

CHAPTER 3

Protection of Persons and Property at Sea and Maritime Law Enforcement

3.1 INTRODUCTION

The protection of both U.S. and foreign persons and property at sea by U.S. naval forces in peacetime involves international law, domestic U.S. law and policy, and political considerations. Vessels and aircraft on and over the sea, and the persons and cargo embarked in them, are subject to the hazards posed by the ocean itself, by storm, by mechanical failure, and by the actions of others such as pirates, terrorists, and insurgents. In addition, foreign authorities and prevailing political situations may affect a vessel or aircraft and those on board by involving them in refugee rescue efforts, political asylum requests, law enforcement actions, or applications of unjustified use of force against them.

Given the complexity of the legal, political, and diplomatic considerations that may arise in connection with the use of naval forces to protect civilian persons and property at sea, operational plans, operational orders, and, most importantly, the *applicable standing rules of engagement* promulgated by the operational chain of command ordinarily require the on-scene commander to report immediately such circumstances to higher authority and, whenever it is practicable under the circumstances to do so, to seek guidance prior to the use of armed force.

A nation may enforce its domestic laws at sea provided there is a valid jurisdictional basis under international law to do so. Because U.S. naval commanders may be called upon to assist in maritime law enforcement actions, or to otherwise protect persons and property at sea, a basic understanding of maritime law enforcement procedures is essential.

3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

Mishap at sea is a common occurrence. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition. A right to enter and remain in a safe harbor without prejudice, at least in peacetime, when required by the perils of the sea or *force majeure* is universally recognized.¹ At the same

¹ See 2 O'Connell 853-58, MLEM 2-9, and paragraph 3.2.2 (p. 3-3). *Force majeure*, or Act of God, involves distress or stress of weather. Distress may be caused, *inter alia*, by equipment malfunction or navigational error, as well as by a shortage of food or water, or other emergency. Distress is further discussed in paragraph 2.3.1, note 25 (p. 2-7).

time, a coastal nation may lawfully promulgate quarantine regulations and restrictions for the port or area in which a vessel is located.²

3.2.1 Assistance to Persons, Ships, and Aircraft in Distress. Customary international law has long recognized the affirmative obligation of mariners to go to the assistance of those in danger of being lost at sea. Both the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention codify this custom by providing that every nation shall require the master of a ship flying its flag, insofar as he can do so without serious danger to his ship, crew, or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as it can reasonably be expected of him. He is also to be required, after a collision, to render assistance to the other ship, its crew,³ and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call.⁴ (See paragraph 2.3.2.5 for a discussion of "Assistance Entry.")

² International Health Regulations, Boston, 1969, 21 U.S.T. 3003, T.I.A.S. 7026, 764 U.N.T.S. 3, as amended at Geneva, 1973, 25 U.S.T. 197, T.I.A.S. 7786. See paragraph 3.2.3 (p. 3-4) regarding the duty of commanders to comply with quarantine regulations.

³ High Seas Convention, art. 12; 1982 LOS Convention art. 98. "Article 98 [1982 LOS Convention] gives expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and the elementary considerations of humanity." Nordquist, Vol. III at 571.

"The duty to render assistance is also addressed in article 18 (Meaning of Passage). Under paragraph 2 of that article, a ship exercising its right of innocent passage through the territorial sea may stop and anchor if it is necessary for the purpose of rendering assistance to persons, ships or aircraft in danger or distress" Article 98, paragraph 1(a) sets out the general obligation to render assistance to persons in distress 'at sea' (i.e., anywhere in the oceans). Article 98 is applicable in the exclusive economic zone in accordance with article 58, paragraph 2. Therefore, in combination with article 18, the duty to render assistance exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas."

Id., at 176-77.

See also International Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, Brussels, 23 September 1910, 37 Stat. 1658, T.I.A.S. 576; (to be superseded for States Party by the 1989 Salvage Convention, Chap. 2, art. 10.); and 46 U.S.C. sec. 2304 (1994). The United States ratified the 1989 International Convention on Salvage on 27 March 1992. See Senate Treaty Doc. 12, 102d Cong., 1st Sess. (1991). Further, the 1979 International Convention on Search and Rescue, T.I.A.S. 11093, requires parties to ensure that persons and property in distress at sea are provided assistance. This obligation has been fulfilled domestically through creation of a National Search and Rescue System. See National Search and Rescue Manual, U.S. Coast Guard, COMDTINST M16120.5A and .6A (vols. 1 & 2). Compare art. 21 of the Second Geneva Convention of 1949 regarding the right of belligerents to appeal to the "charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for the wounded, sick or shipwrecked persons, and to collect the dead" and the special protection accorded those who respond to such appeals. See paragraph 3.2.2.1 (p. 3-3) regarding the right of ships transiting territorial seas in innocent passage to render assistance to persons, ships or aircraft in danger or distress.

⁴ 46 U.S.C. sec. 2303 (1994).

3.2.1.1 Duty of Masters. In addition, the U.S. is party to the 1974 London Convention on Safety of Life at Sea, which requires the master of every merchant ship and private vessel not only to speed to the assistance of persons in distress, but to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea.⁵

3.2.1.2 Duty of Naval Commanders. Article 0925, U.S. Navy Regulations, 1990, requires that, insofar as he can do so without serious danger to his ship or crew, the commanding officer or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance (insofar as this can reasonably be expected of him); render assistance to any person found at sea in danger of being lost; and, after a collision, render assistance to the other ship, her crew and passengers, and, where possible, inform the other ship of his identity.⁶ Article 4-2-5, U.S. Coast Guard Regulations (COMDTINST M5000.3 (series)) imposes a similar duty for the Coast Guard.

3.2.2 Safe Harbor. Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy or hazard. The only condition is that the distress must be real and not contrived and based on a well-founded apprehension of loss of or serious damage or injury to the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any incapacity, penalty, prohibition, duties, or taxes in force at that port.⁷ (See paragraph 4.4 for a discussion of aircraft in distress.)

3.2.2.1 Innocent Passage. Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when necessitated by *force majeure* or by distress. Stopping and anchoring in such waters for the purpose of rendering assistance to others in similar danger or distress is also permitted by international law.⁸

⁵ 1974 International Convention for Safety of Life at Sea (SOLAS), Regulations 10 and 2, Chapter V, 32 U.S.T. 47, T.I.A.S. 9700. The failure of masters or persons in charge of vessels to render assistance so far as they are able (absent serious danger to their own vessel) to every person found at sea in danger of being lost is a crime under U.S. law punishable by a fine not exceeding \$1,000 and/or imprisonment for up to two years (46 U.S.C. sec. 2304 (1994)). This section does not apply to public vessels (*see* 46 U.S.C. sec. 2109 (1994)).

⁶ In addition to these obligations explicitly required by the law of the sea conventions, U.S. Navy Regulations, 1990, art. 0925, also requires that ships and aircraft in distress be afforded all reasonable assistance. Actions taken pursuant to art. 0925 are to be reported promptly to the Chief of Naval Operations and other appropriate superiors. *See* Harry, Failure to Render Aid, U.S. Naval Inst. Proc., Feb. 1990, at 65.

⁷ 2 O'Connell 853-58. *See also* paragraph 2.3.1, note 20 (p. 2-7).

⁸ Territorial Sea Convention, art. 14; 1982 LOS Convention, arts. 18 & 52. Innocent passage is discussed in greater detail in paragraph 2.3.2 (p. 2-7). *See also* paragraph 3.2.1, note 3 (p. 3-2).

3.2.3 Quarantine. Article 0859, U.S. Navy Regulations, 1990, requires that the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While commanding officers and aircraft commanders shall not permit inspection of their vessel or aircraft, they shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security.⁹ To avoid restrictions imposed by quarantine regulations, the commanding officer should request *free pratique*¹⁰ in accordance with the Sailing Directions for that port.

3.3 ASYLUM AND TEMPORARY REFUGE

3.3.1 Asylum. International law recognizes the right of a nation to grant asylum to foreign nationals already present within or seeking admission to its territory.¹¹ The U.S. defines "asylum" as:

*Protection and sanctuary granted by the United States Government within its territorial jurisdiction or in international waters to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*¹²

⁹ See also SECNAVINST 6210.2 (series), Subj: Medical and Agricultural Foreign and Domestic Quarantine Regulations for Vessels, Aircraft, and Other Transports of the Armed Forces, and paragraph 3.2 (p. 3-1). The sovereign immunity of warships and military aircraft is discussed in paragraphs 2.1.2 (p. 2-1) and 2.2.2 (p. 2-6), respectively.

¹⁰ Clearance granted a ship to proceed into a port after compliance with health or quarantine regulations.

¹¹ Sometimes referred to as "political asylum," the right of asylum recognized by the U.S. Government is territorial asylum. Christopher, Political Asylum, Dep't St. Bull., Jan. 1980, at 36. The 1948 U.N. Universal Declaration of Human Rights declares that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution," see Declaration on Territorial Asylum, 22 U.N. GAOR, Supp. No. 16, at 81, U.N. Doc. A/6716 (1968). The decision to grant asylum remains within the discretion of the requested nation. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S. Code), for the first time created substantial protections for aliens fleeing persecution who are physically present in U.S. territory. The Act is carefully examined in Anker, Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980, 28 Va. J. Int'l L. 1 (1987). With regard to illegal Haitian migrants, see the Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Persons Coming from Haiti, 33 U.S.T. 3559; T.I.A.S. 10,241, reprinted in 20 Int'l Leg. Mat'ls 1198 (1981), entered into force 23 Sept. 1981. See also Leich, Contemporary Practice of the United States Relating to International Law--Illegal Haitian Migrants, 83 Am. J. Int'l L. 906 (1989); paragraph 3.3.1.3, note 14 (p. 3-6).

¹² This definition is derived from art. 1 of the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6260, 189 U.N.T.S. 150 (in respect to refugees resulting from pre-1951 events), arts. 2 to 34 of which are incorporated in the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267, AFP 110-20 (Navy Supp.) at 37-2, which makes its provisions applicable without time reference. The United States is party to the latter instrument. Refugees are defined in 8 U.S.C. sec. 1101(42)(A) (1982) in substantially similar terms.

Asylum responsibility rests with the government of the country in which the seeker of asylum finds himself or herself. The U.S. Government does not recognize the practice of granting "diplomatic asylum" or long-term refuge in diplomatic (continued...)

Whether to grant asylum is a decision reserved to higher authority.

3.3.1.1 Territories Under the Exclusive Jurisdiction of the United States and International Waters. Any person requesting asylum in international waters or in territories under the exclusive jurisdiction of the United States (including the U.S. territorial sea, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, territories under U.S. administration, and U.S. possessions), will be received on board any U.S. armed forces aircraft, vessel, activity or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. (See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series), and U.S. Coast Guard Maritime Law Enforcement Manual, COMDTINST M16247.1 (series) (MLEM), Enclosure 17, for specific guidance.)

3.3.1.2 Territories Under Foreign Jurisdiction. Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions) are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. Consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for

¹²(...continued)

missions or other government facilities abroad or at sea and considers it contrary to international law (*but see* paragraph 3.3.2 (p. 3-6)). However, exceptions to this policy have been made. For example, the United States received Cardinal Mindszenty in the U.S. Embassy in Budapest in 1956, and accorded him a protected status for some six years. 6 Whiteman 463-64. Several Pentacostals spent five years in the U.S. Embassy in Moscow between 1978 and 1983. 1 Restatement (Third), sec. 466 Reporters' Note 3, at 488-89. In 1989 two Chinese dissidents were received in the U.S. Embassy in Beijing. Wash. Post, 13 June 1989, at A25; Wall St. J., 13 June 1989, at A20.

Guidance for military personnel in handling requests for political asylum and temporary refuge (*see* paragraph 3.3.2 (p. 3-6)) is found in DODDIR. 2000.11; SECNAVINST 5710.22 (series), Subj: Procedures for Handling Requests for Political Asylum and Temporary Refuge; U.S. Navy Regulations, 1990, art. 0939; and applicable operations orders. These directives were promulgated after the Simas Kurdika incident. *See* Mann, Asylum Denied: The Vigilant Incident, Nav. War Coll. Rev., May 1971, at 4, *reprinted in* Lillich & Moore, Vol. 60 (1980) at 598; Goldie, Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970, Nav. War Coll. Rev., May 1971, at 32, *reprinted in* Lillich & Moore, Vol 60 (1980) at 626; Fruchterman, Asylum: Theory and Practice, 26 JAG J. 169 (1972). Special procedures, held locally, apply to Antarctica and Guantanamo Bay.

On the other hand, some refugees may seek resettlement and not specifically request asylum, such as some of the Indochinese refugees encountered by U.S. naval vessels in the South China Sea since 1975. Guidance for handling refugee resettlement requests may be found in cognizant operations orders, such as CINCPACFLT OPOD 201, Tab E to Appendix 6 to Annex C, para. 3(b).

The legal protection of refugees and displaced persons are discussed in the following four articles appearing in 1988 Int'l Rev. Red Cross 325-78: Hacke, Protection by Action, at 325; Krill, ICRC Actions in Aid of Refugees, at 328; Mumtarbhorn, Protection and Assistance for Refugees in Ground Conflicts and Internal Disturbances, at 351; and Patnrogic, Thoughts on the Relationship Between International Humanitarian Law and Refugee Law, their Protection and Dissemination, at 367.

asylum with the host government insofar as practicable. Because warships are extensions of the sovereignty of the flag nation and because of their immunity from the territorial sovereignty of the foreign nation in whose waters they may be located,¹³ they have often been looked to as places of asylum. The U.S., however, considers that asylum is generally the prerogative of the government of the territory in which the warship is located.

However, if exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be granted. (See paragraph 3.3.2.)

3.3.1.3 Expulsion or Surrender. Article 33 of the 1951 Convention Relating to the Status of Refugees provides that a refugee may not be expelled or returned in any manner whatsoever to the frontier or territories of a nation where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group, unless he may reasonably be regarded as a danger to the security of the country of asylum or has been convicted of a serious crime and is a danger to the community of that country.¹⁴ This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.

3.3.2 Temporary Refuge. International law and practice have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger for the duration of that danger. (See Article 0939, U.S. Navy Regulations, 1990, SECNAVINST 5710.22 (series), and the Coast Guard's MLEM.)

¹³ See paragraph 2.2.2 (p. 2-6) and Annex A2-1 (p. 2-43).

¹⁴ This obligation, known as *non-refoulement*, is implemented by 8 U.S.C. sec. 1231(b)(3) (1997). See 2 Restatement (Third), sec. 711 Reporters' Note 7, at 195-96, and 1 *id.*, sec. 433, Reporters' Note 4, at 338-39.

This obligation does not apply to Haitian migrants intercepted at sea under the Haitian Migration Interdiction Program. Under this executive agreement between the United States and Haiti, 23 September 1981, 33 U.S.T. 3559, T.I.A.S. 10241, Haiti authorized U.S. Coast Guard personnel to board any Haitian flag vessel on the high seas or in Haitian territorial waters which the Coast Guard has reason to believe may be involved in the irregular carriage of passengers outbound from Haiti, to make inquiries concerning the status of those on board, to detain the vessel if it appears that an offense against U.S. immigration laws or appropriate Haitian laws has been or is being committed, and to return the vessel and the persons on board to Haiti. Under this agreement the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." See Presidential Proclamation 4865, 3 C.F.R. 50 (1981 Comp.) (suspending the entry of undocumented aliens from the high seas); Executive Order 12324, 3 C.F.R. 180 (1981 Comp.) (prohibiting the return of a refugee without his consent and requiring observance of our international obligations); 5 Op. Off. Legal Counsel 242, 248 (1981) (discussing U.S. obligations under the Protocol); and *Haitian Refugee Center, Inc. v. Baker, Sec. of State*, 953 F.2d 1498 (11th Cir. 1991) (art. 33 not self-executing; interdiction at sea not judicially reviewable), *cert. denied*, 112 S. Ct. 1245 (1992). See also *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993).

SECNAVINST 5710.22 defines "temporary refuge" as:

Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation¹⁵ or [in international waters],¹⁶ under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country, or nationals of a third nation, solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of the ship, aircraft, station, or activity must decide which measures can prudently be taken to provide temporary refuge. The safety of U.S. personnel and security of the unit must be taken into consideration.¹⁷

3.3.2.1 Termination or Surrender of Temporary Refuge. Although temporary refuge should be terminated when the period of active danger is ended, the decision to terminate protection will not be made by the commander. Once temporary refuge has been granted, protection may be terminated only when directed by the Secretary of the Navy, or higher authority. (See Article 0939, U.S. Navy Regulations, 1990, and SECNAVINST 5710.22 (series), and the Coast Guard's MLEM.)

A request by foreign authorities for return of custody of a person under the protection of temporary refuge will be reported in accordance with SECNAVINST 5710.22 (series).¹⁸ The requesting foreign authorities will then be advised that the matter has been referred to higher authorities.

¹⁵ Including foreign territorial seas, archipelagic waters, internal waters, ports, territories and possessions. *See* paragraph 3.3.1 (p. 3-4) regarding asylum in international waters.

¹⁶ This definition derives from DODDIR 2000.11 of 3 Mar. 1972 (*see* paragraph 3.3, note 12 (p. 3-4)). The language of the actual definition provides, in pertinent part, "on the high seas." The substituted language "[in international waters]" equates to that area of the oceans beyond the territorial sea which was regarded as high seas prior to the 1982 LOS Convention and advent of the exclusive economic zone. *See* paragraph 1.5 (p. 1-18).

¹⁷ All requests for asylum or temporary refuge received by Navy or Marine Corps units and activities will be reported immediately and by the most expeditious means to CNO or CMC in accordance with SECNAVINST 5710.22 (series). Coast Guard units and activities will report such requests through the chain of command for coordination with the Department of State in accordance with the MLEM. No information will be released by Navy or Marine Corps units or activities to the public or the media without the prior approval of the Assistant Secretary of Defense for Public Affairs or higher authority. Coast Guard units and activities are similarly constrained by the MLEM, E-17-8.

¹⁸ Coast Guard units and activities will report such requests in accordance with the MLEM, E-17-6.

3.3.3 Inviting Requests for Asylum or Refuge. U.S. armed forces personnel shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.¹⁹

3.3.4 Protection of U.S. Citizens. The limitations on asylum and temporary refuge are not applicable to U.S. citizens. See paragraph 3.10 and the standing rules of engagement for applicable guidance.

3.4 RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. However, under international law, a warship, military aircraft, or other duly authorized ship or aircraft may *approach* any vessel in international waters to verify its nationality.²⁰ Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, *provided* there is reasonable ground for suspecting that it is:

1. Engaged in piracy (see paragraph 3.5).
2. Engaged in the slave trade (see paragraph 3.6).
3. Engaged in unauthorized broadcasting (see paragraph 3.7).
4. Without nationality (see paragraphs 3.11.2.3 and 3.11.2.4).
5. Though flying a foreign flag, or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.²¹

The procedure for ships exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search during armed conflict described in paragraph 7.6.1. See Article 630.23, OPNAVINST 3120.32B, and paragraph 2.9 of the Coast Guard's MLEM for further guidance.

¹⁹ U.S. Navy Regulations, 1990, art. 0939; SECNAVINST 5710.22 (series); MLEM, 12-3.

²⁰ *Mariana Flora*, 24 U.S. (11 Wheaton) 1, 43-44 (1826); 4 *Whiteman* 515-22; 2 *O'Connell* 802-03. *See also* Zwanenberg, *Interference with Ships on the High Seas*, 10 *Int'l & Comp. L.Q.* 785 (1961); 1 *Oppenheim-Lauterpacht* 604; *McDougal & Burke* 887-93; 2 *Moore* 886; and 1 *Hyde* sec. 227. This customary international law concept is codified in art. 110, 1982 LOS Convention.

²¹ 1982 LOS Convention, art. 110. Sovereign immunity of warships is discussed in paragraph 2.1.2 (p. 2-1); the belligerent right of visit and search is discussed in paragraph 7.6 (p. 7-23).

3.5 REPRESSION OF PIRACY

International law has long recognized a general duty of all nations to cooperate in the repression of piracy. This traditional obligation is included in the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention, both of which provide:

[A]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas²² or in any other place outside the jurisdiction of any State.²³

3.5.1 U.S. Law. The U.S. Constitution (Article I, Section 8) provides that:

The Congress shall have Power ... to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.²⁴

Congress has exercised this power by enacting title 18 U.S. Code section 1651 which provides that:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

U.S. law authorizes the President to employ "public armed vessels" in protecting U.S. merchant ships from piracy and to instruct the commanders of such vessels to seize any pirate ship that has attempted or committed an act of piracy against any U.S. or foreign flag vessel in international waters.²⁵

²² The international law of piracy also applies within the exclusive economic zone. 1982 LOS Convention, art. 58(2). Art. 19 of the High Seas Convention and art. 105 of the 1982 LOS Convention permit any nation to seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates, and to arrest the persons and seize the property on board. The courts of the seizing nation may also decide upon the penalties to be imposed and the disposition of the ship, aircraft or property, subject to the rights of third parties acting in good faith.

²³ High Seas Convention, art. 14; 1982 LOS Convention, art. 100.

²⁴ Congressional exercise of this power is set out in 18 U.S.C. sections 1651-61 (1988) (piracy), 33 U.S.C. sections 381-84 (1988) (regulations for suppression of piracy), and 18 U.S.C. section 1654 (privateering). While U.S. law makes criminal those acts proscribed by international law as piracy, other provisions of U.S. municipal law proscribe, as criminal, related conduct. For example, U.S. law makes criminal arming or serving on privateers (18 U.S.C. sec. 1654), assault by a seaman on a captain so as to prevent him from defending his ship or cargo (18 U.S.C. sec. 1655), running away with a vessel within the admiralty jurisdiction (18 U.S.C. sec. 1656), corruption of seamen to run away with a ship (18 U.S.C. sec. 1657), receipt of pirate property (18 U.S.C. sec. 1660), and robbery ashore in the course of a piratical cruise (18 U.S.C. sec. 1661). *See* Menefee, "Yo Heave Ho!": Updating America's Piracy Laws, 21 Cal. West. Int'l L.J. 151 (1990).

²⁵ 33 U.S.C. secs. 381 & 382 (1988). These sections also authorize issuance of instructions to naval commanders to send into any U.S. port any vessel which is armed or the crew of which is armed, and which shall have "attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel," U.S. or foreign flag, or upon U.S. citizens; and to retake any U.S. flag vessel or U.S. citizens unlawfully captured in international waters.

3.5.2 Piracy Defined. Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. (Depredation is the act of plundering, robbing, or pillaging.)²⁶

3.5.2.1 Location. In international law piracy is a crime that can be committed only on or over international waters (including the high seas, exclusive economic zone, and the contiguous zone), in international airspace, and in other places beyond the territorial jurisdiction of any nation. The same acts committed in the internal waters, territorial sea, archipelagic waters, or national airspace of a nation do not constitute piracy in international law but are, instead, crimes within the jurisdiction and sovereignty of the littoral nation.²⁷

3.5.2.2 Private Ship or Aircraft. Acts of piracy can only be committed by private ships or private aircraft. A warship or other public vessel or a military or other state aircraft cannot be treated as a pirate unless it is taken over and operated by pirates or unless the crew

²⁶ The 1982 LOS Convention defines piracy as follows:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

1982 LOS Convention, art. 101. The High Seas Convention, art. 15, defines piracy in essentially identical terms. Municipal law definitions, however, vary. *Compare* paragraph 3.5.1, note 24 (p. 3-9). The international law of piracy is neither clearly nor completely set forth in the law of the sea conventions. See the discussions in 2 O'Connell 966-83; Rubin, *The Law of Piracy*; and *Essays on Piracy*, 21 Cal. West. Int'l L.J. 105-79 (1990).

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing an act of piracy. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. High Seas Convention, art. 17; 1982 LOS Convention, art. 103.

O'Connell correctly notes that "it is the repudiation of all authority that seems to be the essence of piracy." 2 O'Connell 970.

²⁷ In recent years, piracy has been prevalent in the Strait of Malacca, Singapore Strait, Gulf of Thailand, South China Sea, coastal waters off West Africa and Baja California, the Persian Gulf, and the Caribbean. The impact of modern piracy on the U.S. Navy is described in Petrie, *Pirates and Naval Officers*, Nav. War Coll. Rev., May-June 1982, at 15. *See also* Ellen, *Contemporary Piracy*, 21 Cal. West. Int'l L.J. 123 (1990).

mutinies and employs it for piratical purposes.²⁸ By committing an act of piracy, the pirate ship or aircraft, and the pirates themselves, lose the protection of the nation whose flag they are otherwise entitled to fly.²⁹

3.5.2.3 Private Purpose. To constitute the crime of piracy, the illegal acts must be committed for private ends. Consequently, an attack upon a merchant ship at sea for the purpose of achieving some criminal end, e.g., robbery, is an act of piracy as that term is currently defined in international law. Conversely, acts otherwise constituting piracy done for purely political motives, as in the case of insurgents not recognized as belligerents, are not piratical.³⁰

3.5.2.4 Mutiny or Passenger Hijacking. If the crew or passengers of a ship or aircraft, including the crew of a warship or military aircraft, mutiny or revolt and convert the ship, aircraft or cargo to their own use, the act is not piracy.³¹ If, however, the ship or aircraft is thereafter used to commit acts of piracy, it becomes a pirate ship or pirate aircraft and those on board voluntarily participating in such acts become pirates.³²

²⁸ High Seas Convention, art. 16; 1982 LOS Convention, art. 102.

²⁹ However, the nationality of the vessel is not affected by its piratical use unless such is specifically provided for in the law of the country of the vessel's nationality. High Seas Convention, art. 18; 1982 LOS Convention, art. 104. It should be noted that it is not a precondition for a finding of piracy that the ship in question does not have the right to fly the flag, if any, which it displays. Additionally, the mere fact that a ship sails without a flag is not sufficient to give it the character of a pirate ship, although it could be treated as a ship without nationality. 2 O'Connell 755-57; 9 Whiteman 35-37.

³⁰ "So long as the acts are those which are normally incidental to belligerent activity they would not be characterized as piracy, even though the actors may have only the most slender claims to international authority. . . . [I]t would be a false characterization of illicit acts to describe them as piracy when the intention of the insurgents is to wage war as distinct from committing random depredation." 2 O'Connell 975 & 976; 2 Restatement (Third), sec. 522, Reporters' Note 2, at 85. *See also*, Green, *The Santa Maria: Rebels or Pirates*, 37 Brit. Y.B. Int'l L. 465 (1961). Therefore, terrorist attacks on shipping for the sole purpose of achieving some political end are arguably not piracy under current international law. *See* paragraph 3.10 (p. 3-15). Terrorist acts committed on board or against a vessel are proscribed by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome Convention), 10 March 1988, 27 I.L.M. 668 (1988), (entered into force for the United States on 6 March 1995), codified at 18 U.S.C. sec. 2280 (1994). Acts of terrorism against an oil rig or platform anchored on the continental shelf are addressed in the Protocol to the Rome Convention. *See* Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, 10 March 1988, 27 Int'l Leg. Mat'ls 685 (1988), implemented by the United States in 18 U.S.C. sec 2281 (1994). *See also* Omnibus Diplomatic Security and Anti Terrorism Act of 1986, Pub. L. No. 99-399, Title IX, sec. 906, codified at 33 U.S.C. sec. 1226 (1994), authorizing the Secretary of Transportation to take action including establishing safety and security zones on U.S. waters including the EEZ to prevent or respond to acts of terrorism.

³¹ Although it is a crime if it occurs on a U.S. flag vessel or aircraft under 18 U.S.C. sec. 1656. *See also* paragraph 3.5.2.3.

³² In international law certain types of acts, perhaps technically falling within the definition of piracy in paragraph 3.5.2 (p. 3-10), are generally recognized as not being piracy. Their general character is simply not of a nature so offensive and harmful to international maritime commerce and to the community of all nations as to warrant the designation of the perpetrators as enemies of the human race. Here a rule of reason is applied. For example, a mere quarrel followed by acts of violence or depredations occurring between fishermen in international waters ought not be regarded as an incident of
(continued...)

3.5.3 Use of Naval Forces to Repress Piracy. Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on governmental service and authorized to that effect, may seize a pirate ship or aircraft.³³

3.5.3.1 Seizure of Pirate Vessels and Aircraft. A pirate vessel or aircraft encountered in or over U.S. or international waters may be seized and detained by any of the U.S. vessels or aircraft listed in paragraph 3.5.3. The pirate vessel or aircraft, and all persons on board, should be taken, sent, or directed to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition according to U.S. law. Alternatively, higher authority may arrange with another nation to accept and try the pirates and dispose of the pirate vessel or aircraft, since every nation has jurisdiction under international law over any act of piracy.³⁴

3.5.3.2 Pursuit of Pirates into Foreign Territorial Seas, Archipelagic Waters, or Airspace. If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty over the territorial sea, archipelagic waters, or superjacent airspace to continue pursuit (see paragraphs 3.11.2.2. and 3.11.3.3). The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal nation to obtain its consent. In such a

³²(...continued)

piracy. Likewise, efforts (however unlawful) of conservationists to detain or disrupt whaling vessels on their high seas operations ought not generally be treated as piracy, but may violate U.S. criminal laws. *See also* Gehring, *Defense Against Insurgents on the High Seas: The Lyla Express and Johnny Express*, 27 JAG J. 317 (1973).

³³ High Seas Convention, art. 21; 1982 LOS Convention, art. 107. U.S. Coast Guard cutters are warships. Paragraph 2.1.1, note 3 (p. 2-1).

In many cases, circumstances may be such that there is no reason to doubt the piratical nature of a ship or aircraft. Where, however, the situation is not so clear, before action may be taken against "pirates" it must first be ascertained that they are in fact pirates. A warship may exercise the right of approach and visit (*see* paragraph 3.4 (p. 3-8)) at any time to verify the nationality of another vessel and, if there are reasonable grounds to do so, to determine if it is engaged in piracy.

It is within the general authority of the naval commander to protect innocent shipping in international waters from piratical attack. This authority, with respect to U.S. citizens and U.S. flag vessels is specified in U.S. Navy Regulations, 1990, arts. 0914 and 0920; authority is derived from an amalgam of customary international law, treaty obligation, statute and Navy Regulations with respect to foreign flag vessels. Guidance for dealing with piracy is contained in the fleet commanders' basic operational orders, and for Coast Guard units, in the MLEM 12-13. The commander's specific authority to use force in such circumstances is derived from the standing rules of engagement promulgated by the operational chain of command. When circumstances permit, higher authority should be consulted. *See* para. 8c(5), *Standing Rules of Engagement for U.S. Forces*, Annex A4-3 (p. 4-25).

³⁴ High Seas Convention, art. 19; 1982 LOS Convention, art. 105; 1 Restatement (Third), secs. 404 & 423 (an exercise of universal jurisdiction to prescribe and to enforce), and sec. 404 Reporters' Note 1, at 255. *See also* paragraph 3.11.1.5 (p. 3-20).

case, pursuit must be broken off immediately upon request of the coastal nation, and, in any event, the right to seize the pirate vessel or aircraft and to try the pirates devolves on the nation to which the territorial seas, archipelagic waters, or airspace belong.

Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial seas or through archipelagic sea lanes or air routes, may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage or archipelagic sea lanes passage rights of others are not unreasonably constrained in the process.³⁵

3.6 PROHIBITION OF THE TRANSPORT OF SLAVES

International law strictly prohibits use of the seas for the purpose of transporting slaves.³⁶ The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag.³⁷ If confronted with this situation, commanders should maintain contact, consult applicable standing rules of engagement and Coast Guard use of force policy, and request guidance from higher authority.

3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting involves the transmission of radio or television signals from a ship or off-shore facility intended for

³⁵ *But see* Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in Robertson at 126.

³⁶ Convention to Suppress the Slave Trade and Slavery, Geneva, 25 September 1926, 46 Stat. 2183, T.S. No. 778, 2 Bevans 607, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention of 25 September 1926, New York, 7 December 1953, 7 U.S.T. 479, T.I.A.S. 3532, 182 U.N.T.S. 51; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, 5 September 1956, 18 U.S.T. 3201, T.I.A.S. 6418, 266 U.N.T.S. 3. This obligation is implemented in 18 U.S.C. sec. 1581-88 (1988). *See* 1 Restatement (Third), secs. 404 & 423, and Reporters' Note 1, at 253; and Sohn, *Peacetime Use of Force on the High Seas*, in Robertson at 39-59.

³⁷ 1982 LOS Convention, art. 99. The Slavery Convention, Amending Protocol, and Supplementary Convention, note 36, do not authorize nonconsensual high seas boarding by foreign flag vessels. Nevertheless, such nonconsensual boarding was generally authorized in art. 22(1) of the 1958 High Seas Convention and reaffirmed in art. 110(1)(b) of the 1982 LOS Convention.

receipt by the general public, contrary to international regulation.³⁸ Commanders should request guidance from higher authority if confronted with this situation.

3.8 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC

All nations are required to cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances in international waters. International law permits any nation which has reasonable grounds to suspect that a ship flying its flag is engaged in such traffic to request the cooperation of other nations in effecting its seizure. International law also permits a nation which has reasonable grounds for believing that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another nation is engaged in illegal drug trafficking to request confirmation of registry and, if confirmed, request authorization from the flag nation to take appropriate action with regard to that vessel. Coast Guard personnel, embarked on Coast Guard cutters or U.S. Navy ships, regularly board, search and take law enforcement action aboard foreign-flagged vessels pursuant to such special arrangements or standing, bilateral agreements with the flag state.³⁹ (See paragraph 3.11.3.2 regarding utilization of U.S. Navy assets in the support of U.S. counterdrug efforts.)

3.9 RECOVERY OF GOVERNMENT PROPERTY LOST AT SEA

The property of a sovereign nation lost at sea remains vested in that sovereign until title is formally relinquished or abandoned. Aircraft wreckage, sunken vessels, practice torpedoes, test missiles, and target drones are among the types of U.S. Government property which may be the subject of recovery operations. Should such U.S. property be recovered at sea by foreign entities, it is U.S. policy to demand its immediate return. Specific guidance

³⁸ 1982 LOS Convention, art. 109. This provision supports the Regulations annexed to the International Telecommunications Convention, Malaga-Torremolinos, 25 October 1973, 28 U.S.T. 2495, T.I.A.S. 8572, and the Radio Regulations, Geneva, 6 December 1979. Unauthorized broadcasting from international waters is made a crime in the U.S. by 47 U.S.C. sec. 502 (1988). These rules are designed to aid in the suppression of "pirate broadcasting" which had become a problem to European countries within range of international waters in the North Sea in the 1960s, 2 O'Connell 814-19, and thus was not addressed in art. 22(1) of the 1958 High Seas Convention. The Malaga-Torremolinos Convention was replaced by the 1982 International Telecommunications Convention, Nairobi, 6 November 1982 (entered into force for the United States on 10 January 1986). *See also* Robertson, The Suppression of Pirate Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory, 45.1 Law & Contemp. Problems 73 (1982).

³⁹ 1982 LOS Convention, art. 108; U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, December 20, 1988, art. 17, entered into force 11 November 1990, 28 Int'l Leg. Mat'ls 497 (1989), and implemented by the United States in 46 U.S.C. App. sec. 1901-04 (1988), 49 U.S.C. App. sec. 781-789 (1988) and 14 U.S.C. sec. 89 (1988). The Single Convention on Narcotic Drugs, 1953, New York, 30 March 1954, 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204, including the protocol amending the Single Convention on Narcotic Drugs, 1954, Geneva, 25 March 1954, 26 U.S.T. 1439, T.I.A.S. 8118, 976 U.N.T.S. 3, is implemented by the United States in 22 U.S.C. sec. 2291 (1988). *See also* Convention on Psychotropic Substances, Vienna, 21 February 1971, 32 U.S.T. 543, T.I.A.S. 9725, 1019 U.N.T.S. 175; Innis, The U.N. Convention, Fed. Bar News & J., March/April 1990, at 118-19; 2 Restatement (Third), sec. 522 comment d & Reporters' Notes 4 & 8; 1 *id.*, sec. 433, Reporters' Note 4, at 337-39; 2 *id.*, sec. 513, comment f; 1 *id.*, sec. 403, Reporters' Note 9, at 253-54 (special maritime and territorial jurisdiction of the United States). *See* Sohn, Peacetime Use of Force on the High Seas, *in* Robertson at 59-79.

for the on-scene commander in such circumstances is contained in the standing rules of engagement and applicable operation order (e.g., CINCPACFLT OPOD 201, CINCLANTFLT OPOD 2000).⁴⁰

3.10 PROTECTION OF PRIVATE AND MERCHANT VESSELS AND AIRCRAFT, PRIVATE PROPERTY, AND PERSONS

In addition to the obligation and authority of warships to repress international crimes such as piracy, international law also contemplates the use of force in peacetime in certain circumstances to protect private and merchant vessels, private property, and persons at sea from acts of unlawful violence. The legal doctrines of individual and collective self-defense and protection of nationals provide the authority for U.S. armed forces to protect U.S. and, in some circumstances, foreign flag vessels, aircraft, property, and persons from violent and unlawful acts of others. U.S. armed forces should not interfere in the legitimate law enforcement actions of foreign authorities even when directed against U.S. vessels, aircraft, persons or property. Consult the JCS Standing Rules of Engagement for U.S. Forces for detailed guidance.⁴¹

3.10.1 Protection of U.S. Flag Vessels and Aircraft, U.S. Nationals and Property. International law, embodied in the doctrines of self-defense and protection of nationals, provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels and aircraft, U.S. nationals (whether embarked in U.S. or foreign flag vessels or aircraft), and their property against *unlawful* violence in and over international waters. Standing rules of engagement promulgated by the Joint Chiefs of Staff (JCS) to the operational chain of command and incorporated into applicable operational orders, operational plans, and contingency plans, provide guidance to the naval commander for the exercise of this inherent authority. Those rules of engagement are carefully constructed to ensure that the protection of U.S. flag vessels and aircraft and U.S. nationals and their property at sea conforms with U.S. and international law and reflects national policy.⁴²

3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas. Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and

⁴⁰ See also paragraph 2.1.2.2 (p. 2-3) and Annex A2-3 (p. 2-48); regarding self-defense, see paragraph 4.3.2 (p. 4-10).

⁴¹ International law regards these doctrines as exceptional relief measures that are permitted, under certain pressing circumstances, to override interests protected by the countervailing principles of noninterference with foreign flag ships and aircraft and inviolability of foreign territory (including territorial seas). See *generally*, Chapter 4.

⁴² High Seas Convention, arts. 4-5, and the 1982 LOS Convention, arts. 91-92, vest nationality of ships in the nation whose flag they fly, and reserve to that flag nation the exclusive right, in peacetime, to exercise jurisdiction over that ship on the high seas. U.S. Navy Regulations, 1990, arts. 0914, 0915 and 0920, also reflect this authority. It must be recognized that, for policy reasons, the U.S. Government may choose to protect only those vessels flying the U.S. flag notwithstanding the existence of other vessels flying foreign flags of convenience which are beneficially owned by U.S. persons or corporations.

over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations. The coastal nation is primarily responsible for the protection of all vessels, aircraft and persons lawfully within its sovereign territory. However, when that nation is unable or unwilling to do so effectively or when the circumstances are such that immediate action is required to protect human life, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels, its flag aircraft, and its nationals.⁴³ Because the coastal nation may lawfully exercise jurisdiction and control over foreign flag vessels, aircraft and citizens within its internal waters, archipelagic waters, territorial seas and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters and superjacent airspace.⁴⁴ U.S. naval commanders should consult applicable standing rules of engagement for specific guidance as to the exercise of this authority.

3.10.1.2 Foreign Contiguous Zones and Exclusive Economic Zones and Continental Shelves. The primary responsibility of coastal nations for the protection of foreign shipping and aircraft off their shores ends at the seaward edge of the territorial sea. Beyond that point, each nation bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. On the other hand, the coastal nation may properly exercise jurisdiction over foreign vessels, aircraft and persons in and over its contiguous zone to enforce its customs, fiscal, immigration, and sanitary laws, in its exclusive economic zone to enforce its natural resource-related rules and regulations, and on its continental shelf to enforce its relevant seabed resources-related rules and regulations. When the coastal nation is acting lawfully in the valid exercise of such jurisdiction, or is in hot pursuit (see discussion in paragraph 3.11.2.2) of a foreign vessel or aircraft for violations that have occurred in or over those waters or in its sovereign territory, the flag nation should not interfere. U.S. commanders should consult applicable standing rules of engagement for specific guidance as to the exercise of this authority.

3.10.2 Protection of Foreign Flag Vessels and Aircraft, and Persons. International law, embodied in the concept of collective self-defense, provides authority for the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and

⁴³ 22 U.S.C. section 1732 (1988) requires the President to seek the release of U.S. nationals unjustly deprived of liberty by or under the authority of any foreign government by such means, not amounting to acts of war, as are necessary and proper to obtain or effectuate their release. The purpose of this statute, when it was enacted in 1868, was to ensure that naturalized citizens who return to their country of origin would be protected from unwarranted arrest to the same extent as native born Americans. The statute thus relates to the act of confinement, rather than to treatment after confinement, and not protection of their lives. 1975 Digest of U.S. Practice in International Law 253-54. Protection of nationals in the sense of this statute is among the duties of U.S. consular officers. See U.S. Consular Officers' Arrests Handbook, 1977 Digest of U.S. Practice in International Law 297-307.

⁴⁴ If a prior arrangement has been made with a coastal nation for U.S. forces to protect shipping in the waters of that nation, protective measures may be taken by U.S. warships and military aircraft for these purposes and subject to the limitations of that agreement. So doing would constitute the exercise of collective self-defense consistent with art. 51 of the United Nations Charter.

foreign nationals and their property from *unlawful* violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag nation should first be obtained unless prior arrangements are already in place or the necessity to act immediately to save human life does not permit obtaining such consent.⁴⁵ Should the attack or other unlawful violence occur within or over the internal waters, archipelagic waters, or territorial sea of a third nation, or within or over its contiguous zone or exclusive economic zone, the considerations of paragraphs 3.10.1.1 and 3.10.1.2, respectively, would also apply. U.S. commanders should consult applicable standing rules of engagement for specific guidance.

3.10.3 Noncombatant Evacuation Operations (NEO).⁴⁶ The Secretary of State is responsible for the safe and efficient evacuation of U.S. Government personnel, their family members and private U.S. citizens when their lives are endangered⁴⁷ by war, civil unrest,⁴⁸ man-made or natural disaster.⁴⁹ The Secretaries of State and Defense are assigned lead and support responsibilities, respectively,⁵⁰ and, within their general geographic areas of responsibility, the combatant commanders are prepared to support the Department of State to conduct NEOs.⁵¹

⁴⁵ Such consent could be embodied in an agreement with the flag nation made in advance or may be considered inherent in a request from the vessel's master for assistance. If a prior arrangement has been made, protective measures may be taken for the purposes and subject to the limitations of that agreement. The U.S. offer of distress assistance to friendly innocent neutral vessels in the Persian Gulf and Strait of Hormuz flying a nonbelligerent flag, outside declared war/exclusion zones, that were not carrying contraband or resisting legitimate visit and search by a Persian Gulf belligerent, is an example from the Iran-Iraq tanker war. Dep't St. Bull., July 1988, at 61.

⁴⁶ See generally DoD Dir. 3025.14, Subj: Protection and Evacuation of U.S. Citizens and Designated Aliens in Danger Areas Abroad; JAGMAN sec. 1013; and FMFM 8-1, Special Operations, chap. 7.

⁴⁷ 22 U.S.C. sec. 2671(b)(2)(A) (emergency expenditure authority).

⁴⁸ Where the lives of U.S. nationals are threatened, the United States has intervened in internal conflicts. See paragraph 4.3.2 and note 29 (p. 4-11). Regarding the Indochina evacuations, see 1975 Digest of U.S. Practice in International Law 875-79. On the evacuation of Somalia on 5 January 1991, see Wash. Post, 5 Jan. 1992, at A21.

⁴⁹ Sec. 102(b) of the Diplomatic Security Act of 1986, as amended by sec. 115 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. 101-246, 104 Stat. 22, codified at 22 U.S.C. sec. 4801(b) (1994).

⁵⁰ Executive Order 12656, Assignment of Emergency Preparedness Responsibilities, 18 Nov. 1988, 3 C.F.R. 585 (1988), secs. 502(2) & 1301(2)(f).

⁵¹ See, e.g., USCINCEUR NEOPLAN 4310-90 (U). Para. 18 of SM-712-89, Unified Command Plan (UCP), 16 Aug. 1989, assigns USCINCCENT, USCINCEUR, USCINCLANT (now USACOM), USCINCPAC and USCINCSO responsibilities to the NCA for "[p]lanning and implementing the evacuation of US noncombatant and certain non-US persons abroad . . . in accordance with the provisions of [DoD Directive 3025.14]." NEOs and NEO planning for areas not included in these CINCs' AORs will be assigned as necessary by CJCS. UCP, para. 21. See also the JCS Standing Rules of Engagement. Annex A4-3 (p. 4-25). For an excellent analysis of legal issues associated with the conduct of a NEO see Day, Legal Considerations in Noncombatant Evacuation Operations, 40 Nav. L. Rev. 45 (1992).

3.11 MARITIME LAW ENFORCEMENT

As noted in the introduction to this Chapter, U.S. naval commanders may be called upon to assist in the enforcement of U.S. laws at sea, principally with respect to the suppression of the illicit traffic in narcotic drugs and psychotropic substances into the United States. Activities in this mission area involve international law, U.S. law and policy, and political considerations. Because of the complexity of these elements, commanders should seek guidance from higher authority whenever time permits.

A wide range of U.S. laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by agencies of the United States. Since these activities do not ordinarily involve Department of Defense personnel, they are not addressed in this publication.⁵²

3.11.1 Jurisdiction to Proscribe. Maritime law enforcement action is premised upon the assertion of jurisdiction over the vessel or aircraft in question. Jurisdiction, in turn, depends upon the nationality, the location, the status, and the activity of the vessel or aircraft over which maritime law enforcement action is contemplated.⁵³

International law generally recognizes five bases for the exercise of criminal jurisdiction: (a) territorial, (b) nationality, (c) passive personality, (d) protective, and (e) universal. It is important to note that international law governs the rights and obligations between nations. While individuals may benefit from the application of that body of law, its alleged violation cannot usually be raised by an individual defendant to defeat a criminal prosecution.⁵⁴

3.11.1.1 Territorial Principle. This principle recognizes the right of a nation to proscribe conduct within its territorial borders, including its internal waters, archipelagic waters, and territorial sea.

3.11.1.1.1 Objective Territorial Principle. This variant of the territorial principle recognizes that a nation may apply its laws to acts committed beyond its territory which have their effect in the territory of that nation.⁵⁵ So-called "hovering vessels" are legally reached

⁵² See the MLEM for details.

⁵³ See Paust, *International Law as Law of the United States* 387-404 (1996) (providing an excellent discussion of each of the internationally recognized bases of jurisdiction).

⁵⁴ See 1 Restatement (Third), secs 402 & 404. Nor can an individual ordinarily assert a breach of international law as the basis for, or in defense of, a civil action, without the intervention of the State of which he or she is a national. See Henkin, Pugh, Schachter & Smit, *International Law* (1993) at 374-78.

⁵⁵ *United States v. Postal*, 589 F.2d 862, 885 (5th Cir. 1979).

under this principle as well under the protective principle.⁵⁶ The extra-territorial application of U.S. anti-drug statutes is based largely on this concept. (See paragraphs 3.11.2.2.2 and 3.11.4.1.)

3.11.1.2 Nationality Principle. This principle is based on the concept that a nation has jurisdiction over objects and persons having the nationality of that nation. It is the basis for the concept that a ship in international waters is, with few exceptions, subject to the exclusive jurisdiction of the nation under whose flag it sails. Under the nationality principle a nation may apply its laws to its nationals wherever they may be⁵⁷ and to all persons, activities, and objects on board ships and aircraft having its nationality. As a matter of international comity and respect for foreign sovereignty, the United States refrains from exercising that jurisdiction in foreign territory.⁵⁸

3.11.1.3 Passive Personality Principle. Under this principle, jurisdiction is based on the nationality of the victim, irrespective of where the crime occurred or the nationality of the offender.⁵⁹ U.S. courts have upheld the assertion of jurisdiction under this principle in cases where U.S. nationals have been taken hostage by foreigners abroad on foreign flag ships and aircraft,⁶⁰ and where U.S. nationals have been the intended target of foreign conspiracies to murder.⁶¹ This principle has application to the apprehension and prosecution of international terrorists.⁶²

⁵⁶ See the Hovering Vessels Act of 1935, codified at 19 U.S.C. secs. 1401(k), 1432a, 1436, 1455, 1581, 1584, 1586, 1587, 1615, 1709(d) and 46 U.S.C. sec. 91; *Ford v. United States*, 273 U.S. 593, 618-19, 623 (1927) (alcohol); *United States v. Gonzalez*, 875 F.2d 875 (D.C. Cir. 1989) (drugs); and *United States v. Cariballo-Tamayo*, 865 F.2d 1179 (11th Cir. 1989) (drugs).

⁵⁷ Active duty U.S. military members, for example, are subject to the Uniform Code of Military Justice (UCMJ) at all times and in all places. See UCMJ, Art. 2.

⁵⁸ UCMJ jurisdiction over U.S. military members is exercised in foreign territory pursuant to status of forces agreements (SOFAs) with host nations. For example, article VII 1(a) of the NATO SOFA provides:

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the Sending State over all persons subject to the military law of that State.

Art. VII 1(a), Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, Washington, 19 June 1951, 4 U.S.T. 1792, 119 U.N.T.S. 67, T.I.A.S. 2846, *reprinted in* AFP 110-20 at 2-2.

⁵⁹ The passive personality principle has been disputed as a permissible basis of jurisdiction, "although no objections to its exercise have been made in recent years." Henkin, Pugh, Schachter & Smit, *International Law* (1993) at 1067.

⁶⁰ *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (*Yunis III*); 18 U.S.C. sec. 1203.

⁶¹ *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988) (U.S. citizen defendant); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984), *cert. denied* 471 U.S. 1137 (1985) (Colombian defendant).

⁶² See *Yunis III*, note 60.

3.11.1.4 Protective Principle. This principle recognizes the right of a nation to prosecute acts which have a significant adverse impact on its national security or governmental functions. Prosecution in connection with the murder of a U.S. Congressman abroad on official business was based upon this principle.⁶³ Foreign drug smugglers apprehended on non-U.S. flag vessels on the high seas have been successfully prosecuted under this principle of international criminal jurisdiction.⁶⁴

3.11.1.5 Universal Principle. This principle recognizes that certain offenses are so heinous and so widely condemned that any nation may apprehend, prosecute and punish that offender on behalf of the world community regardless of the nationality of the offender or victim.⁶⁵ Piracy and the slave trade have historically fit these criteria.⁶⁶ More recently, genocide,⁶⁷ certain war crimes,⁶⁸ hostage taking,⁶⁹ and aircraft hijacking⁷⁰ have been added to the list of such universal crimes.⁷¹

3.11.2 Jurisdiction to Enforce

3.11.2.1 Over U.S. Vessels. U.S. law applies at all times aboard U.S. vessels as the law of the flag nation and is enforceable on U.S. vessels by the U.S. Coast Guard anywhere in the world.⁷² As a matter of comity and respect of foreign sovereignty, enforcement action is not

⁶³ *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988).

⁶⁴ *United States v. Alomia-Riascos*, 825 F.2d 769 (4th Cir. 1987); *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir. 1985).

⁶⁵ *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

⁶⁶ See paragraphs 3.5 (p. 3-9) and 3.6 (p. 3-13).

⁶⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 U.N.T.S. 277; Restatement (Third) sec. 404; *Demjanjuk v. Petrovsky*, note 65.

⁶⁸ Adolf Eichman was tried by Israel under the universal principle of jurisdiction for war crimes and crimes against humanity committed in Germany during the course of World War II. Henkin, *et al.*, paragraph 3.11.1.3, note 59 (p. 3-19), at 1085. See also paragraph 6.2.5 (p. 6-21).

⁶⁹ International Convention Against the Taking of Hostages, New York, 17 December 1979, T.I.A.S. 11081. See also 18 U.S.C. sec. 1203 (1994).

⁷⁰ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, 20 U.S.T. 2941, T.I.A.S. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), The Hague, 16 December 1970, 22 U.S.T. 1641, T.I.A.S. 7192; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Montreal, 23 September 1971, 24 U.S.T. 564, T.I.A.S. 7570; Protocol Extending the Montreal Convention to Cover Acts of Violence at Airports Serving Civil Aviation, 27 I.L.M. 67 (1988). See also 49 U.S.C. App., sec. 1472 (1994).

⁷¹ See also 1 Restatement (Third), sec. 404 RN1, at 255-57.

⁷² 14 U.S.C. sec. 89 (1994).

undertaken in foreign territorial seas, archipelagic waters, or internal waters without the consent of the coastal nation.

For law enforcement purposes, U.S. vessels are those which:

1. Are documented or numbered under U.S. law;
2. Are owned in whole or in part by a U.S. citizen or national (including corporate entities) and not registered in another country; or
3. Were once documented under U.S. law and, without approval of the U.S. Maritime Administration (MARAD) have been either sold to a non-U.S. citizen or placed under foreign registry or flag.⁷³

3.11.2.2 Over Foreign Flag Vessels. The ability of a coastal nation to assert jurisdiction legally over non-sovereign immune foreign flag vessels depends largely on the maritime zone in which the foreign vessel is located and the activities in which it is engaged. The internationally recognized interests of coastal nations in each of these zones are outlined in Chapter 2.

Maritime law enforcement action may be taken against a flag vessel of one nation within the national waters of another nation when there are reasonable grounds for believing that the vessel is engaged in violation of the coastal nation's laws applicable in those waters, including the illicit traffic of drugs.⁷⁴ Similarly, such law enforcement action may be taken against foreign flag vessels without authorization of the flag nation in the coastal nation's contiguous zone (for fiscal, immigration, sanitary and customs violations), in the exclusive economic zone (for all natural resources violations), and over the continental shelf (for seabed resource violations). In the particular case of counter-drug law enforcement (of primary interest to the Department of Defense), coastal nation law enforcement can take place in its internal waters, archipelagic waters, territorial sea, or contiguous zone without the authorization of the flag nation. Otherwise, such a vessel is generally subject to the exclusive jurisdiction of the nation of the flag it flies.⁷⁵ Important exceptions to that principle are:

3.11.2.2.1 Hot Pursuit. Should a foreign ship fail to heed an order to stop and submit to a proper law enforcement action⁷⁶ when the coastal nation has good reason to believe that the

⁷³ 46 U.S.C. App. sec. 1903(b) (1994).

⁷⁴ 1982 LOS Convention, art. 108(2); 1988 Vienna Drug Convention, art. 7(2) & (3).

⁷⁵ 1958 High Seas Convention, art. 6(1); 1982 LOS Convention, art. 92(1).

⁷⁶ Hot pursuit is extensively discussed in 2 O'Connell 1075-93 and Knight & Chiu, *The International Laws of the Sea* 385 (1991). *See also* Maidmont, *Historic Aspects of the Doctrine of Hot Pursuit*, 46 Br. Y.B. Int'l L. 365 (1972-1973); (continued...)

ship has violated the laws and regulations of that nation, hot pursuit may be initiated.⁷⁷ The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted.⁷⁸ It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone.⁷⁹ If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.⁸⁰ The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own nation or of a third nation.⁸¹ The right of hot pursuit may be exercised only by warships, military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.⁸² The right of hot pursuit applies also to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf

⁷⁶(...continued)

Poulantzas, *The Right of Hot Pursuit in International Law* (1969); and Nordquist, Vol. III 247-260.

Hot pursuit is to be distinguished from the right to take pursuing action, as necessary to ensure the safety of threatened forces or territory, under the fundamental principle of self-defense (*see* paragraph 4.3.2 (p. 4-10)). The latter is a much broader concept, not dependent upon whether the threat occurs within territorial waters or the contiguous zone. This concept is frequently referred to as "immediate pursuit" or "self-defense pursuit."

⁷⁷ High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). Both the High Seas Convention and the 1982 LOS Convention require that there be "good reason" to believe such a violation has occurred. It is therefore clear that while mere suspicion does not trigger the right, actual knowledge of an offense is not required. 2 O'Connell 1088.

⁷⁸ High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The reference to "one of its boats" reflects the doctrine of constructive presence recognized in the High Seas Convention, art. 23(1) & (4), and the 1982 LOS Convention, art. 111(1) & (4). *See* paragraph 3.11.2.2.2 (p. 3-23). *See also* 2 O'Connell 1092-93.

⁷⁹ High Seas Convention, art. 23(4); 1982 LOS Convention, art. 111(5).

⁸⁰ High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The doctrine applies to all violations within the territorial sea and to violations of customs, fiscal, sanitary, and immigration laws and regulations in the contiguous zone. However, some contend hot pursuit commenced in the contiguous zone may be only for offenses committed in the territorial sea, and not for offenses in the contiguous zone. 2 O'Connell 1083-84. The contiguous zone is defined in paragraph 2.4.1 (p. 2-19).

⁸¹ High Seas Convention, art. 23(2); 1982 LOS Convention, art. 111(3); 2 Restatement (Third), sec. 513 Comment g, at 49.

⁸² High Seas Convention, art. 23(4); 1982 LOS Convention, art. 111(5); Restatement (Third), sec. 513, Comment g. Because of *posse comitatus* limitations (*see* paragraph 3.11.3.1 (p. 3-26)), the right of hot pursuit is not normally exercised by the U.S. Navy or U.S. Air Force but rather by U.S. Coast Guard forces. However, while U.S. practice is to utilize Coast Guard forces for that purpose, under international law, all warships and military aircraft, regardless of service affiliation, may properly exercise the right of hot pursuit. *Id.*; Allen, *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Technologies and Practices*, 20 *Ocean Dev. & Int'l L.* 309, 37 (1989).

installations, of the laws and regulations of the coastal nation applicable to the exclusive economic zone or the continental shelf, including such safety zones.⁸³

a. Commencement of Hot Pursuit. Hot pursuit is not deemed to have begun unless the pursuing ship is satisfied by such practicable means as are available that the ship pursued, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, is within the limits of the territorial sea, within the contiguous zone or the exclusive economic zone, or above the continental shelf. Pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.⁸⁴

b. Hot Pursuit by Aircraft. Where hot pursuit is effected by aircraft:

(1) The preceding provisions apply.

(2) The aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. It must first order the suspected offender to stop. Should the suspected offender fail to comply, pursuit may be commenced alone or in conjunction with other aircraft or ships.⁸⁵

c. Requirement for Continuous Pursuit. Hot pursuit must be continuous, either visually or through electronic means. The ship or aircraft giving the order to stop must itself actively pursue the ship until another ship or aircraft of or authorized by the coastal nation, summoned by the ship or aircraft, arrives to take over the pursuit, unless the ship or aircraft is itself able to arrest the ship.⁸⁶

3.11.2.2.2 Constructive Presence. A foreign vessel may be treated as if it were actually located at the same place as any other craft with which it is cooperatively engaged in the violation of law. This doctrine is most commonly used in cases involving mother ships which use contact boats to smuggle contraband into the coastal nation's waters. In order to establish constructive presence for initiating hot pursuit, and exercising law enforcement authority, there must be:

⁸³ 1982 LOS Convention, art. 111(2). *See also* Nordquist, Vol. III 249-260.

⁸⁴ High Seas Convention, art. 23(3); 1982 LOS Convention, art. 111(4).

Where a ship has been stopped or arrested beyond the territorial seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. High Seas Convention, art. 23(7); 1982 LOS Convention, art. 111(8).

⁸⁵ High Seas Convention, art. 23(5); 1982 LOS Convention, art. 111(6). *See also* Knight & Chiu, paragraph 3.11.2.2.1, note 76 (p. 3-21), at 385-86.

⁸⁶ Allen, note 82 (p. 3-22) at 319-20; McDougal & Burke at 897.

1. A foreign vessel serving as a mother ship beyond the maritime area over which the coastal nation may exercise maritime law enforcement jurisdiction;
2. A contact boat in a maritime area over which that nation may exercise jurisdiction (i.e., internal waters, territorial sea, archipelagic waters, contiguous zone, EEZ, or waters over the continental shelf) and committing an act subjecting it to such jurisdiction; and
3. Good reason to believe that the two vessels are working as a team to violate the laws of that nation.⁸⁷

3.11.2.2.3 Right of Approach and Visit. See paragraph 3.4.

3.11.2.2.4 Special Arrangements and International Agreements. International law has long recognized the right of a nation to authorize the law enforcement officials of another nation to enforce the laws of one or both on board vessels flying its flag. The 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances specifically recognizes and encourages such arrangements and agreements to aid in the suppression of this illegal traffic. Special arrangements may be formalized in written agreements or consist of messages or voice transmissions via diplomatic channels between appropriate representatives of the requesting and requested nations. International agreements authorizing foreign officials to exercise law enforcement authority on board flag vessels take many forms. They may be bilateral or multilateral; authorize in advance the boarding of one or both nations' vessels; and may permit law enforcement action or be more limited. Typically, the flag nation will verify (or refute) the vessel's registry claim, and authorize the boarding and search of the suspect vessel. If evidence of a violation of law is found, the flag nation may then authorize the enforcement of the requesting nation's criminal law (usually with respect to narcotics trafficking) or may authorize the law enforcement officials of the requesting nation to act as the flag nation's agent in detaining the vessel for eventual action by the flag nation itself. The flag nation may put limitations on the grant of law enforcement authority and these restrictions must be strictly observed.⁸⁸

⁸⁷ 1958 High Seas Convention, art. 23(3); 1982 LOS Convention, art. 111(4); 19 U.S.C. secs. 1401(k), 1581(g) & 1587 (1994) (customs law violations by hovering vessels); McDougal & Burke 909-18; Lowe 172-73; *The I'm Alone* (Canada v. U.S.) 3 R.I.A.A. v. 09 (1941). *But see* 2 O'Connell 1092-93.

⁸⁸ Art. 17, U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, *reprinted in* 28 Int'l Leg. Mat'ls 493 (1989); 46 U.S.C. App. sec. 1903(c); 19 U.S.C. sec. 1581(h); *United States v. Quemener*, 789 F.2d 145 (2d Cir.), *cert. denied*, 479 U.S. 829 (1986) (US-UK agreement of 13 Nov. 1981, 33 U.S.T. 4224, T.I.A.S. 10296); *United States v. Williams*, 589 F.2d 210, *rehearing en banc*, 617 F.2d 1063 (5th Cir. 1980) (special arrangement with Panama). *See also* 2 Restatement (Third), sec. 522 RN 8, at 88; and Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 Marine Policy 218-30 (1989).

The United States has entered into numerous bilateral agreements addressing counterdrug and alien migrant interdiction law enforcement operations with nations around the world. Many of the agreements, particularly those with Caribbean nations, provide U.S. Coast Guard law enforcement officers with authority to stop, board and search the vessels of the other party
(continued...)

3.11.2.3 Over Stateless Vessels. Vessels which are not legitimately registered in any one nation are without nationality and are referred to as "stateless vessels". They are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations.⁸⁹ Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.⁹⁰

3.11.2.4 Over Vessels Assimilated to Statelessness. Vessels may be assimilated to a ship without nationality, that is, regarded as a stateless vessel, in some circumstances. The following is a partial list of factors which should be considered in determining whether a vessel is appropriately assimilated to stateless status:

No claim of nationality

Multiple claims of nationality (e.g., sailing under two or more flags)

Contradictory claims or inconsistent indicators of nationality (i.e., master's claim differs from vessel's papers; homeport does not match nationality of flag)

Changing flags during a voyage

Removable signboards showing different vessel names and/or homeports

Absence of anyone admitting to be the master; displaying no name, flag or other identifying characteristics

Refusal to claim nationality.⁹¹

Determinations of statelessness or assimilation to statelessness usually require utilization of the established interagency coordination procedures (see paragraph 3.11.3.4).

⁸⁸(...continued)

seaward of their territorial seas; to embark U.S. law enforcement officials on their vessels and to enforce certain of their laws; to pursue fleeing vessels or aircraft into the waters or airspace of the other party; and to fly into their airspace in support of counterdrug operations. *See generally* MLEM, encl. 4 and the listing of bilateral maritime counterdrug/alien migrant interdiction operations agreements at Table A3-1 (p. 3-33).

⁸⁹ 1982 LOS Convention, art. 110(1)(d).

⁹⁰ 2 Restatement (Third), sec. 522(2)(b) & Reporters' Note 7, at 87-88.

⁹¹ 1958 High Seas Convention, art. 6(2); 1982 LOS Convention, art. 92(2); 46 U.S.C. App. sec. 1903(c)(1) (1994); *United States v. Passos-Paternina*, 918 F.2d 979 (1st Cir.), *cert. denied*, 499 U.S. 982 (1990).

3.11.2.5 Other Actions. When operating in international waters, warships, military aircraft, and other duly authorized vessels and aircraft on government service (such as auxiliaries), may engage in two other actions in conjunction with maritime law enforcement, neither of which constitute an exercise of jurisdiction over the vessel in question. However, such actions may afford a commander with information which could serve as the basis for subsequent law enforcement.

3.11.2.5.1 Right of Approach. See paragraph 3.4 for a discussion of the exercise of the right of approach preliminary to the exercise of the right of visit.

3.11.2.5.2 Consensual Boarding. A consensual boarding is conducted at the invitation of the master (or person-in-charge) of a vessel which is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority (such as arrest or seizure). A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.⁹²

3.11.3 Limitations on the Exercise of Maritime Law Enforcement Jurisdiction. Even where international and domestic U.S. law would recognize certain conduct as a criminal violation of U.S. law, there are legal and policy restrictions on U.S. law enforcement actions that must be considered. Outside of the U.S., a commander's greatest concerns will be: limitations on DOD assistance to civilian law enforcement agencies; the requirement for coastal nation authorization to conduct law enforcement in that nation's national waters; and the necessity for interagency coordination. Similarly, a fourth restriction, the concept of *posse comitatus*, limits U.S. military activities within the U.S.

3.11.3.1 Posse Comitatus. Except when expressly authorized by the Constitution or act of Congress, the use of U.S. Army or U.S. Air Force personnel or resources as a *posse comitatus* -- a force to aid civilian law enforcement authorities in keeping the peace and arresting felons -- or otherwise to execute domestic law, is prohibited by the Posse Comitatus Act, title 18 U.S. Code section 1385.⁹³ As a matter of policy, the Posse Comitatus Act is

⁹² 2 Restatement (Third), sec. 522 RN 4, at 86.

⁹³ The Posse Comitatus Act was originally enacted by the Act of June 18, 1878, sec. 15, 20 Stat. 152 (codified in 18 U.S.C. sec. 1385 (1994)) in reaction to the excessive use of, and resulting abuses by, the U.S. Army in the southern states while enforcing the reconstruction laws. See Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 92-96 (1960).

made equally applicable to the U.S. Navy and U.S. Marine Corps.⁹⁴ The prohibitions of the Act are not applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy.⁹⁵ (See SECNAVINST 5820.7 (series).) The Justice Department has opined that the Posse Comitatus Act itself does not apply outside the territory of the United States. (Memorandum from the Office of Legal Counsel to National Security Council re: Extraterritorial Effect of the Posse Comitatus Act (Nov. 3, 1989)).

3.11.3.2 DOD Assistance. Although the Posse Comitatus Act forbids military authorities from enforcing, or being directly involved with the enforcement of civil law, some military activities in aid of civil law enforcement may be authorized under the military purpose doctrine. For example, indirect involvement or assistance to civil law enforcement authorities which is incidental to normal military training or operations is not a violation of the Posse Comitatus Act.⁹⁶ Additionally, Congress has specifically authorized the limited use of military personnel, facilities, platforms, and equipment, to assist Federal law enforcement authorities in the interdiction at sea of narcotics and other controlled substances.⁹⁷

3.11.3.2.1 Use of DOD Personnel. Although Congress has enacted legislation in recent years expanding the permissible role of the Department of Defense in assisting law enforcement agencies, DOD personnel may not directly participate in a search, seizure, arrest or similar activity unless otherwise authorized by law.⁹⁸ Permissible activities presently include training and advising Federal, State and local law enforcement officials in

⁹⁴ DODDIR 3025.12 (Subj: Military Assistance for Civil Disturbances), secs. V.B & X.A.2, and DODDIR 5525.5, sec. C of encl. 4. *See also* SECNAVINST 5820.7B (Subj: Cooperation with Civilian Law Enforcement Officials), para. 9a(1). SECNAV may waive that policy. DODDIR 5525.5 (Subj: DOD Cooperation with Civilian Law Enforcement Officials), encl. 4, sec. C, and SECNAVINST 5820.7B, para. 9c.

⁹⁵ 14 U.S.C. sec. 89 (1994).

⁹⁶ Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 Mil. L. Rev. 109 (1984); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83 (1975). *See also* DODDIR. 5525.5 (series) Subj: DOD Cooperation with Civilian Law Enforcement Officials; Posse Comitatus Act, and relevant OPORDERS/ OPLANS for current policy and procedures. Policy waivers may be granted on a case by case basis by the Secretary of the Navy.

⁹⁷ 10 U.S.C. secs. 371-78 (1994). The law authorizes DOD to provide support to federal civilian counterdrug efforts provided that doing so does not adversely affect military preparedness. 10 U.S.C. sec. 376 (1994). Notwithstanding this limitation, the Secretary of Defense may still provide such support if the Secretary determines that the importance of providing support outweighs the short-term adverse effect doing so will have on military readiness. *See* National Defense Authorization Act of Fiscal Year 1991, Pub. L. No. 101-510, sec. 1004(d), 104 Stat. 1630, codified at 10 U.S.C. sec. 374 note (1994). This waiver of limitation was initially only authorized for operations occurring in 1991 but has been extended through Fiscal Year 1999. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-337, sec. 1011(a), 108 Stat. 2836, codified at 10 U.S.C. sec. 374 note (1994).

⁹⁸ 10 U.S.C. sec. 375 (1994).

the operation and maintenance of loaned equipment.⁹⁹ DOD personnel made available by appropriate authority may also maintain and operate equipment in support of civil law enforcement agencies for the following purposes:

1. Detection, monitoring, and communication of the movement of air and sea traffic;
2. Aerial reconnaissance;
3. Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with them and directing them to a location designated by law enforcement officials;
4. Operation of equipment to facilitate communications in connection with law enforcement programs;
5. The transportation of civilian law enforcement personnel; and
6. The operation of a base of operations for civilian law enforcement personnel.¹⁰⁰

3.11.3.2.2 Providing Information to Law Enforcement Agencies. The Department of Defense may provide Federal, State or local law enforcement officials with information acquired during the normal course of military training or operations that may be relevant to a violation of any law within the jurisdiction of those officials. Present law provides that the needs of civilian law enforcement officials for information should, to the maximum extent practicable, be taken into account in planning and executing military training or operations.¹⁰¹ Intelligence information held by DOD and relevant to counterdrug or other civilian law enforcement matters may be provided to civilian law enforcement officials, to the extent consistent with national security.¹⁰²

3.11.3.2.3 Use of DOD Equipment and Facilities. The Department of Defense may make available equipment (including associated supplies or spare parts), and base or research facilities to Federal, State, or local law enforcement authorities for law enforcement

⁹⁹ 10 U.S.C. sec. 373 (1994). The Secretary of Defense, in cooperation with the Attorney General, is also required to conduct annual briefing of state and local law enforcement personnel regarding information, training, technical support, and equipment and facilities available from DOD. 10 U.S.C. sec. 380 (1994). The Secretary of Defense is further required to establish procedures under which states and local government units can purchase law enforcement equipment suitable for counterdrug activities from DOD. 10 U.S.C. sec. 381 (1994).

¹⁰⁰ 10 U.S.C. sec. 374 (1994). *See* SECNAVINST 5820.7 (series) and enclosures 3 and 4 to DODDIR 5525.5. The cognizant OPLAN/OPORDER may provide additional guidance.

¹⁰¹ 10 U.S.C. sec. 371(b) (1994). *See also* 10 U.S.C. sec. 374 note (1994).

¹⁰² 10 U.S.C. sec. 371 (1994). *See* SECNAVINST 5820.7 (series) and enclosure 2 to DODDIR 5525.5.

purposes.¹⁰³ Designated platforms (surface and air) are routinely made available for patrolling drug trafficking areas with U.S. Coast Guard law enforcement detachments (LEDETs) embarked. LEDET personnel on board any U.S. Navy vessel have the authority to search, seize property and arrest persons suspected of violating U.S. law.¹⁰⁴

3.11.3.3 Law Enforcement in Foreign National Waters. Law enforcement in foreign national waters may be undertaken only to the extent authorized by the coastal nation. Such authorization may be obtained on an ad hoc basis or be the subject of a written agreement. (See paragraph 3.5.3.2. for exceptions related to the pursuit of pirates.)

3.11.3.4 Interagency Coordination. Presidential Directive NSC 27 (PD-27) requires coordination within the Executive Branch of the government for non-military incidents which could have an adverse impact on U.S. foreign relations. This coordination includes consultation with the Department of State and other concerned agencies prior to taking actions that could potentially have such an impact. The Coast Guard has developed an internal notification mechanism that results in the provision, or denial, of a Statement of No Objection (SNO) from the appropriate superior authority which constitutes authorization to conduct the specific action requested. Interagency coordination initiated for law enforcement actions on naval vessels will be made through appropriate law enforcement agency channels by the embarked Coast Guard LEDET.¹⁰⁵

3.11.4 Counterdrug Operations

3.11.4.1 U.S. Law. It is unlawful for any person who is on board a vessel subject to the jurisdiction of the United States, or who is a U.S. citizen or resident alien on board any U.S. or foreign vessel, to manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.¹⁰⁶ This law applies to:

1. U.S. vessels anywhere (see paragraph 3.11.2.1)
2. Vessels without nationality (see paragraph 3.11.2.3)
3. Vessels assimilated to a status without nationality (see paragraph 3.11.2.4)

¹⁰³ 10 U.S.C. sec. 372 (1994). *See also* 10 U.S.C. sec. 374 note (1994).

¹⁰⁴ 10 U.S.C. sec. 379 (1994). *See* SECNAVINST 5820.7 (series) and para. A of encl. 3 to DODDIR 5525.5. The cognizant OPLAN/OPORDER may provide additional guidance. For U.S. Coast Guard authority, *see* 14 U.S.C. 89 (1994).

¹⁰⁵ *See* MLEM, encl. 3.

¹⁰⁶ Maritime Drug Enforcement Act of 1986, codified at 46 U.S.C. App. secs. 1901-04 (1994).

4. Foreign vessels where the flag nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4)

5. Foreign vessels located within the territorial sea or contiguous zone of the United States (see paragraph 1.5.1)

6. Foreign vessels located in the territorial seas or archipelagic waters of another nation, where that nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4).

3.11.4.2 DOD Mission in Counterdrug Operations. The Department of Defense has been designated by statute as lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, including its possessions, territories and commonwealths.¹⁰⁷ DoD is further tasked with integrating the command, control, communications and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs into an effective communications network.¹⁰⁸

3.11.4.3 U.S. Coast Guard Responsibilities in Counterdrug Operations. The Coast Guard is the primary maritime law enforcement agency of the United States. It is also the lead agency for maritime drug interdiction and shares the lead agency role for air interdiction with the U.S. Customs Service. The Coast Guard may make inquiries, 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 the laws of the United States, including maritime drug trafficking. Coast Guard commissioned, warrant and petty officers may board any vessel subject to the jurisdiction 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 it appears that a violation of U.S. law has been committed, the violator may be arrested and taken into custody. If it appears that the violation rendered the vessel or its cargo liable to fine or forfeiture, the vessel or offending cargo may be seized.¹⁰⁹

¹⁰⁷ 10 U.S.C. sec. 124 and note (1994).

¹⁰⁸ *Id.*

¹⁰⁹ 14 U.S.C. sec. 89 (1994). *See also* paragraph 3.4 (p. 3-8) (right of approach); 46 U.S.C. App. secs. 1901-04 (1994); U.N. Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, Vienna, 20 Dec. 1988, art. 17 (codifying customary law and practice on illicit traffic by sea), 28 Int'l Leg. Mat'ls 493 (1989), 518-20 (1989) (entered into force 11 November 1990); Trainor, *Coping with the Drug Runners at Sea*, Nav. War Coll. Rev., Summer 1987, at 77; Young, Griffes & Tomaselli, *Customs or Coast Guard?*, U.S. Naval Inst. Proc., Aug. 1987, at 67; Lahneman, *Interdicting Drugs in the Big Pond*, U.S. Naval Inst. Proc., July 1990, at 56. *See also* Survey of United States Jurisdiction over High Seas Narcotics Trafficking, 19 Ga. J. Int'l & Comp. L. 119 (1989) (survey ends in 1987). Applicable guidance may be found in CINCLANTFLT OPORD 2120 and COMTHIRDFLT OPORD 230.

Coast Guard commissioned, warrant and petty officers are also designated customs officers providing them additional law enforcement authority.¹¹⁰

3.11.5 Use of Force in Maritime Law Enforcement. In the performance of maritime law enforcement missions, occasions will arise where resort to the use of force will be both appropriate and necessary. U.S. armed forces personnel engaged in maritime law enforcement actions may employ only such force, pursuant to U.S. Coast Guard Use of Force Policy, as is reasonable and necessary under the circumstances.¹¹¹

3.11.5.1 Rules of Engagement Distinguished. U.S. rules of engagement delineate the circumstances and limitations under which U.S. naval, ground and air forces will initiate and/or continue the combat engagement with other forces encountered. (See paragraph 4.3.2.2). Use of force in the context of law enforcement is also permitted to be used to terminate criminal activities and to effect the apprehension of those engaged in such unlawful conduct. DOD and Coast Guard units performing law enforcement duties will be guided by the U.S. Coast Guard Use of Force Policy (Coast Guard MLEM) which details the specific circumstances and limitations under which force may be used to terminate criminal activity and to apprehend those committing such acts. Neither the rules of engagement nor the rules for the use of force in law enforcement limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.¹¹²

3.11.5.2 Warning Shots. A warning shot is a signal -- usually to warn an offending vessel to stop or maneuver in a particular manner or risk the employment of disabling fire or more severe measures.¹¹³ Under international law, warning shots do not constitute a use of force. Disabling fire is firing under controlled conditions, when warning shots and further warnings are unheeded, into the steering gear or engine room of a vessel in order to cause the vessel to stop.¹¹⁴ U.S. armed forces personnel employing warning shots and disabling fire in a maritime law enforcement action will comply with the U.S. Coast Guard Use of Force Policy.

3.11.6 Other Maritime Law Enforcement Assistance. In addition to the direct actions and dedicated assistance efforts discussed above, the naval commander may become involved in other activities supporting law enforcement actions, such as providing towing and escort

¹¹⁰ 19 U.S.C. secs. 1401(1) & 1581 (1994), and 14 U.S.C. sec. 143 (1994).

¹¹¹ See MLEM.

¹¹² See paragraph 4.3.2.2 (p. 4-14), Annex A4-3 (p. 4-25), and Annex B (Counterdrug Support Operations) to Appendix A to Enclosure A of the JCS Standing Rules of Engagement.

¹¹³ See MLEM, para. 4.J.

¹¹⁴ See *id.*, para. 4.K.

services for vessels seized by the U.S. Coast Guard. Naval commanders may also be called upon to provide assistance to law enforcement agencies in the return of apprehended drug traffickers and terrorists to the United States for prosecution. Activities of this nature usually involve extensive advance planning and coordination.

TABLE A3-1
MARITIME COUNTERDRUG/ALIEN MIGRANT INTERDICTION AGREEMENTS
(as of 1 September 1997)

	Shipboarding	Shiprider	Pursuit	Entry-to- Investigate	Overflight	Order-to- Land	AMIO
Antigua & Barbuda ¹	X	X	X	X	X	X	
Bahamas ²		X			X		
Barbados ³	X	X	X	X	X	X	
Belize ⁴	X	X	X	X			
Colombia ⁵	*						
Cuba ⁶							X
Dominica ⁷	X	X	X	X			
Dominican Republic ⁸	X	X	X	X	*		
France (incl. FWI) ⁹							
Grenada ¹⁰	X	X	X	X	X	X	
Haiti ¹¹			X	X	X		
Jamaica ¹²	X	X	X	X	X	X	
Mexico ¹³							
Netherlands Antilles ¹⁴		X	X	X	X		
Panama ¹⁵		X					
St. Kitts & Nevis ¹⁶	X	X	X	X	X	X	
St. Lucia ¹⁷	X	X	X	X	X	X	
St. Vincent/ Grenadines ¹⁸	X	X	X	X			
Trinidad & Tobago ¹⁹	X	X	X	X	X	X	
Turks & Caicos ²⁰		X (air only)					
United Kingdom ²¹	X	X					
Venezuela ²²	X		X (air only)				

"**Shipboarding**": Standing authority for the USCG to stop, board and search foreign vessels suspected of illicit traffic located seaward of the territorial sea of any nation.

"**Shiprider**": Standing authority to embark law enforcement (L/E) officials on platforms of the parties, which officials may then authorize certain law enforcement actions.

"**Pursuit**": Standing authority for USG L/E assets to pursue fleeing vessels or aircraft suspected of illicit traffic into foreign waters or airspace. May also include authority to stop, board and search pursued vessels.

"**Entry-to-Investigate**": Standing authority for USG L/E assets to enter foreign waters or airspace to investigate vessels or aircraft located therein suspected of illicit traffic. May also include authority to stop, board and search such vessels.

"**Overflight**": Standing authority for USG L/E assets to fly in foreign airspace when in support of CD operations.

"**Order-to-Land**": Standing authority for USG L/E assets to order to land in the host nation aircraft suspected of illicit traffic.

"**AMIO**": An agreement to facilitate maritime alien migrant interdiction operations, including repatriation authority.

As of 1 September 1997, similar agreements were in the process of negotiation with Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, and Nicaragua.

Notes:

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- ¹ Four part (shipboarding, shiprider, pursuit, entry-to-investigate) "model" counterdrug (CD) agreement signed 4/19/95. Overflight and order-to-land provisions added by amendment 6/3/96. All parts in force.
 - ² General MLE shiprider & overflight agreement reflected by exchange of notes May 1 and 6, 1996. In force. Other agreements in force; OPBAT Tripart agreement (w/TCI, U.S.), Grey agreement.
 - ³ Shipboarding, shiprider, pursuit, entry-to-investigate, overflight signed but not yet in force.
 - ⁴ Four part model CD agreement signed 12/23/92. In force.
 - ⁵ *Operational procedures for shipboarding special arrangements effective 5 Nov 96. In force.
 - ⁶ AMIO IAW 2 May 95 agreement. In force.
 - ⁷ Four part model CD agreement signed 4/19/95. In force.
 - ⁸ Four part model CD agreement signed 3/23/95. In force. *Temporary overflight authority periodically granted.
 - ⁹ 4/96 French law delegated to Prefect Martinique power to authorize shipboarding, pursuit, entry-to-investigate, and to Martinique General Prosecutor power to authorize waiver of prosecutorial jurisdiction on case-by-case basis.
 - ¹⁰ Four part model CD agreement signed 5/16/95. Overflight and order-to-land added by amendment. All in force.
 - ¹¹ CD pursuit and entry-to-investigate agreements from 1988 and 1991. All in force.
 - ¹² Six part agreement signed but not yet in force.
 - ¹³ US/MX CD agreements have no maritime component.
 - ¹⁴ Shiprider, pursuit, entry-to-investigate, overflight in force.
 - ¹⁵ General maritime support & assistance agreement. In force. CGCs operating in PN territorial sea must do so w/GOP shiprider and GOP vsI escort.
 - ¹⁶ Four part model CD agreement signed 4/13/95. Overflight and order-to-land provisions added by amendment 6/27/96. All in force.
 - ¹⁷ Four part model CD agreement signed 4/20/95. Overflight and order-to-land provisions added by amendment 6/5/96. All in force.
 - ¹⁸ Four part model CD agreement signed 7/4/95. In force.
 - ¹⁹ Six part model CD agreement signed 3/4/96. In force.
 - ²⁰ CD OPBAT Tripart agreement.
 - ²¹ CD shipboarding for vsIs flagged in UK & UK dependent territories located in Westlant, Caribbean & Gulf of Mexico; MOU for USCG LEDET embarkation in UK WIGS; reciprocal USCG/BVI shiprider MOU. In force.
 - ²² 1991 CD reciprocal shipboarding agreement; MOU setting out procedures for pursuit of air TOIs by USG aircraft. In force.

Source: USCG COMDT (G-OPL)