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Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?

Barry Hart Dubner
Barry University

Mary Carmen Arias
Barry University

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Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?

BARRY HART DUBNER* &
MARY CARMEN ARIAS**

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* Barry Hart Dubner, Professor of Law, Barry University, Dwayne O. Andreas School of Law, Orlando, Florida; J.D., New York Law School; LL.M., University of Miami, School of Law; LL.M., New York University School of Law; J.S.D., New York University School of Law.

** Mary Carmen Arias, J.D. Candidate 2017, Barry University, Dwayne O. Andreas School of Law; B.S. Business Administration, University of South Florida, 2011.

**BY THE RUDE BRIDGE THAT ARCHED THE FLOOD,
THEIR FLAG TO APRIL'S BREEZE UNFURLED,
HERE ONCE THE EMBATTLED FARMERS STOOD,
AND FIRED THE SHOT HEARD ROUND THE WORLD.¹**

I. INTRODUCTION

Until I read an article in the *New York Times* dated October 28, 2015, I always thought that a ship had to fly a flag on the high seas in order to avoid being a stateless vessel. I never gave it any thought because I figured it was simply a given in international law. However, I was mistaken, and my interest was peaked in this topic of whether a ship has to fly a flag at sea. The *New York Times* article discussed a drug smuggling case that arose approximately 280 miles from the coasts of Ecuador and Costa Rica.² The article included video footage of the interdiction that was submitted to the court that showed that the small “go-fast” boat contained 680 kilograms of cocaine and “lacked any prominent identifying features;” however, there was “a small emblem of what appear[ed] to be an Ecuadorian flag [that] had been affixed to the boat’s rear starboard side.”³

The United States claimed, “it was not ‘flying its nation’s ensign or flag,’ and was therefore ‘stateless’ under the law.”⁴ The question raised in the *New York Times* article was “[w]hat does it mean to ‘fly’ a flag?”⁵ Both the prosecution and defense lawyers made references to various dictionaries

1. See *Texas v. Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting) (citing RALPH WALDO EMERSON, *Hymn: Sung at the Completion of the Concord Monument*, in COLLECTED POEMS AND TRANSLATIONS 125 (1994)) (This well-known phrase originated in the opening stanza to Ralph Waldo Emerson’s Concord Hymn in honor of the Battle of Concord (first battle of the American Revolution)).

2. Benjamin Weiser, *Fast Boat, Tiny Flag: Government’s High-Flying Rationale for a Drug Seizure*, N.Y. TIMES, Oct. 28, 2015, http://www.nytimes.com/2015/10/29/nyregion/fast-boat-tiny-flag-governments-high-flying-rationale-for-a-drug-seizure.html?_r=0; *United States v. Prado*, 143 F. Supp. 3d 94,96 (S.D.N.Y. 2015).

3. *Prado*, 143 F. Supp. 3d at 96; Weiser *supra* note 2 (article contains video footage showing the Coast Guard approaching and boarding the “go-fast”).

4. Weiser, *supra* note 2.

5. *Id.*

to identify the meaning of flying a flag.⁶ Comparisons were drawn as to the nature of a pirate's garb, and to the grand old flag from Cohan's patriotic march: namely, "[y]ou're a grand old flag, you're a high-flying flag. And forever in peace may you wave."⁷ The Coast Guard sank the vessel and brought the men on board to Manhattan, New York, to face charges after determining the vessel could be hazardous.⁸

The argument was made that unless a vessel has a "flag flapping in the wind," it is stateless, which the defense compared it to an attorney defending against piracy charges by asserting her client is not a pirate because he does not have an eye patch and a peg leg.⁹ Judge Jed Rakoff, sitting in the U.S. District Court for the Southern District of New York was not convinced that the small decal, that was barely visible on the boat, could be considered flying the Ecuadorian flag.¹⁰

The argument was made that although the flag was small in size,¹¹ "[w]ould a larger flag, say 2 feet by 2 feet, painted in three places on a boat, qualify under the law. . . ?"¹² The prosecution stated that such would not be considered flying a flag under the drug statute cited in the case.¹³ The judge determined the boat was not "flying a flag within the meaning of the law" because the flag displayed on the back of the boat was not large or prominent enough to establish that Ecuador's interest would be affected if the boat was interdicted.¹⁴

6. *Id.* ("To move around in the air while being held at one end," the prosecutors wrote, "citing Cambridge Dictionaries Online. 'To float, wave, or soar in the air,' they added, drawing from Webster's Ninth New Collegiate Dictionary."). *Id.*

7. *Id.* (citation omitted).

8. *Id.* (Defense argued "that a videotape made as the Coast Guard boarded the go-fast shows a small Ecuadorean flag — applied as a decal or painted — on the side of the hull." *Id.* They argued that therefore, "[t]he boat was . . . not stateless and should not have been stopped . . .") *Id.*

9. *Id.*

10. Weiser, *supra* note 2, at 2.

11. *See Id.* (Defense acknowledged that the flag was small in size, but stated "... it's certainly not the largest flag you'll ever see, but the boat itself was small and thus should still be considered as having been flying a flag. . . .").

12. *Id.*

13. *Id.*

14. *Id.*

While the defendants argued that the flag painted decal on the side of the “go-fast”¹⁵ vessel was sufficient to “identify” it under international law, the District Court said that it was not.¹⁶ The defense insisted that it need not fly a flag under the criminal drug statute that the defendants were charged with.¹⁷

Having taught international law of the sea for 38 years, I was surprised at the defendants’ argument and wondered where precedent has stated that a ship had to fly a (cloth) flag under either conventional and/ or customary international or maritime law. I asked around, made queries to the Naval War College, and spoke with Navy personnel, however, no one could come up with an answer as to the origin of such a requirement or if such a requirement even existed. Therefore, I decided to do research, and although the answer is not apparent from either customary or conventional international law, the answer appears to contain various layers of logical suppositions (e.g. if it is without a flag, then X, Y, and Z must occur, otherwise it could be stopped at sea, etc.).

The methodology of this article is to: (1) discuss the history of a flag by looking at what the flag represents in both international and other law; (2) look into the origin of when and where this custom of flying a flag originated; and (3) delve into the uses of a flag.

The best way to approach the topic is to look at what would happen if a vessel did not fly a flag, rather than if it did fly a flag. Flying a flag has always been synonymous with identification of the nationality of the ship. Most of the law regarding this comes from “drug” cases, thus it would be necessary to look at those cases and their relationship to what is called a “stateless” vessel under international law.¹⁸ The 1958 Geneva Convention on the High Seas¹⁹ had a few articles on the subject matter of flying a flag

15. A “go-fast” boat is a small, fast boat designed with a long narrow platform and a planning hull to enable it to reach high speeds.

16. Weiser, *supra* note 2.

17. *Id.* A version of this article appears in print on October 29, 2015, on page A25 of the New York edition with the headline: Fast Boat, Tiny Flag: Government’s High-Flying Rationale for a Drug Seizure.

18. See *infra* Part III.

19. Convention on the High Seas, 1958-1962, 13 U.S.T. 2315.

For example: *Article 5 states:*

1. 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

and the identification of ships, which were carried over to the 1982 United Nations Convention on the Law of the Sea.²⁰ The biggest problems that will

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.

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 6 states:

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 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.

Article 22 states:

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

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

20. United Nations Convention on the Law of the Sea, 1833 UNTS 397 1994. [hereinafter UNCLOS]

available at http://www.un.org/Depts/los/convention-agreements/texts/unclos/unclos_e.pdf. "UNCLOS lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. It enshrines the notion that all problems of ocean space are closely related and need to be addressed as a whole. 'The Convention entered into force in accordance with its article 308 on 16 November, 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession.'" Barry Hart Dubner, Recent Developments in the International Law of the Sea, 36 INT'LL. 721,724 (2002) (citing United Nations, United Nations Convention on the Law of the Sea of 10 December 1982 Overview, available at <http://www.un.org/Depts/los/convention-agreements/conventionoverview-convention.htm> (last visited Jan. 4, 2006)). "The Convention comprises 320 articles and nine annexes, governing all aspects of ocean space, such as delimitation, environmental control, marine

be discussed relate to “stateless” vessels, their crews, and their relationship to drug cases. Finally, this article will analyze the use of GPS and other identifying equipment; and, of the requirements for carrying said equipment on vessels at sea as a means of identification in the Twenty-First century.

II. ON THE HISTORIC USE OF FLAGS AT SEA

In order to decide whether there is some rule in international law (via customary, or conventional, or otherwise), it is necessary to see if there was any historic reason to fly a flag and if this approach regarding prior uses of the flag gives an indication of whether it is a requirement at sea or not.

According to the Oxford Encyclopedia of Maritime History, the use of flags at sea goes back to time immemorial and it is “. . . intertwined with the history of empires, seaborne trade, and naval warfare.”²¹ Flags have been used and are still used to demonstrate authority and for purposes of communication.”²² Things have not changed very much in the twenty and twenty-first centuries, as flags continue to be displayed to represent a nation’s sovereignty and warships continue to use flags to issue tactical orders.²³

Historically, flags were used to impart information at sea. Today, “flags continue to be an important communication device” and serve as a “symbol of national identity, and indicator of personal authority.”²⁴ Early records show that the book of Ezekiel mentions the use of nautical banners aboard ships.²⁵ An “ancient coinage from the pre-Christian era clearly depicts flags displayed from ships’ masts.”²⁶ Flags were also used to provide instructions and as a symbol of subordination to both the state and prominent individuals.²⁷

scientific research, economic and commercial activities, transfer of technology and the settlements of disputes relating to ocean matters.” *Id.*

21. John B. Hattendorf, Editor in Chief, THE OXFORD ENCYCLOPEDIA OF MARITIME HISTORY. Oxford University Press, 45 (vol. 2 2007), 2:45.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See Id.*

26. *Id.*

27. Hattendorf, *supra* note 21, at 6.

It is important to note that in 480 Before the Common Era (B.C.E.), the Athenian Themistocles were able to achieve strategic advantage over the Persians by using naval signals.²⁸

Further, Thucydides describes the use of flags during the Peloponnesian War to help prepare for battle.²⁹ When the Peloponnesian War began, “the Athenians had established at least rudimentary procedures for signaling maneuvering instructions to triremes working to common tactical purpose.”³⁰ During the fifth century B.C.E., flags were used “to identify command (or a flagship, in modern parlance), display ship’s allegiance, and for signaling.”³¹

The historian also explains that ships using flags became regular practice.³² However, nowhere is it said that flags were required or that nations used them in ways that have been aforementioned.³³ According to the author, despite the lack of applicable standards or customs, flags simply became the norm.³⁴ Further, the historian mentions that Heraldic flags migrated to ships from ashore, but it was not until late medieval times that some norms of standardization emerged.³⁵

The author points out that this “was not restricted to the Western World;” rather, “Chinese illustrations dating from the twelfth century depict the use of flags in junks.”³⁶ Further, in the early fifteenth century, the Chinese had seagoing expeditions, where flags were often used for identification purposes and to show rankings.³⁷ The Chinese also made use of flags as badges of identification and rank from the seventeenth century onward.³⁸

28. *Id.*

29. Hattendorf, *supra* note 21, at 46.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Hattendorf, *supra* note 21, at 46.

36. *Id.*

37. *Id.*

38. *Id.* (The author points out “that as trade and ocean commerce expanded, the employment of flags at sea became more widespread. As nations began to contest one another on the high seas, the need to clearly distinguish nationality and to communicate more extensively became more accurate. The author further states that basic signals had been previously used to summon subordinates to a flag ship or alert other ships to the presence of an enemy but more was needed.”).

During the Anglo-Dutch War (1652-1654), as a result of "complex naval formations and more sophisticated tactics," there was a need for signaling procedures that were simple and not complicated to use.³⁹ In February 1653, following the Channel fight with the Dutch, the English formalized fleet fighting instructions before anyone else.⁴⁰ Eventually, "signaling procedures were refined, and by the end of the third Anglo-Dutch War in the early 1670s, the use of fighting instructions and signaling had become well established in English and Dutch warships."⁴¹ The French also used and adopted the practice, made improvements, and "became proficient in tactical signaling with flags."⁴²

The author points out that in establishing its meaning, where the flag was displayed on the ship was of equal importance as the shape and color.⁴³ Moreover, "[t]he same flag displayed from one mast could mean one thing; displayed from another mast, it meant something else. . . ."⁴⁴ In the mid-eighteenth century a system of numerical signal flags was created, which provided that each flag had a different meaning.⁴⁵ It was not until 1803 that a change occurred in naval signaling, "when Sir Home Popham's *Telegraphic Signals or Marine Vocabulary* introduced a flexible method that could communicate a range of ideas beyond standardized phrases and orders."⁴⁶

During the same period, the British Royal Navy and other navies developed a standard as to where naval flags should be placed.⁴⁷ It is said that such action "facilitated the ability of officers to ascertain quickly the location of the flagship and determine the squadron affiliation of any ship in company."⁴⁸ This was important because large naval formations in the seventeenth century could easily become disoriented when in battle or as result of bad weather.⁴⁹ Thus, the ability "to quickly re-form the fleet and

39. *Id.*

40. *Id.*

41. Hattendorf, *supra* note 21, at 46.

42. *Id.*

43. *Id.* at 46-47.

44. Hattendorf, *supra* note 20, at 47.

45. *Id.* at 47.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

have ships regain their assigned stations without benefit of signal was a significant tactical advantage.”⁵⁰ Flag customs at sea were not established until mid-eighteenth century and had very little changes through the twenty-first century.⁵¹

It was also pointed out by Cecil Torr, that the ships of a fleet carried a flag to differentiate themselves among the enemy and to help with signaling.⁵² For example, “[a] purple flag was generally the signal for going into action”⁵³ Although there were flags with different colors, there were attempts “at semaphoring⁵⁴ with a single flag [footnote omitted], and occasionally the signal was given by flashing the sunlight from a shield.”⁵⁵ The author mentions that around 500 B.C., flags were placed at the back of Athenians ships and around 50 A.D., they were placed on the masts of the Roman ships.⁵⁶

In summary, with regards to the ancient medieval and modern history on the requirement of using flags, there is nothing to indicate in the research that flags were actually required, although they were necessary for certain signaling and other reasons as indicated above. However, a flag on a vessel represents the sovereignty of the nation and so the vessel itself is deemed, in a metaphorical way, as the territory of the sovereign. Of course, this metaphorical legal fiction falls apart if there is mutiny on board the ship, and the flag is lowered. For example, if a Jolly Roger type of flag is put up.⁵⁷

There does not seem to be any custom requiring a flag on board a ship. There are two main Conventions involving the use of flags. The 1958 Convention on the High Seas,⁵⁸ which we will refer to later, and more recently, the 1982 United Nations Convention on the Law of the Sea,

50. Casey, *supra* note 2, at 47. (“Flags were so important because any ship could join her appropriate squadron within the assembled fleet by simply observing the color and position of naval ensigns and command flags”).

51. *Id.*

52. Cecil Torr, *Ancient Ships* 100 (Anthony J. Podlecki eds., Argonaut, Inc., Publishers Chicago 1964) (1895).

53. *Id.*

54. *Id.* Semaphore is defined as a visual signaling apparatus with flags, lights, or mechanically moving arms, as one used on a railroad.

55. *Id.*

56. *Id.*

57. Hattendorf, *supra* note 21, at 47.

58. 1958 Geneva Convention, *supra* note 19.

(UNCLOS).⁵⁹ Articles 91 and 92, UNCLOS, go into more detail about the relationship between the state of flags and ship.

Article 91 Nationality of Ships 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.⁶⁰

Article 92 Status of ships states:

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.* 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.⁶¹

The reader will observe that under Article 91 of UNCLOS, every state shall fix the conditions for the grant of its nationality to ships and its registration of ships, as well as the right to fly its flag.⁶² Article 91 also states that ships have the nationality of the flag whose State they are entitled to fly.⁶³ The problem with this language is that we have many States that issue so-called "flags of convenience" so that fishing vessels and other types of ships can avoid certain stringent laws (e.g., labor, health, etc.) by registering their ships with a certain country (e.g., Panama, Albania, etc.).⁶⁴ There is nothing at all in Article 91 stating that a ship has to fly a flag.⁶⁵ Rather, it

59. UNCLOS, *supra* note 20, art. 91-92.

60. UNCLOS, *supra* note 20, art. 91 (emphasis added).

61. UNCLOS, *supra* note 20, art. 92 (emphasis added).

62. UNCLOS, *supra* note 20, at art. 91.

63. *Id.*

64. See Hattendorf, *supra* note 21, at 49.

65. See UNCLOS, *supra* note 20, at art. 91.

says that the States shall fix a condition for the grant of its nationality to fly a flag.⁶⁶ Article 92 of UNCLOS regarding the status of ships, states the normal rule that a ship can sail the flag of one State only, but it does not say that it has to use a flag at all.⁶⁷ A ship is prohibited to sail on the flags of two or more states and, as Article 92 states, the ship may not claim any of the nationalities in question with respect to any other State and, therefore, may be assimilated to a ship without nationality.⁶⁸ For example, “[o]ne immediate result of the [American] flag’s adoption was that American vessels harassing British shipping sailed under an authorized national flag.”⁶⁹ If the ship did not have a flag, the British captured the seamen and hung them because they were treated as pirates, instead of prisoners of war.⁷⁰ The thrust of the problem regarding a ship “without nationality” is that it is “stateless.”

In the dissenting opinion of *Texas v. Johnson*, Justice Rehnquist pointed out that one of the advantages of flying a flag was for diplomatic protection.⁷¹ Therefore, it could be said, that a flag flying on a ship gives the ship the nationality of the country with whom the flag is registered. However, there are many problems with regards to ascertaining if a flag is required to be flown on a vessel. In order to demonstrate that a flag is a necessity, but not a requirement, the authors of this article will now turn their attention to the stateless vessel and certain drug cases that have had a big impact in this area of jurisprudence.

III. DEFINITION OF A STATELESS VESSEL AND ITS INTERPLAY WITH U.S. DRUG CASES

It is interesting to observe, as an introduction to the subject of stateless vessels and their relationship to U.S. drug enforcement laws, that drug-running is not considered in the same way piracy and slavery are.⁷² For example, under Article 110, UNCLOS, (which the United States has never ratified), a warship may only stop a merchant vessel if there is reasonable ground to believe that the ship is (a) engaged in piracy; (b) that the ship is

66. *Id.*

67. See UNCLOS, *supra* note 20, at art. 92.

68. See UNCLOS, *supra* note 20, at art. 91.

69. See *Johnson*, *supra* note 1, at 422.

70. *Id.*

71. *Id.*

72. See UNCLOS, *supra* note 20, art. 110.

engaged in the slave trade; or (c) that flying a foreign flag or refusing to show its flag the ship is, in reality, of the same nationality as the warship.⁷³

Only in those aforementioned cases may the warship proceed to verify the ship's right to fly its flag. Under Article 110(2), UNCLOS, the warship can send a boat under the command of an officer to the suspected ship, seek documents and check them out. The warship can also further examine what is going on board of the ship.⁷⁴

The reader will observe that drugs are not listed as a reason to stop a ship, primarily because they have never been considered a basis for jurisdiction over a vessel.⁷⁵ One instance that will give a warship "reasonable ground" to stop a ship it suspects of carrying slaves or of being a pirate ship, is that the ship is flagless.⁷⁶

73. *Id.*

Article 110 of the UNCLOS states that:

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 in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction 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.

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

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

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

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

74. *Id.*

75. *Id.*

76. *Id.*

Under international law, stateless vessels can be subject to stop and inspection if there is suspicion of illegal activity.⁷⁷ This is important to note because if the vessel is stateless, the country stopping the vessel can assert jurisdiction over the ship and persons aboard, without having to show a nexus or connection.⁷⁸ Stateless vessels have always been considered “‘international pariahs’ and have no rights to navigate freely on the high seas, . . . which means they may be subjected to the jurisdiction of any state.”⁷⁹ That is, a vessel can be stopped, either for not identifying itself properly by flying a flag or possibly having a large enough emblem of a flag on the side of the ship, as occurred in *United States v. Prado*.⁸⁰

In *United States v. Rosero*, the court analyzed that the term “stateless vessel” meant that ships only have the nationality of the State whose flag they are entitled to fly under international law.⁸¹ As opined by the *Rosero* court, a vessel is without nationality if it is not authorized to fly the flag of any State.⁸² The situation can arise, for example, “if no State has ever authorized a particular ship to fly its flag, if a State has canceled its authorization, or if the political entity that authorized a ship to fly its flag is not recognized as an international person.”⁸³

The important point is that under international law, when a vessel is without the authority of any state to fly its flag, the vessel is considered to be without nationality.⁸⁴ Therefore, any vessel that is without nationality falls under 46 U.S.C. App. § 1903(c)(2).⁸⁵ This is important because the wording of the statute is not stating that the vessel must fly a flag, but instead states what would happen if the vessel does not fly a flag. For example,

77. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-12, at 90 (5d89 (5th ed. 2012).

78. *Id.* at 90.

79. *Id.*

80. *United States v. Prado*, 143 F. Supp. 3d 94, 95-96 (S.D.N.Y. 2015).

81. SCHOENBAUM, *supra* note 77, at 90; (citing *United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994)); See, e.g., *Restatement (Third) of the Foreign Relations Law of the United States* § 501, which states “the ship has the nationality of the state that registered it and authorized it to fly the ship’s flag. . . .”.

82. SCHOENBAUM, *supra* note 77, at 90 (citing H Meyers, *The Nationality of Ships* 309 (1967)).

83. SCHOENBAUM at 90 (footnote 66); (citing 1 L Oppenheim, *International Law* § 260 (8th ed. 1955)).

84. SCHOENBAUM at 90.

85. *Id.*; 46 U.S.C. App. § 1903(c)(2) (2015); See *infra*, Appendix I.

Schoenbaum states that “we interpret 46 U.S.C App. § 1903(c)(2) to mean that a vessel is ‘without nationality’ if (a) the vessel is ‘stateless’ under international law, which generally will mean that the vessel is not authorized by any state to fly its flag or (b) that the vessel falls within subsections (A) or (B).”⁸⁶

Returning to *United States v. Prado*, we can now explore the decision of the court and understand more about whether a ship must fly a flag or whether the ship can instead use an emblem on the side of the ship as identification.⁸⁷ Keep in mind that our U.S. drug laws are setup to give the Coast Guard jurisdiction without any nexus whatsoever to the ship itself, because Congress has decided that drug laws should be given broader jurisdiction, so that our Coast Guard can enforce our laws anywhere in the world, with few exceptions.⁸⁸

In *Prado*, the defendants were traveling several hundred miles off the coast of South America in a boat known as “go-fast,” which contained more than 600 kilograms of cocaine.⁸⁹ The defendants were arrested for violating the Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C §§ 70501-07,⁹⁰ and as result, the ship was scuttled.⁹¹

It is undisputed that the crew was not traveling to or from the United States. The defendants were interdicted approximately 280 miles from the coasts of Ecuador and Costa Rica.⁹² Video footage shows defendants’ arrest and, per the video, the go-fast did not have any prominent identifying feature, except for a small emblem “of what appears to be an Ecuadorian flag [that] has been affixed to the boat’s rear starboard side.”⁹³

Upon the arrest the defendants admitted to being Ecuadorian, but they did not identify their boat. The Coast Guard members searched the go-fast and did not find any registration papers, but they recovered approximately

86. SCHOENBAUM at 90; See 46 U.S.C. App. § 1903(c)(2).

87. See *Prado*, 143 F. Supp. 3d at 96.

88. See *Id.* at 98.

89. *Id.* at 96.

90. 46 U.S.C. §§70501-07 (2012) [hereinafter MDLEA]. In 2006, Congress repealed the MDLEA as codified at 46 U.S.C. app. §§1901-1904 (2002) and re-codified it in Title 46 itself.

91. See *Prado*, 143 F. Supp. 3d at 96 (“was being enforced and the defendants were charged with the intent to distribute cocaine aboard a vessel subject to the jurisdiction of the United States, and also in violation of the MDLEA”).

92. *Id.* at 97.

93. *Id.*

680 kilograms of cocaine.⁹⁴ This article will not get into the constitutional challenges made by the defendants, as they are irrelevant to this article; however, the defendants' arrest occurred on the high seas and the *Prado* court quoted the Second Circuit in the context of the Death on the High Seas Act ("DOHSA") in showing that the "high seas" mean those waters outside of the territorial waters of any.⁹⁵

The defendants' main argument was that they were stopped and arrested well beyond any State's Exclusive Economic Zone ("EEZ"), as that extends two hundred miles seaward from a State's territorial waters.⁹⁶ The defendants were sailing on the high seas when they were stopped because the closest landmass to them when interdicted, Costa Rican Isle de Coca, was 248 miles away.⁹⁷ It was argued that there was an insufficient nexus between the defendants and the United States.⁹⁸ However, a nexus was established, since Congress determined that trafficking controlled substances aboard a vessel is a threat to both the "security" and "societal well-being" of the United States.⁹⁹ The court found that these findings did not satisfy the nexus test.¹⁰⁰

94. *Id.*

95. *Id.*; (citing *In re: Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200 (2d Cir. 2000)); See UNCLOS, *supra* note 20, at art. 87.

Article 87 provides the definition of the high seas and states that:

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;
- (b) freedom of over flight;
- (c) freedom to lay submarine cables and pipelines, subject to
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These 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, and also with due regard for the rights under this Convention with respect to activities in the Area.

96. *Id.*

97. *Prado*, 143 F. Supp. 3d at 97.

98. *Id.* at 98; (citing *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003)) (quoting *United States v. David*, 905 F.2d 245, 248-49 (9th Cir. 1990)).

99. *Prado*, 143 F. Supp. 3d at 97.

100. *Id.*; See MDLEA, *supra* note 90.

The Government stated that the nexus test did not need to be applied because the vessel was stateless, basing its reasoning on the fact that “[t]he Second Circuit repeatedly made clear that ‘stateless vessels on the high seas are, by virtue of their statelessness, subject to the jurisdiction of the United States . . . even absent proof that the vessel’s operator intended to distribute their cargo in the United States.’”¹⁰¹ The court stated “[i]t is well-settled that ‘[v]essels without nationality are international pariahs,’ and those aboard stateless vessels lack the protections of any country’s law.”¹⁰² Further, the court states that both the United States and Ecuador condemn and criminalize the trafficking of drugs.¹⁰³ The court did not declare that this was a universal crime, rather it stated that it was necessary to protect our population from such drugs, and thus, drugs are equated to a threat to national security.¹⁰⁴

A lack of vessel registration with any country certainly is one method of determining statelessness. Article 91, UNCLOS, as well as Article 5 of its predecessor, the 1958 Convention on the High Seas, provide that, “*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.*”¹⁰⁵

Article 91 and Article 5 do not state that ships must fly a flag. A detailed reading reveals that the wording suggests that every ship is entitled to fly a flag. Article 91 states that “[e]very state shall issue to ships to which it has granted the right to fly its flag documents to that effect.”¹⁰⁶

Further, in *Prado*, the court found that based upon evidence of videos and photographs presented, there were barely any identifying features.¹⁰⁷ To trace a vessel back to any possible documents on land would have been a futile exercise because there was no identifying information that could be provided by the Ecuadorian authorities.¹⁰⁸ Thus, the court held that the “boat

101. *Prado*, 143 F. Supp. 3d at 98.

102. *Id.*; (citing *United States v. Pinto-Mejia*, 720 F.2d 248, 261 (2d Cir. 1983)); (quoting *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982)).

103. *Prado*, 143 F. Supp. 3d at 98.

104. *Id.*

105. *Id.* at 98-99; See UNCLOS, *supra* note 20, at art. 5 (emphasis added).

106. *Prado*, 143 F. Supp. 3d at 99; UNCLOS, *supra* note 20, at art. 91.

107. *Prado* at 99.

108. *Id.*

was unregistered and therefore stateless as a matter of international and constitutional law.”¹⁰⁹

Another important part of *Prado*, for purposes of this article, are the statutory challenges presented by the defendant’s that MDLEA extends to “vessels[s] without nationality.”¹¹⁰ The statute states that “[a] claim of nationality or registry under this section includes only” possession of registration documents aboard the vessel, flying a nation’s flag, or a verbal claim by the person in charge of the vessel.”¹¹¹ Answering the statutory challenges made by the defendants; the MDLEA extends to “vessels without nationalities.”¹¹²

The main issue in *Prado*, as far as this article is concerned, is whether the emblem on the side of the boat that is small in nature “constitutes ‘flying [a] nation’s ensign or flag’ under § 70502(e)(2)?”¹¹³ The gist of the Government’s argument was that the defendant’s should have been flying “a piece of fabric that must wave in the air; defendants argued that merely displaying the image of a flag was sufficient.”¹¹⁴ Both sides used dictionary definitions and contacted the world’s largest boating education organization, the United States Power Squadrons, in order to get an interpretation of this phrase.¹¹⁵ Despite this additional work on behalf of the parties, the court held that the meaning of the phrase could be taken from the context of the statute as whole without referring to outside assistance.¹¹⁶

It is a given that under §70502, maritime interactions between the United States and other nations are of paramount importance. The statute repeatedly cites to the 1958 Convention on the High Seas,¹¹⁷ and requires specific procedures to be followed before the power of the United States can be exercised in ways that conflict with the laws or interests of other nations.¹¹⁸ “[A] vessel must give sufficient indication that it is under the

109. *Id.*

110. *Id.*; See MDLEA, *supra* note 90 at § 70502(c)(1)(A).

111. *Prado* at 99; See MDLEA, *supra* note 90 at § 70502(e).

112. *Prado* at 99; See MDLEA, *supra* note 90 at § 70502(c)(1)(A).

113. *Prado* at 100; See MDLEA, *supra* note 90 at § 70502(e)(2).

114. *Prado* at 100.

115. *Id.*

116. *Id.* i.e., “plain meaning”.

117. See 1958 Geneva Convention, *supra* note 19.

118. *Prado* at 100; See MDLEA, *supra* note 90 at § 70502(c)(1)(C) (defining “vessel subject to the jurisdiction of the United States” to include foreign vessels if flag state consents or waives

protection of another nation before this procedural machinery engages.”¹¹⁹ The court is quick to point out that the vessel need not actually have the protection of another nation under international law.¹²⁰

In order for a vessel to be properly identifiable, a reasonable United States official must be on notice that issues of comity and international relations would not be violated if the vessel was interdicted.¹²¹ One of the ways this can be accomplished is to have a display that is prominent enough that the official is on “notice of another State’s interests.”¹²²

In *Prado*, *sub judice*, assuming that the image on the defendants’ boat was even an Ecuadorian flag, the court said it did not “. . . put a reasonable official on notice that Ecuador’s interest might be affected by the interdiction of defendants’ boat.”¹²³ Further “. . . the emblem— easily confused with ornamentation— is difficult to see in any water, not to mention when the small boat is in the large waves of the high seas to which defendant had taken it.”¹²⁴ The emblem on the boat was “smaller than the nearby ‘swoosh’ images running the length of the boat’s side.”¹²⁵ It is also important that the defendants failed to point out the emblem on the boat and failed to notify the Coast Guard that the boat was Ecuadorian.¹²⁶ The court held that the defendants “were not ‘flying [Ecuador’s] ensign¹²⁷ or flag’ within the meaning of the MDLEA.”¹²⁸ The court referred to 46 USCS § 70502 in deciding the guilt of the defendants.¹²⁹

§ 46 USCS § 70502 states:

(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—

objection to enforcement of U.S. law by United States); *supra* note 90 at § 70502(c)(1)(E), § 70502(c)(1)(C).

119. *Prado* at 100.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Prado* at 100-01.

125. *Prado* at 101.

126. *Id.*

127. An ensign is a flag or banner, as a military or naval standard used to indicate nationality.

128. *Id.*

129. *Id.*; MDLEA, *supra* note 90, at §70502(e)(2).

- (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;

(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.

(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.¹³⁰

A careful reading will show that section (e) states the word “or.” Therefore, the flying of a ship’s States “ensign or flag” is a requirement; or, in the alternative a verbal claim of nationality, etc., is a requirement.¹³¹

From the reading of the explanation of the statute, it is evident that the “stateless vessel” has to respond to inquiries about its nationality when confronted by the Coast Guard.¹³² When the vessel refuses to do so, it may

130. MDLEA, *supra* note 90, at §70502.

131. MDLEA, *supra* note 90, at §70502(e)(2).

132. *Id.* at §70502 (Explanation section 17 of the statute); (citing *United States v. Victoria*, 876 F.2d 1009, 1010 (1st Cir. 1989)).

be deemed a “stateless vessel” or “vessel without nationality” under international law.¹³³ A claim of nationality or registry by the captain of the vessel is a necessity, however, the Coast Guard may still reject such a claim.¹³⁴ For example, in the case of *United States v. Cuevas-Esquivel*, a case about a “stateless” vessel under former 46 USCS Appx §1903 (for the purposes of the Coast Guard boarding) because no claim of nationality existed, by the person in charge at the time of boarding; further, the vessel had no name, flag, or other identifying characteristics, despite the claim that there was a prior statement by someone on the vessel to another Coast Guard indicating the name and city of the vessel.¹³⁵

Scholars disagree as to whether or not customary international law and conventional law allows any country to exercise jurisdiction over stateless ships.¹³⁶ One of those scholars is Andrew Anderson.¹³⁷ Anderson states that if a ship is stateless, nations should be allowed to exercise jurisdiction, because to hold otherwise would allow the un-registered vessel to be immune from interference.¹³⁸ Furthermore, Anderson argues that to allow an un-registered vessel to be immune from interference “would end in chaos and anarchy on the high seas.” Therefore, “all states can . . . substitute for the flag state when there is none.”¹³⁹

Scholars such as Churchill and Lowe disagree¹⁴⁰ because they believe “that to assert jurisdiction over a stateless vessel because it lacks diplomatic protection would be to ‘ignore[] the possibility of diplomatic protection

133. MDLEA, *supra* note 90, at §70502 (Explanation section 17 of the statute).

134. *Id.*; (citing *United States v. Maynard*, 888 F2d 918 (1st Cir. 1989).

135. MDLEA, *supra* note 90, at §70502 (Explanation section 18 of the statute).

136. Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT’L L. 433 (2012) (Ms. Bennett was a law student at Yale Law School); See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA*, 213-14 (3d ed. 1999).

137. Bennett, *supra* note 136, at 444.

138. *Id.*

139. *Id.*; Andrew W. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 336 (1982); (citing Eric M. Komblau, *United States v. Marino-Garcia: Criminal Jurisdiction over Stateless Vessels on the High Seas*, 9 BROOK. J. INT’L L. 141 (1983) (arguing that the Eleventh Circuit was correct in holding that traditional limitations on jurisdiction under international law do not apply to stateless ships)).

140. Bennett, *supra* note 136, at 444; (citing CHURCHILL & A.V. LOWE, *supra* note 136, at 213-14).

exercised by the national State of the individuals on such stateless ships.”¹⁴¹ They maintain, “that there must be an independent jurisdictional nexus between the stateless ship and a state before the State can extend its laws to the vessel.”¹⁴² Additionally, the article provides that DTVA “*blurred the line between exercising jurisdiction based on a vessel’s status as stateless and treating the operation of a stateless vessel as if it were a universal crime . . .*”¹⁴³ The author explains that “[u]niversal crimes are defined as those which are ‘so threatening to the international community or so heinous in scope or degree that they offend the interest of all humanity; that any State may, as humanity’s agent, punish the offender.’”¹⁴⁴ Professor Dubner has written many such articles on sea piracy, which is a prime example, as well as slave trade, genocide, war crimes, and certain acts of terrorism, all of which are universal crimes.¹⁴⁵ Nowhere is it said that a stateless vessel has committed a universal crime by being “stateless”.¹⁴⁶ However, Article 110, UNCLOS,¹⁴⁷ allows warships to board merchant vessels, at times, under subsection (c).¹⁴⁸ Article 110, UNCLOS, authorizes the boarding state to verify the registration of ships only.¹⁴⁹

According to the wording of Article 110, UNCLOS, enforcement powers are not expressly available in cases of statelessness and any authority

141. Bennett, *supra* note 136, at 444-45; (citing CHURCHILL & A.V. LOWE, *supra* note 136, at 214).

142. Bennett, *supra* note 136, at 445; (citing CHURCHILL & A.V. LOWE, *supra* note 136, at 214).

143. Bennett, *supra* note 136, at 445; (citing CHURCHILL & A.V. LOWE, *supra* note 136 at 214) (emphasis added).

144. Bennett, *supra* note 136, at 445-449; See Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 368 (2001).

145. See for example Barry Hart Dubner, *On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof*, 42: 1 J. Mar. L. & Comm. 429 (2011) Available at SSRN: <http://ssrn.com/abstract=2544694>; Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13: 1 Mo. Env't L. & Pol'y Rev. 1 (2005) Available at SSRN: <http://ssrn.com/abstract=2809416>.

146. See Bennett, *supra* note 136, at 449.

147. See UNCLOS, *supra* note 20, at §101.

148. See Bennett, *supra* note 136, at 449.

149. *Id.*

to inspect a vessel does not give rise to the right to arrest or prosecute.¹⁵⁰ In addition, “customary international law, international conventions[,], and scholars agree that failure to register and identify seagoing vessels forfeits a vessel’s rights to undisturbed navigation because the need for predictable orderliness and safety for commercial, military and pleasure craft of all States in international waters requires this doctrine.”¹⁵¹ The problem is that once a vessel is stopped while navigating the high seas, what can a State do after asserting jurisdiction over the stateless vessel under international law?¹⁵² Article 110, UNCLOS, contains no enforcement measures.

The article notes that Norway treats ships that are stateless like their own.¹⁵³ This means that Norway subjects those ships to universal jurisdiction, instead of outlawing the ships.¹⁵⁴ However, returning to the issue as to whether or not a ship must fly a flag, Professor Ted L. McDorman claims that there does not appear to be any conventional or customary legal justification for declaring that a stateless vessel is, by itself, a breach of international law. Specifically, McDorman states: “there does not exist any explicit international rule requiring a vessel to be registered and have a flag.”¹⁵⁵

It was pointed out to Professor Dubner that, from a practical standpoint, a lawyer would want the client’s vessel to be flagged in order to obtain a preferred ship mortgage to secure their lien. The requirement of flying a flag is found in sailing directions issued by the Admiralty (Britain), by the U.S. Government, and other government authorities.¹⁵⁶ For example, under Estonian law, Law of Ship Flag and Ship Register’s Act requires under the heading:

150. *Id.* (citing Douglas Guilfoyle, *Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters*, in *SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA* 83, 83-84 (Clive R. Simmons ed., 2011)).

151. Bennett, *supra* note 136, at 449 (citing Patrick Sorek, Note, *Jurisdiction over Drug Smuggling on the High Seas: It’s a Small World After All - United States v. Marino-Garcia*, 44 U. PITT. L. REV. 1095, 1106-07 (1983)).

152. Bennett, *supra* note 136, at 449.

153. Bennett, *supra* note 136, at 450.

154. *Id.*

155. See Ted L. McDorman, *Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference*, 25 J. MAR. L. & COM. 531, 537 (1994).

156. E-mail from Professor Taylor Simpson Wood to Barry Heart Dubner (March 29, 2016, 9:10 EST) (on file with author). (As related by Professor Taylor Simpson Wood, an authority in Admiralty law).

Part 1 Law of Ship Flag

Chapter 1 Flying National Flag of Estonia

§1 Obligation to fly national flag.

(1) The national flag of Estonia shall be flown by ships owned by the Republic of Estonia, local government and other legal persons in public law.

(2) The national flag of Estonia shall be flown by seagoing vessels owned by:

- 1) Estonian citizens residing in Estonia;
- 2) general and limited partnerships located in Estonia in which Estonian partners have a majority of votes;
- 3) other legal persons in private law located in Estonia in the management boards or equivalent bodies of which Estonian citizens form a majority.

(3) A seagoing vessel in common ownership shall fly the national flag of Estonia if at least one of the co-owners is an Estonian citizen residing in Estonia and if the greater share of the seagoing vessel is owned by Estonian co-owners.

§2. Right to fly national flag

(1) The national flag of Estonia may be flown by seagoing vessels owned by Estonian citizens.¹⁵⁷

Using Estonia as an example, it is apparent that States establish conditions for granting nationality to vessels, but the UNCLOS and the 1958 Geneva Convention (Article 91(1)¹⁵⁸ and Article (5)(1)¹⁵⁹ respectively) do not require States to grant nationality to vessels. As far as conventional law is concerned, there is nothing in UNCLOS or the 1958 Geneva Convention, or elsewhere, that requires a ship to fly a flag. There is no requirement for a vessel to have any nationality. There is no authority under international law for a stateless vessel to be interfered with on the high seas. As Professor McDorman states, “the principle rationale that can be forwarded is that

157. Law of Ship Flag and Ship Registers Act, Nov. 2, 1998 (entered into force Jan. 7, 1998), <https://www.riigiteataja.ee/en/eli/502042014003/consolide>.

158. UNCLOS, *supra* note 20, at art. 91.

159. 1958 Geneva Convention, *supra* note 19, at art. 5.

stateless means that no State has international legal responsibility for the actions of the vessel and this is a potential legal vacuum situation which the international community does not wish to encourage.”¹⁶⁰ As in the *Estonia* example, States are not required to grant nationality to vessels. However, in order to gain diplomatic protection one would want to have the protection of the flag of a State. This is important because if a vessel is stateless, no nation may argue as to the vessel’s interference on the high seas.”¹⁶¹

H. Myers is a leading authority on the subject of setting forth the legal consequences of vessels’ statelessness.¹⁶² He sets boundaries on what States can do with stateless vessels, for example: “. . . the State cannot assert exclusive jurisdiction over a stateless vessel, since exclusivity is a function of nationality (or flag); and no State is permitted to qualify statelessness as unlawful since international law does not make statelessness unlawful.”¹⁶³

The point is made that since piracy is unlawful in international law, stateless vessels cannot be treated as pirate vessels; however, in most cases “... every state may declare its law applicable to any stateless’ ship.”¹⁶⁴

Myers makes an important distinction between the use of a vessel and ownership of a vessel. McDorman notes that “stateless” goes to the use of a vessel, and “ownership” goes to diplomatic protection.¹⁶⁵ O’Connell, another noted authority on the subject, “comment[ed] that a ship without nationality is not necessarily a ship without law, but it is a ship without diplomatic protections.”¹⁶⁶

IV. DOES A VESSEL NEED TO FLY A FLAG ON THE HIGH SEAS?

One of the more articulate opinions on the subject was derived from a dissenting opinion authored by a circuit judge in the case of *United States v. Matos-Luchi*.¹⁶⁷ One basis for jurisdiction on the high seas is to prescribe:

160. McDorman, *supra* note 155, at 538-39.

161. *Id.*

162. *Id.* at 540.; See also H. Meyers, *The Nationality of Ships* 318-321 (1967).

163. McDorman, *supra* note 155, at 540.

164. *Id.* Meyers, *supra* note 162, at 318.

165. McDorman, *supra* note 155, at 540; See generally D. O’Connell, *2 the International Law of the Sea* 755 (1984).

166. McDorman, *supra* note 155, at 540; O’Connell, *supra* note 165, at 755.

167. See *United States v. Matos-Luchi*, 627 F.3d 1 (1st Cir. 2010) (Lipez, J., dissenting). In this case, the Coast Guard team deployed a helicopter to investigate an airplane, which they saw drop several packages into sea. *Id.* at 1-2. There was a small boat waiting nearby began to retrieve

vessel nationality.¹⁶⁸ According to international law, vessels are capable of having nationality and the vessel on the high seas is subject to the laws of the country whose nationality it bears.¹⁶⁹ If the vessel does not have nationality, it is referred to as a stateless vessel and is subject to the “prescriptive jurisdiction of every nation.”¹⁷⁰

Without discussing the implications of U.S. criminal law and the reach of it on the high seas, it is important to point out that “[a] vessel that has been granted the nationality of a particular country is often said to sail ‘under the flag’ of that country (the ‘flag state’) or to be entitled to ‘fly the flag’ of that country.”¹⁷¹ Nationality can be bestowed by an affirmative act of a government; “in some countries, the law provides that any ship meeting certain conditions (e.g., ownership by a national) is considered a national ship.”¹⁷² Some countries such as the United States use the characteristics of different systems.¹⁷³ The crucial point is stated in the Judge Lipez’ dissent, “a vessel either has a given nationality or it does not. It is not therefore

the packages being dropped by the airplane. *Id.* at 2. The officers suspected drug trafficking and descended in the helicopter. *Id.* The boat crew jettisoned the bales and fled, but the boat experienced engine problems and the three crew members on the boat were taken. *Id.* The boat had no ensign, flag, registration, or other evidenced of the vessel’s nationality was found on board. *Id.*

168. *Id.* at 11.

169. *Id.*

170. *Id.* at 1312; See *United States v. Victoria*, 876 F.2d 1009, 1010-11 (1st Cir. 1989); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-83 (11th Cir. 1982). In *Marino-Garcia*, the court held that the lower court was correct in asserting jurisdiction over defendants because the vessel was stateless and not subject to the jurisdiction of any particular sovereign. The Four Roses appeared to have been registered in Honduras under the name Jenny Conner. When approached by the Coast Guard cutter Dependable, however, the vessel displayed no indicia of Honduran authority. In fact, the name of the vessel had been altered and the words “Miami, Florida” were stenciled on the bow to indicate the home port. The defendants tried to argue that there was no nexus connection, however, the court determined that this was not necessary to establish jurisdiction. (Jurisdiction exists solely as a consequence of the vessel’s status as stateless. Such status makes the vessel subject to action by all nations prescribing certain activities aboard stateless vessels.).

171. See *Matos-Luchi*, 627 F.3d at 16; See, e.g., UNCLOS, *supra* note 20, at art. 5.

172. See *Matos-Luchi*, 627 F.3d at 16.

173. *Id.*; See MDLEA, *supra* note 90, at 70502(b); McDorman, *supra* note 155, at 533. (“Practice in the United States suggests that where a vessel is not registered, the nationality of the vessel can become that of the vessel’s owner.”); *The Chiquita*, 19 F.2d 417, 418 (5th Cir. 1927) (“If [a vessel] is not property registered, her nationality is still that of her owner.”).

incorrect to suggest, as the majority does, that whether a vessel is stateless depends upon the circumstances in which it is encountered."¹⁷⁴

Simply put, a stateless vessel "does not have a valid grant of nationality from any country."¹⁷⁵ The example provides that such may be the case if, "no country has granted the vessel nationality" or "if a country has cancelled its grant of nationality; or if the political entity that granted the vessel nationality is not a recognized international person."¹⁷⁶ Other categories of statelessness occur when the vessel claims the nationality of two or more countries according to convenience. It is assimilated to, or deemed to be, a vessel without nationality, even if it legitimately possesses a nationality.¹⁷⁷ Thus, there are two basic categories under international law and the MDLEA regarding vessels without nationality. The first category: "vessels that are genuinely stateless under international law, in the sense that they do not have

174. *Matos-Luchi*, 627 F.3d at 16; *See also Matos-Luchi* majority opinion ("The Controlling question is whether at the point at which the authorities confront the vessel, it bears the insignia or papers of a national vessel or its master is prepared to make an affirmative and sustainable claim of nationality." *Id.* at 6 (emphasis added)).

175. *Id.* at 16; *See United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994) In *Rosero*, the vessel did not bear the name of any port or country and was not flying any flag. After the vessel was later seized and taken to St. Croix, the flags of three nations, Colombia, Honduras, and Brazil, were discovered on board. When the officer asked if their vessel had any documentation, one of the crewmembers answered, and the officer was directed to the cabin, where Colombian registration papers for a vessel named EDGAR were found. These papers bore a registration number, CP-3-189-A, that was similar to but different from that on the TUTO's nameplates, and the papers contained an expiration date of September 2, 1990. According to the declaration of a State Department official, officials of the Colombian government, "after being advised of a claim of Colombian registry for M/V TOTU (sic)," had stated that they could not confirm that the vessel was registered under the laws of Colombia and "agreed that the vessel was a stateless vessel." Under international law, the core of the concept of a vessel that is "without nationality" or stateless is that the vessel lacks authorization to fly the flag of any recognized state. Thus, any vessel that falls within this category is "without nationality" under 46 U.S.C. App. § 1903(c)(2) The Convention on the High Seas of 1958, art. 6(2), 13 U.S.T. 2312, T.I.A.S. No. 5200, provides that 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. Similarly, under international law, ships have the nationality of the state whose flag they are entitled to fly. Convention on the High Seas of 1958, art. 5(1), 13 U.S.T. 2312, T.I.A.S. No. 5200. Therefore, a vessel is without nationality if it is not authorized to fly the flag of any state. The Appellate court reversed defendants' convictions and remanded the case. Under the Convention on the High Seas of 1958, ships had the nationality of the state whose flag they were entitled to fly, and the district court's instruction as to determination of a vessel's statelessness from the totality of the evidence did not correspond with the meaning of "statelessness" under international law.

176. *See Matos-Luchi*, 627 F.3d at 16; *See Rosero*, 42 F.3d at 171.

177. *Matos-Luchi*, 627 F.3d at 16; *See UNCLOS*, note 20, at art. 6(2).

a valid grant of nationality from any country. In the second category are vessels that are deemed to be stateless because they have attempted to obscure their nationality.”¹⁷⁸

In *Matos-Luchi*, the dissent noted that the government argued that the *Yola* was genuinely stateless because the defendants “were not flying a flag, carried no documentation, and never claimed to the Coast Guard that their ship was registered in the Dominican Republic, or flew a Dominican flag.”¹⁷⁹ But, be that as it may, the government suggests that any vessel that fails to affirmatively signal its nationality through a flag, documents, or an oral claim of registry becomes stateless under international law. Judge Lipez states, “they are mistaken.” This is due to the fact that registration, documentation, and the flag are “indicators” of vessel nationality, but they are not “sources” of vessel nationality.¹⁸⁰ A ship registers in order to establish nationality and to be able to claim nationality anywhere on the high seas.¹⁸¹ The judge points out that under international law, even when a vessel is unregistered, has no documents to show nationality, nor has a flag of a particular state, the vessel can still possess the nationality of a state.¹⁸²

This is because “[d]etermining vessel nationality is not just a question of documentation of the vessel, and a vessel literally without a flag, not being a vessel registered in a country, is not necessarily stateless or without nationality.”¹⁸³ For example, Judge Lipez states that “even pirate ships possessing no documents and flying the flag of an unrecognized insurrectionary movement do not necessarily lose their nationality.”¹⁸⁴ In the end, it all depends on national law.¹⁸⁵

178. *Matos-Luchi*, 627 F.3d at 17.

179. *Id.*

180. *Id.*; See Meyers, *supra* note 162, at 138-140; see also *Laruitzen*, 345 U.S. at 584 (“Nationality is evidenced to the world by the ship’s paper and its flag.” (emphasis added)).

181. *Matos-Luchi*, 627 F.3d at 17; *The Mohawk*, 70 U.S. 566, 571, (1865).

182. *Matos-Luchi*, 627 F.3d at 17-18; *Rosero*, 42 F.3d at 172-173 (holding that it was an error to instruct the jury that it could find a vessel genuinely stateless “based on an unstructured weighing of the totality of the evidence,” including various indicators of nationality).

183. *Matos-Luchi*, 627 F.3d at 18; (quoting *Rosero*, 42 F.3d at 172-173).

184. *Matos-Luchi*, 627 F.3d at 18; See UNCLOS, *supra* note 20. (“A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.”); See also UNCLOS, *supra* note 20, at art. 104.

185. *Matos-Luchi*, 627 F.3d at 18.

It has been commented that in international law, flying a state's flag was not required to establish nationality. As stated "[w]hen the last bunting on board was blown to tatters, this never had radical legal consequences, not had the hosting of the flag."¹⁸⁶ Another example is given by R.R. Churchill and A.V. Lowe, where it is stated that when a ship's tonnage is less than a specific figure, there are States that will not issue documents.¹⁸⁷ Furthermore, when a ship is not flying a flag, it may be stopped for verification purposes; however, whether there are grounds for stopping the vessel is different than the question of whether the ship is truly stateless, thus falling under the scope of MDLEA.¹⁸⁸ According to Judge Lipez, "pursuant to the text of 46 U.S.C. § 70502(d)(1)(b), the failure to claim nationality has legal consequences only in specific circumstances: when a specified individual aboard the vessel fails to respond to a federal law enforcement officer's request for a claim of nationality."¹⁸⁹ According to noted scholar, Professor Eugene Kontorovich, "the MDLEA's definition of statelessness goes far beyond what is recognized by international custom or convention."¹⁹⁰ Finally, Judge Lipez, points out that the 14 U.S.C. § 89(a)¹⁹¹ gives the Coast Guard authority to

186. *Id.*; Meyers, *supra* note 162, at 162.

187. *Matos-Luchi*, 627 F.3d at 18; Meyers, *supra*, at 160; *see also* R.R. Churchill & A.V. Lowe, *The Law of the Sea* 213 n.19 (3d ed. 1999) (noting that "a State may not require, or permit, the registration of ships below a certain size, for example, but nonetheless regard such ships as having its nationality if they are owned by its nationals").

188. *Matos-Luchi*, 627 F.3d at 18; Proposed Interdiction of Haitian Flag Vessels, 5 Op. O.L.C. 242, 243 n.4 (1981); *United States v. Potes*, 880 F.2d 1475, 1478 (1st Cir. 1989).

189. *Matos-Luchi*, 627 F.3d at 19.

190. *Id.* at 20; *see* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1228 (2009).

191. 14 U.S.C. § 89 (2012) states:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so

board any vessel subject to the jurisdiction of the United States to “address inquiries to those onboard, examine a ship’s documents and papers, and examine, inspect and search the vessel.”¹⁹² According to Andrew W. Anderson, Professor Myres S. McDougal “has suggested that stateless vessels be equated to pirate or slave vessels, which are subject to universal jurisdiction.”¹⁹³

Every ship is required to have a nationality and scant protection is afforded to ships which have no nationality so a great premium is placed upon the certain identification of vessels for purposes of maintaining

as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

192. *Matos-Luchi*, 627 F.3d at 21; *See United States v. Williams*, 617 F. 2d 1063, 1076-77 (5th Cir. 1989). (This was decided en banc). “Congress, in enacting section 89(a), created an exception to the principle of non interference that is analogous to the exceptions contained in article 22.”;

Article 22 of the Convention codifies the common law doctrine and states:

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 subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship.

If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

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

193. Andrew W. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 336 (1982); *see also* A. Linitone, *The Registration of Ships in International and Intergovernmental Organization* 7 (1973).

minimal order upon the high seas. Extraordinary deprivational measures are permitted with respect to stateless ships. Thus, it is commonly considered that ships either having no nationality or falsely assuming a nationality are almost completely without protection.¹⁹⁴

Anderson also points out that the exclusive jurisdiction of a flag vessel is not gained through registration, but if the vessel lacks registration, others could potentially claim jurisdiction of the vessel.¹⁹⁵ As previously mentioned, "any other result would end in chaos and anarchy on the high seas. If only a country of registration could exercise jurisdiction at all, under any circumstances, than an un-registered vessel would be immune from interference by anyone."¹⁹⁶

However, such result has never been permitted by the nations of the world.¹⁹⁷ In "*Molvan v. Attorney General for Palestine*,"¹⁹⁸ the Privy Council, citing with approval the writings of Oppenheim, wrote:

... [F]reedom 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. No question of comity nor of any breach of international law can arise if there is no state under whose flag the vessel sails. Their Lordships would accept as a valid statement of international law, the following passage . . . "In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatsoever, for the freedom of navigation on the open sea is the freedom for such vessels only as sail under the flag of a State."¹⁹⁹

The reality of the situation is that a State must have the ability to attach criminal consequences to commonly recognized criminal conduct that

194. *Id.*, at 336; McDougal, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 59 AM. J. INT'L L. 25, 27, 76-77 (1960); see also C. Colombos, *The International Law of The Sea* 289 (1967).

195. Anderson, *supra* note 193, at 336.

196. *Id.*

197. *Id.*

198. *Naim Molvan v. Att'y Gen. Attorney General for Palestine*, 81 LI L Rep 277, United Kingdom: Privy Council (Judicial Committee) (1948). This case was dealt with a ship with illegal immigrants on board, which was sighted by British naval vessel outside Palestinian territorial waters. The ship was flying no flag when sighted. The Turkish flag was hoisted later, but it was hauled down when the boarding party approached, and the Zionist flag was hoisted. The Ship was escorted to Palestinian port, where passengers were landed and sent to a clearance camp.

199. *Id.*; Lauterpacht, Oppenheim's International Law, VOL. I, 646 (1934).

occurs outside of its territory, which may produce effects within its territory.²⁰⁰ Thus, the question is: where does one draw the line?²⁰¹ Anderson notes that “the nationality of a ship and that of a person are not the same.”²⁰² This is because there is a “special relationship between a vessel and a country unlike that found between a nation and any other tangible piece of property.”²⁰³

The question is asked regarding the requirement to ascertain nationality.²⁰⁴ It is not enough that the flag is flown, or that a home port is displayed on the ship because these two factors are only external evidence of apparent nationality.²⁰⁵ A flag has a special status “[a]s long as nations have had flags, they have been flown by vessels as a symbol of the sovereign to whom they owe their allegiance and as a warning to others of his protection.”²⁰⁶ Therefore, the display of a flag can be a strong form of evidence of nationality.²⁰⁷ Under international law, Anderson argues that “a vessel must obviously have an obligation to assert the immunity that was given by a State whose flag it flies, or registration it is connected with.”²⁰⁸

A vessel must obviously have an obligation to assert immunity by showing its flag, presenting its documents, or making some other outward or oral claim to a nationality; otherwise it waives that immunity. International law clearly contemplates that the time to establish identity is at or prior to boarding. The Supreme Court has ruled that the burden of proof of nationality is upon the vessel.²⁰⁹

Anderson also makes the argument that “[p]ublic policy also mitigates strongly against allowing a vessel to profit by refusing to observe international procedures.”²¹⁰ Further, he references that “international law shelters only members of the international community of nations from

200. Anderson, *supra* note 193, at 338.

201. *Id.*

202. *Id.*

203. *See Id.*

204. *Id.*

205. *Id.*

206. Anderson, *supra* note 193, at 338.

207. *See Id.*; 2 Moore's Dig. Int'l L. 1002; see also McDougal and Burke, The public Order of the oceans 1-88, 1121 (1962).

208. Anderson, *supra* note 193, at 341.

209. *Id.*; *See United States v. Klintonck*, 18 U.S. 144 (1820).

210. Anderson, *supra* note 193, at 342.

unlawful boarding and searches on the high seas.”²¹¹ Articles 91 and 92(2) of the UNCLOS do not allow a ship to be stateless, but they also do not allow it to have multiple states of registry.²¹² A natural person, however, may be stateless or may have multiple states of citizenship.²¹³ The notion of nationality of vessels, therefore, is directed at the allocation of control, jurisdiction, and diplomatic protection of the vessel and to put persons interested in the vessel under the authority of a state.²¹⁴

Against this background, it is obvious that a ship does not necessarily have to fly a flag on the high seas. However, it may be subjected to over-extensive drug enforcement laws by not doing so. Despite the statements that a stateless vessel is an international pariah, these cases often fall within a drug enforcement scenario. Vessels such as the go-fast and other types of submersibles that carry large amounts of cocaine and marijuana are the types of vessels that are being stopped and searched. One purpose of this article is to demonstrate the fact that a flag could be painted on the side of a ship if it was large enough for a Coast Guard or other law enforcement agency to identify. Nothing in maritime history suggests that a flag has to be flown by a ship, but there is plenty of history and custom to suggest why flags are flown and will be flown in the future. Still, the question remains: Is there a better system for identifying ships, rather than flying a flag or having one painted on the side of a vessel?

V. ON THE INVENTION OF AUTOMATIC IDENTIFICATION SYSTEMS (AIS) AND THEIR VALUE REGARDING IDENTIFICATION OF

211. See *United States v. Victoria*, 876 F.2d 1009, 1010-11 (1st Cir. 1989) (citing *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979)); See also Shearer, *Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels*, 35 INT'L & COMP. L.Q. 320, 336 (1986) (“it has been accepted doctrine since at least as long ago as Ortolan’s treatise of 1845 that a ship without a nationality, or unwilling to claim one, has no right of navigation by international law”); Note, *Drug Enforcement on the High Seas: Stateless Vessel Jurisdiction over Shipboard Criminality by Non-Resident Alien Crewmembers*, 11 Maritime Lawyer 163, 171-78 (1986).

212. John A.C. Cartner, Richard P. Fiske, Tara L. Leiter, *The International Law of the Shipmaster* (2009). The *International Law of the Shipmaster* is a comprehensive review of the laws and regulations governing the shipmaster including customary law, case law, statutory law, treaty law and regulatory law. The book is the only source between two covers which surveys the laws of the shipmaster of all IMO member states, and others by state, for practitioner, court, trainer, master, owner, charterer, shipper, insurer and any person interested in the shipmaster in law.

213. *Id.*

214. *Id.*

VESSELS

It will be observed that the UNCLOS does not expressly allow the seizing of stateless vessels on the high seas or the arrest of its crew members, except when there are reasonable grounds to believe that the vessel was engaged in piracy (Article 105)²¹⁵ or unauthorized broadcasting (Article 109),²¹⁶ or if another treaty authorizes the seizure or arrest (Articles 92²¹⁷,

215. Lous B. Sohn, John E. Noyes, Erik Franckx & Kristen G. Juras, *CASES AND MATERIALS ON THE LAW OF THE SEA*, 206 (Martinus Nijhoff, 2d ed. 2009); *see* Article 105 which states: Seizure of a pirate ship or aircraft 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.

216. *Id.* at 106; *see also* Article 109, which states:

1. All States shall cooperate in the suppression of unauthorized broadcasting from the high seas.
2. For the purposes of this Convention, "unauthorized broadcasting" means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.
3. Any person engaged in unauthorized broadcasting may be prosecuted before the court of:
 - (a) the flag State of the ship;
 - (b) the State of registry of the installation;
 - (c) the State of which the person is a national;
 - (d) any State where the 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.

217. Sohn, *supra* note 215, at 106; *see* Article 92 Status of ships which states:

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. 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.

110²¹⁸).²¹⁹ Additionally, Article 110 provides for arrests for trafficking slaves, which I am equating to human trafficking as well.

As it was previously mentioned, the Pinto-Mejia court concluded that international law provides no bar to the United States' assertion of jurisdiction over a stateless vessel and their crew members under its drug enforcement statute.²²⁰ The only problem is that "[d]rug trafficking has . . . [never] been recognized as an offense," *Jus Cogens* (crime that offends all mankind such as, for example, genocide) so that punishing criminals for drug trafficking on the high seas does not fall within any principle of "universal jurisdiction."²²¹ Thus, there should be a nexus between a State and the State's territory, citizens, vessels, government operations, or security in order for the

218. Sohn, *supra* note 215, at 106; see also Article 110 Right of visit states:

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 in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction 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.

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

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

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

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

219. Sohn, *supra* note 215, at 206.

220. *Id.*

221. *Id.*; see Restatement (Third) Foreign Relations Law of the United States § 404 (1986) (stating that states have "jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, . . . hijacking . . . , genocide, war crimes, and perhaps certain acts of terrorism").

State to validly exercise jurisdiction.²²² This question was asked in the form as follows: “[f]or U.S. Courts, should ‘nexus’ be determined in accordance with international law conceptions of permissible jurisdiction?”²²³ As far as crew members are concerned, Professor Noyes points out “[t]he Pinto-Mejia court concluded that the fact that the vessel was stateless would, in itself, be sufficient to establish the court’s jurisdiction over the defendants.”²²⁴ He posed the question “[i]s it sensible to draw a distinction between jurisdiction with respect to the vessel and jurisdiction over those on board?”²²⁵

Although piracy, the slave trade, and unauthorized broadcasting are listed as part of Article 110, UNCLOS, illicit drug traffic is not specifically listed in that article. Thus, the question raised is whether or not and under what circumstances would the United States or any country be justified in interfering with a flag State’s exclusive jurisdiction? Articles 92²²⁶ and 110,²²⁷ UNCLOS, permit such interference where it is authorized by treaty.²²⁸ Of course, a flag State can consent by radio conference, telephone, or other similar oral electronic means under 46 U.S.C. § 70502(c)(2) 2013 to having a foreign vessel, which is flying its flag and is suspected of engaging in drug trafficking, searched.²²⁹

222. Sohn, *supra* note 215, at 206-207 (stating that where universal jurisdiction does not apply international law requires a connection between a state). (T) (he question is asked: “under the reasoning of the Pinto-Mejia court, would the United have jurisdiction over a stateless vessel and its foreign crew arrested 2,000 miles from U.S. territory, if no evidence established that drugs found on board were destined for the United States?”).

223. *Id.* at 207 (citing *United States v Caicedo*, 47 F.3d 370 (9th Cir. 1995)).

224. *Id.*

225. *Id.* (Professor Noyes further states “. . . that is, even assuming that a U.S. exercise of authority over a stateless vessel is legal, does it follow that the United States has legislative and enforcement jurisdiction over the vessel’s foreign crew members? Would such crew members, or their state of nationality, have a legitimate complaint under international law if they were tried under U.S. law without a showing of jurisdictional nexus?”).

226. UNCLOS, *supra* note 20, at art. 92.

227. UNCLOS, *supra* note 20, at art. 110.

228. Sohn, *supra* note 215, at 197 (There are many examples of multilateral and bilateral treaties granting enforcement authority to a contracting state over the vessels of other state parties in certain circumstances); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Dec. 20, 1988, U.S. Sen. Treaty Doc. No. 101-4 (1989), 1678 U.N.T.S 201, 28 Intl. Leg. Materials 497 (1989).; pg 198; United States-United Kingdom Agreement to Facilitate the Interdiction of Vessels Suspected of Trafficking in Drugs Nov. 13, 1981, 33 U.S.T. 4224, 1285 U.N.T.S 197.

229. Sohn, *supra* note 209, at 197.

Keep in mind that Article 94(1),²³⁰ UNCLOS, requires that every State “effectively exercise its jurisdiction and control in administrative, technical,

230. UNCLOS, *supra* note 20, at art. 94 of UNCLOS, which states:

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

- (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
- (b) 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.

3. Every State shall take such measure for ships flying its flag

as are necessary to ensure safety at sea with regard, *inter alia*, to: (a) the construction, equipment and seaworthiness of ships;

- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

- (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
- (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
- (c) 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, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international

regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State

and social matters over a ship flying its flag.”²³¹ Earlier in this article, it was asked: where is it said that a vessel must fly a flag? Possibly custom? Possibly convention? Possibly drug laws, etc.? Obviously it is not apparent from where this possible custom originated. The authors of this article took the view that the best way to approach the topic was to look over what happens if you do not fly a flag. We have seen that flying a flag is synonymous with identification. The article has discussed various drug cases and how the U.S. treats the carrying of drugs at sea to be the equivalent to a universal crime, subject to universal jurisdiction without any nexus.²³² Further, this article explained Article 110, UNCLOS, which gives a warship that has reasonable grounds to believe that slavery or piracy is being committed on board a merchant vessel the right to board that vessel even though the vessel is flagged. It has been pointed out that pirate ships used to fly the flag of the pirate. Of course, the stateless vessel problem in and of itself creates problems because, after looking at the various drug cases and the evolution of our drug smuggling laws in the United States, a vessel needs to fly a flag or use some means of ready identification. Otherwise, the U.S. Coast Guard will state that it has probable cause or reasonable grounds to believe that the vessel, and the crew of the vessel are engaging in criminal conduct which apparently is so serious as to conjure up the same type of universal jurisdiction as the crime against humanity, such as genocide or piracy.

This brings us to the topic of whether or not there is sufficient technology today to identify ships even if they do not have a flag. Should every vessel be required to have this type of technology on-board? This being the case, is it really necessary for any ship to fly a flag at this point or possibly in the near future?

VI. A POSSIBLE SOLUTION AS TO HOW TO IDENTIFY A VESSEL AT SEA THAT DOES NOT FLY A FLAG

In December of 2011, Professor Dubner gave a lecture in Singapore. He was invited to the Naval base located there. Two naval officers, one from France, and one from India, showed Professor Dubner an electronic board

or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

231. Sohn, *supra* note 215, at 152.

232. See *United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994).

that was as large as anything that he had seen at NASA (Cape Canaveral). On that board were red dots and the maps of the Southeast Asia Region. The Naval officers said that these dots represented various merchant vessels and their locations.

In connection with whether or not a flag is even necessary at this point, Professor Dubner decided to email a representative of Lloyd's Agency in London. Lloyd's underwrites all of the shipping throughout most of the world. A gentlemen responded and said that there is an international maritime organization regulation which requires Automatic Identification Systems (AIS) to be fitted aboard all ships of 300 gross tonnage and upwards that are engaged on international voyages; cargo ships of 500 gross tonnage and upwards that are not engaged on international voyages; and all passenger ships irrespective of size. The requirement became effective for all ships by December 31, 2004. The insurance representative stated that it was his understanding that both inside and outside of Lloyd's market, any insurers would require this regulation to be followed as a condition for policy coverage.²³³

Think of a shipboard radar or an electronic display, which will contain some sort of identification for all the ships that are within a specific area and will indicate their speed and direction.²³⁴ The identification symbol "... can reflect the actual size of the ship, with position to GPS or differential GPS accuracy.²³⁵ Furthermore, when you select the identification symbol, the individual is able to gain information such as: the ship's name, direction, speed, and registration, among other information.²³⁶ AIS would basically provide information such as the closest point of approach, and time to closest point approach, more timely and efficient than an automatic radar plotting aid."²³⁷

With the information received from the AIS, "you can call any ship over VHF radiotelephone by name, rather than by 'ship off my port bow' or some

233. Email from David Lawrence, Controller of Agencies, Lloyd's Agency Department, to Barry Hart Dubner (April 4, 2016, 12:10 EST) (on file with author).²³³

234. *Automatic Identification System Overview*, Navigation Center, www.navcen.uscg.gov/?pageName=AISmain (last updated July 30, 2014).

235. *Id.*

236. *Id.*

237. *Id.* (showing a visual depiction of a shipboard radar display using AIS).

other means.” You can also “dial it up directly using GMDSS equipment, or send to the ship, or receive from it, short safety related email messages.”²³⁸

Automatic identification systems are designed to be capable of providing information about the ship to other ships and to coastal authorities automatically.²³⁹ In fact, regulation 19 of the Convention for Safety of Life at Sea (SOLAS)²⁴⁰ Chapter V-states that Carriage requirements for shipborne navigational systems and equipment sets out navigational equipment to be carried on board ships, according to ship type.²⁴¹

The regulation requires that AIS: provide information-including the ship’s identity, type, position, course, speed, navigational status, and other safety-related information- automatically to appropriately equipped shore stations, other ships and aircraft; receive automatically such information from similarly fitted ships; monitor and track ships; and exchange data with shore-based facilities. By July 1, 2013, all passenger ships and tankers were required to have this type of system and meet all regulations.²⁴² However, there was a security problem.

Apparently there was a maritime security question regarding the gathering of AIS ship data because in December 2004, the Maritime Safety Committee (MSC) agreed, that in relation to the issue of freely available automatic information system (AIS)-generated ship data on the world-wide web:

the publication on the world-wide web or elsewhere of AIS data transmitted by ships could be detrimental to the safety and security of ships and port facilities and was undermining the efforts of the

238. *See id.* (AIS is quite impressive, “capable of handling well over 4,500 reports per minute and updates as often as every two seconds.” It does so by using “Self-Organizing Time Division Multiple Access (SOTDMA) technology to meet this high broadcast rate and ensure reliable ship-to-ship operation).

239. *AIS transponders*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/en/OurWork/Safety/Navigation/Pages/AIS.aspx (last visited July 23, 2016).

240. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47 (as amended) (entered into force May 25, 1980) [hereinafter SOLAS Convention]. SOLAS has been ratified by all Arctic countries. SOLAS Convention deals with the safety of human life at sea, regulations governing ship construction, standardization of safety equipment, radio communications, and operations and navigation of ships.

241. *Id.*; for a visual depiction of AIS data transmission, *see* AIS transponders, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/en/OurWork/Safety/Navigation/Pages/AIS.aspx (last visited July 23, 2016).

242. SOLAS Convention, Nov. 1, 1974, 32 U.S.T. 47 (as amended) (entered into force May 25, 1980).

Organization and its Member States to enhance the safety to navigation and security in the international maritime transport sector²⁴³

Another Committee “condemned the regrettable publication on the world-wide web, or elsewhere, of AIS data transmitted by ships.”²⁴⁴ The Committee “urged Member Governments, subject to the provisions of their national laws, to discourage those who would make available AIS data to others for publications on the world-wide web, or elsewhere”²⁴⁵ Also, “the Committee condemned those who irresponsibly publish[ed] AIS data transmitted by ships on the world-wide web, or elsewhere, particularly if they offer services to the shipping and port industries.”²⁴⁶

By now, most people have heard of Global Positioning System (GPS)²⁴⁷ and basically it has been said that it “has changed the way the world operates.”²⁴⁸ This is especially true for marine operations, including search and rescue.²⁴⁹ GPS provides the fastest and most accurate method for mariners to navigate, measure speed, and determine location.²⁵⁰ It allows effectiveness and safety for all mariners.²⁵¹ For safety reasons, the location of the ship is extremely important for ship officers.²⁵² Further, “[w]hile at sea: accurate position, speed, and heading are needed to ensure the vessel reaches its destination in the safest, most economical and timely fashion that conditions will permit . . . vessel traffic and other waterway hazards make maneuvering more difficult, and the risk of accidents become greater.”²⁵³

243. *AIS transponders*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/en/OurWork/Safety/Navigation/Pages/AIS.aspx (last visited July 23, 2016).

244. *Id.*

245. SOLAS Convention, Nov. 1, 1974, 32 U.S.T. 47 (as amended) (entered into force May 25, 1980).

246. *Id.*

247. Chris Woodford, EXPLAINTHATSTUFF! (June 8, 2015), www.explainthatstuff.com/howgpsworks.html (“There are rival navigation systems. In the United States, GPS is universally used as a synonym for any and every kind of satellite navigation; other countries, such as the U.K., “satnav” is a more familiar generic term. The Soviet Union launched a rival system called GLONASS in 1982 and so on and so forth.”).

248. *Marine*, GPS.GOV, <http://www.gps.gov/applications/marine/> (last updated 2006).

249. *Id.*

250. *Id.* (GPS is operated and maintained by the U.S. Air Force. GPS.gov is maintained by the National Coordination Office for Space Based Positioning, Navigation, and Timing).

251. *Id.*

252. *Id.*

253. *Id.*

GPS data is being used by mariners and oceanographers for underwater surveying, buoy placement, navigational hazard location, and mapping.²⁵⁴ The GPS is also being used by commercial fishing fleets to identify fish and help with regulation compliance.²⁵⁵ “An enhancement to the basic GPS signal known as Differential GPS (DGPS) provides much higher precision and increased safety in its coverage area for maritime operations, which in turn improves harbor navigation”²⁵⁶

Now governments and industrial organizations are working together to develop performance standards for Electronic Chart Display and Information Systems, which use GPS and or DGPS for positioning information.²⁵⁷ The implementation of these systems are changing marine navigation and driving the substitution of paper nautical charts.²⁵⁸

The challenge is to know the absolute position of anything, anytime, anywhere.²⁵⁹ One of the issues that it raises, for example, is that civilian transportation systems are designed to rely on satellite systems provided by the U.S. or Russian military, which could make us vulnerable to the sudden twists of international politics.²⁶⁰ Could a future world of driverless cars, hyper-efficient parcel shipping, and automated air-traffic control be plunged into chaos purely at the whim of these superpowers?²⁶¹ The Europeans use a system called Galileo, a civilian system, which would eliminate possible military interference in time, but at the moment it remains a concern.²⁶² Other concerns include fast-disappearing privacy.²⁶³ It is said that “each new technology brings its pros and cons, from internal combustion engines to

254. *Marine*, GPS.GOV, <http://www.gps.gov/applications/marine/> (last updated 2006).

255. *Id.*

256. *Id.*

257. *Id.*

258. See *Id.* (“Governments and industrial organizations around the world are working together to develop performance standards for Electronic Chart Display and Information Systems’ which us GPS and/or DGPS for positioning information. These systems are revolutionizing marine navigation and are leading to the replacement of paper nautical charts. With DGPS, position and radar information can be integrated and displayed on an electronic chart, forming the basis of the Integrated Bridge System which is being installed on commercial vessels of all type).

259. Woodford, *supra* note 249.

260. *Id.*

261. See *Id.*

262. *Id.*

263. *Id.*

submachine guns, and nuclear power plants to antibiotics.”²⁶⁴ Progress involves making a tradeoff between benefits and costs.²⁶⁵ “All European Union vessels above 15 meters in length are fitted with a Vessel Monitoring System (VMS).”²⁶⁶ This “system relies on satellite navigation and communication technology.”²⁶⁷ United States has a Long Range Identification and Tracking of Shipments system. Regarding system operations, in the strategic and tactical spectrums, the questions that should be asked are: Is the system tracked routinely? Is there active or passing tracking? Who tracks the information and how is tracking information used? Does the U.S. have the ability to track foreign flagged shipping that are participants under amended regulation 19-1 under Chapter V of the Safety of Life at Sea (SOLAS)?²⁶⁸

It is rather obvious that the boats over a certain tonnage should be required to have some form of identification other than a flag. Each ship should be required to have a GPS or some type of universal system so that the vessel can be tracked.

There are a few problems with identification of a ship, but the flag is not one of them. The flag of conveyance or open registry ships remind the authors of this article of the parable of the Emperor’s New Clothes²⁶⁹ in that

264. *Id.*

265. Woodford, *supra* note 249.

266. The Vessel Detection System, Fishreg: Scientific and Technical Support to the Common Fisheries Policy, http://ec.europa.eu/research/press/2007/maritime-briefing/pdf/43-vessel-detection-system-fisheries_en.pdf (last visited July 22, 2016); Vessel Monitoring System, Scottish Government; <http://www.gov.scot/Topics/marine/Compliance/satellite> (last visited July 21, 2016) (“VMS is a form of satellite tracking using transmitters on board fishing vessels. The system is a legal requirement under EC Regulation 2244/2003 and Scottish Statutory Instrument (SI) 392/2004.” It can be handheld with a “communications device which reports the position at a minimum of every two hours.” The unit consists of a GPS receiver which plots the position of the vessel perhaps this is much like in-car Sat Nav (or a handheld GPS unit). So what if the information sent by the VMS unit is automatically sent on a pre-determined time scale and that period includes, the area, the vessel identification, the geographical position, the date/time of fixing a position and the course and speed.)

267. The Vessel Detection System, *supra* note 268.

268. E-mail from Anonymous to Barry Hart Dubner (Apr. 1, 2016, 15:10 EST).

269. Hans Christian Andersen, Hans Andersen’s Fairy Tales 127-130 (J.H. Stickney Second Series 1915).

269. (This is a short tale about two weavers who promise an emperor a new suit of clothes that is invisible to those who are unfit for their positions, stupid, or incompetent. When the Emperor parades before his subjects in his new clothes, no one dares to say that they don’t see any suit of

everybody knows that there is definitely something wrong with the easy flagging of ships these days. However, since international law gives each State the right to flag a ship and sets its own registration laws, health, labor and other laws have become unfavorable to seaman.

VII. CONCLUSION

The authors of this article cannot point to any historical fact indicating that at any point in time seafaring nations and others decided to institute a requirement that a ship fly a flag. There is no requirement regarding painting emblems of flags on the side of ships. There is also a problem with identification of ships at sea with regard to criminal statutes that make stateless vessels subject to being arrested.²⁷⁰ We have looked at what a flag represents in terms of sovereignty and where and when the use of a flag originated. It was pointed out also that there are different types of flags, but the methodology of the article was to approach the topic in reverse; namely what would happen if one did not fly a flag. We learned that basically there is no international law requiring that a ship fly a flag on the high seas; however, if a ship does not fly a flag then it may not receive diplomatic protection. Flying a flag is synonymous with identification, although it is not the only legal means of identifying a ship. The drug cases that were discussed were just a few main cases, but it seems the U.S. Congress has really overstepped its bounds by prescribing drug smuggling as a universal crime. We wonder what would happen if Congress ever decided to legalize the use of drugs in this country. That would change a whole body of law overnight.

The question also was raised whether there is sufficient technology today in order to identify ships and if so, has the necessity for a merchant ship to fly a flag diminished in any way. From what was set forth, it is obvious that the technology does exist to identify ships at sea. The technology is being used by various countries and takes numerous shapes and forms. The technology is available to the international community if it chooses to require each ship, for example, over a certain weight to carry a GPS type of system or something similar. This would, therefore make available easy identification on short notice. The downside, as was pointed

clothes until a child cries out, "But he isn't wearing anything at all!" The tale has been translated into over 100 languages).

270. See *United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994); *United States v. Matos-Luchi*, 627 F.3d 1 (1st Cir. 2010); *United States v. Pinto-Mejia*, 720 F.2d 248, 261 (2d Cir. 1983); *United States v. Prado*, 143 F. Supp. 3d 94 (S.D.N.Y. 2015).

out, is that the technology would be available and privacy rights could be breached easily. The whole discussion regarding flag identification reminds one of a tongue twister from the Danny Kaye movie, "The Court Jester" where he states:

the vessel with the pestle has the pellet with the poison
the chalice with the palace has the brew that is true
Now the chalice with the palace has been broken
and the dragon with flagon has the pellet with the poison
and the vessel with the pestle has a brew that is true.²⁷¹

APPENDIX

Appendix I

§ 1903. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels

(a) Vessels of United States or vessels subject to jurisdiction of United States:

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

(b) "Vessel of the United States" defined

For purposes of this section, a "vessel of the United States" means—

(1) a vessel documented under chapter 121 of title 46 or a vessel numbered as provided in chapter 123 of that title;

(2) a vessel owned in whole or part by—

(A) the United States or a territory, commonwealth, or possession of the United States;

(B) a State or political subdivision thereof;

(C) a citizen or national of the United States; or

271. THE COURT JESTER (Dena Enterprises 1955).

(D) a corporation created under the laws of the United States or any State, the District of Columbia, or any territory, commonwealth, or possession of the United States; unless the vessel has been granted the nationality of a foreign nation in accordance with article 5 of the 1958 Convention on the High Seas and 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 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 either sold to a person not a citizen of the United States or placed under foreign registry or a foreign flag, whether or not the vessel has been granted the nationality of a foreign nation.

(c) “Vessel subject to the jurisdiction of the United States” and “vessel without nationality” defined; claim of nationality or registry

(1) For purposes of this section, a “vessel subject to the jurisdiction of the United States” includes—

(A) a vessel without nationality;

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

(C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel located within the customs waters of the United States;

(E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States; and

(F) a vessel located in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999, and

(i) is entering the United States,

- (ii) has departed the United States, or
- (iii) is a hovering vessel as defined in section 1401 of title 19.

Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under subparagraph (C) or (E) of this paragraph may be obtained by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of the Secretary of State or the Secretary's designee.

(2) For purposes of this section, a "vessel without nationality" includes—

(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed;

(B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

A claim of registry under subparagraph (A) or (C) may be verified or denied by radio, telephone, or similar oral or electronic means. The denial of such claim of registry by the claimed flag nation is conclusively proved by certification of the Secretary of State or the Secretary's designee.

(3) For purposes of this section, a claim of nationality or registry only includes:

(A) possession on board the vessel and production of documents evidencing the vessel's nationality in accordance with article 5 of the 1958 Convention on the High Seas;

(B) flying its flag nation's ensign or flag; or

(C) a verbal claim of nationality or registry by the master or person in charge of the vessel.

(d) Claim of failure to comply with international law; standing; jurisdiction of court

Any person charged with a violation of this section shall not have standing to raise the 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 invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.

(e) Exception; burden of proof

This section does not apply to a common or contract carrier or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such a vessel who possesses or distributes a controlled substance in the lawful course of such person's duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negate the exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with respect to this exception is upon the person claiming its benefit.

(f) Jurisdiction and venue

Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court of the District of Columbia. Jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense. All jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

(g) Penalties

(1) Any person who commits an offense defined in this section shall be punished in accordance with the penalties set

forth in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960).

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under this chapter shall be punished in accordance with the penalties set forth in section 1012 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 962) if such offense is a second or subsequent offense as defined in section 1012(b) of that Act.

(h) Extension beyond territorial jurisdiction of United States

This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

(i) Definitions of drug abuse terms

The definitions in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to terms used in this chapter.

(j) Attempt or conspiracy to commit offense

Any person who attempts or conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.²⁷²

Appendix II

Use of Unique, Special Purpose, and Illicit Flags at Sea

As a ruse during the age of fighting sail, naval vessels and privateers alike would some times display "false colors," the flag of neutral or allied nation, to lull an unsuspecting quarry into a false sense of security.

False colors have also been employed by smugglers and other nefarious activity at sea to disguise their activity or enter

272. 46 U.S.C. app. § 1903 (pre-2006). (Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels)

unchallenged into an unsuspecting nation's territorial rival waters in order to receive or discharge illegal cargos.²⁷³

Appendix III

Below are examples from both a multilateral and bilateral treaty granting enforcement authority to a contracting state over the vessels of other state parties in certain circumstances.

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

Article 17: ILLICIT TRAFFIC BY SEA

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
2. 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.
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 authorization 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 authorize the requesting State to, *inter alia*:

- (a) Board the vessel;
- (b) Search the vessel;

273. John B. Hattendorf, Editor in Chief, *THE OXFORD ENCYCLOPEDIA OF MARITIME HISTORY*, Oxford University Press, 45 (vol. 2 2007).

(c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For 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 authorization 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.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The 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.

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 authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of

coastal States in accordance with the international law of the sea.²⁷⁴

Appendix IV

UNITED STATES-UNITED KINGDOM AGREEMENT TO FACILITATE THE INTERDICTION OF VESSELS SUSPECTED OF TRAFFICKING IN DRUGS Nov. 13, 1981, 33 U.S.T. 4224, 1285 U.N.T.S. 1971.

1. The Government of the United Kingdom of Great Britain and Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States and within the area described in paragraph 9 below, of private vessels under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.
2. On boarding the vessel the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures as are necessary to establish the place of registration of the vessel. When these measures suggest that an offense against the laws of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agree that they will not object to the authorities of the United States instituting a search of the vessel.
3. If the authorities of the United States then believe that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agree that they will not object to the vessel being seized and taken into a United States port.
4. The Government of the United Kingdom may, within 14 days of the vessel's entry into port, object to the continued exercise of United States jurisdiction over the vessel for purposes of the laws referred to in paragraph 2 above, and the

274. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17, opened for signature Dec. 20, 1988, 1582 U.N.T.S. 95.

government of the United States shall thereupon release the vessel without charge. The Government of the United States shall not institute forfeiture proceedings before the end of the period allowed for objection.

5. The Government of the United Kingdom may, within 30 days of the vessel's entry into port object to the prosecution of any United Kingdom national found on board the vessel, and the Government of the United States shall thereupon release such person. The Government of the United Kingdom agree that they will not otherwise object to the prosecution of any person found on board the vessel.

6. Any action by the authorities of the United States shall be taken in accordance with this Agreement and United States law.

7. In any case where a vessel under the British flag is boarded the authorities of the United States shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent developments.

8. If any loss or injury is suffered as a result of any action taken by the United States in contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto, representatives of the two Governments shall meet at the request of either to decide any question relating to compensation. Representatives of the two Governments shall in any case meet from time to time to review the working of these Arrangements.

9. The areas referred to in paragraph 1 above comprise the Gulf of Mexico, the Caribbean Sea, that portion of the Atlantic Ocean West of longitude 55° West and South of latitude 30° North and all other areas within 150 miles of the Atlantic coast of the United States.²⁷⁵

Appendix V

Benefits to The Global Positioning system:

275. Agreement to Facilitate the Interdiction of Vessels Suspected of Trafficking in Drugs , U.S.- United Kingdom, Nov. 13, 1981, 33 U.S.T. 4224, 1285 U.N.T.S. 1971.

Allows access to fast and accurate position, course, and speed information, saving navigators time and fuel through more efficient traffic routing.

Provides precise navigation information to boaters.

Improves precision and efficiency of buoy positioning, sweeping, and dredging operations.

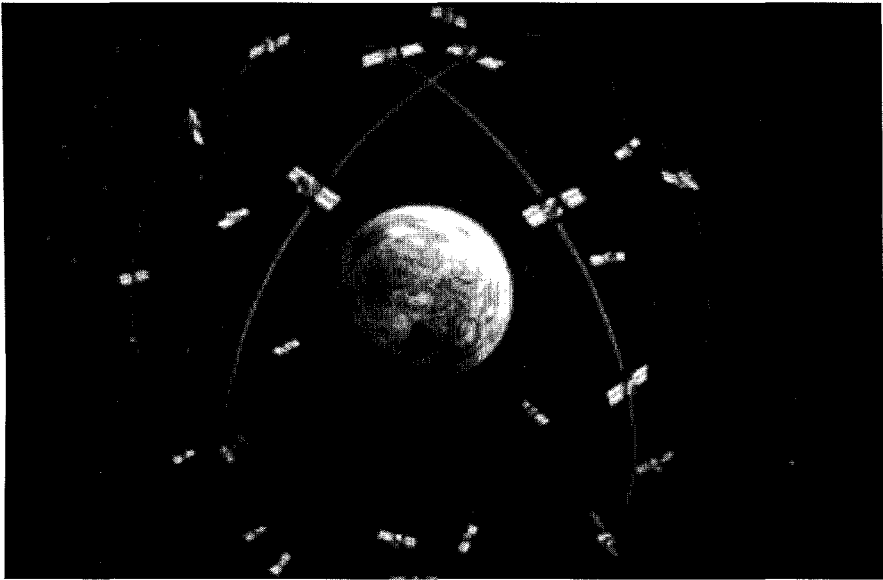
Enhances efficiency and economy for containers management in port facilities.

Increase safety and security for vessels using the AIS.²⁷⁶

Appendix VI

Photo: An artist's impression of the 24 NAVSTAR satellites in orbit around Earth. Picture courtesy of US Department of Defense.

276. GPS.GOV, *Marine*, <http://www.gps.gov/applications/marine/> (last updated 2006).



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How GPS Works

Satellite navigation systems all work in broadly the same way. There are three parts: the network of satellites, a control station somewhere on Earth that manages the satellites, and the receiving device you carry with you.

Each satellite is constantly beaming out a radio-wave signal toward Earth. The receiver “listens out” for these signals and, if it can pick up signals from three or four different satellites, it can figure out your precise location (including your altitude).

How does that work? The satellites stay in known positions and the signals travel at the speed of light. Each signal includes information about the satellite it came from and a time-stamp that says when it left the satellite. Since the signals are radio waves, they must travel at the speed of light. By noting when each signal arrives, the receiver can figure out how long it took to travel and how far it has come—in other words, how far it is from the sending satellite. With three or four signals, the receiver can figure out

²⁷⁷ Chris Woodford, *Satellite Navigation*, EXPLAIN THAT STUFF! (Nov. 13, 2016) www.explainthatstuff.com/howgpsworks.html.

exactly where it is on Earth.

Where in the world are you?

1. If your satellite receiver picks up a signal from the yellow satellite, you must be somewhere on the yellow sphere.
2. If you're also picking up signals from the blue and red satellites, you must be at the black dot where the signals from the three satellites meet.
3. You need a signal from a minimum of three satellites to fix your position this way (and four satellites if you want to find your altitude as well). Since there are many more GPS satellites, there's more chance you'll be able to locate yourself wherever on Earth you happen to be.²⁷⁸

278. Chris Woodford, *Satellite Navigation*, EXPLAIN THAT STUFF! (Nov. 13, 2016) www.explainthatstuff.com/howgpsworks.html.

