, a Statement of No Objection was requested from the Panamanian government for permission to search the Adriatik and, if need be, escort it to a United States port for an intrusive and destructive search. The Panamanian government granted the request (…).[199]

After the search and subsequent arrest of the crew, '[t]he Panamanian government expressly consented to the application of the' U.S. Maritime Drug Law Enforcement Act [MDLEA], which is the primary U.S. domestic criminal statute for high seas drug trafficking prosecutions, and this is discussed further in Chapter 6.[200] Even in situations where some investigatory questions may remain, there are also situations in practice where flag states have granted the U.S. permission to board, search, and detain the vessel and crew on their behalf pending the arrival of authorities from the flag state.[201] However, in most situations, the States lack the capacity to do this, so the U.S. is given the authorisation and waiver of jurisdiction to facilitate the enforcement action.[202] Furthermore, as explored below, the issue of capacity is a significant factor in why States enter

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196 U.S. / Costa Rica Agreement (n 143) Article VI – Jurisdiction.

197 ibid at Article VI – Jurisdiction, The Government of the Republic of Costa Rica may, subject to its Constitution and laws, waive its primary right to exercise jurisdiction and authorise the enforcement of United States law against the vessel, cargo and/or persons on board.[197]

198 For example, see *U.S. v. Robinson, 843 F.2d 1, 4 (1st Cir.1988).* In *Robinson,* 'we decided that the United States had jurisdiction over a Panamanian vessel stopped over 500 miles off shore because the Panamanian government authorised the United States to apply U.S. law to the persons on board the vessel'. See also *U.S. v. Cardales*, Nos. 97-2383, 97-2384 and 97-2385, United States Court of Appeals, First Circuit, Heard Nov. 3, 1998, Decided Feb. 26, 1999. In this case, 'the Venezuelan government authorised the United States to apply United States law to the persons on board the CORSICA. Therefore, jurisdiction in this case is consistent with the territorial principle of international law'. See further, Annual Performance Report of the U.S. Coast Guard, Fiscal Year 2017, accessed on 19 May 2019, <https://www.uscg.mil/Portals/0/documents/budget/FY17%20APR%2015%20May%2018%20%20Final%20%20POSTD.pdf>; Transcript T-001 at 3; Transcript T-002 at 6.

199 *U.S. v. Jose Luis Perez-Oviedo*, United States Court of Appeals for the Third Circuit, No. 01-2512. Decided: February 20, 2002, at 1.

200 ibid 1.

201 Transcript T-001 at 3; Transcript T-002 at 6.

202 Transcript T-001 at 3; Transcript T-002 at 6; Transcript T-004 at 1; Transcript T-005 at 2-4; Transcript T-007 at 4-5.

into these BILATS with the U.S. Many states lack the judicial capacity or domestic legislation to prosecute high seas drug traffickers; thus, they will often relinquish their jurisdiction over their nationals or persons on their flagged vessels interdicted by the USCG.[203]

The second type of safeguard governs law enforcement officials' conduct. The safeguard usually applies to ship-riders and other assigned official personnel. The safeguard also aims to ensure the relevant law is followed by these officials, addressing violations of the law [both domestic and international], and the use of force. In any case, where an embarked ship-rider is present on another party's enforcement vessel or any other law enforcement official is taking part in operations under an agreement, generally, they must adhere to their national laws, policies, and international law. For example, under the U.S./Guyana Agreement:

> [e]ach Party shall ensure that its law enforcement officials, when conducting boardings and searches pursuant to this Agreement, act in accordance with applicable national laws and policies of that Party and with international law and accepted international practices.[204]

This safeguard also includes the obligation that 'law enforcement officials shall take due account of the need not to endanger the safety of life at sea or the security of the suspect vessel and its cargo, and not to prejudice the commercial and legal interests of the flag State or of any other interested State or legal entity or individual'.[205] Other specific conduct, especially from an international law perspective, concerns the use of force, and should remain at what is generally acceptable for non-military law enforcement engagements.[206] In this case, force must be proportionate and necessary, and only as minimal as necessary to accomplish its objective.[207] The right to use force also applies in all cases of self-defence of an officer or other officials of the respective parties.[208]

The last category of safeguards are dispute resolution mechanisms. The BILATS do not contain any binding judicial or arbitration clauses for dispute resolution.[209] Instead, the agreements use consultation should any disputes arise during an interdiction conducted pursuant to a BILAT. For example, the U.S./Canada Ship Rider Agreement permits that either party has the right, 'to resolve the disputes between them that may arise in interpreting or applying this Agreement

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[203] *U.S. v. Jose Luis Perez-Oviedo* (n 199) 3.
[204] U.S./Guyana Agreement (n 154) Article 15-Conduct of Law Enforcement Officials.
[205] U.S./Honduras Agreement (n 182) Article 10.
[206] *M/V Saiga No. 2* (St. Vincent and the Grenadines v Guinea) judgment, [1999] ITLOS n.71 155-156.
[207] U.S./Bahamas Agreement (n 151) Article 16 – Use of Force.
[208] U.S./UKOT (n 161) Article 17.
[209] Cassidy Gale, 'The Ship Rider Shadow: Situating U.S.-Caribbean Ship Rider Agreements within the Law of the Sea' [2017] 31 Ocean Yearbook 418, 444.

through consultations between Central Authorities'.[210] Similarly, the U.S./Costa Rica Agreements states that all disputes shall be resolved through consultation.[211] It is unclear if a party to the BILATS has invoked any such consultations, as they generally include a clause that such actions are to be resolved by 'mutual agreement of the Parties'[212] or to 'meet at the request of either Party to resolve the matter and decide any questions relating to compensation'.[213] Consultations can, however, be invoked under these agreements for other matters, which includes enhancing the agreements though amendments or addressing other aspects of maritime security.[214]

5.2.8 Evolution of U.S. Bilateral Agreements: Maritime Security Generally

Several U.S. BILATS have either been amended or have given rise to additional identical agreements addressing other maritime security issues like illegal migration, IUU Fishing, and the non-proliferation of WMDS. The following section surveys some examples of such agreements and the extent to which they may be evidencing a shift in how States are moving away from approaching matters of maritime security singularly towards a more comprehensive approach of addressing overall 'transnational crime at sea'.

As noted, some of the BILATS have been amended or entered into force as 'Maritime Security Agreements', not just agreements for suppressing drug trafficking on the high seas. For example, the agreement between the U.S. and Vanuatu *Concerning Counter Illicit Transnational Maritime Activity Operations* is an example of a broad bilateral maritime security agreement. The preamble to the agreement recognises the 'complex nature of the problem of detecting, deterring, and suppressing illegal activity at sea, including, without limitation, fisheries offences and illicit maritime drug trafficking'.[215] The agreement also recognises there is an 'urgent need for international cooperation to prevent and combat transnational organised crime'.[216] To do this, the agreement incorporates multiple conventions including the 1995 Fish Stocks Agreement, as

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[210] *Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations Between the Government of Canada and the Government of The United States of America*, Entered into Force May 2009. Article 16 – Dispute Resolution. Central Authorities are defined as the Commissioner of the Royal Canadian Mounted Police or his or her designate for Canada and the Commandant of the United States Coast Guard or his or her designate for the U.S.
[211] U.S./Costa Rica Agreement (n 143) Part VII.
[212] U.S./Honduras Agreement (n 182) Article 11.
[213] *Agreement Between the Government of The United States of America and The Government of the Republic of The Marshall Islands Concerning Cooperation in Maritime Surveillance and Interdiction Activities*, Entered into Force 5 August 2008, Treaty Number 08-144, Article 14.
[214] ibid Article 16.
[215] U.S./Vanuatu Agreement (n 148) at Preamble.
[216] ibid Preamble.

well as UNGA, U.N. Security Council, and IMO resolutions under its framework umbrella for addressing illicit maritime activity.[217]

In keeping with a similar format to the drug interdiction BILATS, these maritime security agreements include the same six-part modality discussed previously. However, some agreements are expanded to include provisions on fisheries and the non-proliferation of WMDs. For example, when considering maritime security operations and fisheries enforcement, the waters of a party now include 'with respect to fisheries resources, the exclusive economic zone and continental shelf of the State, in accordance with international law as reflected the LOSC'.[218] Concerning WMDs, this operates on consent, much in the same way the Proliferation Security Initiative does and in this case, means 'enforcement is authorised by the laws of both Parties'.[219] Apart from changes such as this, the agreements can also include dedicated provisions on migrants at sea.

The provisions on migrants at sea primarily concern the protection of migrants from involuntary return to any country if they have 'a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or fear of torture'.[220] Furthermore, as it relates to enforcement, the parties 'where appropriate and to the extent permitted by [their] law, [agree] to prosecute migrant smugglers and to confiscate vessels involved in smuggling of migrants (and) [e]ach Party agrees to take appropriate action against masters, officers, crewmembers and other persons on board suspect vessels engaged in the unsafe transport of migrants by sea'.[221] The inclusion of additional provisions in the BILATS to address migrants and fishing is used in practice.

According to a 2020 report by the U.S. Coast Guard, through a combination of 'statutory authority, bilateral agreements and policy, the Coast Guard (…) facilitates the return of migrants

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[217] The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, United Nations General Assembly Resolution 48/102, adopted December 20, 1993; and in suppressing the unsafe transport of migrants, as reflected in International Maritime Organization (IMO) Circular MSC/Circ.896, December 16, 1998; in IMO Resolutions A.867(20), adopted November 27, 1997, and A.773(18), adopted November 4, 1993, United Nations Security Council Resolution 1540 of 2004, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Treaty on Non-proliferation of Nuclear Weapons, done at Washington, London and Moscow July 1,1968, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow April 10, 1972, and the 1995 agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Some of these agreements such as the 1995 Fish Stocks Agreement or the agreements concerning the non-proliferation of WMDs are explored further in Chapter 7.
[218] U.S./Vanuatu Agreement (n 148) Definitions.
[219] ibid Definitions.
[220] ibid Part IX.
[221] ibid Part IX.

to their home country while further protecting them from an often-perilous sea voyage'.[222] The report indicates that in 2020, approximately six thousand migrants were interdicted at sea, of which bilateral interdictions accounted for almost seventy percent of all 2020 interdictions.[223] With respect to fishing enforcement, the USCG reports that '[t]hrough bilateral "ship-rider agreements" the Coast Guard also helps build organic enforcement capacity within likeminded partner coastal nations for resource management and commercial fishery regulations'.[224] According to the 2020 report, there were '25 of these types of boardings which were (…) conducted under the authority of a bilateral ship rider agreement or under the authority of a Regional Fisheries Management Organization [RFMO]'.[225] As it relates to WMD interdictions and those agreements under the PSI, Chapter 7 considers this further. The extent to which states are starting to engage with these comprehensive agreements also appears to be increasing. For example, of the over forty bilateral agreements, at least sixteen of these agreements have now been drafted to include provisions with fisheries, migration, and WMD enforcement procedures included in the agreements.[226] Furthermore, there are additional comprehensive bilateral agreements presently under negotiation as the result of the overall approach to addressing maritime security more broadly as part of 'transnational crime at sea'.[227]

5.3 Conclusion

Chapter 5 surveyed how several agreements could close some gaps in the international legal regime for DTV interdictions on the high seas. Regionally, the 1995 CoE Agreement and the CRMA were shown to address the specific gap in the 1988 Vienna Convention concerning the establishment of prescriptive jurisdiction over DTVs [flagged or *without nationality*] interdicted on the high seas. The agreements also contain more practical processes for obtaining the authorisation of a flag state to interdict that party's flagged vessels. However, the regional agreements also diverged in substance as the 1995 CoE Agreement maintained near-identical authorisation procedures to the 1988 Vienna Convention, albeit textually clarified and improved. In contrast, although the CRMA adopts the 1988 Vienna Convention procedures for ship boarding authorisation, the agreement further incorporates ship riders and tacit consent

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[222] U.S. Coast Guard FY 2020 Performance Report, accessed on 29 August 2021, <https://www.uscg.mil/Portals/0/documents/budget/FY_2020_USCG_APR.pdf?ver=2021-03-15-113137-970> 30.
[223] ibid 31.
[224] ibid 35.
[225] ibid 36.
[226] The agreements are between the U.S. and St. Vincent and the Grenadines, Fiji, the Marshall Islands, Tonga, Vanuatu, Samoa, The Gambia, Panama, Antigua and Barbuda, the Bahamas, Kiribati, Senegal, Canada, Micronesia, Tuvalu, and Nauru.
[227] 2020 USCG Report (n 222) 32.

provisions to facilitate authorisations. However, while the chapter showed that both agreements address specific gaps, some questions remained.

On the one hand, both agreements appear to be very under ratified and thus limiting their application in practice. On the other hand, these agreements are also restricted by geography since they are regional. Furthermore, additional questions remain regarding some practice-based matters in these agreements, mainly centring on the CRMA and its specific provisions for ship riders and inbound pursuit. Still, as Chapter 5 shifted its focus to the U.S. bilateral interdiction agreements, especially as they are the origin of those respective approaches to addressing some of the remaining gaps in the law, some of these matters were resolved.

The U.S. BILATS contain comprehensive clauses for ship boarding and obtaining authorisations to board flagged vessels belonging to the other bilateral party. Furthermore, ship riders and differential forms of tacit authorisation were considered within these provisions, including how some agreements incorporate fixed time periods for authorisations. In some cases, the agreement itself is the authorisation to board a party's vessel suspected of being a DTV on the high seas. In this regard, the BILATS addresses many of the gaps identified in previous chapters concerning how states obtain authorisation to board a flagged vessel suspected of being a DTV on the high seas. Furthermore, the chapter showed how these agreements close other practical gaps in the law, including 'cold or reverse' pursuit from the high seas and providing for more exceptional cases, including the limited right to enter another party's territorial sea to affect an interdiction. Additionally, this chapter considered how these agreements demonstrate a possible shift in the overall approach to maritime security issues through comprehensive 'maritime security agreements'.

While Chapter 5 has centred primarily on specific forms of international cooperation to suppress DTVs on the high seas [i.e., regional, and bilateral agreements], the U.S. has also adopted specific approaches at the domestic level regarding DTVs and criminal jurisdiction on the high seas. Recalling Chapter 1, the U.S. remains the leading actor in suppressing drug trafficking on the high seas. Thus, the next chapter engages with and examines the U.S. approach to high seas DTV interdictions.

Agreement	Ship Boarding	Entry to Invenstiagte	Overflight	Shiprider	Pursuit	Order to Land	Source	Date of Agreement
U.S. / Antigua and Barbuda	Pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	U.S. State Department Website. https://www.state.gov/documents/organization/177188.pdf	2003
U.S. / The Bahamas	4 Hour Time Limit	May be conducted without shiprider [exceptional clauses]	Overflight permitted	Shiprider permitted	Pusuit Permitted	not specificed	U.S. State Department Website.https://www.state.gov/documents/organization/108940.pdf	2004
U.S / Barbados	After 3 Hours [No Objection]	May be conducted without shiprider [exceptional clauses]	Overflight permitted	Shiprider permitted	Pusuit Permitted	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/101684.pdf	1997
U.S. / Belize	Pre-authorized Consent to Board	Permitted	Not Permitted	shiprider permitted	Pursuit Permitted	Not Permitted	UN Treaty Website. Vol. 2231 [2003]Nos. 39641-39707	2000
U.S. / Canada	Shared Waterways	Exceptional Clause & May continue to land	Not Specificed	Shiprider permitted	Pursuit Permitted	Not specificed	Public Safety Canada. https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/frmwrk-grmnt-ntgrtd-crss-brdr/frmwrk-grmnt-ntgrtd-crss-brdr-eng.pdf	2009
U.S. / Colombia	After 3 Hours [Consent to Board]	not permitted	Overflight Permitted [Separate Agreement]	shiprider permitted	not specificed	Permitted [Separate Agreement]	U.S. State Department Website. https://www.state.gov/documents/organization/99389.pdf	1997
U.S. / Cook Islands	Pre-authorized Consent to Board	Not permitted	Not Permitted	No Shiprider	not permitted	Not Permitted	U.S. State Department Website. https://www.state.gov/documents/organization/176367.pdf	2007
U.S. / Costa Rica	Pre-authorized Consent to Board	Exceptional Clause or by authorization from shiprider	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	U.S. State Department Website. https://www.state.gov/documents/organization/120374.pdf	1999
U.S. / Dominica	Pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Not Specificed	shiprider permitted	Pursuit Permitted	not specificed	Hathi Trust Digital Library. https://catalog.hathitrust.org/Record/102423873	1995
U.S. / Dominican Republic	After 2 Hours [Consent to Board	permitted	Overflight permitted	shiprider permitted	Pursuit Permitted	not specificed	https://permanent.access.gpo.gov/gpo6877/161133.pdf	2003
U.S. / Fiji	Pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	https://www.state.gov/fiji-18-1112	2018
U.S. / The Gambia	After 2 Hours [Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/180610.pdf	2011
U.S. / Grenada	Pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	not specificed	Hathi Trust Digital Library. https://catalog.hathitrust.org/Record/102423889	1996
U.S. / Guatemala	After 2 Hours [Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	Shiprider permitted	Pursuit Permitted	not specificed	https://www.state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf	2003
U.S. / Guyana	pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	pursuit permitted	not specificed	https://www.state.gov/guyana-20-918	2020

U.S. / Haiti	Not Permitted	Permitted	Overflight permitted	no Shiprider	Pusuit Permitted	not specificed	Hathi Trust Digital Library. https://babel.hathitrust.org/cgi/pt?id=uc1.31210024810713	2002
U.S. / Honduras	After 2 Hours [Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	Shiprider permitted	Pursuit Permitted	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/126095.pdf	2002/2001
U.S. / Jamaica	After 3 Hours [Consent to Board]	Ad hoc Request	Overflight permitted	shiprider permitted	Must be conducted with shiprider authorization	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/163856.pdf	1998/ protocol 2004
U.S. / Kiribati	Shiprider authorization	Must be conducted with shiprider authorization	Overflight permitted	shiprider permitted	not specificed	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/178904.pdf	2008
U.S. / Malta	After 4 Hours [Consent to Board]	Not permitted	Not Permitted	no Shiprider	not permitted	Not Permitted	U.S. State Department Website. https://www.state.gov/documents/organization/108878.pdf	2004
U.S. / Marshal Islands	pre-authorized Consent to Board within geographic limit	Must be conducted with shiprider authorization	Overflight permitted with embarked officer	shiprider permitted	not specificed	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/109767.pdf	2008
U.S. / Micronesia	Shiprider authorization	Must be conducted with shiprider authorization	Overflight permitted	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://permanent.access.gpo.gov/gpo52708/225758.pdf	2014
U.S. / Nauru	Pre-authorized Consent to Board if no shiprider	Must be conducted with shiprider authorization	Overflight permitted	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://permanent.access.gpo.gov/gpo20685/185702.pdf	2011
U.S. / Netherland Antilles	Shiprider authorization	Must be conducted with shiprider authorization	Overflight permitted	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://permanent.access.gpo.gov/gpo6877/161133.pdf	2003
U.S. / Nicaragua	After 2 Hours [Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	U.S. State Department Website. https://www.state.gov/documents/organization/130285.pdf	2001
U.S. / Papua New Guinea	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	2018
U.S. / Palau	Shiprider authorization	Must be conducted with shiprider authorization	Not Specificed	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://www.state.gov/wp-content/uploads/2019/02/08-320-Palau-Maritime-Interdiction.EnglishOCR.pdf	2008
U.S. / Panama	After 2 Hours [Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/Other/TRE-152115.pdf	2001/2002
U.S. / St. Kitts & Nevis	Pre-authorized Consent to Board	may be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	https://www.gao.gov/archive/1998/ns98030.pdf	1996
U.S. / St. Lucia	Pre-authorized Consent to Board	may be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	Permitted	https://www.gao.gov/archive/1998/ns98030.pdf	1995
U.S. / St. Vincent & Grenadines	Pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	not specificed		1995

U.S. / Samoa	Pre-authorized Consent to Board	Must be conducted with shiprider authorization	Overflight permitted with embarked officer	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://www.state.gov/wp-content/uploads/2019/02/12-602-Samoa-Maritime-Interdiction.pdf	2012
U.S. / Senegal	Shiprider authorization	Must be conducted with shiprider authorization	Not Specificed	shiprider permitted	Must be conducted with shiprider authorization	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/169471.pdf	2011
U.S. / Solomon Islands	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	Not Yet Entered Into Force	2016
U.S. / Suriname	Pre-authorized Consent to Board	may be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://www.state.gov/documents/organization/121440.pdf	1999
U.S. / Tonga	Shiprider authorization	Must be conducted with shiprider authorization	Not Specificed	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://2009-2017.state.gov/documents/organization/153588.pdf	2009
U.S. / Trinidad & Tobago	Pre-authorized Consent to Board	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	not specificed	British Library. Hard Copy on File.	1996
U.S. / Tuvalu	Pre-authorized Consent to Board if no shiprider	Must be conducted with shiprider authorization	Overflight permitted	shiprider permitted	must be conducted with shiprider authorization	not specificed	https://permanent.access.gpo.gov/gpo20682/185703.pdf	2011
U.S. / U.K. Exchange of Notes	No Objection in Geographic Area	not permitted	Not Permitted	No Shiprider	not permitted	Not Permitted	UN Treaty Website. https://treaties.un.org/doc/Publication/UNTS/Volume%201285/v1285.pdf	1981 / 2000
U.S/U.K Shiprider Agreement	Must Request Authorization	May be conducted without shiprider [exceptional clauses]	Overflight permitted	shiprider permitted	Pursuit Permitted	not specificed	https://www.state.gov/00-1030	2000
U.S. / Vanatau	Pre-authorized Consent to Board	Must be conducted with shiprider authorization	Overflight permitted	shiprider permitted	must be conducted with shiprider authorization	Permitted	https://permanent.access.gpo.gov/gpo88147/273137.pdf	2016
U.S. / Venezuala	After 2 Hours [Consent to Board	not permitted	Not Specificed	No Shiprider	Not Permitted for Vessels/ Permitted for Aircraft	not specificed	U.S. State Department Website. https://www.state.gov/documents/organization/101688.pdf	1997

Chapter 6:
The U.S. Approach to High Seas Drug Interdictions

Introduction

The purpose of Chapter 6 is to canvas the relevant domestic law of the U.S. regarding high seas DTV interdictions and situate U.S. interdiction practice within international law. Chapter 6 does this to determine if U.S. domestic law and its interpretation, as a means to address drug trafficking on high seas and, more specifically, how such law, and interpretation, addresses the gaps in the international legal regime as set out in Chapters 3 and 4. To accomplish this assessment, Chapter 6 surveys two U.S. domestic criminal laws, the Maritime Drug Law Enforcement Act [MDLEA] and the Drug Trafficking Vessel Interdiction Act [DTVIA]. The chapter then moves to the interpretation and application of these statutes by U.S. Circuit Courts of Appeals, with the Eleventh Circuit Court of Appeals being the primary court in this regard, to evaluate if, and to what extent as a means of addressing the issue of drug trafficking on the high seas, specifically, how the case law situates U.S. practice within international law. Lastly, the chapter looks to how international cooperation factors into the U.S. approach to DTV interdictions on the high seas. The evaluation and assessment are done because the U.S. is recognised as the dominant global actor in high seas drug interdictions.[1]

6.1 The MDLEA and DTVIA

The international legal basis for all high seas drug law enforcement undertaken by the U.S. is the 1988 Vienna Convention, which the U.S. is a party.[2] In this regard, as Chapter 4 set out, there are certain obligations in that Convention which include the establishment of domestic law for the parties. To satisfy these obligations, the MDLEA was enacted [46 U.S.C. app.§ 1901 *et seq.*] as part of the U.S. Anti-Drug Abuse Act of 1986 and remains in effect [now titled 46 U.S.C. § 70501 *et seq.*].[3] The MDLEA is the primary statute the U.S. uses to exercise domestic criminal

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[1] U.S. Southern Command. [https://www.southcom.mil/Media/Special-Coverage/Operation-Martillo/]. See United States Coast Guard, Bureau of International Narcotics and Law Enforcement Affairs, accessed on 18 March 2019, <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253221.htm>. See also Peter J.J. van der Kruit, 'Maritime Drug Interdiction in International Law' (PhD Thesis, University of Utrecht 2007) 267; Natalie Klein *Maritime Security and the Law of the Sea* (University Press 2012) 134; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 89-90.

[2] Transcript T-001 at 1; Transcript T-002 at 3.

[3] The new version of the act also includes the Drug Trafficking Vessel Interdiction Act [DTVIA] which applies to semi-submersibles [narco-subs] and is considered below.

jurisdiction over high seas drug traffickers.[4] Furthermore not only has the U.S. has enacted the statute as part of its obligations that manifest in Article 4 of the 1988 Vienna Convention, including establishing jurisdiction over DTVs under Article 17, but also as part of the obligations in the U.S. 'Six-Part' agreements discussed in Chapter 5.[5] The MDLEA, however, is not the first statute enacted by the U.S. to suppress drug trafficking on the high seas under its domestic law. Indeed, the MDLEA has not only absorbed predecessor statutes, but it has also evolved over many years as legal and practical challenges to those predecessor statutes manifested.

6.1.1 Early Interdictions and the 1970 Comprehensive Drug Abuse and Control Act

The first legal challenges to U.S. interdictions began when the U.S. started conducting high seas DTV interdictions in the 1970s. The initial complications stated because when the U.S. began its interdiction efforts, there was no intelligence or information sharing, so suspicious ships were randomly boarded on the high seas, often with no drugs found onboard.[6] However, as the USCG became better equipped and improved their interdiction abilities, more successful drug interdictions took place, but this was complex under existing U.S. domestic law.[7] The primary drug statute at the time was the Comprehensive Drug Abuse and Control Act 1970 [1970 CSA], which is still in effect, and which was enacted as part of the obligations set out in the 1961 Single Convention to have domestic measures in place for the control on importation, distribution, and manufacturing of drugs.[8] To apply this statute to a high seas interdiction, the U.S. Department of Justice [DOJ] had to prove the interdiction involved an existing criminal conspiracy to import illegal drugs into the U.S.[9] Doing so was complex because as Noyer observes, the 1970 CSA is 'unsuited to high seas narcotics smuggling' since at the time it was often difficult to prove such a conspiracy existed on the high seas.[10]

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[4] Pub. L. 99-570, 100 Stat. 3207 and Act of Oct. 6, 2006, § 10(2), Pub. L. 109-304, 120 Stat. 1485. See also *U.S. v. Francisco Jose Valderrama Carvajal and Luis Alberto Munoz Miranda*, Criminal Action No. 10-106 (-2, 5) (RMC), 02/20/2013 at 13.

[5] Transcript T-002 at 3-4.

[6] Transcript T-001 at 1; Transcript T-002 at 1.

[7] Transcript T-001 at 1; Transcript T-002 at 1.

[8] M. Lawrence Noyer, 'High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction,' [1982] 50 Fordham L. Rev. 688, 702-703.

[9] 1961 Single Convention in Article 29 – Manufacture, Article 30 – Trade and Distribution, Article 35 – Action against illicit traffic, and Article 36 – Penal Provisions. See Noyer (n 8) 688-689. See also Samuel S. Lewis, 'The Marijuana on the High Seas Act: Extending U.S. Jurisdiction Beyond International Limits,' [1982] 8 Yale J. Int'l L. 359-360; Joseph R. Brendel, 'The Marijuana on the High Seas Act and Jurisdiction Over Stateless Vessels,' [1983] 25 Wm. & Mary L. Rev. 313, 314.

[10] Noyer (n 8) 702.

Furthermore, Noyer also notes that the statute, generally, 'is not intended to have extraterritorial effect'.[11] Due to this issue, legal difficulties arose in U.S. courts because DTV prosecutions raised questions of the U.S. exercising extraterritorial jurisdiction on the high seas. According to Lewis, many U.S. courts had approached these interdictions 'cautiously as the U.S. Supreme Court has long observed that international law sets the basis for any exercise of jurisdiction outside a State's territory'.[12] Additionally, the international law addressing drug trafficking as well as cooperative measures to suppress it was still in its infancy with the 1961 Single Convention, 1971 Psychotropic Convention, and the 1958 Geneva Convention on the High Seas, being the only conventions in force.[13] Ultimately, this meant a 'statutory void' existed, and the DOJ found it very difficult to prosecute drug traffickers from the high seas.[14] To overcome this void, a new statute was drafted, the Marijuana on the High Seas Act.

6.1.2 The Marijuana on the High Seas Act [MHSA]

The 1980 MHSA [21 USC § 955a],[15] is no longer in effect having been absorbed by the MDLEA. However, it criminalized the manufacture, distribution, or possession with the intent to manufacture or distribute controlled substances onboard a vessel outside of U.S. territorial waters.[16] The MHSA provided 'the Justice Department the maximum prosecutorial authority permitted under international law to address acts committed outside the territorial jurisdiction of the U.S.'.[17] Additionally, the MHSA addressed evolving tactics used by drug traffickers, including *constructive presence.*[18] To do this, the MHSA separates U.S. criminal jurisdiction over a DTV on

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[11] ibid 702.

[12] Lewis (n 9) 360-361.

[13] ibid 359-360 and 376. See Aaron Casavant, 'In Defense of the U.S. Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach,' [2017] 8 Harvard National Security Journal, 121. See also Chapter 4 regarding 1961 Single Convention and 1971 Psychotropic Convention.

[14] Lewis (n 9) 359-360 and 376.

[15] Pub. L. No. 96-350, 94 Stat. 1159 (1980).

[16] Although the title of the statute is the 'Marijuana' on the High Seas Act, the statute covers other controlled substances such as cocaine, heroin, or psychotropic substances. The MHSA further stipulates that: (b) It is unlawful for a citizen of the U.S. on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. (c) It is unlawful for any person on board any vessel within the customs waters of the U.S. to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. (d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance- (1) intending that it be unlawfully imported into the U.S.; or (2) knowing that it will be unlawfully imported into the U.S. (h) This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the U.S. 955b. Definitions As used in sections 955a to 955d of this title- (a) "Customs waters" means those waters as defined in section 1401(j) of title 19. (b) "High seas" means all waters beyond the territorial seas of the U.S. and beyond the territorial seas of any foreign nation. The act was replaced by the MDLEA.

[17] S. Rep. No. 96-855, 1980 U.S.C.C.A.N.2785–86.

[18] Casavant (n 13) 122. Cf Eugene Kontorovich, 'Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes,' [2009] 93 Minn. L. Rev. 1191, 1197; Ann Marie Brodarick, 'High Seas, High Stakes: Jurisdiction Over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act,' [2012] 67 U. MIAMI L. REV. 255, 259; See also Constructive presence in Chapter 3.

the high seas into two categories. The first category concerns *vessels of the U.S.* The second category addresses *vessels subject to the jurisdiction of the U.S.*[19]

A *vessel of the U.S.* is defined as:

> [a]ny vessel documented under the laws of the U.S., or numbered as provided by the Federal Boat Safety Act of 1971, as amended (...), or owned in whole or in part by the U.S. or a citizen of the U.S., or a corporation created under the laws of the U.S., or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958.[20]

A *vessel subject to the jurisdiction of the U.S.* is a *vessel without nationality.*[21] A *vessel without nationality* or a vessel assimilated to a *vessel without nationality* is one identified 'in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958'.[22]

The MHSA does not contain a specific provision establishing U.S. jurisdiction over a non-U.S. vessel. According to a 1980 report to the U.S. House of Representatives, there were some concerns that the MHSA raised questions of compatibility between the statute and international law, because drug trafficking is not an 'international crime'.[23] The report further considered that the issue would likely arise in cases where a flag state grants its consent to U.S. enforcement authorities. In circumstances like this, the U.S. effectively exercises its domestic criminal jurisdiction over foreign nationals on those non-U.S. flagged vessels and on the high seas.[24] U.S. Courts of Appeals also considered this a conflict between international law and the MHSA. The U.S. First Circuit Court of Appeals in *U.S. v. Cardales-Luna* observed that:

> an attempt was made to enact a provision that would have allowed the application of U.S. drug laws to foreign vessels, irrespective of a U.S. nexus, provided that the U.S. received prior approval of its exercise of extraterritorial jurisdiction from the flag nation of the vessel in question. This proposal, however, was rejected [based] on '[v]arious

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[19] 21 U.S.C. §§ 955a-955d (Supp. V 1981).
[20] ibid.
[21] The term 'vessel without nationality' is used in this chapter to denote a 'stateless vessel' because it is the term the statutes and treaties use; however, U.S. courts often use the terms interchangeably.
[22] **Article 5 1958 GCHS**: Each 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. There must exist a genuine link between the State 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. **Article 6 1958 GCHS:** 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. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. 2. 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.
[23] House Report, 96th Congress (1980) No. 96-323 (Comm. on Merchant Marine and Fisheries) and Senate Report No. 96-855 (Comm. on Commerce, Science, and Transportation).
[24] ibid.

> jurisdictional and constitutional' objections to using a state's 'prior consent as a basis for domestic criminal jurisdiction'.[25]

To address the problem, the MHSA essentially created a 'legal fiction' in the concept of 'customs waters'.[26] Customs waters, which are defined in the U.S. Tariff Act of 1930, and this act remains in effect, defines [in part] this area exists when in:

> the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the U.S. enabling or permitting the authorities of the U.S. to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the U.S., the waters within such distance of the coast of the U.S. as the said authorities are or may be so enabled or permitted by such treaty or arrangement (…).[27]

In other words, customs waters are a 'temporary zone' on the high seas created around a DTV at the time when a flag state waives its jurisdiction and authorises the U.S. to interdict the non-U.S. vessel and exercise its domestic jurisdiction.[28] What is not addressed in the MHSA are situations where the flag state refuses to waive its exclusive jurisdiction. Presumably, in those

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[25] *U.S. v Cardales-Luna*, No-08-1028, (1st Circuit) Decided 20 January 2011. It should be noted here that the First Circuit's line of reasoning is not adopted by other U.S. Appellate Circuits with respect to the MHSA and the ad hoc consent of a flag state. The issue is further considered below in the subsequent sections. See also *U.S. v. Bent-Santana*, 774 F.2d 1545 (11th Cir. 1985*)*; *U.S. v. Gonzalez*. 776 F.2d 931. (11th Circuit), November 1, 1985. See further [1986] 80 Am J Int'l L 645, 653; Anne M Huvos, 'Customs - The Judiciary and Public Policy Considerations of the Marijuana on the High Seas Act' [1986] 10 Suffolk Transnat'l LJ 581, 582-584.

[26] The concept of 'customs waters' was previously noted above with respect to the U.S. unilateral extension of a twelve-mile belt of sea for the purpose of prohibition enforcement. In the context of the MHSA the term "customs waters" means, 'a foreign vessel subject to a treaty or other arrangement between a foreign government and the U.S. enabling or permitting the authorities of the U.S. to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the U.S., the waters within such distance of the coast of the U.S. as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the U.S.'. See also Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing Limited 2013) 246-247.

[27] 19 U.S. Code § 1401 – Miscellaneous.

[28] *U.S. v. Romero-Galue,* 757 F.2d 1147 (11th Cir.1985)*,* the 11th Circuit Court of Appeals observed that, 'the defendants possessed the marijuana in this case 'within the customs waters of the U.S.,' meaning that the possession occurred either within twelve miles of the coastline of the U.S., the area normally considered as the customs waters, or within such area on the high seas beyond the twelve mile limit as the U.S. and a foreign government have, by 'treaty or other arrangement,' designated as an area in which the U.S. can board, seize, or search a vessel flying the flag of such foreign government for the purpose of enforcing the laws of the U.S. Count I charged the defendants with conspiring to possess the marijuana within such customs waters (…) the point on the high seas of the [vessel] seizure could have been "customs waters" designated by the U.S. and Panama, by "treaty or other arrangement," as a place where the U.S. could seize and prosecute under section 955a(c) those in possession of marijuana aboard a Panamanian vessel,' at 12-13. Similarly, in the case of *U.S. v. Molinares Charris*, 822 F.2d 1213 (1st Cir. 1987), the 1st Circuit Court of Appeals observed that the '[a]ppellants were convicted on two counts. Count I charged them with violating subsection (a), which applies to "any person on board a vessel of the U.S., or on board a vessel subject to the jurisdiction of the U.S. on the high seas." The district court instructed the jury that a vessel of a foreign nation "may be subject to the jurisdiction of the U.S. on the high seas" if the foreign nation "consents that the U.S. enforce its laws upon said vessel." Count II charged appellants with violating subsection (c), which applies to "any person on board any vessel within the customs, waters of the U.S.'. The court instructed the jury 'that the waters wherein the vessel was located when it was boarded were in fact customs waters of the U.S. if it found beyond a reasonable doubt "that there was an arrangement between the government of Honduras and the U.S., allowing the U.S. to board and enforce its laws upon the vessel'. Thus, the jury was told in effect that an arrangement between Honduras and the U.S. could be the jurisdictional basis for a conviction on both counts. For the Court, 'the statute, however, the consent given by Honduras to the enforcement of U.S. law against the [vessel] is a jurisdictional basis covered exclusively by subsection (c). See further Papastavridis (n 26) 247.

circumstances, a U.S. enforcement vessel could take no enforcement actions, apart from the exercise of a *right of visit* to determine if the nationality the vessel is claiming is its true flag state. In cases where the flag state rejects a claim of nationality, none is made or cannot be determined, the suspected DTV becomes *without nationality* and becomes *subject to the jurisdiction of the U.S.* per the second jurisdictional category, which is effectively a 'catch all' provision in this regard.[29]

While an essential step in the overall statutory evolution, several legal challenges also drew attention to shortcomings of the MHSA.[30] For example, in the 1981 case *U.S. v. James Robertson*, which involved the interdiction of a *vessel without nationality*, the court found that 'it is without subject matter jurisdiction to consider charges brought against foreign nationals on a stateless vessel carrying a controlled substance, when the ship was found hundreds of miles from American shores and there is no accusation that the defendants intended to distribute the contraband in the United States or cause any other effect'.[31] Furthermore, a 1980 U.S. Senate Report noted that the law was having 'little deterrent effect on the crews or the trafficking organizations in the highly lucrative trade in illegal drugs' and the sporadic seizures by the USCG were just 'part of the cost of doing business' for the DTOs.[32] The U.S. remained inundated with illegal drug use and as enforcement agencies made extensive efforts to curb the flow of drugs and fill the legal gaps, new legislation was needed, therefore, in 1986 Congress adopted the MDLEA.[33]

6.1.3 The MDLEA

The MDLEA is the primary domestic criminal statute used by the U.S. to exercise its domestic criminal jurisdiction over DTVs on the high seas. The statute has absorbed the MHSA, and it has also addressed the gaps in that statute considered above. The first way the MDLEA

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[29] Kontrovich (n 18) 1198.

[30] Consider the case of *U.S. v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981), where the trial judge concluded that '[t]he question before the Court, however, is whether the stipulated facts could possibly show an effect on our sovereignty sufficient to allow the protective principle of jurisdiction'. According to the court, '[t]hat boils down to whether, as a matter of law, the presence of foreign crewmen on a stateless ship carrying marijuana on the high seas 400 miles from the U.S. by definition represents a threat to our national security or to our government's functions (…) [i]t does not [and] [m]ore than that must be alleged and proven'. The opinion noted that '[t]here could be a different result if the controlled substance in question is found near U.S. territory, or if the shipment is bound for the U.S., or if the foreign defendants know or intend that their illegal cargo will be distributed in this country; [however], (…) [t]he Court holds today only that it is without subject matter jurisdiction to consider charges brought against foreign nationals on a stateless vessel carrying a controlled substance, when the ship was found hundreds of miles from American shores and there is no accusation that the defendants intended to distribute the contraband in the U.S. or cause any other effect here'. See further Kontrovich (n 18) 1198; Noyer (n 8) 690-691, 712-717.

[31] *United States v. James Robertson*, U.S. District Court for the Southern District of Florida - 515 F. Supp. 1340 (S.D. Fla. 1981)
June 11, 1981, Corrected Order, Conclusion.

[32] S. Rep. No. 96-855, 1980 U.S.C.C.A.N.2786.

[33] Transcript T-001 at 1; Transcript T-002 at 2-3; Transcript 004 3-5; Transcript 005 1-3.

improves on the previous statutes is it is worded explicitly to 'apply extraterritorially because some courts declined to give statutes extraterritorial effect without an explicit statement from Congress'.[34] Furthermore, as one U.S. official has noted, the statute was purposefully worded to do this so the U.S. would not need to prove any nexus between a DTV and the U.S. for prosecutorial purposes.[35] The explicit statement is set out in the MDLEA's Prohibited Acts section, which states that the statute 'applies even though the act is committed outside the territorial jurisdiction of the U.S.'.[36] The criminal acts the statute references are an that an 'individual may not knowingly or intentionally (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance; (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a))'.[37] The other way the MDLEA improves on its predecessors is through a greatly expanded list of *vessels of the U.S.* and *vessels subject to the jurisdiction of the U.S.*

Vessels of the U.S. are essentially flagged U.S. vessels, vessels linked, or vessels registered to the U.S. under federal law.[38] *Vessels subject to the jurisdiction of the U.S.* include:

> (A) a vessel without nationality;
>
> (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;
>
> (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of U.S. law by the U.S.;
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> (D) a vessel in the customs waters of the U.S.;
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> (E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of U.S. law by the U.S.; and

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[34] *U.S.* v. *Francisco Jose Valderrama Carvajal* (n 4) at 13.
[35] Transcript T-002 at 12.
[36] 46 U.S. Code § 70503 - Prohibited acts.
[37] ibid.
[38] 46 U.S. Code § 70502. Definitions – (1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title; (2) a vessel owned in any part by an individual who is a citizen of the U.S., the U.S. Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the U.S. or of a State, unless - (A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and (B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the U.S. who is authorized to enforce applicable provisions of U.S. law; and (3) a vessel that was once documented under the laws of the U.S. and, in violation of the laws of the U.S., was sold to a person not a citizen of the U.S., placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation'. It should be noted here that under the U.S. system, it is possible for individual states to also have their own registry independent of the federal registry. Therefore, it is possible for a vessel to be registered in any of the 50 U.S. states and still fly the U.S. flag under subsection (2), but the record of the vessel may lie with an individual county register and be inaccessible for verification.

> (F) a vessel in the contiguous zone of the U.S., as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that - (i) is entering the U.S.; (ii) has departed the U.S.; or (iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).[39]

As indicated, some of the MHSA was also included in the text of the MDLEA, such as subsection (A), which concerns *vessels without nationality*; however, there are some more notable additions to the list of *vessels subject to the jurisdiction of the U.S.* The most significant change is the addition of subsection (C). Subsection (C) fulfils U.S. obligations under the 1988 Vienna Convention and stems from the general framework proved in Article 17 (3). In this regard, when the U.S. does this type of interdiction, it is based on a 'consent and waiver' of jurisdiction by a foreign State. This aspect of the MDLEA also reflects the permissive establishment of jurisdiction in Article 4(1)(b)(ii) the 1988 Vienna Convention, set out in Chapter 4.[40] Furthermore, this establishment of U.S. jurisdiction is also necessary to encompass the individual bilateral interdiction agreements further considered in Chapter 5, especially those which provide for standing and tacit authorisation to board the other party's vessel on the high seas.

Subsection (D) is similar in this regard and retains the use and concept of 'customs waters' from the MHSA, discussed above, which applies when a non-U.S. flag state grants its authorisation to board its vessel on the high seas. Others, such as subsection (E) and (F) are unique to the MDLEA. Subsection (F) concerns vessels in the U.S. contiguous zone, as defined in Presidential Proclamation 7219.[41] Subsection (F) also adds functional language by including a definition of 'constructive presence' similar to the definition in Article 111 LOSC, but there are some noted changes.[42] These changes include:

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[39] ibid.

[40] 1988 Vienna Convention, **Article 4(1)(b)(ii):** May take such measures as maybe necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when: The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article. **Article 17(3):** In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia: a) Board the vessel; b) Search the vessel; c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

[41] Presidential proclamation 7219 of September 2, 1999, states that: '[i]nternational law recognises that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones. The contiguous zone of the U.S. is a zone contiguous to the territorial sea of the U.S., in which the U.S. may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea. Extension of the contiguous zone of the U.S. to the limits permitted by international law will advance the law enforcement and public health interests of the U.S. Moreover, this extension is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline', accessed on 29 March 2019, <https://www.govinfo.gov/content/pkg/CFR-2000-title3-vol1/pdf/CFR-2000-title3-vol1-proc7219.pdf>.

[42] **Article 111 LOSC** states [in part]: The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters,

> [a]ny vessel which is found or kept off the coast of the U.S. within or without the customs waters, if, from the history, conduct, character, or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the U.S. in violation of the laws of the U.S.; and (2) any vessel which has visited a vessel described in paragraph(1).[43]

The above definition incorporates an overall assessment of the 'history, conduct, character, or location of the vessel' combined with the legal test of 'reasonable belief' [i.e., reasonable grounds] the suspect vessel is engaging or attempting to engage in the introduction of 'merchandise' into the U.S.[44] The other notable change is the addition of subsection (E), which establishes U.S. jurisdiction if a foreign State consents to U.S. enforcement within the foreign state's territorial sea. This subsection could apply in situations where the 'pursuit' or 'entry to investigate' provisions of the BILATS are invoked by the USCG. However, the main thrust of the MDLEA is subsection (A), which addresses DTVs *without nationality* on the high seas.

For a vessel to be *without nationality* and subject to U.S. jurisdiction on the high seas, the MDLEA sets out a specific process for determining *nationality*. The process begins when a *right of visit* is triggered, and then continues by examining the:

> (1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas; (2) flying its nation's ensign or flag; or (3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.[45]

A verbal claim under subsection (3) may be refuted or denied if:

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the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. (2) The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones. (3) The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

[43] Customs Duties: 19 U.S. Code § 1401 – Miscellaneous.

[44] The reasonable belief test is a 'common sense standard' that looks at the totality of the circumstances and is usually held to be a standard that is less than probable cause. In *U.S. v. Pruitt*, 458 F.3d 477, 483 (6th Cir. 2006), the Sixth Circuit Court of Appeals held that the Supreme Court did not use the terms "probable cause" and "reason to believe" interchangeably and thus implied that "reason to believe" is a lesser standard. See also *U.S. v. Veal*, 453 F.3d 164, 167 n.3 (3d Cir. 2006); *U.S. v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005); *U.S. v. Route*, 104 F.3d 59, 62–63 (5th Cir. 1997); *U.S. v. Risse*, 83 F.3d 212, 216–17 (8th Cir. 1996); *U.S. v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995). It should be noted that while a majority of U.S. Appeals courts have adopted this standard, the Ninth Circuit has not adopted this line of reasoning and it equates Reasonable Belief with Probable Cause. See further *U.S. v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002), 'the 'reason to believe,' or 'reasonable belief', standard of Payton (. . .) embodies the same standard of reasonableness inherent in probable cause'. See generally Michael A. Rabasca, 'Payton v. New York: Is "Reason to Believe" Probable Cause or a Lesser Standard?' [2009] Seton Hall Circuit Review, 5, 437.

[45] 46 U.S. Code § 70502. Definitions.

> (A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;
>
> (B) a vessel aboard which the master or individual in charge fails, on request of an officer of the U.S. authorized to enforce applicable provisions of U.S. law, to make a claim of nationality or registry for that vessel; and
>
> (C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.[46]

These above operational procedures reflect a pragmatic approach to the time-consuming process of determining a vessel's flag state by placing the responsibility on the vessel's master.[47] The procedure is not the operational procedure known as 'master's consent' which involves obtaining consent to board and search a vessel. 'Master's consent' has been used by the USCG in the past and is somewhat controversial, as Van der Kruit observes.[48] However, data compiled for this study suggests the 'Master's Consent' procedure is becoming less used.[49] The 'master's claim' is to identify, practically as soon as possible, the flag state at the earliest time, so that authorisations may be granted, a determination of a bilateral agreement being in place to provide authorisation exists, or the vessel declared to be *without nationality*.[50] Approaching claims of nationality in this way is also known as *Presumptive Flag State Authority*.

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[46] ibid.

[47] For example, Article 17 (7) of the 1988 Convention states that 'a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorisation made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests'. Conversely, the 'master's claim' of nationality is not the same as another operational procedure of obtaining the 'master's consent' whereby the vessel's master can grant consent to a boarding party to conduct a full search of a vessel.

[48] Van der Kruit (n 1) 246-247. Van der Kruit concludes that, '[c]onsensual boarding for maritime drug interdiction is not endorsed by international law. None of the examined treaties provides for it or mentions it. Consensual boarding carried out by the U.S. Coast Guard and related to maritime drug interdiction is based on U.S. national law'.

[49] Transcript T-001 at 2; Transcript T-002 at 6.

[50] For example, when the USCG makes initial contact with a suspected DTV, the boarding team will ask 'right-of-visit questions to determine the nationality of the vessel' especially in cases where there is no flag or indicia of nationality, then the boarding team would ask the 'passengers if anyone wished to make a claim of nationality for the vessel,' followed by asking the occupants to 'identify the master of the vessel,' or ask each person individually to make the claim of vessel master. See *U.S. v. Cabezas-Montano, Placios-Solis, and Guaga-Alarcon*, No-17-14294, D.C. Docket No. 4:16-cr-10050-KMM-2, (11th Circuit), (Jan 30, 2020) at 8-9. It was noted in the case that '[w]hen asked about the [go-fast vessel's] last port of call, Palacios-Solis stated that it was Manta, Ecuador. According to one (…) boarding team member, without a claim of nationality for the vessel or a master to take the claim from, the Coast Guard 'take[s] the last port of call as the nationality of the vessel'. The boarding team also observed an Ecuadorian maker's mark on the back of the [vessel] indicating that the vessel was manufactured in Ecuador. When asked about the date of last port of call, Palacios-Solis stated that he and the other two defendants had gone fishing but ended up lost at sea for 32 days'. See further Transcript T-001 at 2; Transcript T-002 at 5-6; Transcript 005 at 2 and 5.

6.1.3.1 Presumptive Flag State Authority

Presumptive flag state authority is another operational procedure for flag state verification and is mentioned in previous chapters.[51] *Presumptive flag state authority* means the claim of nationality is taken at face value. In other words, '[the suspect vessel] is assumed to be subject to [the claimed State's] jurisdiction and [the claimed State] may thus authorise boarding'.[52] For example, if the USCG sees a Panamanian Flag, the USCG may presume the flag state is Panama and request authorisation to board. Panama must 'affirmatively and unequivocally assert the vessel is of its nationality'. Panama may deny the U.S. boarding, in which case the USCG can take no further action. However, if Panama refutes the claim or can 'neither confirm nor deny' it, the suspect vessel becomes *without nationality* and subject to U.S. domestic jurisdiction.

Presumptive flag state authority is, as Guilfoyle concludes, 'a pragmatic view the vessel [DTV] will prove to be (i) a U.S. vessel, in which case the permission is valid, (ii) without nationality, making U.S. permission irrelevant; or (iii) also, on inspection, carrying other flags or evidence of registry – in which case it can again be assimilated into a stateless vessel' under Article 92(2) of the LOSC.[53] The procedure further simplifies the labour-intensive process of verification envisioned in Article 17(7) of the 1988 Vienna Convention.[54] *Presumptive flag state authority* is also not without some controversy. For example, a presumed flag state may grant its permission to board without correctly verifying the vessel. In these cases, the legality of the interdiction is in question as the claimed flag state is not in a position to grant such authorisation.[55] Often, the responses from the queried flag state are intentionally worded as the flag state 'cannot confirm or deny' the claim, which is effectively an outright denial and results in the vessel being *without nationality* as set out in the procedures above.[56] Situations like this appear in many U.S. appellate court cases.[57] However, as discussed below, very few interdictions are outright chance encounters.[58] In most

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[51] Presumptive flag state authority is also discussed in Chapter 3.
[52] Guilfoyle (n 1) 'Shipping Interdiction' 96.
[53] ibid 96.
[54] Article 17(7) of the 1988 Vienna Convention states: [f]or the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorisation made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.
[55] Guilfoyle 'Shipping Interdiction' (n 1) 96.
[56] Transcript T-001 at 2; Transcript T-002 at 6-7.
[57] *U.S. v Obando*, D.C. Docket No. 1:16-cr-20962-FAM-3, No. 17-11202, U.S. 11th Circuit Court of Appeals, June 1, 2018, at 6 noting that 'Ecuadorian officials could not confirm the nationality or registry of the vessel'; *U.S. v. Matos Luchi*, Nos. 08-2289, 08-2290, 08-2291, '[t]he statute's provisions dovetail: a refusal to claim nationality renders the unflagged vessel stateless and so within federal jurisdiction, while a supportable claim of nationality allows the federal authorities to seek jurisdiction by consent of the flag nation'.
[58] A 'cold stop' is the term used by law enforcement officers for the investigatory detainment of individuals where those individuals were subsequently found to be engaging in criminal offenses and there was no advanced intelligence. For example, a police officer detains a vehicle for a traffic violation and the vehicle is found to contain

cases, some intelligence exists concerning the DTV's embarkation time, cargo, possible identities of the traffickers, and the DTV's intended destination.[59] Presumptive flag state authority is further expanding in scope through U.S. case law.

In the 2018 case, *U.S. v. Obando*, the Eleventh Circuit Court of Appeals expanded *presumptive flag state authority* because the court had 'to decide whether a flag painted on the side of a vessel is "flying" for the purpose of making a 'claim of nationality or registry' under the MDLEA.[60] The court concluded that the ordinary meaning of the statute's text means the 'term "flying" requires a flag to be hoisted in the air'.[61] The court acknowledged there are circumstances where it may not be possible to 'fly' a flag in the conventional way [e.g., storm, vessel damage, or a submarine under water].[62] Also, the absence of a flag does not always indicate absence of nationality for the

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illegal weapons and drugs. Also consider case backgrounds such as *U.S. v. Rendon* [2003], when 'patrolling international waters' in the Eastern Pacific Ocean on May 11, 2001, the crew of a U.S. Navy P3 surveillance airplane spotted a "go-fast" vessel traveling at high speed and followed it (…) [s]hortly thereafter, the crew observed the occupants of the boat throwing bales overboard. The Navy P3 crew informed the U.S. Coast Guard Law Enforcement Detachment aboard the USS Halyburton of the position of the go-fast boat and also dropped a sonar buoy into the water to mark the location of the discarded bales'; *U.S. v. Estupinian* 453 F.3d 1336, June 2006, '[o]n May 30, 2005, the U.S. Coast Guard ("USCG") spotted a "go-fast" boat alongside a fishing vessel in international waters off the coast of Ecuador. After the two vessels separated, the go-fast boat appeared dead in the water': *U.S. v. Hernandez*, No. 15-10810. July 28, 2017, '[o]n November 5, 2013, the U.S. Coast Guard identified a suspicious go-fast vessel in international waters, about 120 nautical miles southwest of the El Salvador/Guatemala border, in the Pacific Ocean. The vessel was not flying any national flag. When a Coast Guard helicopter approached it, the vessel sped off'. See further Charles R. Fritch, 'Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction Over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement,' [2009] 8 Wash. U. Global Stud. L. Rev. 701, 702, Fritch summarizing the interdiction notes that '[i]n the predawn hours of September 11, 2000, members of the Coast Guard Law Enforcement Detachment Team (LEDET) attached to the USS De Wert monitored via radar a suspicious rendezvous between the supposed fishing vessel Gran Tauro and a yet-to-be-identified vessel. The team members expected that they would soon witness an integral step in high seas drug smuggling, the resupplying of a Go-Fast boat from a logistical support vessel'.

[59] *U.S. v. Cadena* 588 F.2d 100. The background to the case notes that, '[t]he U.S. Coast Guard boarded a freighter carrying a cargo of marijuana in international waters and arrested the thirteen Colombian crew members aboard. Their arrest was the culmination of an investigation that began two months before, when federal agents in Florida received a tip that Thomas Albernaz was seeking a vessel to rendezvous with a freighter on the high seas, to receive a large quantity of marijuana from it, and to deliver the shipment to shore in Florida. During the following weeks, Drug Enforcement Administration agents plotted with Albernaz and others to supply such a vessel'. See Transcript T-002 at 2; Transcript T-004 3-5; Transcript T-005 6-7; Transcript T-006 5.

[60] *U.S. v. Obando* (n 57) at 2. The background of the case notes that: 'Alexander Obando, Laureano Roberto Quiroz-Mendoza, and Alfonso Bitaliano Marcillo-Mera were aboard the vessel, but they failed to produce documents evidencing nationality or to make a verbal claim of nationality or registry. Coast guardsmen spotted a Colombian flag painted on the hull of the Siempra Malgarita, but the master of the vessel asserted that the flag was Ecuadorian. The guardsmen did not ask Colombian officials whether the vessel was registered in Colombia or whether Colombia consented to the Coast Guard exercising jurisdiction. Guardsmen later boarded the vessel and arrested the crew members', at 2-3.

[61] The court later determined that '[t]he ordinary meaning of the word "flying" requires a flag to be capable of freely moving in the air, 10-11, 19.

[62] *U.S. v. Obando (*n 52) 10-16. The court citing *U.S. v. Campbell* observed that, 'we mentioned that a 'vessel lacked all indicia of nationality: it displayed no flag, port, or registration number', 743 F.3d at 804'. Also citing *U.S. v. de la Cruz*, the court 'explained that the stateless vessel in question flew no flag, carried no registration paperwork, and bore no markings indicating its nationality', 443 F.3d 830, 832 (11th Cir. 2006). 'According to the crew members, this language suggests that any visual depiction of a flag is enough. But even if these statements addressed the question whether a painted flag can "fly," they would cut the other way. Our separate mentions of whether a vessel "flew [a] flag" or "bore (. . .) markings indicating its nationality," id., imply that a flying flag is distinct from other visual displays that also suggest nationality'.

vessel.[63] For example, 'while failing to fly a flag' a vessel may also 'fail to display marks of registry, a port number, registration paperwork, or any indicia of nationality'.[64] Still, according to the Eleventh Circuit, 'a flag hoisted in the air avoids these line-drawing problems and provides certainty to both American officials on the high seas and the courts that second-guess their decisions'.[65] The court's literal conclusion of 'flying' a flag greatly broadens the likelihood a vessel becomes *without nationality*; however, the extent this is reflected in U.S. practice remains undetermined as no cases to date cite this specific aspect of the opinion. Apart from a vessel being *without nationality* on the high seas under the MDLEA, the DTVIA, which primarily addresses semi-submersibles or 'narco-subs,' went into force in 2008 to compliment the MDLEA.

6.1.4 The DTVIA

The DTVIA was enacted to address the use of *self-propelled submersible and semi-submersible* vessels that are *without nationality* and on the high seas. Commonly known as 'Narco-Subs,' these vessels are more likely to go undetected, more problematic to interdict, and are easy to scuttle, which may also destroy any evidence of drug trafficking.[66] They are self-contained, self-propelled, highly camouflaged, have little to no outboard lighting, a low water profile, and create little to no

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[63] ibid.

[64] ibid 10-16.

[65] ibid 18. When considering the issue further the court reasoned that '[t]he ambiguities posed by painted flags also rebut the crew members' practical complaint that the requirement of a physical flag will "lead to absurd results" because "a postage-stamp size (. . .) flag hoisted on a ship's mast could constitute a claim of nationality but a flag several feet long by several feet wide painted on the (. . .) hull of a boat could not." Indeed, the Act has good reason to require an actual flag of any size instead of a painted representation. Consider a vessel painted with horizontal red, white, and blue stripes. Is this vessel flying the flag of the Netherlands? Or is it instead owned by a captain who only likes those colors'? The court concluded that '[a] flag hoisted in the air avoids these questions and unambiguously asserts nationality'. See also *U.S. v. Prado*, 143 F. Supp. 3d 94 (S.D.N.Y. 2015), the Southern District of New York ruled that a 'small emblem of what appear[ed] to be an Ecuadorian flag (. . .) affixed to [a] boat," was not "flying (. . .) within the meaning of the [Act]'. Furthermore, '[t]he district court declined to adopt the argument of the government "that a piece of fabric must wave in the air." Instead, it explained that the phrase 'flying a nation's ensign or flag' (. . .) 'at a minimum refer[s] to a display sufficiently prominent as to put a U.S. official on notice of another country's interests before it concluded that the particular emblem in question was not remotely large or prominent enough'. However, regarding the case in *Prado,* the Eleventh Circuit Court of Appeals disagreed with the district court and concluded that '[n]ot only was this functionalist analysis unnecessary in the light of the ordinary meaning of the phrase "flying a flag," but the opinion in *Prado* also highlighted the inherent difficulty of dispensing with the requirement of a hoisted flag when it grappled with the question whether the "emblem" on the vessel in question was enough to put a reasonable official on notice that [another country's] interests might be affected'.

[66] U.S. v. *Saac,* 632 F.3d 2011 (11th Cir. 2011) - defendants [were] on board a self-propelled, semi-submersible vessel 'as the U.S. Coast Guard approached defendants' vessel, a helicopter crew saw the four defendants, three of whom were wearing life vests, emerge from the vessel's hatch and jump into the water. The vessel sank within minutes,' at 3-4.

wake.[67] In other words, 'narco-subs' have one purpose, to avoid detection.[68] These vessels also have potential for use in weapons trafficking or as an explosive device in a terrorist attack.[69] According to U.S. Representative Daniel Lungren, '[t]he Coast Guard has reported that at any one time, there are over 100 of these vessels on the high seas all headed to the U.S., all bringing cargo, drugs or even people'.[70] Indeed, their prevalence continues to rise as these vessels are being found or captured in various parts of the world, including Europe.[71]

The DTVIA addresses these unique challenges by amending:

> the federal criminal code (…) for knowingly operating, attempting or conspiring to operate, or embarking in any submersible or semi-submersible vessel that is without nationality in, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to avoid detection. [The Statute] [g]rants extraterritorial federal jurisdiction over an offense under this Act.[72]

The DTVIA also criminalizes the use of a narco-sub even in cases where there is no evidence of drug trafficking. Therefore, as Bennett states, '[u]nder the DTVIA (…) not only is a vessel's statelessness grounds for the exercise of prescriptive jurisdiction but is an essential component of the conduct that the law criminalizes'.[73] Some criminal appeals have adopted these criticisms

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[67] *U.S. v. Ibarguen-Mosquera*, 634 F.3d 1370 (11th Cir. 2011), *U.S. v. Valarezo-Orobio, U.S. v. Saac* (n 66). See Casavant (n 13) at 122 noting that '[t]he traffickers' first foray into submarines was the self-propelled semisubmersible vessel (SPSS). Emphasizing stealth over speed, SPSSs ride extremely low in the water and are nearly impossible to detect at visual ranges greater than one mile'. See also Joseph Trevithick, 'The first narco-submarine ever seized off a European coast is a monster,' in The Dive, accessed on 27 November 2019, <https://www.thedrive.com/the-war-zone/31248/the-first-narco-submarine-ever-seized-off-a-european-coast-is-a-monster>.

[68] Consider the admissions and statements of arrested drug traffickers, for example in *U.S. v. Valarezo-Orobio*, the case notes that '[b]oth Appellants were crewmembers on a thirty-five-foot, aqua blue, self-propelled, semi-submersible vessel ("SPSS") that was apprehended by the U.S. Coast Guard on July 27, 2009, while operating in international waters near Malpelo Island, Colombia. No flag nor markings of registry were visible on the vessel. The vessel, which Valarezo ***admitted was semi-submerged in order to evade detection*** (emphasis added)'.

[69] 154 Cong. Rec. H7238-39 (daily ed. July 29, 2008); 154 Cong. Rec. H10153-54, H10252-54 (daily ed. Sept. 27, 2008); H.R. Rep. No. 110-941, at 182-83 (2009); H.R. Rep. No. 110-936, at 28 (2009). See *U.S. v. Saac* (n 66), noting that '[t]he U.S. Coast Guard reported to Congress that semi-submersible vessels present 'one of the emerging and most significant threats we face in maritime law enforcement today'. Additionally, '[t]hese vessels pose a formidable security threat because they are difficult to detect and easy to scuttle or sink'; 154 Cong. Rec. H7238-39; 154 Cong. Rec. H10153-54, H10252-54; H.R. Rep. No. 110-941 at 182-83; H.R. Rep. No. 110-936, at 28 that states, '[t]hese vessels therefore facilitate the destruction of evidence and hinder prosecution of smuggling offences'. See further Brian Wilson, 'Submersibles and Transnational Criminal Organizations,' [2011] 17 Ocean & Coastal L.J., 51.

[70] Statement of U.S. Rep Daniel E. Lungren, Congressional Record, U.S. House of Representatives, July 29, 2008, H7239. According to Rep. Lungren, '[t]hese submersible and semi- submersible vessels are typically less than 100 feet in length and usually carry between 5 and 6 tons of illicit cargo, everything from drugs, guns, people, and potentially weapons of mass destruction. The range of these vessels is sufficient to reach the south- eastern U.S. from the north coast of South America without refuelling', accessed on 29 May 2021, <https://www.congress.gov/crec/2008/07/29/CREC-2008-07-29-pt1-PgH7237-2.pdf>.

[71] Office of Counternarcotics Enforcement Fiscal Year 2010 Annual Report, U.S. Department of Homeland Security March 2011, 8. See South-COMM (n 1).

[72] S.3598, Public Law Number 110-407, October 13, 2008, accessed on 29 May 2021, <https://www.congress.gov/bill/110th-congress/senate-bill/3598]>.

[73] Allyson Bennett, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the DTV Interdiction Act,' [2012] 37 Yale J. Int'l L. 440, 446.

as a defence to prosecution and so are discussed below.[74] Having set out the two statutes, the MDLEA and DTVIA, the chapter now turns to these criminal appeals, which the U.S. Circuit Courts of Appeals adjudicate.

6.2 The MDLEA and DTVIA: Interpretation and Application by U.S. Courts

The following section engages with the MDLEA and DTVIA in one aspect of U.S. practice, its interpretation and application by U.S. Courts. The section looks at how the law applies to DTV interdictions on the high seas and the U.S. courts' approach to the jurisdictional questions raised from those interdictions on appeal. In this regard, the primary focus of the section is how the U.S. Courts of Appeals interpret the MDLEA/DTVIA in their case law with respect to the types of jurisdictions in international law, mainly prescriptive and adjudicative jurisdiction as well as the basis for exercising this jurisdiction, which as will be examined, is primarily the *protective principle* of jurisdiction.[75] Furthermore, the case law considered herein, and above, has greatly expanded the reach of the MDLEA/DTVIA through mostly liberal interpretations of the statues within the scope of general rules of international law. However, before specifically surveying the case law and its interpretation and application, a note on the U.S. Federal Court system aids to inform this chapter.

6.2.1 A Note on the U.S. Federal Courts

The U.S. has twelve federal circuits that each have district and appellate courts. There are ninety-four district trial courts. Each of the federal circuits has an appellate court, and generally, three judges will sit for an appeal; however, an appeals court may sit *en banc,* but this is rare and usually 'not favoured' according to the U.S. Federal Rules of Appellate Procedure.[76] The U.S. Supreme Court is the highest court in the U.S.; however, it should be noted that the Supreme Court has yet to hear a high seas DTV interdiction appeal from one of the Circuit Courts of Appeals. This is the reason the case law surveyed in the chapter generally comes from appellate opinions.

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[74] *U.S. v. Ibarguen-Mosquera*, 634 F.3d 1370 (11th Cir. 2011).

[75] See Chapter 2 on the types and basis of jurisdiction in international law.

[76] There is also a 13th appeals court that is the U.S. Court of Appeals for the Federal Circuit, but this court only hears cases on specific subject matter such as appeals from the 'U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Patent and Trademark Office. It exclusively hears certain types of cases appealed from the district courts, primarily those involving patent laws'. [https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide]. See Rule 35: En Banc Determination, accessed on 29 May 2021, <https://www.law.cornell.edu/rules/frap/rule_35>.

The appellate courts, any of which may hear a high seas DTV interdiction case, only function to 'make sure that the proceedings were fair and that the proper law was applied correctly',[77] which as stated not only concerns the application of the MDLEA/DTVIA, but rules of international law including those set out in the LOSC and 1988 Vienna Convention. When undertaking an appeal, U.S. courts adhere to the legal doctrine, *starie decisis* [precedent], and this often governs initial proceedings through the end of the appeals process.[78] Indeed, unless the opinion comes from the Supreme Court, a circuit court of appeals sitting *en banc*, or Congress modifies a statute, appellate opinions 'are final, but they are only *binding on lower courts within the same circuit*'.[79] Appellate courts may clarify previous precedents in subsequent opinions and on occasion go against them, although this is rare and done 'cautiously'.[80] An appellate court may adopt a precedent from another circuit; however; a 'federal district court need not adhere to a decision made by any district or appellate court in any other district';[81] however, the appellate courts often adopt similar views on high seas DTV cases.

As it relates to drug traffickers detained by the USCG on the high seas and subsequently brought into the U.S. for prosecution, theoretically, the DOJ can prosecute drug traffickers in any U.S. district court.[82] The First, Second, Third, Fourth, Fifth, and Eleventh Circuits are on the East Coast, and the Ninth Circuit is on the West Coast of the U.S. Typically, there are USCG and Navy vessels in the Caribbean [East] and Eastern Pacific [West], so the drug traffickers are often disembarked based on location. Some drug traffickers interdicted in the Caribbean area, East Coast of Central America, and South America are disembarked in either Puerto Rico [First Circuit] or the U.S. Virgin Islands [Third Circuit]. Similarly, drug traffickers interdicted in the Eastern Pacific are disembarked in California [Ninth Circuit]. Occasionally, there are cases brought before the Second, Fourth, and Fifth Circuits, but these are fewer in number as they typically concern drug traffickers further up the U.S. Atlantic coast.[83] This section; however, primarily engages with the case law of the Eleventh Circuit Court of Appeals, as it has become

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[77] ibid 'About the U.S. Courts of Appeals'.

[78] *Starie decisis* is the doctrine of judicial precedent. Additionally, as stated by the Legal Information Institute at Cornell University, '[t]he doctrine operates both horizontally and vertically. Horizontal stare decisis refers to a court adhering to its own precedent. A court engages in vertical stare decisis when it applies precedent from a higher court', accessed on 29 May 2021, <https://www.law.cornell.edu/wex/stare_decisis>.

[79] Note that the Eleventh Circuit Court of Appeals in *U.S. v. Hanna*, 153 F.3d 1286, 1288 (11th Cir. 1998) concluded that 'only the court of appeals sitting en banc, an overriding U.S. Supreme Court decision, or a change in the statutory law can overrule a previous panel decision'. See also 'Appellate Courts and Cases: A Journalists Guide' accessed on 30 May 2021, <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide>.

[80] Stare Decisis (n 78).

[81] ibid.

[82] 46 U.S. Code § 70504. Jurisdiction and venue.

[83] *U.S. v. Pinto-Mejia*, 720 F.2d 248, 260-61 (2d Cir. 1983).

the primary circuit for the prosecution of MDLEA/DTVIA cases, and it has the most abundant case law to date.

When U.S. courts bring an individual to trial, they must have 'personal jurisdiction' over the offender, which exists 'when a defendant appears voluntarily or involuntarily before a U.S. judge'.[84] The method used to bring the defendant before the court is a separate matter for concern. As noted in Chapter 2, enforcement jurisdiction often does not divest a court from personal jurisdiction even if a person is unlawfully abducted abroad. Therefore, defendants in U.S. criminal cases often have difficulty in challenging their physical presence before a court. The difficulty stems from two U.S. court cases, *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952), which created the *Ker-Frisbie Doctrine*.

The *Ker-Frisbie Doctrine* is a legal doctrine stating that a defendant cannot challenge their appearance before a U.S. court [i.e., personal jurisdiction] even where the defendant[s] appearance 'was procured illegally'.[85] As it relates to high seas DTV interdictions, the *Ker-Frisbie Doctrine* resonates in the MDLEA. Although the chapter did not discuss it in the previous section, the MDLEA has a specific rule dedicated to personal jurisdiction and international law, which states that:

> [a] person charged with violating section 70503 of this title, or against whom a civil enforcement proceeding is brought under section 70508, does not have standing to raise a claim of failure to comply with international law as a basis for a defence. A claim of failure to comply with international law in the enforcement of this chapter may be made only by a foreign nation. A failure to comply with international law does not divest a court of jurisdiction and is not a defence to a proceeding under this chapter.[86]

Section 70505 above has a specific purpose: the need to identify congressional intent that the statute is an extraterritorial extension of U.S. law, which may conflict with international law.[87] Furthermore, the section indicates the separation of powers within the U.S. Government. Accordingly, 'Congress has delineated between judicial and diplomatic compliance with international law limits on criminal jurisdiction over the actions of aliens on ships on the high

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[84] Charles R. Fritch, 'Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction Over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement,' [2009] 8 Wash. U. Global Stud. L. Rev. 701, 710.

[85] ibid at 710.

[86] 46 U.S. Code § 70505. Failure to Comply with International Law.

[87] *U.S. v. Pinto–Mejia* (n 83) the court noting that '[i]n enacting statutes, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the U.S., in excess of the limits posed by international law. As long as Congress has expressly indicated its intent to reach such conduct, a U.S. court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment'.

seas, with respect to limits on both prescriptive and enforcement jurisdiction'.[88] In other words, as the Fourth Circuit case of *U.S. v. Howard-Arias* notes, although high seas drug interdiction cases involve international law, and are 'complicated by the presence of international law concerns and the intent of Congress in treating them' there is a possibility of a conflict between the bodies of law.[89] Thus, according to the Fourth Circuit:

> [w]hile 'international law' is part of this nation's laws, 'international law must give way when it conflicts with or is superseded by a federal statute (...) to the extent permitted by the due process clause of the Fifth Amendment,' and the U.S. may violate international law principles in order to effectively carry out this nation's policies.[90]

The Fourth Circuit opinion in *Howard-Arias* should be analysed cautiously since this implies that U.S. courts are willing to cast international law aside in many cases. This is generally not the case, and alternatively, a closer look at other case law supports this assessment. For example, in the Second Circuit Court of Appeals case, *U.S. v. Toscanino [1974]*, the court found the abduction of a drug trafficker from Uruguay and subsequent mistreatment [possibly torture] was grounds to remove personal jurisdiction.[91] However, the *Toscanino* case likely could not be cited as precedent in the case of an appeal concerning a DTV interdiction on the high seas because, as Fritch concludes:

> the problem faced by a drug smuggler abducted from the high seas attempting to invoke *Toscanino* is that the Second Circuit's opinion focused extensively on the seventeen days of abhorrent physical torture the defendant suffered. Since the U.S. Coast Guard is responsible for the arrest and transport of drug smugglers and does not have a history of mistreating detainees after arrest, it is unlikely that this would be grounds for a successful defence.[92]

Still, there are occasional situations where a State has lodged a formal protest for the forceful abduction of its nationals by U.S. authorities. Indeed, the U.S. Supreme Court in *U.S. v. Alvarez-Machain* [1992] asked the question if 'the U.S. had authorised [an] abduction and since the Mexican Government had protested the Treaty violation, [was] jurisdiction was improper'?[93] Ultimately, the Supreme Court concluded that '[t]he fact of respondent's forcible abduction does

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[88] *U.S. v. Hernandez* [2017], (11th Circuit) No. 15-10810 at III-IV, the Court concluding that 'under international law a nation may lack power to go on the territory of a foreign state without consent to seize a person, even a national of the seizing state, such that the state whose territory is violated may protest diplomatically. These limits fall under the rubric of a nation's jurisdiction to enforce', at 1305-06. See generally 'Restatement (Second) of the Foreign Relations Law of the U.S. § 6 cmt. a (1965)'.

[89] *U.S. v. Edmundo Howard-Arias*, Appellant. No. 81-5153. U.S. Court of Appeals, Fourth Circuit. Argued Jan. 8, 1982. Decided June 1, 1982.

[90] *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900) and *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1161 (E.D.Pa.1980).

[91] *U.S.* v. *Francisco Toscanino*, Appellant. 500 F.2d 267, U.S. Court of Appeals, Second Circuit, No. 746, Docket 73-2732, Argued Feb. 13, 1974, at Conclusion.

[92] Fritch (n 84) 712.

[93] *U.S. v. Alvarez-Machain*, 504 U.S. 655, 669 (USSC 1992) 659-670.

not prohibit his trial in a U.S. court for violations of this country's criminal laws'.[94] Therefore, in DTV interdiction cases, it is unlikely that a U.S. court will lack personal jurisdiction, which includes jurisdiction over individuals interdicted on DTVs that are flagged or *without nationality*.

6.2.2 Establishing a base of Jurisdiction: The Protective Principle and U.S. Appellate Case Law

As Chapter 2 set out, when a State exercises its jurisdiction to prescribe, enforce, or adjudicate, it must have a basis for this exercise of jurisdiction in international law. Chapter 2 concluded that a State could apply the *protective principle* to secure that state's vital security interests, and drug trafficking is argued as an act prejudicial to those security interests. This section lays the foundation for applying the *protective principle* by U.S. courts, which is cited in many of DTV interdiction case law. The first case is *Church v. Hubbart*, which is a U.S. Supreme Court case examining the right of a State to seize a vessel engaged in 'illicit trade' on the high seas.[95] In *Church v. Hubbart,* the U.S. Supreme Court concluded that:

> [t]he right of a nation to seize vessels attempting an illicit trade is not confined to its harbors (...) [i]ts power to secure itself from injury, may certainly be exercised beyond the limits of its territory. This right does not appear to be limited within any marked boundaries (...).**[96]**

The case establishes the foundation for extraterritorial criminal jurisdiction more broadly, but especially in DTV cases, including the 2019 First Circuit case, *U.S. v. Aybar-Ulloa.*[97] However, *Rocha v. U.S.* [1961] expands on U.S. criminal jurisdiction by applying the *protective principle* to exercise U.S. extraterritorial jurisdiction.[98]

In *U.S. v. Rocha*, the Ninth Circuit Court of Appeals delivered the first appellate ruling concerning the exercise of U.S. domestic criminal jurisdiction under the *protective principle.* The case concerned a conspiracy to defraud the U.S. through illegal immigration and 'sham marriages'.[99] In the case, the Ninth Circuit defined the *protective principle* as a 'determination of jurisdiction by reference to the national interest injured by the offence'.[100] The Ninth Circuit, citing *Church v. Hubbart*,

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[94] ibid. See Restatement (Fourth) of U.S. Foreign Relations Law at 428. See also Rapporteur William S Dodge, 'Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of U.S. Foreign Relations Law,' [2020] *Chinese Journal of International Law*, Volume 19, Issue 1, 21.
[95] *Church v. Hubbart*, 6 U.S. 2 Cranch 187, 187 (1804)
[96] ibid.
[97] *U.S. v Aybar-Ulloa*, Jan 9, 2019, No. 15-2377. The court citing *U.S. v. Cardales*, 168 F.3d 548 (1st Cir. 1999), which concerned the application of the MDLEA to drug smugglers on the high seas (in this case on a foreign-flagged ship). In *Cardales*, the First Circuit confers with *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234-35, 2 L.Ed. 249 (1804) concluding that, '[a nation's] power to secure itself from injury may certainly be exercised beyond the limits of its territory'.
[98] *Rocha v. U.S.* 9 Cir., 1961, 288 F.2d 545, cert. den. 366 U.S. 948, 81 S.Ct. 1902, 6 L.Ed.2d 124.
[99] ibid 1.
[100] ibid 4.

concluded that '[a] sovereign state must be able to protect itself from those who attack its sovereignty,' and 'there are no constitutional provisions which prohibit the exercise of jurisdiction over an alien found within the sovereign's territory, under the protective principle theory'.[101] The Ninth Circuit did not expand further on the *protective principle*, only noting 'the protective principle, [which is] 'less well known than 'the territorial principle,' yet as 'claimed by most states' [means that] there is, and should be, jurisdiction'.[102] The last case which must be set out is *U.S. v. Pizzarusso* [1968].[103]

In *U.S. v. Pizzarusso*, the Second Circuit deliberated an extraterritorial exercise of U.S. criminal jurisdiction over statements made in a visa application outside the U.S. and if those statements are 'an affront to the very sovereignty of the U.S.' [falling] under the 'Objective' Territorial Principle or the Protective Principle.[104] The court, drawing on the U.S. Restatement (Second) Foreign Relations Law, Section 33 (1965), reasoned that a State:

> has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognised as a crime under the law of states that have reasonably developed legal systems.[105]

Notably, the Second Circuit differentiated objective territoriality as 'the theory that the 'detrimental effects' constitute an element of the offense and since [when] they occur within the country, jurisdiction is properly invoked under the territorial principle'.[106] However, the court had concerns with applying objective territoriality, especially its application by other appellate circuits, because the 'effect' felt by the forum state dictates the application of the principle.[107] In other words, protective jurisdiction exists when 'all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a 'potentially adverse effect' upon security or governmental functions (…) [so] there need not be any actual effect in the country as would be required under the objective territorial principle'.[108] The above case law opinions have been very influential on other U.S. appellate circuits, which too have accepted these opinions with respect to the *protective principle* and DTV interdictions, including the Fifth Circuit in *U.S. v. Columba-Colella* [1979],[109] *Rivard v. U.S.* [1967][110], and the Eleventh Circuit in *U.S. v.*

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[101] ibid 23-24.
[102] ibid 23; note 4.
[103] The case was also referenced in Chapter 2 concerning the *protective principle*.
[104] *U.S. v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.) at 10. See Chapter 2.
[105] ibid.
[106] ibid 10-11.
[107] ibid 10-11.
[108] ibid 10-11.
[109] *U.S. v. Columba-Colella,* 604 F.2d 356, 358 (5th Cir.1979).
[110] *Rivard v. U.S.* 375 F.2d 882, 885, n. 7 (5th Cir.1967), cert. denied, 389 U.S. 884, 88 S.Ct. 151, 19 L.Ed.2d 181 (1967).

Romero-Galue [1985][111] and *U.S. v. Gonzalez* [1985].[112] Indeed, it was in *Gonzalez* where the Eleventh Circuit ultimately concluded that:

> [r]eliance on the protective principle is not a novel idea in American law. Indeed, the protective principle was the basis Congress cited for the Anti-Smuggling Act. S.Rep. No. 1036, 74th Cong. 1st Sess. 5 (1935). The Senate Report to that legislation noted that 'there is no fixed rule among the customs and usages of nations which prescribes the limits of jurisdictional waters other than the rule of reasonableness, that a nation may exercise authority upon the high seas to such an extent and to so great a distance as is reasonable and necessary to protect itself and its citizens from injury.[113]

The above cases show that U.S. courts have, and continue, to invoke the *protective principle* in high seas DTV interdictions, especially those which occur hundreds or thousands of miles from the U.S. The subsequent section continues this examination by looking more specifically at the case law from these interdictions.

6.2.3 Surveying the Case Law and the MDLEA/DTVIA

Two of the earliest DTV interdiction cases are *U.S. v. Rubies* [1979-80] and *U.S. v. Cortes* [1979], both involving a *vessel without nationality*. In *U.S. v. Cortes [1979]*, the Fifth Circuit, for the first time, examined the 'legality of a [U.S.] Coast Guard search on the high seas of a vessel-without-a-country'.[114] In determining the legality of the search, the court turned to international law, specifically the 1958 GCHS. First, the court began by interpreting the 1958 GCHS. The court interpreted the convention as establishing no protection for a *vessel without nationality* on the high seas. Instead, the Convention is a limitation on 'the boarding and search of "foreign merchant ships," and those ships are identified as vessels that have the "right to fly" the flag they show'.[115] Thus, according to the court's interpretation, 'international law shelters only members of the international community of nations from unlawful boarding and searches on the high seas'.[116] Citing *Molvan v. Attorney General for Palestine,* [see Chapter 3] to justify U.S. extraterritorial criminal

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[111] *U.S. v. Romero-Galue* (n 28).
[112] *U.S. v. Gonzalez*, 776 F.2d 931, 938-41 (11th Cir.1985).
[113] ibid 39.
[114] *U.S. v. Cortes*, 588 F.2d 106, 109 (5th Cir. 1979) at 109.
[115] **Article 22 1958 GCHS** [Right of Visit] states in part: 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 (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.
[116] *U.S. v. Cortes* (n 114) 110. The court, citing Oppenheim, *International Law* (7th ed. 1948) 546, noted that: '[i]n the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State'.

jurisdiction, the court recognised that 'the Privy Council stated that with regard to a *vessel without nationality* '[n]o question of comity nor of any breach of international law can arise, if there is no State under whose flag the vessel sails'.[117] The court then focused on how U.S. law addresses the authority and purpose of the USCG on the high seas. According to the statute, the USCG is 'restricted to inquiries, boarding[s], and [conducting a] limited search designed to elicit information about the vessel's identity and registration'.[118] Effectively, this is the *Right of Visit* and per Chapter 3, is well established in international law.[119] Therefore, the Fifth Circuit concluded that 'under the authority granted by U.S. statutes and international law, the boarding and subsequent search of the vessel (…) was justified'.[120] The same reasoning continues to foreclose many appellant arguments in the case law, and this is supported by *U.S. v. Rubies* [1979-80].[121]

In *U.S. v. Rubies*, the Ninth Circuit considered factual matters similar to the opinion in *Cortes*.[122] During an interdiction, a DTV claimed a British flag; however, when the court analysed the factual circumstances, the vessel actually 'flew no flag and her claimed country of registration and port of destination were both false, (…) [f]or all intents and purposes, she was a vessel without a country'.[123] Thus, the Ninth Circuit held that 'in such circumstances, the [USCG] had not only the right but the duty to determine her true identity by whatever reasonable means

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[117] Ibid 110. The court also citing Ian Brownlie, *Principles of Public International Law* (1966) 212, 222; H. Meyers, *The Nationality of Ships*, (1967) 309-323, specifically observing that '[t]o secure the protection accorded foreign merchant ships on the high seas, a vessel must accept the duties imposed by registration'.

[118] ibid 109.

[119] The court further noted that '[u]nder the principles of international law discussed below, stateless vessels are subject to this type of examination. Hence, stateless vessels are "subject to the jurisdiction (. . .) of the U.S., for these limited purposes (…) [and] [t]his authority is not curtailed by the Convention on the High Seas, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200. The Convention recognises certain principles of international law for the mutual benefit of its signatories. As we stated in *Cadena*, 585 F.2d 1252 at 1261, '[t]here is no indication in the treaty, or elsewhere, that it was intended to confer rights on non-member nations or on vessels of non-member nations, let alone on citizens of non-member nations'. In this case, the appellants were Colombian Nationals; however, the court noted that since Colombia is not a party to the GCHS, it would also not be able to cite a violation of the agreement', at 109-111.

[120] *U.S. v. Cortes*, (n 116) at 109.

[121] *U.S. v. Rubies*, 612 F.2d 397 (9th Cir. 1980).

[122] Ibid., at 402. It was noted above that the Ninth Circuit Court has a nexus requirement concerning the extraterritorial application of the U.S. anti-drug laws to a non-U.S. flagged DTV on the high seas. This line of reasoning is further evident here as the Nineth Circuit argues that a nexus could include, '[f]or example, items of food products and packages of apparent American origin, including a carton of Olympia beer, were found. Additionally, a note written in Spanish upon a Panamanian Holiday Inn stationery was found in [appellant's] cabin. This note had a drawing of a high-masted sailing ship with the words "azul jolly" written below the drawing. The note also contained radio frequencies, estimates of travel time, and instructions for off-loading the marijuana. The note is important because "azul" translates into "blue" and one of the other indicted co-conspirators (not before this court at this time) owned a blue 61-foot sailing sloop named "JOLI." This co-conspirator also owned some secluded water-front property along the north-western coast of Washington'.

[123] In this case, the suspect vessel claimed British Registry and '[e]ven though no British flag was shown, when the [vessel] claimed British registry the [USCG] did not then deny this claim and board her, but rather allowed her the right of free navigation accorded all foreign flag ships. The radical change of course, coupled with the flight through the night without lights in violation of the rules of maritime navigation and the lack of British registry, combined to give the Coast Guard ample cause to board the [vessel] to determine her true identity and recent activities'.

necessary'. [124] Using similar reasoning as the Fifth Circuit in *Cortes*, the Ninth Circuit explained that only '[a] foreign flag vessel is thereby protected by her country of Registration' and '[a]n unregistered or 'stateless' vessel, however, does not have these rights and protections'.[125] Based on this reasoning, the Ninth Circuit concluded that:

> [u]nder international law, foreign flag vessels are generally accorded the right of undisturbed navigation on the high seas. This right is often embodied in treaties. It is the duty of the flag nation to control its vessels. If another nation should wish to board a foreign flag vessel, the other nation would generally seek authorisation to do so from the nation whose flag the vessel flies. A foreign flag vessel is thereby protected by her country of registration.[126]

The *Cortes* and *Rubies* cases lay the fundamental groundwork for how U.S. courts approach domestic criminal jurisdiction over DTVs on the high seas.[127] Still, it would not be until the contentious 1982 case of *U.S. vs Marino-Garcia*, where some of the most significant and liberal interpretations of domestic and international law greatly expanded U.S. jurisdiction over *vessels without nationality* on the high seas.

The Eleventh Circuit case of *U.S. vs Marino-Garcia* questions if, under the *protective principle*, the criminal jurisdiction of the U.S. extends 'to all stateless vessels on the high seas engaged in the distribution of controlled substances' and 'whether international law imposes any substantive restrictions upon [the] right to extend jurisdiction to all stateless vessels on the high seas'. [128] The Eleventh Circuit approached this inquiry first by questioning if the statute can be interpreted 'in

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[124] ibid.

[125] *U.S. v. Postal*, 589 F.2d 862 (5th Cir. 1979). In citing *Cortes*, the Ninth Circuit concluded that '[u]nder international law, the waters off the coast of a sovereign are generally divided into three categories: territorial sea, contiguous customs enforcement zone, and the high seas. Generally speaking, the territorial sea extends three miles seaward and it is in this area that the coastal state exercises virtually plenary control subject to the recognised requirement that the passage of foreign flag vessels may not be interfered with unreasonably. Extending for yet another nine miles is the area commonly referred to as the contiguous customs enforcement zone. The power of the coastal state over this area is generally limited to specific interests such as the enforcement of the customs and safety laws as well as other concerns agreed upon by treaty. The territorial sea together with the contiguous customs enforcement zone comprise what is commonly referred to as the "12-mile limit." The high seas lie seaward of the territorial sea and therefore include the contiguous zone. Each nation is generally responsible for policing its own vessels on the high seas and no state may subject the high seas to its exclusive sovereignty. Appellants argue the actions of the Coast Guard violated provisions of two treaties to which the U.S. is a party: Convention on the High Seas, opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962); and the Convention on the Territorial Sea and Contiguous Zone, opened for signature April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964). However, as discussed in the text of this opinion infra, because the HELENA STAR [DTV] was an unregistered vessel neither she nor her crew could claim any protection that might be provided by these treaties'.

[126] ibid 402-403.

[127] *U.S. v. Arra,* 630 F.2d 836, 840 (1st Cir. 1980). The court further noted that 'Federal courts have upheld this country's right to subject stateless vessels on the high seas to its jurisdiction in a number of instances'. See *U.S. v. Monroy*, 614 F.2d 61 (5th Cir.), cert. denied, 449 U.S. 892, 101 S.Ct. 250, 66 L.Ed.2d 117 (980); *U.S. v. Dominguez*, 604 F.2d 304 (4th Cir. 1979); *U.S. v. May-May*, 470 F.Supp. 384 (S.D.Tex.1979).

[128] *U.S. v. Esteban Marino-Garcia et al*, Nos. 81-5551, 82-5284. 679 F.2d 1373 73 A.L.R.Fed. 144, 1985 A.M.C. 1815. July 9, 1982, at 11. The court expanded on the protective principle by observing, 'the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions'.

a manner consistent with international law'.[129] To do this, the Eleventh Circuit used the *Lotus Case* [see Chapter 2] as its starting point. The court, agreeing with the *Lotus Case,* established that under 'the principle of freedom of the seas, international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas'.[130] The Eleventh Circuit also noted that in the *Lotus Case* there are certain principles of international law allowing for jurisdiction 'where a nexus exists between a foreign vessel and the nation seeking to assert jurisdiction'.[131]

Building on this line of reasoning, the Eleventh Circuit then reconsidered *Molvan v. Attorney-General for Palestine*, [see above and Chapter 3] and highlighted that in the *Molvan Case* the '[a]ppellants contended that Great Britain violated the internationally recognised right of 'freedom of the seas' by asserting jurisdiction over a stateless vessel on the high seas [but] [t]he English Court rejected the argument'.[132] Based on this assessment the Eleventh Circuit reasoned that the:

> restrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability in connection with stateless vessels. Vessels without nationality are international pariahs. They have no internationally recognised right to navigate freely on the high seas. Thus, the assertion of jurisdiction over stateless vessels on the high seas in no way transgresses recognised principles of international law.[133]

The Eleventh Circuit went on to determine that:

> international law permits any nation to subject stateless vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation's affairs (…) Jurisdiction exists solely as a consequence of the vessel's status as stateless. Such status makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions.[134]

However, this conclusion means that the Eleventh Circuit also had to address the question of a nexus between the drug traffickers and the U.S. To do this, the Eleventh Circuit returned to the

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[129] ibid.
[130] ibid.
[131] ibid., the Court reasoned that under 'the objective principle including a vessel engaged in illegal activity intended to have an effect in a country is amenable to that country's jurisdiction. Similarly, the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions'.
[132] Citing *Molvan v. Atty General for Palestine*, the Eleventh Circuit observed that '[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 (stateless vessel in this case) 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 (...) (court's emphasis added)'.
[133] ibid, the Court citing *U.S. v. Dominguez,* 604 F.2d 304, 308 (4th Cir. 1979), cert. denied, 444 U.S. 1014, 100 S.Ct. 664, 62 L.Ed.2d 644 (1980) (concluding that stateless vessels have 'no rights under international law').
[134] ibid.

district trial court's opinion from the Southern District of Florida, where the case originated. According to the district court, 'drug trafficking amounts to a threat to [U.S.] security' and the defendant's conduct 'threatens the security or governmental functions of the U.S.'.[135] Based on the totality of these factors, the Eleventh Circuit affirmed this is an exercise of jurisdiction under the *protective principle,* and the Eleventh Circuit held that in any case where 'drug trafficking is found to be a threat to the security of the U.S., [the U.S.] would have jurisdiction under the protective principle over all vessels engaged in the illicit practice, including those flying foreign flags'.[136] Indeed, the *Marino-Garcia* reasoning regarding the *protective principle* and its application to non-U.S. flagged vessels and *vessels without nationality* includes cases such as *U.S. v. Romero-Galue* [1985],[137] and *U.S. v. Gonzalez* [1985].[138]

The cases of *U.S. v. Gonzalez [1985]* and *U.S. v. Romero-Galue [1985]* are cases in which the Eleventh Circuit not only continued to build on the *Marino-Garcia* opinion but expanded it, going so far as to propose that '[e]ven absent a treaty or arrangement, the U.S. could, under the 'protective principle' of international law, prosecute foreign nationals on foreign vessels on the high seas for possession of narcotics'.[139] The Eleventh Circuit based this conclusion on the fact that, 'Congress grounded [the statute] in the *protective principle* of international law (…) [thus] Congress observed that the U.S. may, consistent with the *protective principle*, assert jurisdiction (…) to protect its customs (…) interests'.[140] Other U.S. Circuit Courts of Appeals have reached similar conclusions concerning non-U.S. flagged DTVs and DTVs *without nationality* on the high seas, even in cases where there is no nexus between the DTV and the U.S.

The Fifth Circuit in *U.S. v. Cadena [1979],* for example, when considering if a non-U.S. flagged vessel, was afforded the protection of its flag state despite not being a party to the 1958 GCHS, reasoned that '[t]he treaty is not an act of disinterested benevolence for the peoples of the world. There is no indication in the treaty, or elsewhere, that it was intended to confer rights on non-member nations or on vessels of non-member nations, let alone on citizens of non-member nations'.[141] According to the Fifth Circuit:

> [t]he Convention on the High Seas is a codification of international law, and a treaty that purports to be binding upon all signatories (…). The treaty is not an act of disinterested benevolence for the peoples of the world. There is no indication in the treaty, or

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[135] *U.S. v. Marino-Garcia* (n 128) at note 4. The Eleventh Circuit also giving accord to, *U.S. v. Angola*, 514 F.Supp. 933 (S.D.Fla.1981).
[136] ibid 4.
[137] *U.S. v. Romero-Galue* (n 28).
[138] *U.S. v. Gonzalez* (n 112).
[139] ibid.
[140] ibid.
[141] *U.S. v. Cadena* (n 59) at 22.

> elsewhere, that it was intended to confer rights on non-member nations or on vessels of non-member nations, let alone on citizens of non-member nations (…) The violation of international law, if any, may be redressed by other remedies and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct (…) and citizens of non-member nations ought not enjoy the benefits of greater prophylaxis, such as exclusion or dismissal of indictments, by virtue of their nation's failure to ratify.[142]

Similarly, in the case of *U.S. v. Cardales-Luna [2011],* the First Circuit concluded that even in the absence of any evident fact that a Bolivian flagged vessel was destined for the U.S., the U.S. could still exercise its jurisdiction under the MDLEA over the flagged vessel because the 'Bolivian Government waived objection to the enforcement of U.S. laws by the United States with respect to the [vessel], including its cargo, and all persons onboard'.[143]

The Third Circuit has also adopted this line of reasoning and applied it to a non-U.S. flagged DTV on the high seas. For example, in the case of *U.S. v. Perez-Oviedo [2002],* the court noted that a Panamanian flagged vessel, which was bound for Canada could still be subject to U.S. jurisdiction under the MDLEA because 'a Statement of *No Objection* was requested from the Panamanian government for permission to search [the vessel] and the Panamanian government granted the request'.[144] Indeed, these interdictions are also well-founded in the legal framework as set out in Articles 17, and 4 of the 1988 Vienna Convention [see Chapter 4], and as said, the MDLEA is enacted in part to fulfil those obligations in the Convention.[145] On the other hand, the Ninth Circuit has rejected this view and the collective case law of the First, Third, Fourth, Fifth, and Eleventh Circuits. Unlike these circuit courts, which do not require a jurisdictional nexus between the U.S. and drug traffickers on non-U.S. flagged DTVs on the high seas, the Ninth Circuit imposes a nexus requirement for said vessels.[146]

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[142] ibid 20-23.

[143] *U.S. v. Cardales-Luna* (n 25) at II. But see the Dissent of Judge Torruella at B, who notes that '[t]he unconstitutional application of U.S. criminal law to persons and activity without any nexus to, or impact in, the United States. The matters previously discussed are almost irrelevant to the outcome of this appeal when compared to the more basic jurisdictional issue that arises from the government's reliance on the Maritime Drug Enforcement Act (MDLEA), codified as amended at 46 U.S.C. §§ 70501-70507, as the basis for the extraterritorial application of the criminal laws of the United States to Appellant. The invalidity of the application of MDLEA to Appellant results from Congress's *ultra vires* extension of its Article I legislative powers 6 to foreign territory, as applied to persons and/or activities that have no nexus with the United States'.

[144] *U.S. v. Perez-Oviedo*, 281 F.3d 400, 402-03 (3d Cir.2002) at I.

[145] The 1988 Vienna Convention imposes no such nexus requirement for a foreign flagged vessel interdicted pursuant to Article 17(3), only that the flag state has provided its prior authorisation before the interdiction takes place. Any subsequent actions, absent a condition set by the flag state under Article 17(6), are entirely for the interdicting state to take under its domestic law pursuant to Article 17(4) and Article 4(1)(b)(ii).

[146] *U.S. v. Mena* 863 F.2d 1522 (11th Cir. 1989); *U.S. v. Martinez-Hidalgo* 933 F.2d 1052 (3d Cir. 1993); *U.S. v. Cardales* 168 F.3d 548 (1st Cir. 1999); *U.S. v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002); *U.S. v. Pinto-Mejia* (2nd Circuit) 1983, noting that in *Pinto-Mejia*, the case concerns a DTV found to be 'without nationality' and the Second Circuit dismissing the need to establish a nexus to the U.S. and the vessel.

The Ninth Circuit Court of Appeals requires that a jurisdictional nexus exists between the U.S. and any non-U.S. flagged DTV interdicted on the high seas.[147] The court's requirement is unusual since a jurisdictional nexus is not an element of the MDLEA's provisions on *vessels subject to the jurisdiction of the U.S.* The case of *U.S. v. Davis [1990]* is the seminal case for the Ninth Circuit's reasoning for imposing this nexus requirement. The case centres on a DTV flying a British flag that was interdicted under a bilateral agreement between the U.S./U.K.[148] The DTV was on the high seas and appeared to be destined for the U.S., thus according to the Ninth Circuit, '[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction,' which is the necessary nexus between the non-U.S. flagged DTV and the U.S. exercising its jurisdiction on the high seas.[149]

Following the *Davis* case, *U.S. v. Caicedo [1993]* and *U.S. v. Klimavicius-Viloria [1998]* have further entrenched the nexus requirement in Ninth Circuit case law. For example, in *Klimavicius-Viloria [1998]*, the Ninth Circuit, citing *Caicedo,* reasoned that '[w]e have explained the need for the requirement this way, '[a] defendant [on a foreign flag ship] would have a legitimate expectation that because he has submitted himself to the laws of one nation [the foreign flag nation], other nations will not be entitled to exercise jurisdiction without some nexus'.[150] Still, the Ninth Circuit acknowledges that the MDLEA itself, 'contains no nexus requirement'.[151]

Indeed, this is why the other circuits have refused to read in or impose such a requirement into the MDLEA.[152] The Ninth Circuit; however, has read this requirement into the MDLEA by reasoning that it is necessary as a 'judicial gloss applied to ensure that a defendant is not

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147 See Chapter 3 concerning *vessels without nationality* on the high seas.
148 *U.S. v. Davis,* 905 F.2d at 2-7.
149 ibid 20.
150 See *United States v. Klimavicius-Viloria*, (9th Circuit 1998) 144 F.3d 1249 at A.
151 ibid A.
152 *U.S. v. Cardales* 168 F.3d 548 (1st Cir. 1999) footnote 1. The First Circuit notes that '[t]he defendants contend that the Fifth Amendment Due Process Clause requires the government to prove a nexus between their criminal conduct and the United States in a prosecution for violating the MDLEA (…). See *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir.1998) (requiring the government to prove that offense conduct is likely to have effects in United States); *United States v. Davis*, 905 F.2d 245 (9th Cir.1990) (requiring a sufficient nexus between criminal conduct and United States such that application of U.S. law would not be arbitrary or unfair). This nexus requirement, however, was specifically rejected by the Third Circuit'. The Third Circuit in *U.S. v. Martinez-Hidalgo*, 993 F.2d 1052 (3d Cir.1993) held that the MDLEA 'does not contain nexus requirement, and that Congress intended MDLEA to override international law to extent nexus might be required'. Concluding, the First Circuit in *Cardales* stated that, '[w]e decide today that due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants'.

improperly haled before a court for trial'.[153] It should also be noted that the Ninth Circuit, while standing in contrast to its sister circuits on the matter of a nexus to non-U.S. flagged vessels interdicted on the high seas, has adopted the case law of the other appellate circuits that such a requirement does not exist for a DTV *without nationality* on the high seas.

Returning to DTVs *without nationality*, these are by far the more prominent case law opinions coming from the U.S. Circuit Courts of Appeals. As stated, many of these opinions are issued from the Eleventh Circuit, and it is also this circuit whose case law has significantly expanded the MDLEA/DTVIA. However, before specifically considering how contemporary case law continues to develop, the Eleventh Circuit case of *U.S. v. Bellaizac-Hurtado [2011]* merits consideration here due to its more contentious nature and apparent break from the court's existing case law.

The case of *U.S. v. Bellaizac-Hurtado [2011]* has some implications which may seem to overturn a majority of the Eleventh Circuit's previous case law and has garnered some scholarly attention. The case involves the USCG alerting the Panamanian Navy to a suspicious fishing vessel.[154] The Panamanian Navy then 'pursued the vessel until its occupants abandoned the vessel and fled into a jungle' inside Panama.[155] A land-based search by the Panamanian authorities discovered the drug traffickers. After a diplomatic exchange, they were transferred to the U.S. for prosecution.[156] The case raised many questions on appeal, including why the U.S. would elect to exercise domestic criminal jurisdiction over drug traffickers apprehended form inside Panama with no connection to the U.S.[157] The case also took a different approach to the MDLEA whereby when arguing the appeal, the U.S. Department of Justice [DOJ] contended that drug trafficking is a violation of customary international law. Framing the exercise of U.S. jurisdiction in this manner meant that the court had to consider whether the U.S. 'Congress has the power (…) to proscribe drug trafficking as part of the 'law of nations'.[158]

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153 *Klimavicius-Viloria* (n 150) at A; *U.S. v. Cardales* (n 152) at footnote 1. The First Circuit stating that '[a]lthough the MDLEA does not explicitly contain a domestic nexus requirement, the Ninth Circuit has read into the MDLEA a nexus requirement with respect to foreign-registered vessels'.

154 *U.S. v. Bellaizac–Hurtado*, a.k.a. Fausto, a.k.a. El Zarco, a.k.a. El Colorado, Luis Carlos Riascos–Hurtado, Pedro Angulo–Rodallega, a.k.a. Pepito, Albeiro Gonzalez–Valois, a.k.a. Tocayo, Defendants–Appellants. Nos. 11–14049, 11–14227, 11–14310, 11–14311, Decided: November 06, 2012, at Background.

155 ibid.

156 ibid.

157 Casavant (n 13) 153; Papastavridis (n 26) 255. See Douglas Guilfoyle, 'Drug trafficking at sea: no longer a crime of universal jurisdiction before U.S. Courts? EJIL: Talk!, (22 November 2012), accessed on 20 February 2018, <https://www.ejiltalk.org/drug-trafficking-at-sea-no-longer-a-crime-of-universal-jurisdiction-before-us-courts/>.

158 *U.S. v. Bellaizac–Hurtado* (n 154). The interdiction in question involves the USCG patrolling the territorial waters of Panama and providing information to the Panamanian Navy concerning a suspicious vessel. The U.S. and Panama are party to a bilateral agreement that permits such action. The Panamanian Navy engaged in a hot pursuit of the suspicious vessel which ultimately concluded with the suspicious vessel heading to shore and being left abandoned. The Panamanian Navy then searched the vessel and found 'approximately 760 kilograms of cocaine

According to the DOJ, drug trafficking is a violation of the 'law of nations' which means it falls under the 'offences clause' of the U.S. Constitution [discussed below], and thus Congress may prescribe a law that addresses a violation of customary international law.[159]

The Eleventh Circuit disagreed and employed a literal interpretation of the U.S. Constitution to conclude that 'drug trafficking is not a violation of customary international law, [and] Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama'.[160] The conclusion comes from a two-part analysis of drug trafficking and customary international law. The court's analysis reasoned that, '[d]rug trafficking was not a violation of the law of nations during the [U.S.] founding period' and '[d]rug trafficking is not a violation of customary international law today'.[161] Therefore, in this case, the U.S. lacked jurisdiction to bring the drug traffickers back to the U.S. from inside Panama's land territory as a violation of customary international law. The Eleventh Circuit has maintained this view, including the case of *U.S. v. Davila-Mendoza et al.* [2020], which further expands on the *Bellaizac-Hurtado* opinion.

According to the Eleventh Circuit in *U.S. v. Davila-Mendoza et al. [2020]*, the 'MDLEA exceeds Congress's constitutional authority pursuant to the Constitution's Foreign Commerce Clause or, alternatively, the Necessary and Proper Clause, as applied to the drug-trafficking activities (…)

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and they searched on land for the occupants of the abandoned vessel and arrested Bellaizac–Hurtado, Angulo–Rodallega, Gonzalez–Valois, and Riascos–Hurtado in various locations on the beach and in the jungle. After an exchange of diplomatic notes, the Foreign Ministry of the Republic of Panama consented to the prosecution of the four suspects in the U.S'..

[159] The U.S. government did not argue the interdiction and MDLEA as falling under the piracies and felonies clause of Article 1 Section 8 of the U.S. Constitution. The issue is considered further at the end of the chapter as this appeal is often incorrectly read to mean that all U.S. DTV interdictions under the MDLEA are now unconstitutional. The appeal set the standard that *the U.S. Department of Justice could not argue that DTV interdictions and the MDLEA were part of customary international law* [author's emphasis added]. When argued as part of the Felonies Clause on the *High Seas*, the MDLEA remains upheld by all appellate circuits that have heard such cases. For example, the Eleventh Circuit Court notes that, 'we have always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause'. See *U.S. v. Estupinan*, 453 F.3d at 1339, the Court concluding that, 'we readily hold that the district court committed no error in failing to *sua sponte* rule that Congress exceeded its authority under the Piracies and Felonies Clause in enacting the [Maritime Drug Law Enforcement Act]'. However, the Court continued observing that, 'we have never held that Congress has the power, under the Offences Clause, to apply our drug trafficking laws to conduct in the territorial waters of another State'.

[160] ibid. In making this determination, the Court also noted that, 'drug trafficking is not an international crime because it is not a crime under customary international law and is not a matter of mutual concern: [T]he notion of international crimes does not include illicit traffic in narcotic drugs and psychotropic substances. For one thing, this broad range of crimes is only provided for in international treaties or resolutions of international organizations, not in customary law. For another, normally it is private individuals or criminal organizations which perpetrate these offences; States fight against them, often by joint official action. In other words, as a rule these offences are committed against States. Usually, they do not involve States as such or, if they involve State agents, these agents typically act for private gain, perpetrating what national legislation normally regards as ordinary crimes, [the court citing] Antonio Cassese, *International Criminal Law*, (2003) 24'.

[161] ibid.

in the territorial waters of a consenting foreign country'.[162] The question is, do these collective case law decisions overturn decades of existing precedents, all of which have generally hold the MDLEA is a valid establishment of U.S. jurisdiction over DTVs on the high seas? The cases do not, and as will be seen in the next section, these cases, mainly *Bellaizac-Hurtado,* should be applied and interpreted cautiously within the scope of a DTV *without nationality* and because they were differently argued based on Congress' authority to prescribe law. Furthermore, the cases of *U.S. v. Campbell* [2014],[163] and *U.S. v. Hernandez* [2017],[164] *U.S. v. Cabezas-Montano et al* [2020],[165] *U.S. v. Nunez et al* [2021],[166] and *U.S. v. Zapata* [2021][167] have all affirmed the Eleventh Circuit's long-standing case law that the MDLEA permits the U.S. to establish and exercise its domestic jurisdiction *on the high seas* against a *vessel subject to the jurisdiction of the U.S.* as defined by the MDLEA. These opinions, however, have also been subject to some academic criticisms.

Cook, for example, has said that 'the Eleventh Circuit's conflation of the [U.S. Maritime Drug Laws] and subsequent use of persuasive legislative history is an aggressive, and arguably reactionary judicial attempt to combat the illicit drug trade'.[168] Other views, including one of the most prominent critiques, concerns the MDLEA operating under what is effectively universal jurisdiction [UJ] over drug traffickers on the high seas. Kontrovich, in his assessment of the MDLEA, notes that:

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[162] *U.S. v. Davila-Mendoza et al*, case no. 17-12038, (11th Circuit) August 26, 2020. In citing its previous case law, the Eleventh Circuit also concluded that '[b]ecause the crimes here were not committed on the high seas, the Piracies and Felonies Clauses do not apply. And we explained in *Bellaizac-Hurtado* that the use of the term "the law of nations" in the Offenses Clause limits its application to those offenses recognised by customary international law, at 700 F.3d at 1249–53. According to the Court, '[b]ecause drug trafficking is not such an offense, we held that the MDLEA was unconstitutional under the Offenses Clause as applied to the *Bellaizac-Hurtado* defendants, who had been charged with drug trafficking on board a vessel in the territorial waters of Panama [id. at 1253–57]'.

[163] *U.S. v. Campbell* [2014] (11th Circuit) at 806, 810-812, The conclusion was that '[j]urisdictional issues arising under [the MDLEA] are preliminary questions of law to be determined solely by the trial judge. The Act declares "a vessel without nationality" as subject to the jurisdiction of the U.S. and defines a stateless vessel as including "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality (…) [furthermore] [w]e also have recognised that the conduct proscribed by the Act need not have a nexus to the U.S. because universal and protective principles support its extraterritorial reach'.

[164] *U.S. v. Hernandez* [2017], (11th Circuit) No. 15-10810 at III-IV, the Court observed that, 'as a statutory jurisdictional argument, the defendants' argument cannot overcome the conclusive-proof provision of the MDLEA. The statute plainly states that the certification conclusively proves the foreign country's response. Here, because the certification conclusively proves that the Guatemalan government "could neither confirm nor deny" the *Cristiano Ronaldo*'s registry, the certification also establishes the fact that Guatemala did not "affirmatively and unequivocally assert" registry (…)'.

[165] *U.S. v. Cabezas-Montano* et al (n 50) 30.

[166] *U.S. v. Nunez et al.* No. 19-14181, (11th Circuit), D.C. Docket No. 1:19-cr-00033-JB-N-2, Appeal from the Southern District of Alabama, June 17, 2021.

[167] *U.S. v. Zapata*, No. 20-10385, 2021 WL 4947103 (11th Cir. Oct. 25, 2021). The Eleventh Circuit upholding the interdiction of a Panamanian flagged vessel under a U.S. bilateral agreement.

[168] Arthur J. III Cook, 'Drug Trafficking on the High Seas: How a Consolidation of the Maritime Drug Law Enforcement Act and the Drug Trafficking Vessel Interdiction Act and a Statutory Nexus Requirement Will Improve the War on Maritime Drug Trafficking,' [2012] 10 Loy. Mar. L.J. 493, 506.

> America uses UJ far more than any other nation (…) [u]nder the (MDLEA), the U.S. Coast Guard apprehends vessels carrying drugs on the high seas, often thousands of miles from American waters; the crews of these vessels are prosecuted in U.S. courts for violating U.S. drug law, and are sentenced to terms in U.S. jails. In none of these cases is there any evidence the drugs were destined for the United States.[169]

According to Kontrovich, under existing rules of international law, as set out in Article 110 LOSC, the USCG 'cannot stop or board foreign vessels on the high seas or in foreign waters'.[170] Furthermore, when conducting these high seas boarding operations, he argues that the process for verifying a vessel's nationality in the '[t]he MDLEA's "statelessness" provision sweeps further (…) to include vessels that are properly authorized to fly a nation's flag (…) and [t]his goes beyond what international law recognises as statelessness and [i]ndeed, it is not a statelessness rule. It is a rule of flag state consent or waiver'.[171] Likewise, he rejects the opinions of several U.S. Circuit Courts of Appeals concerning the primary base of jurisdiction the MDLEA is prescribed and enforced under the *protective principle*. In Kontrovich's view:

> the cases that see the MDLEA as an exercise of protective jurisdiction fundamentally misconceive the principle (…) and courts have given little reason for treating MDLEA offenses as within protective jurisdiction apart from the fact that the statutes preamble sounds vaguely like the test for protective jurisdiction (…) [b]ut no treaty, law, or state practice supports such broad jurisdiction over drug offenses (…) and [c]ommentators stress that the category of protective jurisdiction offenses is quite small, and none suggest drug smuggling as one of them.[172]

Other commentators have rejected these critical views, predominantly due to the existing principles of jurisdiction in international law and the rules in the ILoS.

Kraska aptly summarizes that, '[w]arships of all nations may "approach" international merchant shipping transiting beyond the territorial sea and inquire as to the nature of the vessel's voyage, crew, cargo manifest, last port, next port or previous voyages, flag state registry, ownership, and other questions to elicit information about the ship and its purpose'.[173] The U.S. is no exception in this regard. The USCG may approach a vessel on the high seas pursuant to the general *right of visit*, as discussed in Chapter 3. As it relates to the principles of jurisdiction, Ryngaert reasons that 'the protective principle is often invoked under not very dramatic circumstances, e.g. (…) in cases of drug smuggling (…) and [i]n such cases, the exercise of protective jurisdiction is as uncontroversial as the exercise of active personality-based jurisdiction' and these were all

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169 Kontorovich (n 18) 1193.
170 ibid 1202.
171 ibid 1229.
172 ibid 1229-1230.
173 Commander James Kraska, JAGC, USN, 'Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure,' [2010] 16, Ocean & Coastal L.J., 25.

discussed in Chapter 2.[174] Casavant, also disagreeing with Kontrovich's assessment of the protective principle and the MDLEA, notes that:

> there is a two-part test for determining whether the protective principle of jurisdiction applies to a particular activity. First, does the conduct in question threaten the security of the United States or the operation of its governmental functions and, second, is the conduct generally recognised as a crime under the law of states that have reasonably developed legal systems?[175]

Answering both questions in the affirmative, Casavant highlights that U.S. courts have interpreted and applied the MDLEA under the *protective principle* because, in the view of the courts, drug trafficking at sea is a direct threat to U.S. security on many levels.[176] As noted, this is the dominant view of the majority of U.S. Circuit Courts of Appeals that have adjudicated MDLEA/DTVIA cases, especially the Eleventh Circuit.

Furthermore, as Casavant discusses, the threat to vital security functions of the U.S. is overtly evident because over a seven-year period, 'one hundred forty four current or former Customs and Border Protection (CBP) agents were arrested or indicted for drug-related corruption'.[177] Regarding recognising the crime of drug trafficking under the domestic law of states having reasonably developed legal systems, both the LOSC and the 1988 Vienna Convention, as well as the 1995 CoE Agreement, the CRMA, and the over forty U.S. BILATS substantiate that drug trafficking, especially drug trafficking at sea is recognised by nearly all states as a crime.[178] In turn, the 1988 Vienna Convention, the 1995 CoE Agreement, the CRMA, and the U.S. BILATS all contain language which recognises that drug trafficking on the high seas requires states should establish their jurisdiction over that offence through domestic law.[179]

Likewise, according to Tate, the '[g]eneral principles of jurisdiction and the treatment of illicit narcotics trafficking under international law weigh heavily in favour of prosecuting defendants apprehended under the MDLEA in United States courts'.[180] In his view, because the MDLEA includes an explicit provision that 'flag nations consent to United States enforcement of United

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174 Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 99.
175 Casavant (n 13) 141. See 2015 Report of the Department of Homeland Security, Investigation of Employee Corruption, that '[n]early 200 of all investigations were alleged acts of corruption, involving ICE, CBP, and U.S. Citizenship and Immigration Services (USCIS) employees and contractors. Such alleged corruption included bribery and the smuggling of drugs, aliens, and other contraband', accessed on 29 August 2021, <https://www.dhs.gov/sites/default/files/publications/Departmental%20Management%20and%20Operations%20%28DMO%29%20-%20Investigation%20of%20DHS%20Employee%20Corruption%20Cases_0.pdf>.
176 Casavant (n 13) 142-145.
177 ibid 145-146.
178 ibid 145-146. See Chapters 3, 4, and 5 concerning these agreements.
179 For example, the 1988 Vienna Convention does this in Article 4(1)(b)(ii) which is linked to Article 17(3) and (4). See Chapters 4 and 5 for these discussions. See also Chapter 2 with respect to transnational crimes.
180 James Tate, 'Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas,' [2008] 77 U. Cin. L. Rev. 267.290.

States law (…) this satisfies any prohibitions against interference with a foreign flagged ship without consent'.[181] In this regard, he turns to international cooperation, specifically the U.S. BILATS, and argues that '[d]omestic treaty obligations and international agreements demand United States participation in combating the serious problem of illicit traffic in narcotics (…) and domestic courts are typically the only forum available for international criminal prosecution of drug traffickers'.[182]

Furthermore, Tate considers that the 'universal criminalisation of drug trafficking also serves to legitimate taking jurisdiction under the protective principle'.[183] In other words, since there exists a near universal proscription against drug trafficking in international law, as well as the shared goals of the international community to cooperate in its suppression [note previous chapters], '[w]hen combined with the potential for flag state consent, drug traffickers on registered vessels have notice they may be subject' to the laws of another state.[184] Thus, he summarises the question of U.S. jurisdiction over non-U.S. flagged DTVs by stating that:

> [e]xercising jurisdiction over an activity that is illegal essentially everywhere, and that is the subject of international cooperative enforcement agreements, can hardly be considered fundamentally unfair when that cooperation in fact takes place.[185]

Regarding a DTV *without nationality*, he further reasons that these vessels are altogether different. Adopting a broad view [see Chapter 3] and concluding that 'by attempting to avoid the laws of all nations by failing to register their ships with a sovereign, these vessels forfeit the protections of international law and are subject to jurisdiction anywhere'.[186] Ultimately, for Tate, there is no question that persons on board a *vessel without nationality* engaged in drug trafficking can potentially be prosecuted anywhere.[187]

Additionally, under its obligations to engage in international cooperation 'to the fullest extent possible',[188] Tate argues that the U.S. is 'best equipped to enforce international proscriptions against drug trafficking in its hemisphere, and without United States participation in enforcement, drug traffickers effectively do occupy floating sanctuaries'.[189] Data compiled for this study corroborates these views.[190] Moreover, U.S. domestic jurisdiction over DTVs *without*

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[181] ibid 290.
[182] ibid 290.
[183] ibid 293.
[184] ibid 293-4.
[185] ibid 294.
[186] ibid 294.
[187] ibid 294.
[188] Article 17(1) 1988 Vienna Convention.
[189] Tate (n 180) 294.
[190] Transcript T-001 at 2; Transcript T-002 at 1, 3-4; Transcript T-005 at 6-9; Transcript T-007 at 1-3.

nationality has been seen in a new light under the DTVIA and the Eleventh Circuits case law in *U.S. v. Ibarguen-Mosquera*, *U.S. v. Saac,* and *U.S. v. Valarezo-Orobio.*[191]

The primary purpose of the DTVIA is to address the emergence and use of 'narco-subs' by enacting a domestic statue establishing U.S. criminal jurisdiction over them on the high seas. To date, the Eleventh Circuit is the only court to interpret and apply the DTVIA to a 'narco-sub' interdicted on the high seas. The court first did this in the case of *U.S. v. Ibarguen-Mosquera* [2011]. The case concerns the USCG acting on 'a report (…) of an unmarked ['narco-sub'] spotted in the Eastern Pacific Ocean (…) and the [v]essel was ocean-blue, 50 to 60 feet in length, and sat very low in the water'.[192] As the USCG boarding team approached the vessel it was scuttled; however, they were able to recover the crewmembers.[193] The crew appealed their conviction under the DTVIA arguing, 'its enactment exceeds Congress's power' since their conduct was on the high seas and because no drugs were recovered.[194]

To address the appeal, the Eleventh Circuit first reasoned that the DTVIA as with the MDLEA, is enacted to establish and exercise the extraterritorial criminal jurisdiction of the U.S. on the high seas.[195] According to the court, for the DTVIA to be a permissible exercise of jurisdiction in this regard, the statute must be based on 'international law principles such as (…) the protective principle or the territorial principle'.[196] Thus, the court followed its existing case law concerning high seas DTV interdictions and *vessels without nationality* holding that generally, those

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[191] The case of *U.S. v. Ibarguen-Mosquera* was the first to come up for appeal and has set the case law for the other cases.

[192] ibid.

[193] ibid. The background to the case states that '[o]n January 13, 2009, a federal grand jury returned a two-count indictment charging Defendants with conspiring to operate or embark in a semi-submersible vessel in international waters, without nationality and with the intent to evade detection, in violation of 18 U.S.C. § 2285, and operating, while aiding and abetting in the operation of, a semi-submersible vessel in international waters, without nationality and with the intent to evade detection, in violation of 18 U.S.C. § 2285 and 18 U.S.C. § 2'.

[194] ibid Section II.

[195] ibid concluding that '[t]he federal courts are in consensus on two basic restrictions to giving a law extraterritorial effect'. According to the Court, '[f]irst, Congress must state that it intends the law to have extraterritorial effect'. The Court further citing examples from *U.S. v. Flores*, 289 U.S. 137, 155, 53 S.Ct. 580, 584, 77 L.Ed. 1086 (1933), stating that '[c]riminal statutes of the U.S. are not by implication given extraterritorial effect'; [however], [t]hat requirement is clearly met here, under 18 U.S.C. § 2285(c), '[t]here is extraterritorial jurisdiction over an offense under this section (....)'. Second, application of the law must comport with due process, meaning that application of the law "must not be arbitrary or fundamentally unfair." [the Court citing] *U.S. v. Cardales*, 168 F.3d 548, 553 (1st Cir.1999); see also *U.S. v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982) (principles of international law may give way to an extraterritorial federal statute, but that statute must still comport with due process)'.

[196] Ibid., citing *U.S. v. Gonzalez*, 776 F.2d 931, 938-41 (11th Cir.1985), the Court noted that it is 'relying on the protective principle to reject defendants' arguments that applying the predecessor to the Maritime Drug Law Enforcement Act (the "MDLEA") to them violated due process'. The Court citing *U.S. v. Marino-Garcia*, 679 F.2d 1373, 1380-83 (11th Cir. 1982) (noting these as exceptions to the general prohibition against criminalizing conduct by foreigners outside of the U.S.); *U.S. v. Suerte*, 291 F.3d 366, 370 (5th Cir.2002); *Cardales,* 168 F.3d at 553'. The 'objective principle' is often cited in U.S. courts as a 6th base of jurisdiction in international law; however, it is also known as variant to the territorial principle, the 'objective territorial principle'. See Chapter 2.

bases of jurisdiction permit such an exercise of jurisdiction.[197] However, the Eleventh Circuit in this case then expanded the reach of U.S. jurisdiction on the high seas by interpreting the bases of jurisdiction in international law as 'only apply[ing] to laws that govern the conduct of flagged vessels and which have no applicability in connection with stateless vessels'.[198] Indeed, while it may seem that the Eleventh Circuit has interpreted the DTVIA in a way which may be applied to a narco-sub even absent a base of jurisdiction in international law, a close reading of additional case law concerning the DTVIA draws out why the court has approached the problem of narco-subs in this specific way.

In *U.S. v. Saac* [2011], the Eleventh Circuit argued that the U.S. must protect itself from '[t]hose who engage in conduct the DTVIA targets' which threatens the 'nation's security by evading detection while using submersible vessels to smuggle illegal drugs or other contraband, such as illegal weapons, from one country to another, and often into the U.S.'.[199] Especially, since these vessels generally pose a significant security threat to all coastal states.[200]

Additionally, according to the court, the 'DTVIA targets criminal conduct that facilitates drug trafficking', which is 'condemned universally by law-abiding nations',[201] and accordingly, 'Congress further found that other than these ills, these vessels have no utilitarian value to society'.[202] Therefore, for the Court, '[b]ased on these findings, Congress determined to criminalise not only the underlying conduct-whatever that conduct may be-but also traveling on the vessel itself'.[203] Likewise, the Court has maintained that:

> [w]hile it is probably true that the DTVIA was enacted in part to deal with the problem of losing drug evidence to the sinking of semi-submersibles, the DTVIA is not a drug-trafficking statute. In enacting the DTVIA, Congress chose to prohibit an entirely new evil, not to redefine an old one. Indeed, in discussing the enactment of the DTVIA,

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197 ibid.

198 ibid. The court relying on its existing case law and noting that, 'such vessels are "international pariahs" that have "no internationally recognised right to navigate freely on the high seas', *Marino-Garcia,* 679 F.2d at 1382. The court continued arguing that, '[i]ndeed, the law "places *no restrictions* upon a nation's right to subject stateless vessels to its jurisdiction' (the Court's emphasis added). Additional case law cited by the court includes *U.S. v. Rendon,* 354 F.3d 1320, 1325 (11th Cir. 2003), noting that '[b]ecause stateless vessels do not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws'; *U.S. v. Rubies,* 612 F.2d 397, 403 (9th Cir. 1979). Furthermore, according to the case law in *U.S. v. Dominquez,* 604 F.2d 304, 307-09 (4th Cir.1979), the Court concluded that 'international law permits any nation to subject stateless vessels on the high seas to its jurisdiction (...) [j]urisdiction exists solely as a consequence of the vessel's status as stateless, citing *Marino-Garcia,* 679 F.2d at 1383'.

199 *U.S. v. Saac* generally. See *U.S. v. Gonzalez*, (n 112).

200 DHS Report 2010 (n 71) 7-9.

201 *U.S. v. Saac*, 632 F.3d 1203, 1209 (11th Cir. 2011), citing *U.S. v. Estupinan*, 453 F.3d at 1339; *U.S. v. Martinez-Hidalgo*, 993 F.2d at 1056).

202 *U.S. v. Ibarguen-Mosquera* (n 67) 3.

203 ibid 3.

> Congress considered that these vessels are useful not only in drug trafficking, but also in trafficking of weapons and people.[204]

The Eleventh Circuit concluded that the U.S. may 'assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions (…) and [t]hese vessels pose a formidable security threat because they are difficult to detect and easy to scuttle or sink (…) [and] therefore facilitate the destruction of evidence and hinder prosecution of smuggling offenses'.[205] In this regard, the court specifically notes that 'the *protective principle* of international law provides an equally compelling reason to uphold the DTVIA'.[206] Some commentators; however, disagree with the Eleventh Circuit and its interpretation of the DTVIA and its application to DTVs *without nationality* on the high seas.

Bennett, for example, in her assessment of the DTVIA, also focuses on a UJ argument. Bennett notes that one of the substantive provisions of the DTVIA specifically references that the vessel must be 'without nationality' on the high seas for the act to apply.[207] Bennett then argues that 'using a vessel without nationality should not be a universal crime'.[208] In treating *vessels without nationality* as a UJ crime, 'the DTVIA opens the door to troubling expansion of the criminalisation of the operation of stateless vessels',[209] which may influence other areas of maritime security, such as '[t]reating the use of a stateless vessel as a crime could allow states to circumvent' the provisions of the Refugee Convention.[210]

Similarly, Broaderick observes that in one case, *U.S. v Saac* [2011], discussed above, that '[t]he court explained that the DTVIA satisfies the universal principle because Congress' findings show that the DTVIA targets criminal conduct that facilitates drug trafficking, which is condemned universally by law-abiding nations'.[211] In this regard, Broaderick concludes that since the LOSC ensures freedom of navigation for all states, the use of a *vessel without nationality* on the high seas does not always subject it to the jurisdiction of any state, because of 'freedom of the seas principles'.[212]

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[204] ibid. *See further* U.S. Congressional Records, 154 Cong. Rec. H7, 238-39; 154 Cong. Rec. H10, 253; 154 Cong. Rec. H10, 252-54 (Sept. 27, 2008).
[205] *U.S. v. Saac*, 632 F.3d 1203, 1209 (11th Cir. 2011).
[206] ibid 13-15.
[207] Bennett (n 73) 452.
[208] ibid 452.
[209] ibid 457.
[210] ibid 455.
[211] Ann Marie Broaderick, 'High Seas, High Stakes: Jurisdiction Over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act,' [2012] 67 U. MIAMI L. REV. 255, 270.
[212] ibid 270-271.

On the one hand, as it concerns this overarching question of *vessels without nationality* generally, Chapter 3 established that it is commonly recognised the high seas are for use by States, not individuals. Thus, the protections associated with the accepted high seas freedoms are likewise not bestowed on individuals, but rather granted to States. In turn these freedoms are then afforded to a State's ships when a ship registers and assumes the nationality of its flag state as per Article 91 and 92 LOSC. Agreeing, Tate cites the Ninth Circuit in *U.S. v. Caicedo* [1995] to support this position. Tate states that individuals using a *vessel without nationality* for drug trafficking are 'on notice that the United States or any other nation concerned with drug trafficking could subject their vessel to its jurisdiction'.[213] Apart from addressing *vessels without nationality* in this approach to 'narco-subs,' the Eleventh Circuit has issued contemporary case law that has undoubtedly expanded the MDLEA further and supporting this position.

The case of *U.S. v. Nunez et al [2021]*[214] involves the interdiction of a DTV *without nationality* on the high seas, and fundamentally expands the Eleventh Circuit's long-standing case law regarding its interpretation and application of the MDLEA on the high seas. The case also, in many ways, expands the technicality of the statute by interpreting it in such a way that only a person 'in charge' of the vessel may claim its nationality. In the absence of such an individual, the 'Coast Guard [is] not required to ask the crew for such a claim'.[215] In other words, as will be seen, when crewmembers attempt to conceal who is in command or fail to identify a master of the vessel, it is a *vessel without nationality* because the general crew cannot claim a vessel's nationality.

The circumstances of the interdiction involved three crewmembers, who when interdicted by the USCG on the high seas, that effectively offered no evidence of the vessel's nationality and claimed no specific induvial was in charge of the vessel, they took turns piloting the boat.[216] According to the Eleventh Circuit, since '[n]o one on the vessel verbally claimed that it had any nationality, nor was the vessel "in a position to provide evidence" of any nationality, it falls within

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213 *U.S. v. Caicedo*, 47 F.3d 370 1995 A.M.C. 1085, Decided Feb. 7, 1995, at 14. See Tate (n 180) 288.
214 *U.S. v. Nunez et al.* (n 166).
215 ibid 16.
216 ibid 13-14. The court observing that '[t]he smugglers' vessel offered none of these customary signs of nationality. It carried no documents, it flew no flag, and it had no name or identifying numbers that would permit entry into a national registry'. Furthermore, '[t]he smugglers and their boat could make no "claim of nationality or registry," and it is hard to see how a boat with no claims of nationality could be anything other than a vessel without nationality. The smugglers' boat had no master or individual in charge who could make a verbal claim of registry under section 70502(e) [of the MDLEA]. During the interception of the boat, a Coast Guard officer asked the smugglers who was the master or individual in charge, and no one claimed to be. The evidence showed that the smugglers were equals; each man took turns driving the boat, and Martinez said everyone decided together to turn around when the boat started having engine problems. Martinez even laughed when a federal agent asked him if the boat had a captain. The record contains no evidence of a hierarchy among the smugglers'.

the meaning of a "vessel without nationality" in international law'.[217] Building on this, the Court then considered what procedures would render a vessel *without nationality* in international law.

According to the Eleventh Circuit this also must be considered in light of how 'customary international law prescribes procedures for determining whether a vessel is stateless (…) [and] which [i]t is well established that a ship can have only one nationality; if it attempts to claim association with more than one nation for its own convenience, it loses association with any nation and becomes stateless'.[218] The Court noted that in most circumstance, '[a] ship seeking the protection of nationality will usually make its association with its flag state obvious—classically, by flying a flag and carrying official documents as evidence of its association with its flag state,' and which Chapter 3 considered as part of the obligations of the flag in Article 91 LOSC.[219] Furthermore, the Court went on to state that, '[c]ustomary international law does not otherwise define the conditions under which a nation may conclude that a vessel is stateless or any examination necessary to reach that conclusion'.[220]

Recalling the law concerning vessel nationality from Chapter 3, a vessel may lose its nationality for many reasons. Still, the issue here is if or when a vessel could lose its nationality when there are malefactors in play [i.e., flags of convenience], intentional obfuscation of who commands the vessel, or destruction of documents so that a flag state cannot be determined. For the Eleventh Circuit, this was the circumstance because in this case not only did the 'vessel deliberately obscure its nationality,' but it also 'lacks a master or individual in charge and bears no flag or markings of nationality'.[221] To address this problem, the Eleventh Circuit considered the case of *U.S. v. Prado* [2019] from the Second Circuit, which delt with a similar issue. In *U.S. v. Prado* no crewmembers made a claim of nationality for the vessel; however, in this case the Second Circuit found that this was not sufficient for the DTV to be declared *without nationality* and found the U.S. lacked jurisdiction in that case.[222]

The Eleventh Circuit disagreed with the Second Circuit and concluded that there are several methods for determining the nationality of a vessel, each of which has also been addressed by its case law and is set out in the text of the MDLEA.[223] Thus, the MDLEA itself was expanded by the court because in cases where there is no individual in effective control of the vessel then no

[217] ibid 13.
[218] ibid 17.
[219] ibid 13.
[220] ibid 17-18.
[221] ibid 19.
[222] ibid 19.
[223] ibid 17-19.

individual crewmember may make a claim of nationality. The implication for this in future interdictions is important. DTV crewmembers often refuse to provide information or deliberately conceal their identities. These actions in turn can deny them the possible protection of a flag state or their state of nationality since it is only the vessel master or person in charge which may invoke the claim of nationality and registry. Cases such as this, especially the Eleventh Circuits overall interpretations of the MDLEA and international law, have led to further criticisms from some commentators.

Broadly, Papastavridis critiques the jurisdictional provisions of the MDLEA and DTVIA as well as their overall compatibility with international law. With respect to the DTVIA, Papastavridis agrees with Bennett's position above, observing that under the law the operation of a stateless vessel alone 'would suffice for prosecution purposes even if no drugs were found on the vessel in question and no jurisdictional nexus with the U.S. existed'.[224] In Papastavridis' view, '[s]tatelessness thus becomes a *crimen jure gentium*, something which, most probably, is not in harmony with international law'.[225] Ultimately, Papastavridis looks to the case law of the MDLEA/DTVIA, concluding that 'it is not clear whether the statues address both the question of prescriptive and enforcement jurisdiction, and the exercise of the right of visit as such'.[226]

In turn, this means, according to Papastavridis, that in general, 'the practice of the USCG, as well as the application of the relevant statutes by the U.S. courts is not always in strict compliance with international law'.[227] To this end, he further criticizes the U.S. practice by noting that 'although the defendants in these cases are not able to successfully invoke a violation of international law'[228] as a defence, 'they are able to invoke U.S. Constitutional protections, namely reasonable suspicion standard for searches pursuant to the Fourth Amendment as well as the requirements of due process clause in the Fifth Amendment'.[229] These factors combined, according to Papastavridis means that 'there certainly has been in some cases an abusive and erroneous application of international criminal jurisdiction principles by the U.S. courts'.[230] However, in considering how the MDLEA/DTVIA are prescribed by the U.S. Congress and how the USCG approaches interdictions on the high seas, an alternative view point can be seen to this position, and this begins by considering the U.S. Constitution further.

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[224] Papastavridis (n 26) 252-253.
[225] ibid 253.
[226] ibid 248.
[227] ibid 257.
[228] ibid 257.
[229] ibid 257.
[230] ibid 257-258.

The U.S. Constitution, in Article 1 Section 8 Clause 10 provides for the enactment of specific laws on the high seas and is known as the *high seas clause*. Under this clause, Congress may, 'define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations'.[231] The Piracy Clause is the authority to define and punish piracy on the high seas.[232] The Felony Clause is the authority to define and punish felonious criminal conduct on the high seas.[233] The Offenses Clause establishes Congressional authority to recognise a violation of customary international law and enact specific legislation punishing those violations.[234]

Article 1 Section 8 also contains Clause 18, stating Congress shall 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the U.S. (…)'.[235] The clause is the 'necessary and proper clause' granting Congress its power to both 'criminalise felonies on the high seas and enact laws necessary and proper for achieving that end'.[236] Under this combined authority, Congress may then prescribe laws which can apply extraterritorially on the high seas, which both the MDLEA and DTVIA are prescribed.[237] There is, however, a limit to this congressional authority, and this is found in the U.S. Restatement of Foreign Relations Law.

The (Fourth) Restatement states that 'the main limit on the exercise of jurisdiction to prescribe by the U.S. is a principle of statutory interpretation known as the presumption against extraterritoriality'.[238] In effect, this creates an analytic test that U.S. courts use when deliberating if a U.S. statute and its extraterritorially is constitutional. In 'the first step of the analysis, a court looks to see if there is a "clear indication" of congressional intent with respect to the geographic scope of a provision'.[239] The next step in the test, according to the (Fourth) Restatement, concerns a strict limitation on U.S. adjudicative jurisdiction in enforcing a statute

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231 Article 1 U.S. Constitution, 'The U.S. Senate: Civics and the U.S. Constitution', accessed on 26 June 2020, <https://www.senate.gov/civics/constitution_item/constitution.htm#a1>.
232 See Chapter 3: the criminalization of Piracy is long-standing customary international law under the ILoS generally and specifically noted in the LOSC under Article 100 and Article 105.
233 Crimes and Criminal Procedure, 18 U.S. Code § 3156 – Definitions, the term "felony" means an offence punishable by a maximum term of imprisonment of more than one year.
234 *U.S. v. Campbell*, 743 F.3d 802, 805 (11th Cir. 2014) noting that '[t]he Supreme Court has interpreted that Clause to contain three distinct grants of power: to define and punish piracies, to define and punish felonies committed on the high seas, and to define and punish offenses against the law of nations'. See also *U.S. v. Bellaizac–Hurtado* (n 154).
235 U.S. Constitution (n 231).
236 *Chicago, Burlington, & Quincy Ry. Co. v. U.S.*, 220 U.S. 559, 578-79, 31 S.Ct. 612, 617, 55 L.Ed. 582 (1911), the Court noting that '[t]his clause is a broad grant of power to Congress to punish offenses outside of the U.S. Given that legislatures have plenary power to define the terms of criminal offenses', cited by 11th Circuit Court of Appeals in *U.S. v. Ibarguen-Mosquera* [2011]. See also Elaina Aquila, 'Courts Have Gone Overboard in Applying the Maritime Drug Law Enforcement Act,' [2018] 86 Fordham L. Rev. 2993, 2972.
237 *U.S. v. Castillo*, (11th Circuit) No. 17-10830, D.C. Docket No. 0:16-cr-60241-WPD-4, at 9.
238 Dodge (n 94) 101–135.
239 Restatement (Fourth) of U.S. Foreign Relations Law § 404 at Comment B.

extraterritorially, which is based on certain protections including 'the Due Process Clauses of the U.S. Constitution' as well as certain limits in customary international law.[240] Addressing these limitations and protections is also necessary to determine if the U.S. can apply its statutes to non-nationals on the high seas under the existing international legal regime.

The primary Constitutional protections concern the Fourth and Fifth Amendments to the U.S. Constitution. The Fourth Amendment is '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'.[241] Generally, any intrusive search conducted by U.S. law enforcement is subject to the legal standard of the Fourth Amendment known as *probable cause*.[242] However, as it concerns high seas interdictions, there is an important caveat. The Fourth Amendment standard of probable cause does not apply to non-U.S. citizens on the high seas. Since 1990, the U.S. Supreme Court in *U.S. v. Verdugo-Urquidez,* maintains that the Fourth Amendment does not apply 'to U.S. activities directed against aliens in foreign territory or in international waters'.[243] The Circuit Courts of Appeals acknowledge this binding precedent and have maintained it on the high seas in DTV interdictions.[244] Although, the application of such constitutional protections have now been

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[240] Dodge (n 94) at 21.

[241] The Fourth Amendment - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[242] The Legal Information Institute of Cornell Law School defines 'Probable Cause' as a requirement found in the Fourth Amendment that must usually be met before police make an arrest, conduct a search, or receive a warrant. Courts usually find probable cause when there is a reasonable basis for believing that a crime may have been committed (for an arrest) or when evidence of the crime is present in the place to be searched (for a search). Under exigent circumstances, probable cause can also justify a warrantless search or seizure. Persons arrested without a warrant are required to be brought before a competent authority shortly after the arrest for a prompt judicial determination of probable cause, accessed on 15 May 2020, <https://www.law.cornell.edu/wex/probable_cause>.

[243] *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) noting at (c) that '[t]he Fourth Amendment's drafting history shows that its purpose was to protect the people of the U.S. against arbitrary action by their own Government, and not to restrain the Federal Government's actions against aliens outside U.S. territory. Nor is there any indication that the Amendment was understood by the Framers' contemporaries to apply to U.S. activities directed against aliens in foreign territory or in international waters', 494 U. S. 266-268. According to the Court, '[t]he view that every constitutional provision applies wherever the Government exercises its power is contrary to this Court's decisions in the *Insular Cases*, which held that not all constitutional provisions apply to governmental activity even in territories where the U.S. has sovereign power'. The Court citing *Balzac v. Porto Rico*, 258 U. S. 298, concluding that '[t]he claim that extraterritorial aliens are entitled to rights under the Fifth Amendment -- which speaks in the relatively universal term of "person" -- has been emphatically rejected,' see *Johnson v. Eisentrager*, 339 U. S. 763, 339 U. S. 784. Pp. 494 U. S., 268-269.

[244] *U.S. v. Vilches-Navarrete*, 523 F.3d 1, 13 (1st Cir. 2008) applying *Verdugo-Urquidez* and holding that 'the district court improperly dismissed the MDLEA defendant's Fourth Amendment claim regarding the U.S. Coast Guard's actions because the defendant was Chilean, he was not residing in the U.S., and the Coast Guard's actions occurred in international waters'; *U.S. v. Bravo*, 489 F.3d 1, 8-9 (1st Cir. 2007) where the First Circuit ruled that 'the district court properly denied the MDLEA defendants' motion to suppress evidence seized from their vessel because, under *Verdugo-Urquidez*, the Fourth Amendment does not apply to activities of the U.S. against aliens in international waters'; the Ninth Circuit concluding in *U.S. v. Zakharov,* 468 F.3d 1171, 1179-80 (9th Cir. 2006) that 'because the alleged unconstitutional delay took place outside of the U.S. in international waters and there was no suggestion that Zakharov, as neither a U.S. citizen nor U.S. resident, had any substantial connection to this country, the Fourth Amendment did not apply to him and his claim'; see also *U.S. v. Rojas*, 812 F.3d 382, 388, 397-98 (5th Cir. 2016)

found to reach non-U.S. nationals abroad in very limited circumstances, such as those held in Guantanamo Bay, Cuba, non-U.S. nationals are still generally not afforded this protection on the high seas.[245] For example, in 2020, the Eleventh Circuit Court of Appeals in *U.S. v. Cabezas-Montano, et al*, which is a high seas DTV interdiction, concluded that someone 'who is a non-U.S. citizen and non-U.S. resident, and who has no significant connection to the U.S., cannot challenge under the Fourth Amendment' the search of the vessel by the USCG'.[246] The other limitation which must be addressed to determine if, under the (Fourth) Restatement, a U.S. law may be enforced extraterritorially concerns due process under the Fifth Amendment.

The primary Fifth Amendment protection is the right of due process.[247] Generally, the due process clause of the Fifth Amendment prohibits most extraterritorial U.S. jurisdiction. However, as it relates specifically to DTVs on the high seas, U.S. courts agree that the extraterritorial application of the MDLEA and DTVIA will not generally violate the due process clause of the Fifth Amendment.[248] For example, in the case of *U.S. v. Cabezas-Montano* [2020], the Eleventh Circuit maintains that 'the Fifth Amendment's Due Process Clause does not prohibit the trial and conviction of aliens captured on the high seas while drug trafficking because

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where the Fifth Circuit reasoned that, 'under *Verdugo-Urquidez*, the defendants—Colombian citizens and residents—had no Fourth Amendment protections to challenge the admission of wiretap conversations, which were recorded in Colombia, in their drug trafficking prosecutions'. Additionally, [w]hile not in a drug trafficking case under the MDLEA, this Court similarly has applied the *Verdugo-Urquidez* rule in drug trafficking cases brought against non-resident aliens in *U.S. v. Valencia-Trujillo*, 573 F.3d 1171, 1173, 1182-83 (11th Cir. 2009) because under '*Verdugo-Urquidez*, [t]he Fourth Amendment (. . .) does not apply to actions against foreign citizens on foreign soil and thus a non-resident alien charged with drug smuggling crimes could not challenge on Fourth Amendment grounds (…)'.

[245] ibid. The Eleventh Circuit noting that, '[i]n this drug trafficking case under the MDLEA, we too must follow *Verdugo-Urquidez*'.

It could be argued that in *Boumediene v. Bush* 553 U.S. 723 (2008) the Supreme Court has changed its line of reasoning concerning Fourth Amendment application on the high seas. However, this is generally not the case regarding a high seas interdiction. What the court held in *Boumediene* is that the U.S. 'by virtue of its complete jurisdiction and control over the base [Guantanamo Bay, Cuba] maintains de facto sovereignty of this territory (…) and the Constitution has full effect at Guantanamo Bay'. While it can be further argued that the search of a non-U.S. citizen on board a U.S. military vessel would fall under the *Boumediene* criteria because it is a vessel flagged to the U.S. and is subject to U.S. exclusive jurisdiction, this is generally not the case when U.S. agents search a DTV on the high seas. The search of a DTV on the high seas is almost always conducted on board the DTV at sea or in port of a bilateral partner. Thus, while *Boumediene* would likely extend constitutional protections to persons on board a U.S. military vessel, the holding in *Verdugo-Urquidez* has not changed. *See further* Frank Sullivan, 'Adrift at Sea: How the U.S. Government is Forgoing the Fourth Amendment in the Prosecution of Captured Terrorists,' [2017] 5 PENN. ST. J.L. & INT'L AFF. 237, 256-259. Data compiled for the study also supports this conclusion that there is no Fourth Amendment protection to foreign nationals on the high seas using a *vessel without nationality* to transport illegal drugs or outside the U.S.

[246] *U.S. v. Cabezas-Montano* (n 50) 39-42.

[247] The Fifth Amendment - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation, accessed on 15 May 2020, <https://www.law.cornell.edu/constitution/billofrights>.

[248] For example, see *U.S. v. Rendon,* 354 F.3d 1320, 1325 (11th Cir. 2003).

the MDLEA provides clear notice that all nations prohibit and condemn drug trafficking (...)'.[249] Therefore, due process is afforded because it is foreseeable that such conduct can result in prosecution. Having addressed the relevant Congressional and Constitutional matters, it is next necessary to consider how the U.S. Coast Guard, which is the primary law enforcement authority for the U.S. against DTVs on the high seas, conducts interdictions.

The USCG is the 'lead federal agency for maritime law enforcement'.[250] As stated, the USCG's general interdiction authority on the high seas is derived from international law, specifically the 1988 Vienna Convention. The CRMA and individual bilateral agreements set out in Chapter 5 supplement this authority. Therefore, the USCG has broad authority to detain a vessel on the high seas and board it under this combined regime. Domestic law enforcement authority comes from Congress and statute 14 USC § 89. Under this statute, the USCG is empowered to 'make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the U.S. has jurisdiction, for the prevention, detection, and suppression of violations of laws of the US'.[251]

Unlike the USCG, the U.S. Navy does not have similar law enforcement powers due to the Posse Comitatus Act of 1878 (18 U.S.C. § 1385) and this effectively prevents U.S. military forces from being used for civilian law enforcement purposes. However, the USCG is exempt from the prohibition to use military personal for civilian law enforcement because there is a 'drug exception' to the use of military forces in the suppression of drug trafficking.[252] Additionally, this drug exception permits that 'the Navy may assist the Coast Guard in pursuit, search, and seizure of vessels suspected of involvement in drug trafficking' but these agencies are not the only ones taking part in the overall effort to interdict drug traffickers on the high seas.[253] Both agencies fall under the umbrella of the U.S. Department of Defense [DoD].

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[249] *U.S. v. Cabezas-Montano,* (n 50) at 25, citing *U.S. v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003); see also *Valois*, 915 F.3d at 722 (following Rendon and reaching the same holding). According to the Court, '[t]he defendants' MDLEA convictions thus do not violate their due process rights even if their offenses lack a "nexus" to the U.S'. The court also citing *U.S. v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016); *Campbell*, 743 F.3d at 812.

[250] James Kraska and Raul A. Pedrozo, *International Maritime Security Law* (Martinus Nijhoff 2013) 587.

[251] 14 USC § 89 (a).

[252] 10 USC 275: Restriction on direct participation by military personnel. Additionally, the distinction between the two agencies is largely due to the Posse Comitatus Act of 1878 (18 U.S.C. § 1385). Under the act, the military forces of the U.S. cannot be engaged to enforce U.S. domestic law absent very specific situations such as rebellion or insurrection, and often only in cases where the local authority is unable to quell the violence. Although the Navy is not specifically named in the act, it was added per the Department of Defence in 1992. Under the 'drug exception' the U.S. Army also can provide training and equipment to civilian law enforcement agencies. See 'Overview of the Posse Comitatus Act, Implications for the Army and Homeland Security Activities, Appendix D', 243-245, accessed on 13 March 2021, <https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1251/MR1251.AppD.pdf>.

[253] 10 USC 279: Assignment of Coast Guard personnel to naval vessels for law enforcement purposes. 10 USC 279(a): (a) The Secretary of Defense and the Secretary of Homeland Security shall provide that there be assigned on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are

Additionally, under U.S. law, the DOD may also provide support to civilian law enforcement agencies, both state and federal, in drug trafficking suppression efforts.[254] What further seems to be omitted from the critiques discussed above is the reality that the USCG very often does not act in isolation when conducting high seas DTV interdictions. In other words, although the 'DoD is the lead federal agency in efforts to detect and monitor aerial and maritime transit of illegal drugs towards the U.S.' there are additional mechanisms in place.[255] The DoD administers U.S. Southern Command [SOUTH-COMM], which, is an 'interagency effort against narcotics to disrupt the flow of illegal narcotics from South America, Central America, and the Caribbean Sea into the U.S.', and is the primary means for international cooperation between the U.S., its bilateral partners, as well as other States.[256]

SOUTH-COMM is presently engaged in ongoing Campaign Martillo [Hammer].[257] Campaign Martillo is a 'U.S., European, and Western Hemisphere effort targeting illicit trafficking routes in coastal waters along the Central American isthmus'.[258] States participating in Campaign Martillo include 'Belize, Canada, Colombia, Costa Rica, El Salvador, France, Guatemala, Honduras, the Netherlands, Nicaragua, Panama, Spain, and the United Kingdom. Chile has also previously contributed to the operation'.[259] Within this programme, the DoD operates a substantial network of counter-narcotics vessels, ships, planes, interagency taskforces, Coalition taskforces, and intelligence networks, meaning most interdictions are a highly coordinated effort and not chance encounters.[260] These networks work to position enforcement 'assets in the right place at the right time to set up a successful interdiction, intelligence also alerts law enforcement agencies to emerging trends, and new tactics, techniques, and procedures used by the DTOs'.[261]

The assets come from the USCG, U.S. Navy, the Department of Justice [DOJ], and the Department of Homeland Security [DHS]. Furthermore, as explained by SOUTH-COMM, '[t]he actual interdictions – boarding, search, seizures and arrests – are led and conducted by embarked U.S. Coast Guard Law Enforcement Detachments [LEDETs], or partner nation drug law enforcement agencies' which as stated in Chapter 5, are generally bilateral partner states.[262]

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trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures. See Overview of the Posse Comitatus Act (n 251).

[254] 10 USC 284: Support for counterdrug activities and activities to counter transnational organized crime.

[255] U.S. Southern Command (n 1) 'Campaign Martillo'.

[256] Kraska '*International Maritime Security Law* (n 250) 636.

[257] U.S. Southern Command (n 1).

[258] ibid.

[259] ibid.

[260] Office of Counternarcotics Enforcement Fiscal Year 2010 Annual Report, U.S. Department of Homeland Security March 2011, 7-8.

[261] ibid 7.

[262] U.S. Southern Command (n 1).

The interdictions are conducted as part of Joint Interagency Task Force-South [JIATF-South], which 'serves as the catalyst for integrated and synchronized interagency counter-illicit trafficking operations, and is responsible for the detection and monitoring of suspect air and maritime drug activity in the Caribbean Sea, Gulf of Mexico, and the eastern Pacific'.[263] JAITF-South is composed of over 'twenty-six different agencies and partnered with twenty foreign governments to facilitate information exchanges and international interdictions'.[264] Information is at the centre of JAITF-South's approach to international cooperation with foreign law enforcement and an overall mission of promoting regional security.[265]

One of the primary sources of intelligence comes from Operation 'Panama Express (PANEX), an Organized Crime Drug Enforcement Task Force'.[266] Created in 1995, PANEX is responsible for decades of investigations, intelligence, and arrests of international drug traffickers.[267] Intelligence from PANEX goes 'directly to JIATF-South, focusing on detection and monitoring efforts, and to facilitate' interdictions.[268] Teams of analysts are responsible for information sharing, and this activity results in fifty to seventy per cent of all JAITF-South seizures and roughly eighty per cent of U.S. cocaine seizures.[269] As part of JAITF-South, the USCG is responsible for providing 'law enforcement authorities' for maritime interdictions.[270]

The USCG receives additional intelligence from the 'Intelligence Coordination Center, who provides strategic smuggling assessments and general decision support to drug interdiction program managers' and support is accomplished with Coast Guard military attachés assigned to key embassies'.[271] Additional efforts at cooperation, both inter-agency and international, allow the USCG to deploy LEDETs 'onboard designated U.S. Navy frigates deployed under JIATF-South, aboard British Royal Navy vessels, and to U.S. Navy and Allied surface assets operating

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[263] ibid.
[264] U.S. Government Accountability Office, Report to the Ranking Member, Committee on Foreign Affairs, House of Representatives, Counternarcotics, Overview of Efforts in the Western Hemisphere, October 2017, 29.
[265] ibid 29.
[266] DHS 2010 (n 260) 7.
[267] According to the U.S. DOJ the Federal Bureau of Investigation [FBI] reports that from 2000 to 2011, 'operation Panama Express has resulted in the seizure of over 500 tons of cocaine worth an estimated $10 billion. Authorities have arrested more than 2,000 international drug traffickers and transporters, mostly Colombians. Additionally, pending capture at open sea, transporters have dropped to the bottom of the Pacific Ocean another 391 tons of cocaine worth another $7 billion', accessed on 12 April 2021, <https://leb.fbi.gov/articles/featured-articles/a-model-for-success-in-the-drug-war>.
[268] DHS 2010 (n 260) 7. According to the report, 'PANEX has expanded the scope of their intelligence collection and dissemination activities greatly, while ensuring that resulting investigations generate new leads and successful prosecutions'.
[269] GAO Report (n 264) 29.
[270] ibid 29-30
[271] DHS 2010 (n 260) 7.

under JIATF-South;' however, the interdiction and arrests are conducted by the USCG because of their law enforcement authority.[272]

USCG intelligence offices also provide specific information to bilateral partner states, for example, the Bahamas and Turks and Caicos as part of Operation OPBAT, which works to increase 'foreign nation capacity and effectiveness'.[273] Therefore, as the above establishes, while it may initially appear that U.S. interdictions are unilateral, there is a substantial amount of behind the scenes activity, most of which is significant international cooperation between the U.S., its bilateral partners, and even queried flag states that takes place before an interdiction actually occurs on the high seas.

6.3 Conclusion

Chapter 6 has surveyed the interdiction practice of the U.S. In this regard, the chapter not only set out the provisions of the U.S. domestic criminal statutes the MDLEA and DTVIA, but it also undertook an analysis of those statutes and how they address *vessels subject to the jurisdiction of the U.S.* on the high seas. These are *vessels without nationality* or non-U.S. flagged vessels whose flag state has consented to the enforcement of U.S. laws against the vessel. The chapter then considered the evolution of these statutes, which shows that as new issues developed from interdictions in practice, the U.S. Congress amended the statutes to address those issues. The statutes were also amended to accommodate new international obligations, such as those created by the 1988 Vienna Convention, subsequent U.S. Bilateral agreements, and practical hurdles including the emergence of narco-subs. Furthermore, as the U.S. Courts of Appeals began to hear more DTV interdiction cases, the U.S. Congress also amended the statutes to address the concerns raised before and by the courts.

As it relates to the courts, the case law concerning the MDLEA/DTIVA shows how the U.S. Circuit Courts of Appeals interpret these statutes within the U.S. legal system, within existing U.S. legal obligations under international law, and within general principles of international law. In turn, the courts have applied these statutes to DTV interdictions on the high seas, holding in a vast majority of cases that the U.S. can exercise its domestic jurisdiction over DTVs, both non-U.S. flagged and *without nationality* on the high seas. Additionally, the case law analysis shows that when U.S. courts apply the *protective principle* of jurisdiction over DTVs on the high seas, the overall U.S. practice is appropriately situated within international law.

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[272] ibid 7-8.
[273] ibid 7-8.

Thus, through this expanded U.S. domestic jurisdiction on the high seas, the USCG continues to engage in numerous interdictions through its actions and a substantial effort at international cooperation. Indeed, as this chapter as well as Chapter 5 shows, the combined practice of the USCG, the use of bilateral interdiction agreements, the extensive modes of international cooperation, and the application of the MDLEA/DTIVA by the U.S. Courts of Appeals demonstrates how the U.S. practice has overcome the existing gaps in the international legal regime for DTVs on the high seas. However, when considering how the U.S. addresses the gaps in the law, questions emerge regarding the more general practical issues surrounding DTV interdictions. In other words, are there similar gaps such as ship boarding authorisations, *vessels without nationality*, or international cooperation, manifesting in other types of transnational crime at sea or maritime security-related concerns? Chapter 7 surveys different agreements and initiatives to consider this issue further.

Chapter 7:
Other Maritime Security Models

Introduction

The purpose of Chapter 7 is to survey different models for addressing other maritime security matters such as armed violence at sea, illegal, unreported, unregulated fishing [IUU], and the non-proliferation of weapons of mass destruction at sea. Chapter 7 does this by exploring two agreements: the Suppression of Unlawful Acts at Sea Convention [SUA Convention] and the 1995 Straddling Fish Stocks Agreement [1995 FSA]. The chapter will also consider the Proliferation Security Initiative [PSI] and its 'principles of interdiction'. Chapter 7 conducts this assessment to determine what lessons are learned from considering how or if similar gaps in the law like those impacting the legal regime for DTV interdictions are found in other agreements. Furthermore, in situations where similar gaps are not identified, this chapter considers any innovative aspects contained within these agreements and how they may serve as a model for addressing the gaps in the DTV legal regime.

The overall purpose of such an examination also forms part of this thesis' contribution to knowledge. For example, the SUA Convention, specifically its 2005 protocol, incorporates an enforcement model which may be used against the flagged vessels of other parties and contains many aspects of the CRMA that was previously discussed in Chapter 5. Similarly, the 1995 FSA also includes different provisions on cooperation and enforcement, which creates the possibility of enforcement against flagged vessels without prior authorisation from the flag state through cooperation. Enforcement of this type is dependent on international cooperation made through regional fisheries management organisations [RFMOs]. Furthermore, both agreements and the PSI are deeply rooted in international cooperation, so the means for cooperating may also provide possible models applicable to drug trafficking at sea.

7.1 The SUA Convention

The SUA Convention entered into force in 1992 and has 166 States parties who combined account for '95% of the gross tonnage of the world's merchant fleet'.[274] The SUA Convention arose out of the necessity to address acts of violence and terrorism at sea, which previously had

[274] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome March 10, 1988, Entry into Force 1 March 1991, UNTS 1678. Article 6; Article 9 SUA Convention. See IMO Status of Conventions, Accessed on 03 August 2021, <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202021.pdf>.

'no conventional or customary rules specific to the issue'.[275] Thus, the purpose of the SUA Convention is to create new criminal acts at sea, including seizing control of a ship by force, performing acts of violence against persons on board a ship, or destroying a ship with the intent to endanger the safe navigation of that ship.[276]

The SUA Convention also aims to suppress violence and terrorism against shipping by ensuring legal action is taken against persons who engage in such acts.[277] The primary way the Convention does this is by creating extensive obligations to cooperate and obligations to extradite or punish suspected offenders. In terms of high seas interdiction, the SUA Convention does not create any new ship-boarding procedures or authorisations; rather, it simply relies on existing principles of international law, such as the *Right of Visit*.[278] In other words, the SUA Convention does not create any legal obligations permitting non-flag states the right to circumvent obtaining authorisation from the flag state to interdict a vessel on the high seas. However, the Convention does add clarity to some of the more ambiguous matters left unanswered in the LOSC, such as what constitutes a ship.

7.1.1 A Definition of 'Ship'

The SUA Convention defines a 'ship as 'a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft'.[279] The inclusion of a specific but open-ended definition is something much needed in the international legal regime for DTVs. The reason is DTVs are not uniform in construction, especially submarines or homemade GFVs. As noted, there remains debate concerning the flagging and use of small craft on the high seas. Since the SUA Convention incorporates a definition, this may mitigate this debate surrounding the flagging of ships and simplify possible enforcement against small craft on the high seas. For example, by defining a 'ship' under the Convention, the parties who are also flag states may be more likely to have a record of a vessel and may then be able to cooperate better by providing information on a ship.

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[275] Scott D MacDonald, 'The SUA 2005 Protocol: A Critical Reflection,' [2013] 28 Int'l J Marine & Coastal L 485, 486.
[276] SUA Convention (n 1) Article 3.
[277] IMO, About the Conventions, Accessed on 03 August 2021, <https://www.imo.org/en/About/Conventions/Pages/SUA-Treaties.aspx>.
[278] See Chapter 3 concerning the *Right of Visit*.
[279] SUA Convention (n 1) Article 1.

7.1.2. Enforcement and Jurisdiction in the SUA Convention

Article 6 provides [in part] that a State party '*shall* take such measures to establish its jurisdiction over an offence when it is committed, (a) against or onboard a ship flying the flag of the state at the time the offence was committed, (b) in the territory of that state, including the territorial sea, (c) by a national of that state'.[280] Under Article 6, a State party may also exercise its jurisdiction when a national of the State is 'seized, threatened, injured, or killed'.[281] The SUA Convention creates additional obligations for States regarding offenders. The primary obligation is established through Article 6(4) and Article 7(1) and (5). For example, Article 7(1) obligates the States Parties to take an offender [or alleged offender] into custody if that person is found within the State's territory or to take measures so person may be extradited to another State party.[282]

Similarly, Article 8 creates specific obligations on the States Parties who are 'receiving' States of offenders. A 'receiving state' is any party whose authorities agree to take custody of an offender pursuant to a request from a ship's master [or flag state] and who agree to initiate criminal proceedings against the offender[s] if able.[283] Alternatively, Article 10 creates an obligation to exercise criminal jurisdiction if the offender is found within the territory of any State Party, and the State does not extradite them. Article 10 further obliges States to prosecute the offender 'in the same manner as (…) any other offence of a grave nature under the law of the State'.[284] The above obligations are clear that their application applies within the territory of States party and their territorial sea. However, this raises a potential question about how these obligations apply on the high seas against flagged vessels.

Article 9 addresses this question of ship-boarding, which relies on existing principles of international law. Article 9 states that:

> [n]othing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise their investigative or enforcement jurisdiction on board ships not flying their flag.[285]

Thus, a State party may still exercise its *Right of Visit,* so Article 9 is of critical importance. In other words, should a State party determine that a ship belonging to another party is harbouring offender[s], it may exercise its *Right of Visit* to investigate and possibly detain the offender[s].

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[280] ibid Article 6.
[281] ibid Article 6.
[282] ibid Article 7(1).
[283] ibid Article 8. Under Article 8(3) and (5) the receiving state may refuse to exercise its jurisdiction in certain circumstances; however, the receiving state must provide justification by submitting a statement setting out the reasons for the refusal.
[284] ibid Article 10.
[285] ibid Article 9.

Instances like this will often require significant coordination between the parties, which is why the SUA Convention creates new obligations for international cooperation and the suppression of violence at sea, some of which have been set out above regarding extradition and prosecution. However, the SUA Convention does not address 'requests' to authorise a boarding of another State's flagged vessel.[286]

The convention does not consider this issue at all; instead, it aims to set out the procedures for a 'receiving state' taking custody of an offender. Furthermore, the question of ship-boarding and another State party's vessel is not set out in the SUA Convention. Instead, it is only alluded to in Article 9, which, as discussed above, reaffirms that States party may exercise their *Right of Visit* according to existing rules of international law [i.e., Article 110 LOSC or customary international law]. The primary example of this problem in the SUA Convention exercised in practice can be seen in the case of *U.S. v Shi* [2008].[287]

The case of *U.S. v Shi* [2008] remains the only case of the SUA Convention invoked in practice. The defendant, Shi [Chinese national], had committed violent acts against his fellow Chinese crewmembers onboard a Taiwan-owned, Seychelles flagged fishing ship. After a protracted ordeal where Shi took control of the vessel by force and murdered the captain and first officer, after a request for assistance from the ship's owners, the USCG eventually boarded the ship as it neared the U.S. of the coast of Hawaii where Shi was arrested and later convicted for piracy in the U.S.

On appeal, however, the case was upheld under 'the SUA Convention, its implementation into U.S. domestic law, and a waiver of jurisdiction from the flag state'.[288] Still, the case itself was unusual, and according to Kontrovich, '[o]ne can only speculate about what inspired the decision to prosecute Shi (…) the U.S. government was apparently not interested in sending the defendant to his home country, and the Seychelles apparently were not interested in prosecuting Shi'.[289] However, the U.S. was required to bring Shi to trial under the obligations established in the SUA Convention.[290] Other obligations merit consideration as well, including the prevention of SUA offences.

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[286] Chapter 3 noted this same problem in Article 108 LOSC with respect to DTVs on the high seas.
[287] *United States v Shi*. 525 F.3d 709, cert. denied, 129 S.Ct. 324 (2008).
[288] U.S. v. Shi, 'Fact Summary' UNODC Case Law Database, accessed on 10 July 2021, <https://sherloc.unodc.org/cld/case-law-doc/piracycrimetype/usa/2008/us_v_shi.html>.
[289] Eugene Kontorovich, 'United States v. Shi' [2009] 103 Am J Int'l L 734, 738.
[290] ibid 738-739. Kontrovich also speculates that 'the United States' unwillingness to exercise universal jurisdiction over genuine high seas pirates suggests Shi may have been a one-off occurrence in the field of universal jurisdiction over criminal violence on the high seas'.

Articles 12 and 13 set out these additional cooperative obligations in the SUA Convention. Article 12 obliges states to 'afford one another the greatest measure of assistance in criminal proceedings' concerning a Convention offence.[291] Article 13 further builds on this cooperative framework by obligating the parties to take 'all practical measures to prevent preparations in their respective territories for the commission of those offences within or outside their territory'.[292] Furthermore, under Article 13, the Convention encourages effective information exchanges so States can prevent an Article 3 offence.[293] The offences created by the SUA Convention are expanded by two Protocols, one in 1992 and the other in 2005.[294]

7.1.3 The 2005 Protocol to the SUA Convention

The 2005 protocol, which began negotiations in 2003, creates additional criminal acts concerning ships, entered into force in 2010, and has 51 State Parties.[295] The 2005 Protocol amends the SUA Convention to include Biological, Chemical, or Nuclear weapons [BCNs] within the scope of the Convention's criminal acts.[296] The protocol also makes significant changes to the types of criminal offences, including the criminalisation of nuclear-related items through a 'complementary law enforcement element to the nuclear non-proliferation regime'.[297] In other words, the creation of specific criminal offences relating to the use of nuclear-related items in the 2005 protocol is to address a gap in the existing international legal framework by providing a mechanism for law enforcement against such conduct.[298] Furthermore, as Chapter 5 notes, the 2005 SUA Protocol is in many respects, already influential on DTV interdictions since some of its provisions were incorporated to the CRMA.[299]

7.1.3.1 The 2005 Protocol and Changes to Enforcement Procedures

The main changes brought on by the 2005 Protocol that are important for consideration here are those which establish a ship-boarding and authorisation procedure. This ship boarding

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[291] SUA Convention (n 1) Article 12.
[292] ibid Article 13.
[293] ibid Article 13(2).
[294] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA 2005), Entry into Force 28 July 2010. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, UNTS 1678, I-29004, Entry into force: 1 March 1992.
[295] IMO Status of Conventions, Accessed on 03 August 2021, <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20%202021.pdf]>. The 1992 Protocol is not discussed here as it relates specifically to the continental shelf and fixed platforms.
[296] 2005 Protocol (n 21) Article 1.
[297] J. Ashley Roach, 'Global Conventions on Maritime Crimes Involving Piratical Acts,' [2013] 46 Case Western Reserve Journal of International Law, 91, 101.
[298] ibid 100-101.
[299] Transcript T-002 at 3.

procedure in the 2005 Protocol, according to a U.S. official, is the first practical 'how to do a boarding' type of article included in a multilateral convention.[300] The procedure is outlined in Article 8*bis*. Article 8*bis* also establishes a procedure setting out how to verify a ship's nationality to establish the flag state in that:

> States Parties shall co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this article as expeditiously as possible.[301]

The process for verifying a ship's nationality is set out in Article 8*bis* (2). It states [in part] that the requesting State should formulate requests to, 'contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information'.[302] The article also makes it clear that there is a distinction in this regard and notes when a State seeks to board another state party's ship, 'it shall request (…) the Party confirm the claim of nationality'.[303] The distinction here is crucial because it deviates from the previously considered boarding procedures set out in Chapters 3 and 4, which usually revolve around verifying *registry* prior to confirming a flag state.

As observed, the question of registry versus nationality can play a decisive role in establishing which State is a vessel's actual flag state and who can subsequently authorise a ship-boarding. Thus, the 2005 Protocol acknowledges and addresses this by focusing on verifying *nationality*. With regards to the actual ship-boarding procedures, Article 8*bis* primarily follows the format set out in the 1988 Vienna Convention in Article 17(2) and (3); however, it does adopt some aspects of the regional/bilateral agreements from Chapter 5.[304] The procedure also includes a 'comprehensive provision on obtaining flag state consent to board' ships outside the territorial sea, 'provisions on the conduct of such boardings,' and 'protections designed to facilitate the boardings'.[305]

On the one hand, for example, Article 8*bis* (4) states [in part] that, '[a] State Party that has reasonable grounds to suspect that an offence (…) is being or is about to be committed involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence'.[306] On the other hand, under Article 8*bis* (5)(b), states that if the flag

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[300] Transcript T-002 at 3.
[301] 2005 Protocol (n 21) Article 8bis (1).
[302] ibid Article 8bis (2).
[303] ibid Article 8bis (5)(a).
[304] See Chapter 4 on Article 17(2) and (2) of the 1988 Vienna Convention. See also Roach 'Global Initiatives' (n 24) 106-108, noting that the article is also derived from Article 8(1) of the Migrant Smuggling Protocol.
[305] Data compiled for this study shows the U.S. was a driving force in bringing these specific amendments to the SUA Convention. See also Roach 'Global Initiatives' (n 24) 106.
[306] 2005 Protocol (n 20) Article 8bis(4).

state confirms a ship's nationality, the interdicting state may, 'take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board'.[307] Additionally, the article outlines the options available to the flag state, which include:

> (i) authorise the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or (ii) conduct the boarding and search with its own law enforcement or other officials; or (iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or (iv) decline to authorise a boarding and search.[308]

However, Article 8*bis* (5) also incorporates some practical language from the U.S. bilateral agreements and the CRMA in subsections (d) and (e). States Parties can deposit notification with the IMO Secretary-General establishing their acceptance of tacit authorisation. Subsection (d) uses the elapsed four-hour timeframe method, and Subsection (e) permits that the 'requesting Party is authorised to board and search a ship, its cargo and persons on board, and to question the persons on board'.[309]

According to Macdonald, the CRMA, 'may have had some influence on the 2005 Protocol, despite being considered an inappropriate precedent'.[310] It is worthwhile to note that the boarding procedure was also heavily debated due to the practicality of imposing a time limit on a flag state and what, if any basis for this procedure, exists in international law.[311] As a result, several states 'could not support a presumption that boarding could take place in the absence of a response from the flag State'.[312] Ultimately, the protocol underwent significant compromise where the primary method for authorisations would remain the explicit authorisation of the flag state; however, the other models for authorisations were also included in the Protocol.[313] Data compiled for this study shows the U.S. was very influential in incorporating those approaches in

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[307] ibid Article 8bis(5)(b). The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorisation of the flag State.
[308] 2005 Protocol (n 21) Article 8bis(5)(c).
[309] ibid Article 8bis(5)(e).
[310] Report of the Legal Committee on the Work of its Eighty-Fifth Session, IMO Doc. LEG 85/11 [5 November 2002] at para. 92. Document accessed in person at IMO June 2019. See also MacDonald (n 2) 507. Cf Transcript T-002 at 3. One U.S. official notes that the 2005 SUA Protocol was already in development, thus the CRMA was not the inspiration for the 2005 Protocol but rather the drafting work of the 2005 SUA Protocol was influential in the late stages of the CRMA negotiations. See Natalie Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation,' [2007] 35 Denv. J. Int'l L. & Pol'y 287, 288-289.
[311] Report of the Legal Committee on the Work of its Eighty-Sixth Session, IMO Doc. LEG 86/15 [2 May 2003] at para. 67. Document accessed in person at IMO June 2019. See also MacDonald (n 2) 506-507.
[312] MacDonald (n 2) 506-507.
[313] Report of the Legal Committee on the Work of its Eighty-Ninth Session, IMO Doc. LEG 89/16, [4 November 2004] at paras. 48-49. Document accessed in person at IMO June 2019. See also Macdonald (n 2) 506-507.

the 2005 Protocol. The last subsection of Article 8*bis* considered here concerns the actions taken after the ship-boarding and search.

If the interdicting state finds an offence under the 2005 Protocol, the flag state retains its exclusive jurisdiction over the offenders. Furthermore, Article 8*bis* creates an obligation for the interdicting state to notify the flag state of any 'discovery of evidence of illegal conduct that is not subject to [the] Convention'.[314] However, the flag state may at any time relinquish its jurisdiction and 'subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction'.[315] Thus, it is no different than the obligations set out in Article 92 LOSC, which allow the flag state to consent to the jurisdiction of another state if it chooses.

7.1.4 The SUA Convention and 2005 Protocol as a DTV Model

In surveying the 2005 Protocol and the SUA Convention's adaptability to a new regime to address the gaps in the drug trafficking international legal framework, perhaps as a new protocol, some elements could be adopted. For example, the primary component which could be adopted are the substantial obligations to prevent criminal acts and the extradite or punish clauses from the SUA Convention. However, much of the 2005 Protocol, particularly the ship boarding and authorisation procedures, is redundant of the 1988 Vienna Convention and the regional agreements already in place to address DTVs on the high seas. It is also worthwhile to note the 2005 Protocol is not widely ratified, with only fifty-one parties as compared to the one hundred sixty-six of the SUA Convention.[316]

The most significant problem with the low ratification number concerns the states that have ratified the 2005 Protocol. For example, of the ten most recognised flags states, only Panama, Greece, and the Marshall Islands are party to the 2005 Protocol.[317] Similarly, of the primary naval states, only France, the U.K., and the U.S. are parties to the 2005 Protocol.[318] In terms of ship-

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[314] 2005 Protocol (n 21) Article 8bis(6).
[315] ibid Article 8bis(8).
[316] IMO, Status of Conventions, (n 22).
[317] Lloyds List, 'Flags of Convenience' Accessed on 12 June 2020, <https://lloydslist.maritimeintelligence.informa.com/LL1
129840/Top-10-flag-states-2019>. See Status of Conventions, (n 22).
[318] NATO Parliamentary Assembly, Defense and Security Committee, 162 DSCFC 16 E rev.1 fin Report: NATO and the Future of Naval Power, Madeleine Moon (United Kingdom) Rapporteur, Sub-Committee on Future Security and Defence Capabilities. 19 November 2016. See Jonathan Masters, Council on Foreign Relations, 'Sea Power: The U.S. Navy and Foreign Relations, 19 August 2019, accessed on 15 October 2020, <https://www.cfr.org/backgrounder/sea-power-us-navy-and-foreign-policy>; Office of the Secretary of Defense, 'Annual Report to Congress: Military and Security Developments Involving the People's Republic of China, 2020, accessed on 15 October 2020, <https://media.defense.gov/2020/Sep/01/2002488689/-1/-1/1/2020-DOD-CHINA-MILITARY-POWER-REPORT-FINAL.PDF>; Joint Doctrine Publication 0-10 (JDP 0-10) (5th Edition), dated October 2017, Accessed on 15 October 2020, Accessed at: <https://assets.publishing.service.gov.uk

boarding, no State has attached a declaration under Article 8*bis* permitting a ship-boarding under the tacit consent provisions, which means the ad hoc authorisation procedure is the only one applicable in the 2005 Protocol.[319] Reflective of this, Macdonald explains that 'the protocol only applies between the parties; therefore, there is little reason to become a party until the major maritime powers and flag of convenience States have ratified'.[320] Thus, since the 2005 Protocol is effectively identical to the 1988 Vienna Convention in terms of ship-boarding and authorisation procedures, and despite the inclusion of the U.S. approaches, its use as a model for a DTV framework essentially is already in place.

7.2 The 1995 FSA

The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stock and Highly Migratory Fish Stocks* [1995 FSA] entered into force in 2001 and has 91 States Parties.[321] The following section will set and explore the relevant aspects of the regulatory and cooperative frameworks, the ship-boarding, investigation, and enforcement provisions of the 1995 FSA, which can potentially be adaptable to a new DTV interdiction framework on the high seas. The reason the 1995 FSA is explored in this regard is the 1995 FSA not only creates a regulatory framework for the management of high seas fisheries it also 'clarifies many of the 'too general' provisions' in the LOSC.[322] Furthermore, the 1995 FSA builds a robust cooperative framework for States using RFMOs, while also forming a special enforcement regime for non-flag states and the 'new concept of port state jurisdiction against fishing vessels'.[323] As stated, the primary way all of these provisions work is through cooperation, which also remains essential for addressing some of the gaps in the international legal regime for DTVs on the high seas.

/government/uploads/system/uploads/attachment_data/file/662000/doctrine_uk_maritime_power_jdp_0_10.pdf]>. See Status of Conventions, (n 22).

319 Denmark has attached a declaration stating that an '[a]uthorisation granted by Danish authorities pursuant to article 8bis denotes only that Denmark will abstain from pleading infringement of Danish sovereignty in connection with the requesting State's boarding of a vessel or a platform. Danish authorities cannot authorise another State to take legal action on behalf of the Kingdom of Denmark'.

320 Macdonald (n 2) 511.

321 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Entry into Force 11 December 2001, UNTS 2167, p. 3; and depositary notification C.N.99.1996. Treaties-4 of 7 April 1996 (procès-verbal of rectification of the authentic Arabic text).

322 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2015) 103.

323 David Freestone, W. R Edeson and Elly Gudmundsdottir, *Legislating for Sustainable Fisheries: A Guide to Implementing the 1993 FAO Compliance Agreement and 1995 U.N. Fish Stocks Agreement (Law, Justice, And Development)* (The World Bank Group 2001) 22.

7.2.1 Cooperation

Part III of the 1995 FSA sets out some of these mechanisms for international cooperation, and as will be seen, some are more comprehensive than those in place for DTV interdictions, and some are similar. One such similarity is in Article 8, which sets out the cooperative framework for States in working with regional and subregional fisheries management organisations to 'ensure effective conservation and management of such stocks'.[324] In one regard, this approach to regional and sub-regional cooperation is seen in the CRMA. Part III also establishes how States may cooperate to share information and research related to fish stocks, including an obligation for flag states to share any relevant data collected by their fishing vessels and those fish stocks.[325]

Building on these obligations, Part IV creates an obligation for States that are not a party to an RFMO or SRFMO to cooperate, including such States:

> shall not authorise vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.[326]

The heavy reliance on RFMOs in Article 8 also creates a unique scenario concerning international cooperation and fishing on the high seas. Since the article sets out that only States 'participating in or abid[ing] by the measures the RFMO may have access to the fishery', the freedom to fish on the high seas is effectively reduced in areas under RFMOs for the States Parties to the 1995 FSA.[327] Part V, through Article 18 then sets out the duties and obligations for the flag state and its fishing vessels in those fisheries zones.

The 1995 FSA, taking the standard approach to jurisdiction on the high seas, sets the flag state as the lead actor in the enforcement of the obligations it creates.[328] Such obligations provide that the flag state 'shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures'.[329] However, Article 18(2) 1995 FSA creates an additional obligation on the flag state. Article 18(2) states that, '[a] State shall authorise the use of vessels flying its flag for fishing on the high seas only where it is able to effectively exercise its responsibilities in respect of such vessels under the Convention

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[324] 1995 FSA (n 48) Article 8.
[325] ibid Article 14.
[326] ibid Article 17.
[327] Freestone 'Legislating' (n 50) 38. *See also* David Freestone and Zen Makuch, 'The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement,' [1998] Yearbook of International Environmental Law 7: 3– 51, 28.
[328] Lawrence Juda, 'The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique,' [1997] 28 Ocean Dev & Int'l L 147, 157.
[329] 1995 FSA (n 48) Article 18(1).

and this Agreement'.[330] Unlike Article 94 LOSC, which sets out the general obligations for a flag state over its flagged vessels, Article 18(2) of the 1995 FSA creates an exceptional limitation on flag states who seek to fish in an area under an RFMO. In other words, the obligation in Article 18(2) creates a duty on the flag state to implement a regime for inspection, investigation, and enforcement of the regulations set up by the agreement. If the flag state cannot, then it may not permit its vessels to fish for straddling/migratory fish stocks on the high seas.

The regime governing these 'measures' stems from additional obligations in Article 18(3). The measures include 'control of such vessels on the high seas by means of fishing licences,' prohibiting 'fishing on the high seas by vessels which are not duly licensed or authorised to fish,' 'ensur[ing] that vessels flying its flag do not conduct unauthorised fishing within areas under the national jurisdiction of other States,' and 'establish[ing] a national record of fishing vessels authorised to fish on the high seas'.[331]

Furthermore, the national record of fishing vessels maintained by a flag state shall 'on request by directly interested States,' be made available to the requesting State.[332] Also included in these measures are obligations that the flag state engage in 'monitoring, control and surveillance of such vessels, their fishing operations and related activities'.[333] All of these obligations are 'obligations of conduct,' which according to ITLOS in the *Sub-Regional Fisheries Commission Advisory Opinion*, are not 'an obligation 'of result' but are a 'due diligence obligation.[334] In other words, the flag state, 'is under the 'due diligence obligation' to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag'.[335] In terms of the actual obligation, this stems from the LOSC, including Articles 58 and 62, which 'the flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag (…)'.[336]

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330 ibid Article 18(2).
331 ibid Article 18(3).
332 ibid Article 18(3). The release of such information is done 'taking into account any national laws of the flag State regarding the release of such information'.
333 ibid Article 18 (3).
334 *Request For an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Request for Advisory Opinion Submitted to The Tribunal) International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions, and Orders, List of Cases No. 21. Advisory Opinion of 2 April 2015, 40 at para. 129.
335 ibid 40 para. 129.
336 ibid 42 para. 134. According to ITLOS, '[t]he aforementioned provisions of the Convention also impose the obligation on the flag State to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorised by the SRFC Member States,' at para 135. The obligation also applies, 'to a flag State whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal State concerned. The flag State is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action', at 139.

7.2.2 Enforcement

The enforcement of fisheries laws on the high seas is often problematic, especially since it is both a freedom of the high seas and cannot trigger a *Right of Visit*. The 1995 FSA attempts to balance the inclusion of non-flag state enforcement against fishing vessels on the high seas inside an RFMO area and prevent abuse by those states by outlining a ship-boarding procedure.[337] One way this is balanced is through international cooperation in enforcement actions.

Article 20 establishes a cooperative framework for enforcement procedures to ensure compliance with the 1995 FSA. For example, a flag state may 'request the assistance of any other State whose cooperation may be useful in the conduct of that investigation'.[338] Further cooperative measures include information sharing between 'interested States or through the relevant subregional or regional fisheries management organisation or arrangement' and cooperating by 'identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures'.[339]

Article 21 builds on these cooperative measures by setting up additional means of cooperation for enforcement in a subregional and regional context. For example, Article 21 establishes a regime for ship-boarding for non-flag states who are part of an RFMO or SRFMO, which is a notable departure from the international legal regime addressing DTVs. These RFMOs or SRFMOs 'may, through its duly authorised inspectors, board and inspect (…) fishing vessels flying the flag of another State Party to [the 1995 FSA], whether or not such State Party is also a member of the organisation or a participant in the arrangement'.[340] If a vessel is boarded, the ship-boarding procedure under the 1995 FSA is much different from the procedures set up under the SUA Convention or the 1988 Vienna Convention.

According to Article 22, a fishing vessel may be boarded and inspected to ensure compliance with the relevant measures of the 1995 FSA. During a boarding, force may be used in situations where the safety of the inspectors is at risk or if they are obstructed; however, force must be reasonable to the circumstance.[341] Once inspectors board a fishing vessel, they must:

> present credentials to the master of the vessel and produce a copy of the text of the relevant conservation and management measures or rules and regulations in force in the high seas area in question pursuant to those measures.[342]

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337 Juda (n 55) 158.
338 1995 FSA (n 48) Article 20(2).
339 ibid Article 20(3) and (4).
340 ibid Article 21(1).
341 ibid Article 22(1)(f).
342 ibid Article 22(1).

The boarding is only to inspect 'the vessel, its licence, gear, equipment, records, facilities, fish and fish products and any relevant documents'.[343] It is essential to note in cases where a violation is found, the flag state always retains its preferential jurisdiction and can intervene at any time.[344] Furthermore, if any prosecution of the offence[s] is to take place, it is dependent on explicit authorisation from the flag state.[345] If there is no violation found, then the inspectors must 'promptly' leave the vessel; however, in the event there is a violation, the inspectors shall 'where appropriate, secure evidence and shall promptly notify the flag State of the alleged violation'.[346] The inspecting State is also required to 'at the request of the flag State, release the vessel to the flag State along with full information on the progress and outcome of its investigation'.[347] Lastly, it is worth noting that the 1995 FSA does consider the use of a fishing vessel *without nationality*.

If a fishing vessel is boarded on the high seas and is a *vessel without nationality*, the 1995 FSA states that 'a State may board and inspect the vessel, [and] [w]here evidence so warrants, the State may take such action as may be appropriate in accordance with international law'.[348] Understandably, this leaves open the question as to what 'such action as may be appropriate in accordance with international law' means within the scope of the 1995 FSA. 'Actions' depend on many factors, including the State executing the boarding and inspection, the location of the vessel, the actions of the vessel, the type and quantity of fish, and possibly the nationality of the crew. The approach to fishing vessels *without nationality* in the 1995 FSA is also open-ended enough to accommodate the two views of stateless vessels set out in Chapter 3. In other words, it accounts for the different approaches to 'prescriptive and enforcement jurisdiction in general international law'.[349]

7.2.3 The 1995 FSA as a DTV Model

The 1995 FSA has several elements that could prove adaptable into a new framework applicable to DTVs on the high seas. The primary component of the 1995 FSA, which demonstrates the essential addition to the framework, is the specific approach to *vessels without nationality*. Since neither the 1988 Vienna Convention nor the LOSC effectively addresses this question of jurisdiction over *vessels without nationality*, the method used in the 1995 FSA could provide much-needed clarity. By providing this clarity, States may become less apprehensive about taking

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343 ibid Article 22(2).
344 David H. Freestone, 'Current Developments in International Law: The Straddling Stocks Agreement of 1995: an Initial Assessment,' [1996] 45 Int'l & Comp LQ 463, 472.
345 Ibid., 472.
346 1995 FSA (n 48) Article 21(5).
347 ibid Article 21(12).
348 ibid Article 21 (17).
349 Guilfoyle (n 49) 108.

additional enforcement actions, including criminal prosecution of drug traffickers on a *vessel without nationality*.

The other facet of the 1995 FSA which could be helpful in a new DTV framework is the cooperative enforcement framework created by the agreement. For example, the ship-boarding procedures set out in Article 21 permit enforcement by non-flag states against other States party's vessels, even in cases where they are not members of a fisheries management organisation. However, such an enforcement provision has its notable drawbacks, which the 2005 SUA Protocol evidences. In other words, since the inclusion of a similar ship-boarding and search procedure was attempted in the 2005 SUA Protocol, States would likely meet such enforcement measures with resistance. For example, this was a noted concern in the 1995 FSA negotiations concerning the enforcement regime of the agreement, which ultimately remains with the flag state.[350]

7.3 The Proliferation Security Initiative

The proliferation of various types of WMDs are a serious concern for all States.[351] Furthermore, as the 2005 SUA Protocol highlights, WMDs that are biological, nuclear, or chemical pose an enhanced and significant threat, as do their precursors and delivery systems.[352] However, unlike piracy, illegal fishing, or drug trafficking, there is no universally agreed position regarding the legality [or illegality] of WMDs or their associated materials.[353] The incident involving the *M/V So San* in 2002 serves as a gentle reminder of this *problématique*.[354] Additionally, the trade, manufacture, and possession of such weapons are regulated mainly by certain agreements since there is no customary international law regarding these activities.[355] Thus, these combined

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[350] A/CONF.164/15, Statement made by the Chairman of the Conference at the Closing of the Second Session, held on 30 July 1993 - 10 August 1993, noting '[t]he Conference has also recognized the need for practical and enforceable monitoring, control and surveillance measures, to ensure effective compliance and enforcement. In this connection, there is agreement that the primary responsibility for ensuring adherence to conservation and management measures for high seas fisheries rests with the flag States. However, it is also recognized that port States can supplement the responsibility of the flag States in promoting agreed conservation and management measures in accordance with international law', at 3.

[351] UNSC Res 1540 [2004]. According to the resolution, 'the Security Council decided that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes. The resolution requires all States to adopt and enforce appropriate laws to this effect as well as other effective measures to prevent the proliferation of these weapons and their means of delivery to non-State actors, in particular for terrorist purposes', accessed on 08 September 2021, <https://www.un.org/disarmament/wmd/sc1540/>.

[352] Guilfoyle (n 49) 232.

[353] ibid 233.

[354] Susan Goldenberg, John Gittings, and Brian Whitaker, 'Sailing on, the ship with a hold full of scud missiles: U.S. Forced to Let North Korean Arms Go Free,' The Guardian, 12 December 2002, accessed on 03 May 2020, < https://www.theguardian.comcom/world/2002/dec/12/yemen.northkorea]>.

[355] Guilfoyle (n 49) 233.

matters are leading States to either address the problem through international organisations or unilateral measures.[356] Still, this does not mean that the international community more generally has not seen fit to take steps in the criminalisation of WMDs under international law.[357]

One such step is the Proliferation Security Initiative [PSI], which began in 2003 as part of the 2002 'U.S. National Strategy to Combat Weapons of Mass Destruction'.[358] According to the U.S. State Department; the PSI 'is an innovative and proactive approach to preventing proliferation that relies on voluntary actions by states that are consistent with their national legal authorities and relevant international law and frameworks'.[359] The general basis for the PSI in international law can be traced to the 'implementation of the U.N. Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the U.N. to prevent proliferation'.[360]

States endorsing the PSI, of which there are 105 states, [including flag, coastal, port or any state where proliferation may affect] agree to cooperate 'to take steps to stop the flow of such items at sea, in the air, or on land'.[361] One way this is achieved is by adopting the PSI's 'Statement of Interdiction Principles'. The principles are not a new agreement but rely on existing rules in international law, primarily the *right of visit* and international cooperation between interdicting states and flag states to achieve the PSI objectives. The PSI is also not uncontroversial, as will be seen when the principles of interdiction are considered. For example, Papastavridis questions 'whether this initiative affords a tenable legal basis for interdiction operations on the high seas, and what are their legal contours'?[362] Such questions often arise into what Perry discusses as the stagnated scholarly debate surrounding the PSI and its 'potential impacts on the law of the sea'.[363]

In this regard, the 'literature generally embraces a binary analytical framework in which the PSI is depicted as standing in polar opposition to—and therefore irreconcilable with—navigational freedoms, including right of innocent passage'.[364] While a detailed analysis of the PSI is beyond

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356 Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing Limited 2013) 139.
357 Guilfoyle (n 49) 233.
358 The Proliferation Security Initiative, U.S. State Department, 'About the Proliferation Security Initiative', accessed on 03 May 2020, <https://www.state.gov/about-the-proliferation-security-initiative/>.
359 ibid.
360 The Proliferation Security Initiative, U.S. State Department Archived Data, accessed on 03 May 2020, <https://2009-2017.state.gov/t/isn/c27726.htm>.
361 ibid.
362 Papastavridis (n 83) 140.
363 Timothy Perry, 'The PSI as a Shared Good: How the Proliferation Security Initiative Both Challenges and Reinforces a Prevailingly Mare Liberum Regime,' [2018] 49 Ocean Development & International Law, 4, 335–367, 335.
364 ibid 336.

the scope of this thesis, these contrasting views are insightful because (1) the PSI is not a legally binding instrument and (2) since it is based on existing rules of international law, it approaches WMD interdictions grounded in a similar legal regime as DTV interdictions, consensual authorisations.

The PSI 'Principles of Interdiction' are four commitments States endorsing the PSI agree to undertake. The first two principles set out the main cooperative framework of the PSI. For example, under the first principle, States '[u]ndertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern'.[365] The first principle is also one of crucial importance when setting out the overall scope of the PSI. The reason for this is the words 'states and non-state actors'. This text raises some additional questions because it is essentially the interdicting states determining [collectively or unilaterally] which state is 'of concern'.[366] In other words, as Thomas illustrates, 'the PSI is a highly selective non-proliferation initiative because it does not target proliferation of WMD per se, but targets such proliferation only to those States or non-State actors that are deemed to be of proliferation concern'.[367] Likewise, the 'to and from' language, raises further questions because it creates the possibility that states of import are of proliferation concern as are states of export.[368]

These matters are possibly further complicated by some commentators who conclude that the PSI somehow creates new legal regimes for the interdiction of WMDs. For example, Thomas 'argues that the discriminatory operating principles of the PSI have been repositioning the international legal framework for regulating the use of the world's oceans, leading to relegation of certain customary principles of the UNCLOS such as freedom of navigation'.[369] However, when considering the other interdiction principles, it will be shown that an alternate conclusion is possible, and this is drawn by looking further at the second and fourth principles of interdiction, and which means these principles must be read together.

The second principle encourages participating States to:

> [a]dopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified

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365 The Proliferation Security Initiative (n 87).
366 Papastavridis (n 83) 141.
367 Ticy V. Thomas, 'The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS: An Indian Perspective,' [2009] 8 Chinese J Int'l L 657, 665.
368 Papastavridis (n 83) 141.
369 Thomas (n 94) 3. *Cf.* Thomas D. Lehrman, 'Rethinking interdiction: The future of the proliferation security initiative,' [2004] The Nonproliferation Review, 11:2, 1-45, 3. See Guilfoyle (n 49) 237-238; Natalie Klein, *Maritime Security and the Law of the Sea* (University Press 2012) 200-202.

> information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximise coordination among participants in interdiction efforts.[370]

These actions are based on what is permitted by each State's respective 'national legal authorities' and 'consistent with their obligations under international law and frameworks'.[371] The PSI is not creating any new legal framework but instead using those already in existence. Thus, a State, in a permissive way similar to the 1988 Vienna Convention, may adopt domestic measures under its 'national legal authorities' addressing WMDs. Under the PSI, States are encouraged to cooperate by providing their consent for 'the boarding and searching of its flag vessels by other states and to the seizure of such WMD-related cargoes'.[372] The primary interdiction actions are detailed in the fourth principle. These actions may include [in part]:

> [a]t their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.
>
> [t]o take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified.[373]

The above actions are also the aspects of the PSI generating controversy and this is mainly due to the uncertain status of general arms trafficking and the 'dual use' factor surrounding the precursors or delivery systems.[374]

Furthermore, the PSI operates on the legal standard of 'reasonable suspicion' and some, such as Lehrman, have argued this runs counter to Article 94 LOSC and exclusive flag state jurisdiction.[375] For example, as Article 94 uses the term 'clear grounds', the PSI should mirror this approach to flag state jurisdiction and operate on the 'reasonable grounds' standard.[376] On the other hand, as there is also some difficulty in measuring PSI outcomes due to military sensitivity of WMD interdictions and despite the heavy emphasis on cooperation, it may prove ineffectual.[377] These matters are further complicated by the above interdiction principles, possibly running counter to the *right of innocent passage* in the territorial sea and the general absence

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[370] The Proliferation Security Initiative (n 87).
[371] ibid.
[372] ibid.
[373] ibid.
[374] Klein (n 96) 309.
[375] Lehrman (n 96) 5.
[376] ibid 5.
[377] Guilfoyle (n 49) 238.

of a *right of visit* on the high seas for WMD related conduct.[378] Moreover, the above principles also raise questions concerning the enforcement of customs laws over WMDs in a coastal state's contiguous zone.[379]

The primary issues here concern the underlying principles of international law that the PSI is founded. These as set out in Chapter 3 include coastal state jurisdiction in the territorial sea and the *right of visit* on the high seas. Similar principles of international law were also set out in Chapter 4, and Chapter 5 concerning the ways flag states can grant their authorisation to board a vessel. Thus, the consistency of the PSI with general international law or with the ILoS is not problematic.[380] For example, when considering the interdiction principles, it is essential to note they are cooperative, and consent is critical. Likewise, the PSI does not create any new enforcement mechanisms.[381]

As Klein concludes, 'there is an arguable basis that the illicit trafficking in WMDs and related material in the territorial sea of a state is (…) inherently prejudicial to the peace, good order, or the security of the coastal state contrary to Article 19(1) LOSC'.[382] Consequently, despite the high number of States endorsing the PSI, those States have not asserted the *right of visit* entails any enforcement against WMDs on the high seas exists absent flag state consent or authorisation from the U.N. Security Council.[383] Therefore, rather than attempt to pigeonhole the PSI into a specific legal regime, interdictions conducted under its guise should be assessed on a case-by-case basis.[384]

In this regard, the interdiction of WMDs such as the one concerning the *M/V So San* shows that where there is no prohibition from the Security Council or consent of the flag state, WMDs may still ultimately reach their intended destination.[385] The PSI will also undoubtedly remain controversial as States, such as India, shift their acceptance of the initiative. India is a long-standing critic of the PSI but now has taken part in PSI training exercises as an observer.[386] Furthermore, the PSI has strengthened international cooperation among concerned states and led to the conclusion of individual U.S. bilateral WMD interdiction agreements or combined

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[378] Klein (n 96) 309.
[379] Guilfoyle (n 49) 232.
[380] ibid 237.
[381] ibid 237.
[382] Klein (n 96) 309. See Perry (n 90) 347-348.
[383] Klein (n 96) 310.
[384] Perry (n 90) 349-350. See Guilfoyle (n 49) 237.
[385] Michael Beyers, 'Policing the High Seas: The Proliferation Security Initiative,' [2004] 98 AJIL3, 526-528.
[386] The Nuclear Threat Initiative, 'The Proliferation Security Initiative' May 2020. [https://www.nti.org/learn/treaties-and-regimes/proliferation-security-initiative-psi/].

maritime security agreements as discussed in Chapter 5. Therefore, although the PSI is still in its infancy with regarding the long-standing principles it is purported to upend, it serves as a model for 'an inclusive security interest, that interacts with the law of the sea in a more complex way than is often assumed'.[387]

7.3.1 The PSI as a DTV Framework

The PSI as a framework applicable to drug trafficking on the high seas has merit. The reason is that the PSI is a voluntary initiative. Given the difficulties in overcoming the role of flag state jurisdiction on the high seas, it is more likely to address some of the gaps in the drug trafficking international legal regime. Furthermore, as the PSI is rooted in existing principles of international law, such as the *right of visit* and *right of innocent passage*, applying these principles to DTVs is not dissimilar, especially since drug trafficking, unlike WMDs, is universally recognized as criminal conduct.

The principles of interdiction, including the recommendation States interdict vessels in extended maritime areas where they retain limited jurisdiction, such as the contiguous zone, demonstrates how small measures have the potential for greater exercises of jurisdiction.[388] However, it is ultimately the PSI's cooperative framework through voluntary participation and information sharing that makes it most suitable for amendment into a possible DTV framework.

As earlier chapters have shown, any attempts in a treaty to upend or diminish the exclusive jurisdiction of the flag state are generally met with resistance. Thus, by engaging with flag states in a voluntary initiative such as the PSI, it is possible to enhance cooperation further to prevent abuse to flag state jurisdiction while simultaneously increasing enforcement actions against DTVs on the high seas.

7.4 Conclusion

Chapter 7 has surveyed different maritime security issues and the subsequent agreements or initiatives targeting these matters. The agreements include the 2005 SUA Convention Protocol, and the 1995 Fish Stocks Agreement. The initiative is the Proliferation Security Initiative. The chapter has drawn attention to how similar questions regarding jurisdiction arise over vessels engaged in other acts impacting maritime security. It is clear that many of the same concerns impacting DTV interdictions on the high seas are present in other forms of crime at sea. This is

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[387] Perry (n 90) 359.
[388] See Chapter 3 regarding the contiguous zone.

particularly clear with respect to the exclusive jurisdiction of the flag state. Thus, the chapter looked to states have overcome these concerns and may exercise their jurisdiction over another party's vessel under these models and how international cooperation is addressed.

In this regard, the SUA Convention, creates several new obligations for States, especially the obligation to exercise criminal jurisdiction over offenders found in their respective territory, on-board their flagged vessels, or extradite those offenders. Furthermore, the 2005 Protocol provides States party with a robust framework for ship-boarding and determining a vessel's nationality to establish a ship's flag state. Both the SUA Convention and the 2005 Protocol also create many obligations for international cooperation. These include information sharing and the collection and preservation of evidence for prosecutorial purposes.

Concerning the 1995 FSA, the primary obligations the agreement sets out include a greater emphasis on flag state enforcement against its fishing vessels. The agreement also demonstrates how cooperation is used through RFMOs when exercising enforcement jurisdiction over other State's vessels. As a cooperative measure, RFMOs provide a way for States to enforce the 1995 FSA against States that are not part of the RFMO but fish within its area. Furthermore, the 1995 FSA shows how *vessels without nationality* may be included and addressed under the generally accepted international law rules and domestic law implementation.

The PSI, which is not a binding agreement, shows how voluntary initiatives can address certain maritime security matters such as the non-proliferation of WMDs. For example, the PSI emphasises international cooperation between States endorsing the PSI, flag states, and port/coastal states. The PSI also encourages cooperation between interdicting states and flag states through consensual authorisations for interdictions. Furthermore, international cooperation under the PSI has led to bilateral ship-boarding agreements, like those surveyed in Chapter 5. However, the PSI is more controversial, predominantly due to the status of WMDs under international law. Still, as the PSI functions on existing and generally accepted principles of international law [e.g., international cooperation and flag state consent], the initiative provides valuable insight into addressing gaps in the international legal regime for DTV interdictions through voluntary measures.

Chapter 8: Concluding Remarks

Introduction

The thesis studies international law, drug trafficking on the high seas, and how states exercise their jurisdiction by interdicting ships engaging in this transnational crime. At its centre, the thesis explores how the relevant legal regime works and is applied in contemporary interdiction practice. This examination of the law and how it works in practice has generated the primary question for research, which is *to what extent do the existing gaps in the international legal framework impact DTV interdictions in practice and how has the US addressed these gaps in its approach to DTV interdictions?* Three research sub-questions aid in this regard to answer the primary research question, mainly how the applicable law works in practice. The three research sub-questions are:

> 1. What is the international legal framework that applies to interdictions of DTVs on the high seas, and what is the nature and significance of any gaps in this framework in the context of contemporary interdiction practice?
>
> 2. What is the practice of the U.S., the primary global actor in high seas DTV interdictions, at the domestic level, and where is this practice situated in international law?
>
> 3. What forms of international cooperation have been developed to address the interdiction of DTVs on the high seas, and do these address the gaps identified in sub-research question (1) above. This sub-question again focuses significantly on U.S. practice in international cooperation, as it has been a leading player in developing such arrangements.

To answer the research questions Part I of the study first set out the applicable international legal regime addressing DTVs on the high seas. This was done by analysing the treaty obligations in the LOSC and 1988 Vienna Convention within the context of contemporary developments in drug trafficking at sea, and including practical considerations associated with conducting interdictions on the high seas. As a result of this analysis, several gaps in the legal regime are drawn out, and their practical implications were highlighted regarding contemporary interdiction practice. In Part II of the study, the thesis considered two ways the gaps in the legal regime applicable to DTV interdictions are addressed.

The first way the gaps are addressed is through the specific focus on U.S. practice and the need for domestic legislation establishing jurisdiction to conduct interdictions; and the role of the protective principle in the approach taken by the U.S. courts. The second way the gaps in the law were addressed is through international cooperation in the form of regional and bilateral

interdiction agreements; and significant U.S.-led efforts at capacity development and expanding maritime security agreements. These overarching conclusions were further supported by the supplemental qualitative data collected for the study. The broad data influenced the direction of the thesis in several ways.

First, the information provided by the interviewees substantiated the doctrinal research, which had identified several gaps in the international legal regime as set out above. The thesis had, as part of its practice-oriented approach to DTV interdictions posed a question to establish if there were indeed gaps and if these gaps manifest in actual interdictions. The research indicated that these gaps do indeed appear, and the information provided in the interviews supported this conclusion. Secondly, the thesis had questioned the role or impact of international cooperation in the overall process of a high seas DTV interdiction. The initial doctrinal research suggested that international cooperation was critical for states to conduct high seas DTV interdictions. The research showed that this was particularly important for flag state boarding authorisations. Again, the data gathered from the interviews supported this view.

The interview data also suggested that although international cooperation was essential for obtaining flag state consent, there were often procedural hurdles that could prevent authorisations from taking place. Furthermore, the interview data directed the focus of the research toward the use of bilateral or regional drug trafficking agreements to address these issues. Lastly, the thesis focused heavily on the US approach to DTV interdictions on the high seas. The doctrinal research indicated that the US is the key actor in DTV interdictions. The ability of the US to do this rested on its extensive military and law enforcement capability, domestic law, and extensive engagement in international cooperation. The data analysed from the interviews substantiated this, but it also provided significant detail as to how the overall US approach works in practice. This ultimately led to the conclusions put forward in the thesis as well as some future developments and areas for further research.

8.1 The Legal Regime and Drug Trafficking Vessels on the High Seas: A Practical Analysis

The primary international legal regime addressing drug trafficking vessels on the high seas and a State's jurisdiction over them is mainly set out in two treaties, the LOSC and the 1988 Vienna Convention. These two Conventions create different legal obligations concerning how or if States can exercise jurisdiction over a DTV on the high seas. However, before considering the

extent these Conventions provide states with jurisdiction to interdict a DTV on the high seas, the thesis contemplated another matter. The interdiction of a DTV on the high seas is a practical undertaking as interdictions are taking place around the world, and at increasing frequency.[1]

Thus, when considering whether these Conventions provide States with jurisdiction to interdict a DTV, the approach this study adopted and applied to the international legal regime meant the treaty analysis was done through a practice-oriented methodology to the interpretation of the relevant treaty obligations. The practice-oriented approach was then, in part, informed by the supplementary interview data. The overall analysis then identified several gaps in the international legal regime applicable to DTVs on the high seas. Still, the actual question is, given the nature and significance of the identified gaps in this legal regime, how are they put into context with contemporary interdiction practice? In answering this question, the thesis divided the gaps in the law in two thematic areas. The first theme concerns the exclusive jurisdiction of the flag state over its vessels on the high seas. The second theme relates to how States exercise their jurisdiction over a *vessel without nationality* on the high seas.

The exclusive jurisdiction of the flag state means typically only the flag state can exercise its jurisdiction over its flagged vessels on the high seas, and very few exceptions to this rule exist. In the LOSC and the 1988 Vienna Convention, jurisdiction over flagged DTVs on the high seas remains with the flag state. However, under this legal regime, the flag state may consent to another State exercising its enforcement jurisdiction over a suspected DTV by authorising an interdiction. Still, as the study investigated authorisations, several questions came to light regarding these processes and identified shortfalls that impacted interdiction practice.

Firstly, in the LOSC, Article 108 does not contain a ship boarding procedure for a non-flag state to request authorisation from a flag state to conduct an interdiction of a flagged DTV on the high seas. Secondly, the general cooperative mechanisms set out in Article 108 are only designed to allow a flag state to request assistance from another state to suppress the flag state's vessel suspected of being a DTV. Thirdly, while Article 110, the right of visit, permits a non-flag state the right to interfere with a flagged vessels freedom of navigation, there is no *right of visit* for flagged vessels suspected of being a DTV on the high seas. Practically, these gaps in the law are significant in light of contemporary interdiction practice due to the absence of a ship boarding

[1] For example, see CMF Press Release, 'U.S. Navy Ships Interdict Heroin Worth $4 million with International Task Force,' 12 December 2021, accessed on 12 December 2021, <https://combinedmaritimeforces.com/2021/12/30/u-s-navy-ships-interdict-heroin-worth-4-million-with-international-task-force/>.

and authorisation procedure. However, the 1988 Vienna Convention does contain an authorisation and ship boarding procedure.

The 1988 Vienna Convention, specifically Article 17, contains both a procedure for a non-flag state to request authorisations from another party and the article sets out a ship boarding procedure. In other words, Article 17 addresses the gaps in the LOSC; however, the wording of the article creates additional practical hurdles. For example, authorisations are based on a 'confirmation of registry'; however, the flag state may differ from the registry state. Although flag states are required to maintain a registry of vessels flying their respective flags, this is often not the case in practice. This is because most flag states generally lack the capacity to maintain a register of ships, operate open registries or issue flags of convenience, and further lack the ability to police their flagged ships.[2]

Additionally, according to the legal regime of the flag as set out in the LOSC, it is nationality that determines the flag state, not only the state of registry. Thus, the authorisation procedure codified in the 1988 Vienna Convention is counter to the LOSC and customary international law, which means it is possible to seek authorisation from the wrong state under the 1988 Vienna Convention's authorisation procedures. Other practical questions regarding the 1988 Vienna Convention and DTVs on the high seas concern the Convention's overall approach to DTVs.

According to the authorisation and ship boarding procedures set out in Article 17 of the 1988 Vienna Convention, there is the assumption that DTVs are flagged. In other words, the Convention aims to address the interdiction of another party's vessel. While there are indeed interdictions of flagged DTVs by non-flag states under the 1988 Vienna Convention, the majority of DTV interdictions are DTVs that are *without nationality*. *Vessels without nationality* remain a controversial topic as does the exercise enforcement jurisdiction over them on the high seas.

The primary reason this controversy persists regarding DTVs and *vessels without nationality* broadly is that the LOSC does not address this type of vessel beyond a *right of visit* to verify a vessel is *without nationality*. This means that the exercise of enforcement jurisdiction over such ships engaged in drug trafficking or other maritime security concerns is open to debate. Furthermore, related to DTVs *without nationality* specifically, there is no enforcement jurisdiction afforded to States Parties to the 1988 Vienna Convention. This leaves a significant gap in the legal regime. However, this does not mean that a DTV *without nationality* cannot be interdicted, but it does leave a practical gap in the law.

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[2] Steven Haines, 'Developing Human Rights at Sea,' [2021] Ocean Yearbook 25, 16.

The practical gap in the law does not concern exercising enforcement jurisdiction over the DTV [i.e., the ship] or seizure of drugs from the vessel. The gap in the law affects exercising enforcement jurisdiction over the drug traffickers on the vessel. In other words, since the 1988 Vienna Convention and the LOSC do not specifically account for the exercise of personal jurisdiction over drug traffickers, they are usually set free once the interdiction has concluded. This means there is a lack of effective deterrent and seizure of the traffickers' vessels. Still, this does not imply that these gaps in the law cannot be addressed. Indeed, the thesis has put forward that States can address the practical gaps discussed in this section through domestic law and international cooperation.

8.2 Addressing the Gaps: A Focus on U.S. Interdiction Practice

The U.S. is the recognised global leader in maritime interdictions, primarily the interdiction of DTVs on the high seas. As the primary global actor in DTV interdictions, the U.S. has addressed the gaps in the international legal regime applicable to DTVs on the high seas through a multifaceted approach to these interdictions. To do this, the U.S. has developed a comprehensive domestic criminal statute, known as the MDLEA/DTVIA, that allows the exercise of U.S. criminal jurisdiction over DTVs on the high seas. The enforcement of this criminal statute to DTVs and their crews on the high seas has expanded over time as the U.S. has sought to continually address new legal challenges in DTV interdictions domestically and internationally. The expansion of this statute has also taken place through its interpretation by U.S. criminal courts, especially the U.S. Circuit Courts of Appeals. These courts, mainly the Eleventh Circuit Court of Appeals, have expanded U.S. extraterritorial criminal jurisdiction over DTVs on the high seas in their interpretation of international and domestic law. Ultimately, this raises the question about what the U.S. practice is, especially at the domestic level, and where this practice is situated in international law?

The U.S. addresses the gaps in the international legal regime through domestic law. The thesis has maintained that States must establish their jurisdiction over DTVs on the high seas through domestic law, especially domestic law establishing jurisdiction over *vessels without nationality*. In this regard, the U.S. MDLEA/DTVIA define and establish U.S. domestic jurisdiction over DTVs on the high seas for U.S. vessels, non-U.S. flagged vessels, and *vessels without nationality*. However, this raises the question of exercising that jurisdiction against DTVs on the high seas, or in other words, the existence of extraterritorial enforcement jurisdiction.

Extraterritorial enforcement jurisdiction over DTVs on the high seas exists in the U.S. approach in two areas. The first area where extraterritorial enforcement jurisdiction is derived is the U.S. bilateral drug interdiction agreements. These agreements permit the exercise of U.S. domestic criminal jurisdiction over the other party's flagged vessel and crew on the high seas, subject to the individual conditions of the various agreements. This type of jurisdiction has been further expanded through U.S. case law. The majority of U.S. Circuit Courts of Appeals have reasoned that due to the significant threat drug trafficking poses to not only U.S. national security but to the international community, the *protective principle* of jurisdiction permits the exercise of U.S. criminal jurisdiction over another State's flagged vessel. This exercise of jurisdiction is permitted even in situations where the drugs are not destined for the U.S.[3] The second area where extraterritorial enforcement jurisdiction is derived is U.S. case law addressing DTVs *without nationality* on the high seas.

The U.S. Circuit Courts of Appeals agree that *vessels without nationality* are subject to the jurisdiction of whatever State encounters them on the high seas. According to the courts, the MDLEA/DTVIA establishes U.S. domestic jurisdiction over a *vessel without nationality* on the high seas. The courts have adopted this position, again, based on their interpretation of the MDLEA/DTVIA and where these statutes are situated in international law. From an international law perspective, the courts view the ILoS as a body of law existing between States. The protections created by the law are then provided for by States through the nationality of a vessel or in other words, the *flag*. As *vessels without nationality* lack this, they are afforded no protection from the ILoS in this regard. The courts have generally adopted the view that the *protective principle* justifies the exercise of U.S. domestic jurisdiction over DTVs *without nationality* on the high seas due to the threat they pose to U.S. national security and the freedom of navigation.

The other way the U.S. addresses the gaps in the international legal regime is through international cooperation. Although the U.S. bilateral interdiction agreements are a substantial element of this practice, they are only one aspect of how the U.S. uses international cooperation to interdict DTVs on the high seas. This includes substantial law enforcement and military intelligence networks, inter-agency domestic intelligence sharing, international intelligence sharing, advanced technological assets, and the deployment of U.S. Coast Guard law enforcement detachments on enforcement vessels from partner nations. From a practical

[3] The Ninth Circuit Court of Appeals requires that a jurisdictional nexus be demonstrated between the DTV and the U.S. However, the other U.S. Circuit Courts of Appeals, especially the Eleventh Circuit, have rejected this argument and no not require a jurisdictional nexus between the DTV and the U.S.

perspective, this means that the overwhelming majority of interdictions are not by chance; they are intelligence driven.

Ultimately, the combination of domestic statutes, case law, and cooperation means that the U.S. has addressed the gaps in the international legal regime from a practice-based perspective. Furthermore, as the thesis has maintained, it means that this approach is firmly situated within the existing confines of international law. This is demonstrated through the application of the *protective principle* of jurisdiction to DTVs interdicted by the U.S. on the high seas by U.S. Courts of Appeals and through international cooperation, primarily the U.S. bilateral interdiction agreements.

8.3 International Cooperation: Suppressing Drug Trafficking Vessels on the High Seas

One of the core themes of the thesis has been the focus on international cooperation and the suppression of DTVs on the high seas. How international cooperation is defined and used in the international legal regime applicable to DTV interdictions is broad and largely undefined. Yet, it is an obligation that appears in every multilateral, regional, and bilateral agreement applicable to drug trafficking on the high seas. Ultimately, the question is what forms of international cooperation have developed from these obligations?

International cooperation has developed into two types of obligations with respect to the suppression of DTVs on the high seas. The first are the general or framework obligations to cooperate created by the LOSC and the 1988 Vienna Convention. The second are the more specific obligations to cooperate and how to achieve these obligations in practice. In other words, these are the practical cooperative obligations, and this mainly concerns ship boarding authorisations. There are also forms of specific cooperation ranging from capacity building and development to the potential 'multilateralization' of the U.S. bilateral agreements.

Regarding the first types of cooperative obligations, these general obligations lay the necessary groundwork for cooperating to suppress DTVs on the high seas and are found in the LOSC. The LOSC in Article 108 does not detail what this obligation entails. However, the article does form the basis for how cooperation is addressed in subsequent agreements, specifically the 1988 Vienna Convention. Furthermore, the obligation to cooperate does little to provide non-Flag States with any jurisdiction to interdict a DTV on the high seas apart from aiding a flag state, but this can only be done when requested explicitly by the flag state.

In the 1988 Vienna Convention, the second type of cooperative obligations begin to manifest, and these are set out in Article 17. Article 17 provides two frameworks for cooperation. The first framework is a procedure for obtaining ship boarding authorisations from a flag state. The second is a framework for encouraging States Parties to enter into regional or bilateral agreements that enhance Article 17. The authorisation and ship boarding framework in Article 17 is a significant textual clarification from the LOSC from a cooperative perspective. The article provides a mechanism for requesting authorisations to board another party's vessel on the high seas suspected of being a DTV. However, from a practical perspective, as noted above, there are some limitations to this cooperative framework when non-flag States request authorisations. Thus, the actual avenue for cooperation in Article 17 of the 1988 Vienna Convention is through regional and bilateral agreements to enhance the overall provisions of the article.

From a cooperative point of view, regional and bilateral agreements are the embodiment of the obligation for how States cooperate in the suppression of DTVs on the high seas. They are also essential from a practical perspective since these agreements often provide greater detail on how States Parties should cooperate. Furthermore, these agreements are critical because they broadly address many of the practical gaps in the law already noted. The primary gaps the regional and bilateral agreements close are those concerning authorisations to board a flagged DTV on the high seas. However, the methods used for obtaining ship boarding authorisations in the regional and bilateral agreements are very different. This was evident in the two regional agreements interdiction agreements considered in the study, the 1995 CoE Agreement and the CRMA.

The regional agreements maintain the general obligation that the parties cooperate; however, as it concerns how the parties cooperate in providing authorisations for ship boarding, there are substantial differences. For example, the 1995 CoE Agreement does not deviate from the framework created in Article 17 of the 1988 Vienna Convention. However, the 1995 CoE Agreement does adopt an obligation that a party acknowledge and respond to authorisation requests. From a practical and cooperative perspective, this addresses the similar gaps concerning authorisations in the 1988 Vienna Convention. Likewise, the CRMA provides several methods for cooperation and ship boarding procedures addressing the gaps in the 1988 Vienna Convention.

The way the CRMA does this is it adopts several different methods for ship boarding authorisations including procedures like the 1988 Vienna Convention and the U.S. bilateral interdictions agreements. The primary ship boarding procedure still requires a non-flag state to request authorisation, and the request must be answered within four hours. However, the CRMA

also allows States parties to consider that the agreement serves as standing authorisation. Another option is authorisation is considered granted after the four-hour timeframe has passed. These forms of tacit authorisations are most common in the U.S. bilateral interdiction agreements.

The U.S. has been the principal driving force in international cooperation for the suppression of DTVs on the high seas, mainly through bilateral agreements and capacity building and technical cooperation.[4] The U.S. bilateral agreements, like the regional agreements, are cooperative methods developed to address the gaps in the international legal regime for suppressing drug trafficking at sea. These agreements do this primarily through their comprehensive ship boarding authorisation provisions. Practically, these agreements facilitate a substantial number of U.S.-led interdictions, mainly since most of them serve as standing or tacit authorisation for the U.S. Coast Guard to board the other party's vessels without the need to pre-obtain authorisation on an ad hoc basis.

The agreements also provide clauses for other forms of ship boarding authorisations, including inward-bound pursuits and entry to investigate a party's territorial sea. Furthermore, the bilateral agreements often permit the use of ship riders. Ship riders not only facilitate boarding authorisations, but in the case of U.S. ship riders embarked on a bilateral party's enforcement vessel, they allow for U.S. domestic criminal jurisdiction over DTVs interdicted on the high seas. However, the bilateral agreements are not only focused on cooperation in ship boarding authorisations; they focus on capacity building and development for the bilateral parties.

In this regard, the bilateral agreements are not only vital for the suppression of DTVs on the high seas, but they have also started to broaden from strictly drug interdictions to 'maritime security' agreements. The broader agreements have expanded how the U.S. cooperates with its bilateral partners to address IUU fishing, illegal migration, and the non-proliferation of WMDs at sea. The agreements also facilitate capacity building and development through training, asset sharing, judicial and prosecutorial development, information sharing, and technical assistance. In turn, bilateral parties are then able to conduct their own interdictions more effectively. The expansion of the drug interdiction bilateral agreements into maritime security agreements also indicates some of the similar issues that impact the legal regimes addressing different types of criminal conduct at sea. In other words, other maritime security concerns, including violence

[4] Transcript T-001 at 2; Transcript T-002 at 13-14; Transcript T-006 5-6.

and terrorism at sea, IUU Fishing, and the non-proliferation of WMDs, all have seen analogous practical complications, mostly surrounding ship boarding authorisations and procedures.

To this end, the thesis assessed other agreements and initiatives including the SUA Convention, the 2005 Protocol to the SUA Convention, the 1995 FSA, and the Proliferation Security Initiative. In terms of cooperation and ship boarding procedures, these different legal regimes use similar approaches to the legal regime for DTVs on the high seas. On the one hand, for example, the 2005 SUA Protocol adopts the procedures from the 1988 Vienna Convention. Still, due to U.S. influence on the 2005 Protocol, there are also boarding provisions similar to those in the CRMA. On the other hand, the 1995 FSA adopts cooperative measures using RFMOs and SRFMOs to permit members of those fisheries management organisations to board and inspect fishing vessels of other members.

Alternatively, the Proliferation Security Initiative is strictly voluntary, which means that any ship boarding is cooperative and requires authorisations from a flag state. In reviewing these different sectors of maritime security, the study has shown that the only way to address ship boarding is through cooperation. This is due to the primacy of exclusive flag state jurisdiction over vessels on the high seas. Thus, addressing these maritime security issues individually shows that similar gaps in the law can remain. The most feasible way to close the gaps is through cooperation, potentially through a multilateral maritime security agreement like those the U.S. uses on a bilateral level.

8.4 Future Developments and Further Research

Throughout this study, several topics fell outside the scope of this research, and so they were not considered in detail. These topics present the possibility for future developments and further research. The principal topic in this regard is the international human rights law dimensions for persons detained under the enforcement regimes considered in this study. This study focuses on a specific enforcement element, which is the enforcement against drug trafficking vessels, flagged or *without nationality*, on the high seas. Ultimately, the research has put forward several conclusions and arguments about how States may exercise their enforcement jurisdiction against drug trafficking *vessels* on the high seas. However, some lingering questions remain concerning the rights and protections of the *individuals* encountered or detained from those vessels during an interdiction.

The question of human rights and the detention of persons engaged in criminal conduct at sea remains relatively complex, primarily since the LOSC does not accord any rights to detainees in

this regard.[5] Furthermore, other intricacies can arise including applying human rights law to individuals interdicted on *vessels without nationality*, as these persons are generally subject to the sole jurisdiction of whatever State encounters them on the high seas. Additionally, given the often-fragmented approach to general issues of maritime security, the inclusion of obligations to protect human rights for States engaging in maritime law enforcement operations remains limited.[6] Therefore, further research is needed concerning the application of international human rights law to persons detained for criminal conduct at sea and how States may implement these legal obligations to any type of high seas interdictions.

Still, it is not only in the detention of individuals at sea where human rights remain a serious factor but also in the interdiction process when these individuals are apprehended. Practically, interdictions often involve the use of force, which ranges from using force to incapacitate a non-compliant vessel to using force in self-defence against a hostile crew during a ship boarding operation.[7] These uses of force scenarios create the possibility for further research regarding how force is used in high seas law enforcement interdictions generally. However, in considering these questions concerning high seas interdictions, such as the use of force, there are areas of future development regarding maritime security more generally that must be further researched.

The primary area of further research in this regard in what, if any possibility exists for addressing maritime security issues [e.g., piracy, drug trafficking, migration, human trafficking, WMD non-proliferation, or IUU Fishing etc] on a broad multilateral scale. In other words, a multilateral maritime security cooperative agreement addressing 'transnational crime at sea'. The possibility of a comprehensive maritime security agreement at the multilateral level offers the opportunity to explore how the fragmented approach to crime at sea could be better addressed, mainly through international cooperation. For example, many of the agreements analysed in this thesis include capacity building. When considering if a broad agreement for crime at sea is theoretically feasible, further research into capacity building and its impacts on how States have made use of capacity building to address maritime security concerns is an area of further research. Ultimately, the conclusion of a multilateral maritime security agreement could indeed be necessary to address the ever-evolving nature of transnational crime at sea.

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[5] Douglas Guilfoyle, 'The High Seas,' in Donald Rothwell and others, *The Oxford Handbook of The Law of The Sea* (Oxford University Press 2017) 224-225.
[6] Haines (n 2) 8.
[7] For example, the *Case of Medvedyev and Others v. France* (Application no. 3394/03) Judgment Strasbourg 29 March 2010. See Craig H. Allen, *International Law for Seagoing Officers*, (United States Naval Institute Press, 6th Edition, Annapolis, Maryland 2014) 267.

Appendix

Interview Questions

1. Can you explain your agency's procedure when conducting an interdiction of a drug trafficking vessel?

2. What happens during the interdiction if evidence of illicit drug trafficking is found?

3. Has your agency encountered legal obstacles during at sea drug interdictions? Could you give some examples?

4. Are there any practical difficulties your agency encounters at sea drug interdictions such as uses of force?

5. Does your State have any relevant domestic law to prosecute drug traffickers interdicted in areas outside your national jurisdiction?

6. Can you detail how your agency engages in international cooperation as part of Article 108(1) LOSC and Article 17(1) 1988 Vienna Convention?

7. Are there any obstacles to cooperation, and is cooperation effective in conducting interdictions?

8. Does your agency engage in any capacity building or technical training with other states that also conduct drug trafficking interdictions?

9. Do you see drug trafficking at sea being addressed broadly in the context of maritime security generally or as something that needs to be addressed through specific measures?

10. Do you have any other points to raise or discuss?

Interview Questions [International Organizations]

1. What role does your agency play in addressing drug trafficking at sea?

2. Can you detail some of the difficulties in trying to address the problem of drug trafficking at sea from within an international organization?

3. Can drug trafficking at sea be addressed similarly to the way piracy is through the Security Council?

4. Can you detail how your agency engages in international cooperation as part of Article 108(1) LOSC and Article 17(1) 1988 Vienna Convention?

5. Are there any obstacles to cooperation, and is cooperation effective in conducting interdictions?

6. Does your agency engage in any capacity building or technical training with states that are conducting drug trafficking interdictions?

7. My research evaluates possible solutions to address some of the legal issues identified in the study. One possible solution is the use of guidelines or arrangements similar to those in the Proliferation Security Initiative [PSI]. Are these arrangements necessary, or is the system alright as it is?

8. Do you see drug trafficking being addressed broadly in the context of maritime security generally or as something to be explicitly addressed?

9. Do you have any other points to raise for further consideration?

Supplemental Research Interview Data and Conclusions

Some of the key findings that were concluded from these interviews are as follows:

1. International cooperation is critical for DTV interdictions on the high seas.
    - International cooperation is necessary for obtaining flag state authorisations; however, it is recognized that very often this is not possible because flag states lack capacity to provide authorisations.
    - The case of *Medvedyv v. France* is shows that even with authorisations, interdictions can still have practical legal issues even when the flag state consents to the boarding.
    - US bilateral agreements are fundamental in the success the US has had in overcoming the authorisation process set out in Article 17 of the 1988 Vienna Convention.

2. There are substantial issues with flags, flag states, and how the overall process of flag state jurisdiction is exercised on the high seas.
    - The use of flags of convenience remains a very serious problem for high seas law enforcement against flagged vessels.
    - There is a lack of oversight in how flags are issued to vessels and how those vessels are subsequently policed on the high seas.
    - Authorisations from flag states are very difficult to obtain in many cases and can take days before a response is given, if at all.

3. Vessels without nationality or stateless vessels remain a critical threat to the safety of maritime navigation.

4. States must adopt more effective domestic legislation to address drug trafficking at sea.
    - Many states are aware of the US MDLEA/DTVIA.
    - States are starting to look to include specific legislation to address jurisdiction over vessels without nationality.

5. The US remains the primary actor for DTV interdictions.
    - The US conducts more interdictions than any other state.
    - The use of bilateral agreements is what drives this practice.
    - The US exercise of domestic criminal jurisdiction over vessels without nationality is another driving factor in the US approach.

46 U.S. Code CHAPTER 705— MARITIME DRUG LAW ENFORCEMENT

46 U.S. Code § 70501 - Findings and declarations

Congress finds and declares that (1) trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States and (2) operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.

(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub. L. 110–407, title II, § 201, Oct. 13, 2008, 122 Stat. 4299.)

46 U.S. Code § 70502 – Definitions

(a) Application of Other Definitions. —
The definitions in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to this chapter.

(b) Vessel of the United States. — In this chapter, the term "vessel of the United States" means —

(1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless—
(A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

(c) Vessel Subject to the Jurisdiction of the United States. —

(1) In general. — In this chapter, the term "vessel subject to the jurisdiction of the United States" includes —
(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2. 1999 (43 U.S.C. 1331 note), that —

(i) is entering the United States;
(ii) has departed the United States; or
(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(2) Consent or waiver of objection. — Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E)—

(A) may be obtained by radio, telephone, or similar oral or electronic means; and
(B) is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(d) Vessel Without Nationality. —
(1) In general.—In this chapter, the term "vessel without nationality" includes—

(A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

(2) Response to claim of registry. —
The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) Claim of Nationality or Registry. — A claim of nationality or registry under this section includes only—

(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;

(2) flying its nation's ensign or flag; or

(3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

(f) Semi-submersible Vessel; Submersible Vessel. — In this chapter:

(1) Semi-submersible vessel. —

The term "semi-submersible vessel" means any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft.

(2) Submersible vessel. —
The term "submersible vessel" means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.

(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub. L. 109–241, title III, § 303, July 11, 2006, 120 Stat. 527; Pub. L. 110–181, div. C, title XXXV, § 3525(a)(6), (b), Jan. 28, 2008, 122 Stat. 601; Pub. L. 110–407, title II, § 203, Oct. 13, 2008, 122 Stat. 4300.)

46 U.S. Code § 70503 - Prohibited acts

(a) Prohibitions. — While on board a covered vessel, an individual may not knowingly or intentionally —
(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

(2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or

(3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

(b) Extension Beyond Territorial Jurisdiction. —
Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

(c) Nonapplication. —
(1) In general.—Subject to paragraph (2), subsection (a) does not apply to—

(A) a common or contract carrier or an employee of the carrier who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business; or

(B) a public vessel of the United States or an individual on board the vessel who possesses or distributes a controlled substance in the lawful course of the individual's duties.

(2) Entered in manifest. —
Paragraph (1) applies only if the controlled substance is part of the cargo entered in the vessel's manifest and is intended to be imported lawfully into the country of destination for scientific, medical, or other lawful purposes.

(d) Burden of Proof. —
The United States Government is not required to negative a defense provided by subsection (c) in a complaint, information, indictment, or other pleading or in a trial or other proceeding. The burden of going forward with the evidence supporting the defense is on the person claiming its benefit.

(e) Covered Vessel Defined. — In this section the term "covered vessel" means—

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1687; Pub. L. 114–120, title III, § 314(a), (b), (e)(1), Feb. 8, 2016, 130 Stat. 59.)

46 U.S. Code § 70504 - Jurisdiction and venue

(a) Jurisdiction. —
Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

(b) Venue. — A person violating section 70503 or 70508—
(1) shall be tried in the district in which such offense was committed; or

(2) if the offense was begun or committed upon the high seas, or elsewhere outside the jurisdiction of any particular State or district, may be tried in any district.

(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub. L. 110–407, title II, § 202(b)(2), Oct. 13, 2008, 122 Stat. 4300; Pub. L. 115–91, div. A, title X, § 1012(a), Dec. 12, 2017, 131 Stat. 1546.)

46 U.S. Code § 70505 - Failure to comply with international law as a defense

A person charged with violating section 70503 of this title, or against whom a civil enforcement proceeding is brought under section 70508, does not have standing to raise a claim of failure to comply with international law as a basis for a defense. A claim of failure to comply with international law in the enforcement of this chapter may be made only by a foreign nation. A failure to comply with international law does not divest a court of jurisdiction and is not a defense to a proceeding under this chapter.

(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub. L. 110–407, title II, § 202(b)(3), Oct. 13, 2008, 122 Stat. 4300.)

46 U.S. Code § 70506 – Penalties

(a) Violations. —
A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960). However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).

(b) Attempts and Conspiracies. —
A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

(c) Simple Possession. —

(1) In general. —
Any individual on a vessel subject to the jurisdiction of the United States who is found by the Secretary, after notice and an opportunity for a hearing, to have knowingly or intentionally possessed a controlled substance within the meaning of the Controlled Substances Act (21 U.S.C. 812) shall be liable to the United States for a civil penalty of not to exceed $5,000 for each violation. The Secretary shall notify the individual in writing of the amount of the civil penalty.

(2) Determination of amount. —
In determining the amount of the penalty, the Secretary shall consider the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters that justice requires.

(3) Treatment of civil penalty assessment. —
Assessment of a civil penalty under this subsection shall not be considered a conviction for purposes of State or Federal law but may be considered proof of possession if such a determination is relevant.

(d) Penalty. —
A person violating paragraph (2) or (3) of section 70503(a) shall be fined in accordance with section 3571 of title 18, imprisoned not more than 15 years, or both.
(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub. L. 111–281, title III, § 302, Oct. 15, 2010, 124 Stat. 2923; Pub. L. 114–120, title III, § 314(c), Feb. 8, 2016, 130 Stat. 59.)

46 U.S. Code § 70507 – Forfeitures

(a) In General. —
Property described in section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)) that is used or intended for use to commit, or to facilitate the commission of, an offense under section 70503 or 70508 of this title may be seized and forfeited in the same manner that similar property may be seized and forfeited under section 511 of that Act (21 U.S.C. 881).

(b) Prima Facie Evidence of Violation. —
Practices commonly recognized as smuggling tactics may provide prima facie evidence of intent to use a vessel to commit, or to facilitate the commission of, an offense under section 70503 of this title, and may support seizure and forfeiture of the vessel, even in the absence of controlled substances aboard the vessel. The following indicia, among others, may be considered, in the totality of the circumstances, to be prima facie evidence that a vessel is intended to be used to commit, or to facilitate the commission of, such an offense:

(1) The construction or adaptation of the vessel in a manner that facilitates smuggling, including—

(A) the configuration of the vessel to ride low in the water or present a low hull profile to avoid being detected visually or by radar;

(B) the presence of any compartment or equipment that is built or fitted out for smuggling, not including items such as a safe or lock-box reasonably used for the storage of personal valuables;

(C) the presence of an auxiliary tank not installed in accordance with applicable law or installed in such a manner as to enhance the vessel's smuggling capability;

(D) the presence of engines that are excessively over-powered in relation to the design and size of the vessel;

(E) the presence of materials used to reduce or alter the heat or radar signature of the vessel and avoid detection;

(F) the presence of a camouflaging paint scheme, or of materials used to camouflage the vessel, to avoid detection; or

(G) the display of false vessel registration numbers, false indicia of vessel nationality, false vessel name, or false vessel homeport.

(2) The presence or absence of equipment, personnel, or cargo inconsistent with the type or declared purpose of the vessel.

(3) The presence of excessive fuel, lube oil, food, water, or spare parts, inconsistent with legitimate vessel operation, inconsistent with the construction or equipment of the vessel, or inconsistent with the character of the vessel's stated purpose.

(4) The operation of the vessel without lights during times lights are required to be displayed under applicable law or regulation and in a manner of navigation consistent with smuggling tactics used to avoid detection by law enforcement authorities.

(5) The failure of the vessel to stop or respond or heave to when hailed by government authority, especially where the vessel conducts evasive maneuvering when hailed.
(6) The declaration to government authority of apparently false information about the vessel, crew, or voyage or the failure to identify the vessel by name or country of registration when requested to do so by government authority.

(7) The presence of controlled substance residue on the vessel, on an item aboard the vessel, or on an individual aboard the vessel, of a quantity or other nature that reasonably indicates manufacturing or distribution activity.

(8) The use of petroleum products or other substances on the vessel to foil the detection of controlled substance residue.

(9) The presence of a controlled substance in the water in the vicinity of the vessel, where given the currents, weather conditions, and course and speed of the vessel, the quantity or other nature is such that it reasonably indicates manufacturing or distribution activity.

(Pub. L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub. L. 114–120, title III, § 314(d), Feb. 8, 2016, 130 Stat. 59.)

46 U.S. Code § 70508. Operation of submersible vessel or semi-submersible vessel without nationality

(a) In General.—
An individual may not operate by any means or embark in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into,

through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection.

(b) Evidence of Intent To Evade Detection.—
In any civil enforcement proceeding for a violation of subsection (a), the presence of any of the indicia described in paragraph (1)(A), (E), (F), or (G), or in paragraph (4), (5), or (6), of section 70507(b) may be considered, in the totality of the circumstances, to be prima facie evidence of intent to evade detection.

(c) Defenses.—

(1) In general. —
It is a defense in any civil enforcement proceeding for a violation of subsection (a) that the submersible vessel or semi-submersible vessel involved was, at the time of the violation —

(A) a vessel of the United States or lawfully registered in a foreign nation as claimed by the master or individual in charge of the vessel when requested to make a claim by an officer of the United States authorized to enforce applicable provisions of United States law;

(B) classed by and designed in accordance with the rules of a classification society;

(C) lawfully operated in government-regulated or licensed activity, including commerce, research, or exploration; or

(D) equipped with and using an operable automatic identification system, vessel monitoring system, or long range identification and tracking system.

(2) Production of documents. — The defenses provided by this subsection are proved conclusively by the production of—

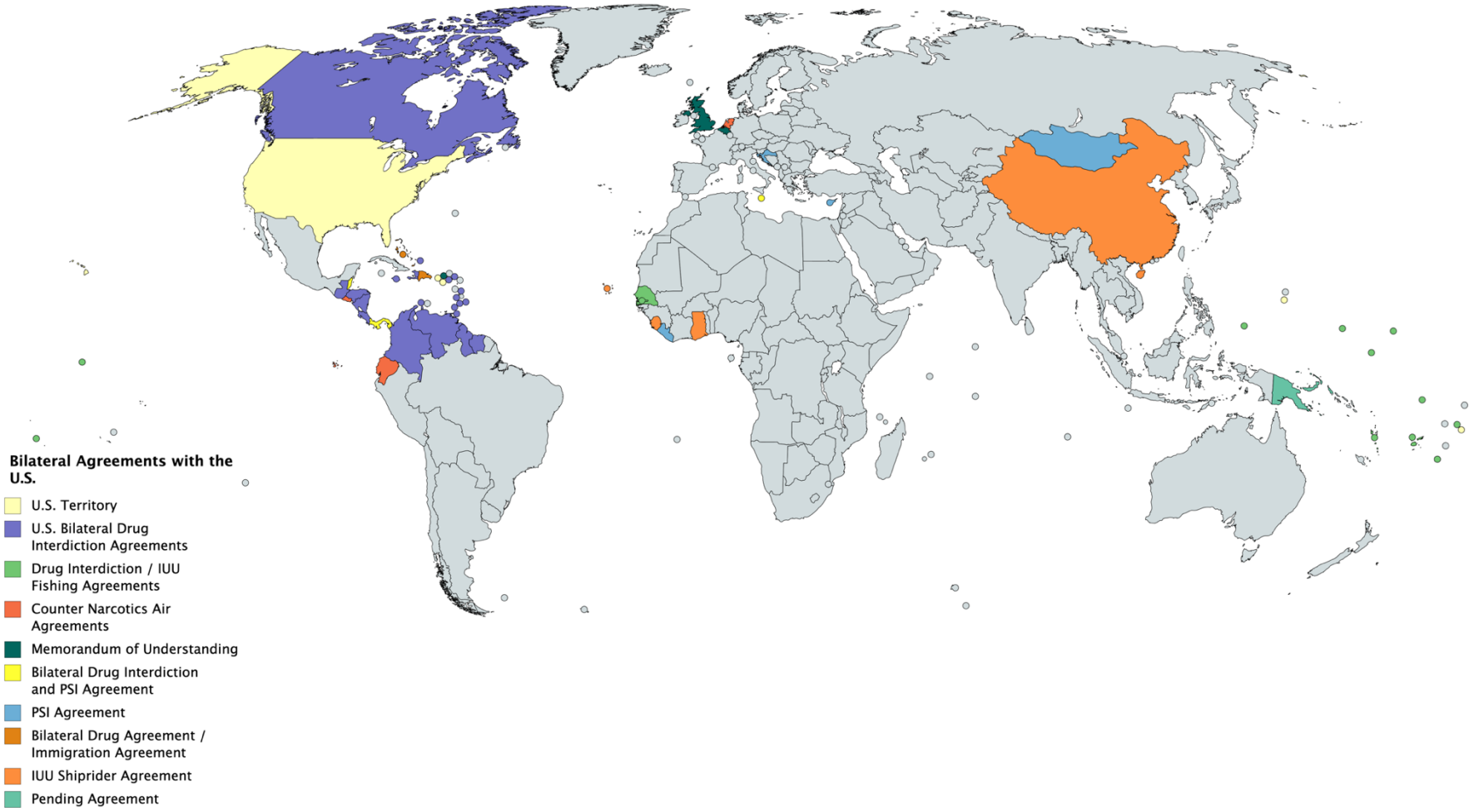
(A) government documents evidencing the vessel's nationality at the time of the offense, as provided in article 5 of the 1958 Convention on the High Seas;
(B) a certificate of classification issued by the vessel's classification society upon completion of relevant classification surveys and valid at the time of the offense; or

(C) government documents evidencing licensure, regulation, or registration for research or exploration.

(d) Civil Penalty. —
A person violating this section shall be liable to the United States for a civil penalty of not more than $1,000,000.

(Added Pub. L. 110–407, title II, § 202(a), Oct. 13, 2008, 122 Stat. 4299.)

Global Map of U.S. Bilateral Agreements



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