

Chapter III

Peacetime Use of Force on the High Seas

by
Louis B. Sohn*

I: Scope of Comment

The subject discussed in this comment—peacetime use of force on the high seas against foreign vessels—is approached rather gingerly in Chapter 3 of *The Commander's Handbook on the Law of Naval Operations*. The main thrust of the chapter is to protect United States persons and property at sea by U.S. naval forces in peacetime against actions by pirates, terrorists or insurgents, and against the hazards of the sea, such as storms or mechanical failure. But the chapter deals also with such topics as transport of slaves, international narcotics traffic and unauthorized broadcasting from international waters; it also deals with the right of U.S. warships to approach and visit vessels sailing on the high seas under a foreign flag if suspected of such activities or in other special circumstances.

In the case of the transport of slaves, no direct guidance is given; if confronted with such situation, “commanders should request guidance from higher authority.” Similar advice is given in the case of unauthorized broadcasting. In both cases also it is noted (in paragraph 3.8) that the vessel may be approached, stopped and boarded, and the ship’s documents examined, in order to verify its nationality. There the advice stops, and nothing is said about possible search and seizure. While the last sentence of paragraph 3.8 suggests that the procedure for exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search, it is not clear whether this statement applies only to “stateless vessels” with which it is linked in a separate subparagraph, or also to other suspected vessels. It is quite obvious, on the other hand, that the belligerent and peacetime situations are quite different, and throughout history the United States has strongly opposed this analogy (as will be documented later in this comment).

The issue of suppression of international narcotics traffic is even more puzzling, as that traffic is not mentioned at all in paragraph 3.8, which lists the only situations in which approach and boarding of foreign vessels were allowed. Reliance is placed instead on “bilateral arrangements” (paragraph 3.6), or “Congressional direction” and “consent” of the foreign flag nation,

granted by a bilateral agreement or *ad hoc* for the particular occasion (paragraph 3.12.4). There seems to be admission here that there is no general rule of international law authorizing such action, especially if the action envisaged here should extend beyond approach and visit, including even arrest, search and seizure.

It might be useful to the commander on the spot, as well as the "higher authority" which is supposed to provide him with guidance, to explain the history of the two main efforts to authorize warships to visit, search, and, if justified, seize the vessels of other nations, and the reasons for the opposition of some major powers, including for a long time the United States and even today France, to this "strengthening" of the law and of the means to enforce it. This comment will thus discuss primarily the efforts to strengthen the control over transport of slaves and international narcotics traffic, with only incidental references to piracy (where international law developed detailed rules, which are generally accepted) and to the limited and by now mostly obsolete arrangements for stopping the smuggling of alcoholic beverages into the United States.

Since its early days, the principle of the freedom of the high seas has been subjected to a two-pronged attack: the efforts of some coastal states to extend their jurisdiction far into the sea, and the assertion by some naval powers of the right to exercise jurisdiction over the vessels of other states navigating on the high seas. While the first attack has led to a dramatic diminution of the area of the high seas, the second attack has led to such strong resistance that it resulted in only minor inroads on the freedom of navigation of the high seas. Nevertheless, in the last years of the twentieth century, after stopping repeated attempts to subject foreign vessels on the high seas to search and seizure in the name of abolishing the universally condemned slave trade (which unfortunately still exists under different guises), a new danger to the freedom of navigation on the high seas has arisen from unilateral attempts to enforce national legislation on the high seas in an area almost as odious—traffic in narcotic drugs. In view of this development, it seems useful to explore the reasons for the persistence of the original opposition to such encroachments on the freedom of the seas, to consider the applicability of these arguments to the current situation, and to suggest some means to overcome the difficulties.¹ As this subject is still too vast, this comment is necessarily limited to a discussion of only some of the rules of international law which relate to the activities of naval vessels on the high seas in time of peace, authorizing some and prohibiting others.²

II. Crusade Against Slave Trade

The essence of the great principle of the freedom of the seas is that all nations have an equal right to the uninterrupted use of the high seas for their

navigation. From this principle flow two additional principles: that a ship on the high seas is subject only to the jurisdiction of the state whose flag it flies and that no state has the right to interfere in any manner with vessels of other states navigating upon the high seas in time of peace. Even in time of war the right to visit, search or seize a neutral vessel has important limits, and the state exceeding these limits must pay compensation to the neutral state for any loss or damage caused to the vessel, its owner, crew, or cargo; even more, freedom of navigation must be observed in time of peace, and the violator must pay compensation proportional not only to the damage and loss, but also to the gravity of the violation.³

These rules have been recognized for at least two hundred years. For instance, in the often quoted statement in the 1817 *Le Louis* case, the eminent British Admiralty judge, Sir William Scott (later Lord Stowell), explained these principles in the following manner:

Upon the first question, whether the right of search exists in time of peace, I have to observe that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; . . . and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which . . . mainly concerns the peace of mankind, both in their public and private capacities, to [be] preserve[d] inviolate. The second is, the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce. Against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals, the friends of both, each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy, the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages.⁴

A 1950 memorandum prepared by the Secretariat of the United Nations for the International Law Commission, after examining the pretensions of various nations to claim dominion over vast areas of the sea, concluded that the concept of the freedom of the seas which was developed to counteract these claims means not only that every nation has an equal right to use the high seas, but also that ships flying the flag of one state are prohibited from interfering with ships flying the flags of other nationalities. The memorandum pointed out that:

Such interference, which is naturally forbidden in the mutual relations of users, is not even tolerated in the case of warships, which might be considered to have as their general mission to watch over the maintenance of order and security at sea. In peace-time warships have no police powers except over private vessels flying their own flag. The

general policy powers of warships on the high seas in respect of private foreign vessels are limited to the right of approach, and do not comprise the right to check nationality by examination of ships' papers. The only exception to this rule is in the case of grave suspicion, and the State to which the investigating warship belongs is responsible for any damage caused by an examination that proves to be unwarranted. A warship which considers it necessary to interfere in this way with the navigation of a ship flying a flag other than its own, assumes, and thereby involves the State to which it belongs in, full responsibility for the action taken and for any possible damages.⁵

In his opening statement to the 1958 Conference on the Sea, Admiral Oswald S. Colclough called attention to the fact that the United States "had often had to defend itself against the infringements of the principle [of the freedom of the seas]," and that, therefore, it "attached great importance to it."⁶

A dispute arose as early as the 1790s between the United States and Great Britain with respect to the British practice of stopping foreign vessels, including the American ones on the high seas, and removing sailors considered by the British to be still British subjects although they were naturalized abroad. This British abuse of the right of visit and search was one of the reasons for the War of 1812, and although this practice was in fact abandoned soon thereafter, the United States continued to raise the issue for some thirty years.⁷ The American objections were spelled out in 1823 by John Quincy Adams, then Secretary of State:

[T]he United States have never disputed the belligerent right of search, as recognized and universally practiced conformably to the laws of nations. They have disputed the right of belligerents, under colour of the right of search for contraband of war, to seize and carry away men, at the discretion of the boarding officer, without trial and without appeal; men, not as contraband of war or belonging to the enemy, but as subjects, real or pretended, of the belligerent himself, and to be used by him against his enemy. It is the fraudulent abuse of the right of search for purposes never recognized or admitted by the laws of nations; purposes in their practical operation of the deepest oppression and most crying injustice, that the United States have resisted and will resist, and which warns them against assenting to the extension in time of peace, of a right which experience has shown to be liable to such gross perversion in time of war.⁸

The matter was only settled by an exchange of notes made in connection with the Webster-Ashburton Treaty in 1842.⁹

When in 1807 the British Parliament prohibited slave trade by British citizens,¹⁰ the British Government embarked on a crusade to stop this trade also by citizens of other countries. Remembering the difficulties about the impressment of seamen, the United States—though in 1807 it also prohibited importation of slaves into the United States¹¹—refused to concede to the British Navy the right to visit and search vessels under the United States flag. While British courts approved searches and seizures of American vessels during the Napoleonic wars,¹² Sir William Scott had to consider the seizure in peacetime of *Le Louis*—mentioned above—which involved a French vessel, condemned by the British admiralty court at Sierra Leone on the grounds that it was equipped for carrying slaves, that it resisted the capture, and that

in the process it “piratically killed” eight members of the crew of the British cruiser. Sir William held that slave trade was not piracy nor a generally accepted crime under the law of nations, and that its illegality under the laws of both England and France was not a sufficient ground for the vessel’s seizure. He started with the premise that neither a British act of parliament, nor any commission founded on it, can effect any right or interest of foreigners unless they are founded upon principles and impose regulations that are consistent with the law of nations. While a state has the “right to see that its own vessels are duly navigated,” it has no right “to visit and search all the apparent vessels of other countries on the high seas, in order to institute an inquiry whether they are not in truth British vessels violating British laws.” He added that a state should not make regulations which it “cannot enforce without trespassing on the rights of others.” He emphasized that

[t]o press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.

If a country should agree by convention to allow visit and search in time of peace, it would be “for the prudence of states to regulate by that convention the exercise of the right with all the softenings of which it is capable,” and to make sure that it would be “so constructed as not to excite just irritation.” He pointed out, finally, that France rejected a proposed treaty permitting search on a reciprocal basis, “upon the express ground that she would not tolerate any maritime police to be exercised on her subjects but by herself.”¹³

After the British Government concluded treaties with Spain, Portugal and the Netherlands allowing, on a reciprocal basis, search and seizure of vessels and adjudication by a mixed commission, the United States rejected a similar treaty. John Quincy Adams, then Secretary of State, claimed that in accordance with this plan, citizens of the United States would be liable

in time of peace to have their vessels searched and with their persons seized and carried away by the naval officer of a foreign power, subjected to the decision of a tribunal in a foreign land, without benefit of the intervention of a jury of accusation or of a jury of trial, by a court of judges and umpires half of whom would be foreigners and all irresponsible to the supreme authorities of the United States.¹⁴

On another occasion, Mr. Adams made clear, however, that

although Great Britain . . . may be willing to abandon those of her subjects who defy the laws and tarnish the character of their country by participating in this trade to the dispensation of justice even by foreign hands, the United States are bound to remember that the power which enables a court to try the guilty authorizes them also to pronounce upon the fate of the innocent and the very question of guilt or innocence is that which the protecting care of their Constitution has reserved for citizens of this Union to the exclusive decision of their own countrymen. This principle has not been departed from by the statute which has branded the slave trader with the name, and doomed him to the punishment, of a pirate. The distinction between piracy by the law of nations and

piracy by statute is well known and understood in Great Britain; and while the former subjects the transgressor guilty of it to the jurisdiction of any and every country into which he may be brought or wherein he may be taken, the latter forms a part of the municipal criminal code of the country where it is enacted and can be tried only by its own courts.

At that time, Mr. Adams explained also, with real passion, that the United States had even more basic objections to the whole idea of search and seizure. He noted that:

[T]he nature of the right of search at sea . . . , as recognized or tolerated by the usage of nations, is a right exclusively of war, never exercised but by an outrage upon the rights of peace. It is an act analogous to that of searching the dwelling-houses of individuals on the land. The vessel of the navigator is his dwelling-house, and like that, in the sentiment of every people that cherishes the blessings of personal liberty and security, ought to be a sanctuary inviolable to the hand of power, unless upon the most unequivocal public necessity, and under the most rigorous personal responsibility of the intruder. Search at sea, as recognized by all maritime nations, is confined to the single object of finding and taking contraband of war. By the law of nature, when two nations conflict together in war, a third, remaining neutral, retains all its rights of peace and friendly intercourse with both. Each belligerent, indeed, acquires by war the right of preventing a third party from administering to his enemy the direct and immediate materials of war; and, as incidental to this right, that of searching the merchant vessels of the neutral on the high seas to find them. Even thus limited, it is an act of power which nothing but necessity can justify, inasmuch as it cannot be exercised but by carrying the evils of war into the abodes of peace, and by visiting the innocent with some of the penalties of guilt. Among the modern maritime nations, an usage has crept in, not founded upon the law of nature, never universally admitted, often successfully resisted, and against which all have occasionally borne testimony by renouncing it in treaties, of extending this practice of search and seizure to all the property of the enemy in the vessel of the friend. This practice was, in its origin, evidently an abusive and wrongful extension of the search for contraband: effected by the belligerent, because he was armed; submitted to by the neutral, because he was defenseless; and acquiesced in by his sovereign for the sake of preserving a remnant of peace, rather than become himself a party to the war. Having thus, occasionally, been practiced by all as belligerents, and submitted to by all as neutrals, it has acquired the force of an usage which, at the occurrence of every war, the belligerent may enforce or relinquish, and which the neutral may suffer or resist, at their respective options.

This search for and seizure of the property of an enemy in the vessel of a friend is a relic of the barbarous warfare of barbarous ages—the cruel and, for the most part, now exploded system of private war. As it concerns the enemy himself, it is inconsistent with that mitigated usage of modern wars which respects the private property of individuals on the land. As relates to the neutral, it is a violation of his natural right to pursue, unmolested, his peaceful commercial intercourse with his friend. Invidious as is its character in both these aspects it has other essential characteristics equally obnoxious. It is an uncontrolled exercise of authority by a man in arms over a man without defense—by an officer of one nation over the citizen of another—by a man intent upon the annoyance of his enemy, responsible for the act of search to no tribunal, and always prompted to balance the disappointment of a fruitless search by the abusive exercise of his power, and to punish the neutral for the very clearness of his neutrality. It has, in short, all the features of unbridled power, stimulated by hostile and unsocial passions.

I forbear to enlarge upon the further extension of this practice by referring to injuries which the United States experienced when neutral in a case of vital importance; because, in digesting a plan for the attainment of an object which both nations have equally at heart, it is desirable to avoid every topic which may excite painful sensations on either side. I have adverted to the interest in question from necessity, it being one which could not be lost sight of in the present discussion.

Such being the view taken on the right of search, as recognized by the law of nations and exercised by belligerent powers, it is due to candor to state that my Government has an insuperable objection to its extension by treaty, in any manner whatever, lest it might lead to consequences still more injurious to the United States, and especially in the circumstance alluded to. That the proposed extension will operate in time of peace and derive its sanction from compact present no inducements to its adoption. On the contrary, they form strong objections to it. Every extension of the right of search on the principles of that right is disapproved. If the freedom of the sea is abridged by compact for any new purpose the example may lead to other changes. And if its operation is extended to a time of peace, as well as of war, a new system will be commenced for the dominion of the sea, which may eventually, especially by the abuses into which it may lead, confound all distinction of time and circumstances, of peace and of war, and of rights applicable to each state.¹⁵

In 1824, a British–American treaty was drafted based on a proposal made by then Secretary of State John Quincy Adams, who took into account the fact that both countries had enacted laws declaring the slave trade to be piracy punishable by death,¹⁶ as well as a resolution of the United States Congress requesting the President to conduct negotiations leading to the ultimate denunciation of the slave trade “as piracy under the law of nations, by the consent of the civilized world.”¹⁷

The 1824 Treaty declared that the right to visit and search, reciprocally conceded, is wholly and exclusively founded on the consideration that the two nations have by their laws made the slave trade piracy, and that each power shall use its influence with all other civilized powers, to procure from them the acknowledgement that the slave trade is piracy under the law of nations. To remove United States objections to foreign adjudication the treaty also provided that a slave trading vessel of one country captured by the naval vessel of the other should be delivered to a port of the captured vessel’s own country for adjudication.¹⁸ The Senate circumscribed its consent to ratification with several amendments cutting down United States obligations; these amendments were rejected by the British Government, and the treaty had to be abandoned.¹⁹

After this attempt to find a compromise came to naught, the situation deteriorated. In 1839, the British Parliament enacted a law which was primarily directed against Portuguese vessels, but also applied to vessels “not being justly entitled to claim the protection of the flag of any state or nation.”²⁰ It authorized their visit to ascertain their nationality; seizing them not only when slaves were found on board but also if they were equipped for slave trade (e.g., carrying shackles, handcuffs, extra food and water, and large boilers for mass cooking); bringing them for adjudication as if they were

the property of British subjects; granting a bonus (“indemnity”) to all persons concerned in their capture; and protecting the captors from any suit against them in a British court.²¹

When this bill was presented to the House of Lords, the Duke of Wellington, the great British hero who defeated Napoleon in the Battle of Waterloo, opposed the bill regardless of its laudable objective. He reminded the lords that “the greatest judge who ever presided over an Admiralty Court” (Lord Stowell) had laid down in the *Le Louis* case that in peacetime even the right of search was illegal and contrary to the law of nations, unless that right had been conceded by treaty. If British cruisers should start stopping and searching suspicious ships of other nations, whether a treaty existed or not, as they had already started doing in relation to some foreign flag ships, other nations might soon resist or retaliate, and there would be a grave danger of universal war.²² Wellington’s view prevailed, and the House of Lords rejected the bill; it was, however, adopted on the second reading, after the Government made sufficient changes in the bill to persuade enough lords to accept it.²³

In 1840, the British Government informed the United States that it could not allow foreign vessels to protect themselves by a fraudulent use of the American flag, and instructed the Admiralty to board American flag vessels suspected of being non-American for the restricted purpose of examining their papers and ascertaining whether they were actually entitled to display the American flag. If these papers were in order, the vessel would have to be immediately released; if they were not in order, it would be permissible to search the vessel; and if it had slaves on board or was equipped for slave trading, it would have to be detained and sent to the appropriate port for trial. The Admiralty’s orders made it clear that American vessels must be shown every possible courtesy when boarded, but no one should be allowed to refuse inspection, and force might be used if necessary.²⁴

After the United States protested the boarding of American flag vessels, Lord Palmerston, the British Foreign Secretary, explained that “the right existed of ascertaining in some way or another the character of the vessel, and that by her papers and not the colours on flag, which might be displayed,” and that such inspection of papers “could not be regarded as amounting to a right of search.” In reply, the United States ambassador, Mr. Stevenson, made clear that “under no circumstances could the government of the United States consent to the exercise of the right on the part of any foreign nations, to interrupt, board, or search their vessels on the high seas.” He added that “to admit the right of a foreign naval officer, to decide upon the genuineness of American vessels, by boarding them . . . was in effect allowing the right of search, and therefore utterly indefensible.”²⁵

The difference of views on the right of visit was ingeniously papered over in the Webster-Ashburton Treaty of 1842, which dealt with a number of

important British-American disputes. It provided for sending two squadrons, one British and one American, to West Africa to suppress, separately but in concert and cooperation, the slave trade.²⁶ It was understood that the main duty of the American squadron would be to ascertain, in case of doubt, the right of a vessel to display the American flag, and thus to avoid its visit by a British warship.²⁷

In order to avoid further conflict, the British Admiralty issued the following instructions to the Navy:

The Slave Trade has been denounced by all the civilized world as repugnant to every principle of justice and humanity. You are, however, to bear in mind, that Great Britain claims no rights whatever with respect to foreign ships engaged in that traffic, excepting such as the Law of Nations warrants, or as she possesses by special Treaties and Conventions with particular states.

It is your duty to make yourself thoroughly conversant with the Treaties, Conventions, and Laws, as well as with all the Instructions given to you relative to the Slave Trade.

You are not to visit a vessel under a Foreign flag on the High Seas on suspicion of the Slave Trade, except in virtue of special authority under Treaty, or in case you have reason to believe that the vessel has no right to title to claim the protection of the flag she bears . . .

Towards every functionary, British or Foreign, with whom you may come in contact, you will invariably maintain a respectful and courteous demeanour.

You will take special care to ensure propriety of language and demeanour on the part of officers, seamen and marines, towards all persons (officers being held responsible for any 'exhibition of intemperance' on the part of those under their command).²⁸

Nevertheless, other incidents occurred, and in 1852 Secretary of State Cass reopened the controversy by notifying the British Government that the United States denied "the right of cruisers of any other power whatever, for any purpose whatever, to enter their vessels by force in time of peace. . . . No change of name can change the illegal character of the assumption. Search, or visit, it is equally an assault upon the independence of nations."²⁹ When the British Government asked the law officers of the Crown for their opinion on this subject, they responded that the United States was right in its interpretation of international law, and that an American vessel could be boarded by British officers only at their own risk. Consequently, British cruisers were ordered "to respect the American flag under any circumstances."³⁰

President Lincoln, upon taking office, immediately authorized Secretary of State Seward to start negotiations with the British Government on a convention to suppress the slave trade. These negotiations terminated in April of 1862 by the conclusions of a detailed convention, which authorized the ships of the two navies to "visit such merchant vessels of the two nations as may, upon reasonable grounds, be suspected of being engaged in the African

Slave Trade, or having been fitted for that purpose; or of having, during the voyage on which they are met by the said cruisers, been engaged in the American Slave Trade, contrary to the provisions of this Treaty." The means of the search were carefully specified in the treaty, and it was made clear that "the only object of the search is to ascertain whether the vessel is employed in African Slave Trade, or is fitted up for the said Trade." The right to search was originally limited to the distance of 200 miles from the coast of Africa, southward of the 32nd parallel of north latitude, and within 30 leagues of the coast of Cuba; later it was extended to the area within 30 leagues of Madagascar, Puerto Rico and Santo Domingo.

The two governments agreed to establish three Mixed Courts of Justice, formed of an equal number of individuals from both countries; their seats were to be at Sierra Leone, Cape of Good Hope and New York. Each captured ship was to be brought before one of these courts and, if condemned, was to be broken up (to avoid its later sale to another slave trader); the master and crew of any condemned vessel were to be punished according to the laws of the country to which such vessel belonged, and should ordinarily be delivered for the execution of that punishment to the nation under whose flag the condemned vessel was sailing; and punishment was also to be meted to the owners of the condemned vessel and the persons interested in her equipment or cargo unless they should be able to prove that they had no participation in the enterprise. The enslaved Africans found on board of a condemned vessel were to be placed at the disposal of the Government whose cruiser had made the capture; they were to be set free immediately, the Government to whom they had been delivered guaranteeing their liberty. Should the Mixed Court of Justice decide, however, that the cruiser was guilty of an arbitrary and illegal detention, the cruiser's Government would be obligated to make good any losses suffered by the subjects or citizens of the other country, such indemnification to be paid within one year from the Court's decision. If one Government should complain that a navy officer of the other country had deviated from the stipulations of the Treaty, his government would be bound to institute an inquiry and to inflict upon the officer, if found guilty of willful transgression, a punishment proportionate to the transgression.³¹

By the end of the 1860s, the slave trade diminished greatly, and Congress asked for the abolition of the Mixed Courts of Justice in order to cut unnecessary expenditures.³² These courts were terminated in 1870, and their jurisdiction was transferred to national courts competent to deal with maritime prizes. Any American vessel captured by a British cruiser was to be sent for adjudication to New York or Key West, whichever should be more accessible, or was to be handed over to a United States cruiser, if one should be available in the neighborhood of the capture; similarly, a British vessel captured by an American cruiser was to be sent for adjudication to

the nearest or most accessible British colony, or was to be handed over to a British cruiser, if one should be available in the neighborhood of capture. All enslaved Africans on board either an American or British vessel were to be handed over to the nearest British authority, to be immediately set free and guaranteed liberty by the British Government. If some of them had to be sent with the detained vessel as necessary witnesses, they were to be set free as soon as their testimony should no longer be required and their liberty was to be guaranteed.³³ This ambitious treaty ended the American-British debate about visit and search, but it had little practical effect as the slave trade across the Atlantic came to an end at about the same time as a result of Brazil's change of attitude and its willingness to take effective action against importation of slaves.³⁴

The work of the abolitionists was not yet finished. In the meantime, there was an increase in slave traffic from East Africa across the Indian Ocean, which led in 1888 to the renewal of the debate about the right of visit and search between, on the one hand, Great Britain and Germany, who were supposedly helping the Sultan of Zanzibar to blockade the coast, and, on the other hand, France. In addition, problems arose between Great Britain and Germany, which dealt harshly with captured vessels, their crews, and even the liberated cargo.³⁵

When the Brussels conference on the affairs of Africa was convened by King Leopold II of Belgium in 1889, the British Government made sure that the issue of terminating maritime slave traffic would be on the agenda, and proposed a general agreement to establish a specific slave trade zone within which the signatory powers would have the "right of supervision, jointly and severally, whether on high seas or in territorial waters, over all sailing vessels under any flag."³⁶ The proposal was to be implemented by bringing the captured slavers before mixed tribunals representing at least five of the signatory powers; by turning the offenders over to their own national authorities for punishment under their own laws, which would provide for severe penalties; and by establishing international offices to exchange information not only about the slave trade but also about ships authorized to fly each national flag and the sentences passed on slavers.³⁷

The French Government responded with a proposal which allowed inspection within a more limited zone of only indigenous vessels for the sole purpose of verifying the flag. It required, in case of doubt about a vessel's right to fly a particular flag, that the investigation be handed over to the flag nation. It provided for returning the vessel to the captor if it was not entitled to fly the flag it claimed, and imposed compensation for wrongful arrest, to be settled, in case of a dispute, by an international tribunal.³⁸

The Russian jurist, Frederic de Martens, was given the task of preparing a compromise solution, and his proposal became chapter III of the General Act for the Repression of African Slave Trade, signed at Brussels on July

2, 1890.³⁹ It provided for more effective repression of the slave trade in the maritime zone of the Indian Ocean extending from south of Madagascar to Persia (Iran) in the north, and including the Red Sea and the Persian (Arab) Gulf. The surveillance was to be limited to native vessels whose tonnage was less than 500 tons. A warship of any signatory power, having reason to believe that a vessel of such tonnage, navigating within the specified zone, was engaged in the slave trade or was guilty of the fraudulent use of a flag, was entitled only to examine the ship's papers; any further search or calling the roll of the crew and passengers was only authorized when permitted by a prior convention for suppression of the slave trade concluded by the flag state of the vessel. Should the acts of supervision permitted by the treaty or convention convince the naval officer in command of the cruiser that irrefutable proofs existed of fraudulent use of the flag or participation in the slave trade, he had to bring the arrested vessel to the nearest port of the zone where there was a competent magistrate of the flag state of that vessel or to turn it over to a cruiser of that vessel's nationality, if the latter consented to take charge of it. If the investigation by the magistrate proved that the flag was fraudulently used, the vessel would be put at the disposal of the captor. If slaves should be found on board or any other offense connected with the slave trade was proven, the vessel and cargo would remain sequestered in charge of the magistrate who had conducted the investigation until the vessel had been properly condemned and transferred to the captor, or declared innocent and permitted to continue on its course. The slaves were to be liberated by the local authority and either returned home or settled on the spot. If the vessel was illegally arrested, an indemnity had to be fixed by the magistrate in proportion to the damage suffered by the vessel being taken out of its course. If the officer of the capturing vessel disagreed as to the amount of the indemnity the matter had to be immediately submitted to arbitration. The captain and the crew of the vessel condemned for an offense were to be brought promptly before a tribunal of the nation whose flag had been used by the accused or to a specially commissioned authority of that nation.

The main antagonists were satisfied with the final text. The British Government received the right to visit all likely slave-carrying vessels within the zone, and French vessels were freed from visit and search outside the zone.⁴⁰ Nevertheless, the French Chamber of Deputies refused to accept the provisions relating to the verification of the flag, and to preserve the treaty France was allowed to exclude these clauses in its ratification document.⁴¹ In consequence, the apparent consensus disintegrated and a shadow was thrown again on the right of visit and search.

By the end of the 19th century, the measures taken under the Brussels Act contributed to the almost complete abolition of the slave trade, though it survived under various guises in a few places throughout the 20th century.⁴²

In revising the map of the world after the First World War, the victors decided to get rid of the cumbersome anti-slavery provisions of the Brussels Act, and replaced them as between the parties to one of the Saint-Germain Conventions of 1919, by a provision which merely contained a general statement that the parties will endeavor "to secure the complete suppression of slavery in all its forms and of the black slave trade by land and sea."⁴³

In 1925, the British Government proposed to the League of Nations the adoption of a convention implementing the general provision of the 1919 convention. It suggested strong enforcement measures including a provision that "[t]he act of conveying slaves on the high seas shall be deemed to be an act of piracy, and the public ships of the signatory powers shall have the same rights in relation to vessels and persons engaged in such act as over vessels and persons engaged in piracy." It also would have provided for a decision by the courts and according to the laws of the country of the captor with respect to the validity of the capture of the vessel and the liberation of slaves, but for handing over of the persons engaged in the act of conveying slaves on the high seas to the authorities of their own country which was to bring them before its court.

In view of a strong opposition to these proposals, the special committee to which this matter was referred limited the provision in Article 3, paragraph 2, of the 1926 Convention on the Suppression of Slave Trade and Slavery to an undertaking to negotiate a convention based on an agreement concluded in 1925 relating to international trade in arms, which, in turn, contained enforcement provisions similar to those of the 1890 Brussels Act, including restrictions to native vessels of limited size, special zones, the right to verify the nationality of the suspected vessel, and the authorities entitled to decide about the illegality of the trade.⁴⁴ Article 3, paragraph 3, of the 1926 Convention also authorized the parties to it "to conclude between themselves, without, however, derogating from the principles laid down in the preceding paragraph, such special agreements as, by reason of their peculiar situation, might appear suitable in order to bring about as soon as possible the complete disappearance of the slave trade." Neither these special agreements nor the supplementary convention envisaged in paragraph 2 of the Article have, however, been concluded, and the British effort was sidetracked again.⁴⁵

After a lapse of almost thirty years, the indomitable British diplomats tried again, taking advantage of a 1951 report of the United Nations *Ad Hoc* Committee on Slavery which complained that the then existing arrangements for suppressing slave trade at sea were less satisfactory than those of the 1890 Brussels Act. They suggested the preparation of a convention which would supplement the 1926 Convention by declaring slave trading on the high seas to be a "crime similar to piracy in international law," and subjecting slave trading to the same treatment and punishment as piracy.⁴⁶ The British Government presented such a draft convention in 1954. It contained provisions

similar to those presented by it in 1925. It proposed to make slave trade equivalent to piracy, but instead of the detailed provisions relating to capture and legal proceedings against the vessel and the crews, it merely proposed that the “[p]ublic vessels under the control of parties to [this Convention shall have the same rights in relation to vessels engaged in [the act of conveying slaves on the high seas or slave-raiding] as they have in relation to vessels and persons engaged in acts of piracy.”⁴⁷ A Drafting Committee appointed by the Economic and Social Council revised the British draft several times, and prepared a more elaborate article making clear that the provisions relating to the slave trade would apply only to specified areas of the Indian Ocean, and added a provision authorizing warships or military aircraft to exercise the same rights of visit, search and seizure in relation to vessels “suspected on reasonable grounds of being engaged in the act of conveying slaves as they have in relation to vessels so suspected of being engaged in acts of piracy.” It limited the enforcement to vessels of parties to the proposed Convention, and a proposal to extend it to “stateless vessels” was withdrawn.⁴⁸ At the Conference held in 1956 to adopt the convention, strong opposition was expressed to the provisions relating to visit, search, and seizure by foreign warships. A more limited draft restricted to visit and search, and leaving further action to the flag state, was also rejected.⁴⁹ Consequently, the 1956 Convention leaves the enforcement completely in the hands of the flag state. It requires only that states take effective measures to prevent the transport of slaves by ships and aircraft and to “punish persons guilty of such acts or of using a national flag for the purpose.” They must also exchange information to ensure practical coordination of measures for combating the slave trade. It is also provided that “[a]ny slave who takes refuge on board any vessel of the State Party to this Convention shall *ipso facto* be free.”⁵⁰

During the 1950s, in the context of the codification of the international law of the sea, the International Law Commission also encountered the question of the scope of the rule relating to the right to visit and search foreign vessels on the high seas. Its rapporteur, Professor J. P. A. Francois, in his first report stated that the “only police measure [on the high seas] allowed in time of peace is the right of approach, that is to say the right to ascertain the identity and nationality of the vessel, but not the right to check nationality by examination of ship’s papers, and not, *a fortiori*, the right of search.” After noting the British efforts to establish “the legality, if not of boarding foreign merchant vessels, at any rate of the verification of the flag,” he pointed out that wireless telegraphy had almost eliminated the various reasons for which formerly vessels were induced to make material contact with each other on the high seas.⁵¹

In his second report, Professor Francois stuck to his position with respect to the main principle, but added three clarifications. Acts of interference may be allowed by a treaty; boarding and further action may be justified, if “there

is a reasonable ground for suspecting that the vessel is engaged in piracy;" and, if suspicion of piracy should "prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to stoppage."⁵²

In view of concurrent discussions in the United Nations *Ad Hoc* Committee on Slavery,⁵³ Professor Francois suggested that some special provisions on slave trade might be included in the International Law Commission's draft. He rejected, however, the proposal that slave trade be regarded as an act of piracy, permitting the stoppage and search of any vessel suspected of engaging in such a trade by any warship and taking it to a port of the captor for trial there by national courts. He pointed out the following differences between piracy and slave trade:

Part at least of the ground for internationalizing the crime of piracy is that the acts occur on the high seas and that in many cases there are no relations between the pirate and a given country. The slave trade, on the other hand, takes place between two given countries. Since both these countries are bound to cooperate in repressing the slave trade, internationalization— meaning that the vessel may be conducted to any port for trial by the local courts—does not appear appropriate.

He considered also that the right of control in this case should be limited to small vessels below a specified tonnage, and should not extend to the whole area of the high seas but to a limited area only where slave trade is still carried on, by analogy to the Berlin Act of 1890.⁵⁴ Finally, he made clear that a visit of a suspected vessel should be restricted to an examination of its papers, that examination of the cargo or search of the vessel is permissible only when, and to the extent, authorized by a convention to which the vessel's flag state is a party, that trial should be by the courts of the flag state of the captured vessel, and that in case of illegal arrest an indemnity would have to be paid.⁵⁵ During the discussion of his report by the International Law Commission, Professor Francois pointed out that while old types of slavery were disappearing, the concept of slavery was being widened, thus threatening that vessels would be boarded "at all times and in all places," and increasing the hesitancy of states to accept the right of approach. When the prohibition of slavery and slave trade by the Universal Declaration of Human Rights⁵⁶ was invoked in order to justify the exercise of the right of approach "everywhere in respect of vessels suspected of being engaged in the slave trade," Francois replied that "[t]o recognize that the slave trade was prohibited was one thing, to recognize the right of approach was another."⁵⁷

The Commission decided in 1951 that in the interests of stamping out the slave trade, the right of approach to ships engaged in the slave trade "should be put on the same footing as in the case of piracy, and hence should be permissible without regard to zone or tonnage."⁵⁸ Consequently, Professor Francois submitted the following proposal to the Commission concerning the right of approach, designed to safeguard the freedom of navigation and to

prohibit, except in clearly defined cases, the boarding and inspection of ships on the high seas:

Except where acts of interference are done under powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting that the vessel is engaged in piracy or in the slave trade. Should such suspicions prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to the stoppage.⁵⁹

In addition, he proposed the following separate article emphasizing the duty to cooperate in measures for the repression of the slave trade:

All States are required to cooperate for the more effective repression of the slave trade. They undertake to adopt efficient measures to prevent the transport of slaves on vessels authorized to fly their colours and to prevent the unlawful use of their flag for the purpose.

Any slave who has taken refuge on board a ship of war or a merchant vessel shall be *ipso facto* set free.⁶⁰

Similar provisions on slave trade were included in the rapporteur's 1954 report and in the Commission's 1955 text. The 1954-55 texts contained also, for the first time, more elaborate provisions on piracy.⁶¹ New difficulties did arise, however, with respect to the right-of-approach proposal. At the 1955 session of the Commission, Professor Scelle revived the traditional distinction between the right to verify the flag and the right to board and search, and pointed out that the existing situation was dangerous as the "exercise of the right of verification could easily, and almost imperceptibly, become an act of boarding and searching;" that it "was the thin edge of the wedge;" and that "such possibility should be guarded against." As a remedy he suggested that "verification should take place on board the investigating warship."⁶² In reply, Professor Francois explained that "the problem of the policing of the high seas was both complex and difficult." He pointed out that:

It was generally accepted that warships had the right to demand that merchant vessels at sea should show their flag upon request. Such a request for identification was perfectly natural, because it was not the usual practice for merchant vessels continually to fly their flags at sea. It was also widely recognized that, if the merchant vessel refused to show her flag or gave an evasive reply, the warships had the right to investigate her identity. That, again, was an essential condition for the control of piracy. . . .

Sanctions for unjustified verification had previously been provided in the form of damages, the award of which was to be made by one of two methods. The first, and more severe, was that whereby, if the suspicion proved to be unfounded, compensation must be rendered for any loss due to the stoppage. The second, and less stringent, provided for compensation to be paid if it could be shown that the vessel had been stopped for insufficient reason. He had chosen the first of those alternatives because of the liability to abuse in the application of the second owing to the difficulty of judging motives.

He opposed, however, the proposal that verification should take place on board the investigating warship, stressing “the danger in even a moderate sea of carrying the ship papers—the loss of which would be a most serious matter—to and from the investigating warship in a small open boat.” With some exceptions, the practice of investigation on board the merchant vessel has been followed since 1659.⁶³

Professor Scelle insisted, however, that the need to verify the flag goes far beyond piracy and slave trade, is essential for the general policing of the seas in view of the fraudulent practices in the registration of ships and the need to determine responsibility for any damage done by merchant vessels on the high seas by violating general rules on navigation or pollution. He added later that “it was as important to prevent ships from sailing under false colours as it was to suppress slavery and piracy.”

This view was opposed by several members of the Commission who wanted the right to verify a vessel’s flag restricted to piracy and slave trade. The Scelle proposal for a general right of flag verification was rejected by a vote of 6 to 2, with 2 abstentions.⁶⁴ The rapporteur accepted more easily the suggestion that a warship should be allowed to board a foreign-flag vessel if there was a reasonable ground to suspect that the vessel was in fact of the same nationality as the warship. It was generally recognized also that a warship can verify the flag of merchant vessels flying the same flag as the warship, and can seize it and bring to a port of the flag state for punishment if the vessel was flying the flag without authority.⁶⁵

Another controversy arose with respect to the right to visit and search a vessel when a warship has reason to suspect it of engaging, “during times of imminent peril to the security of the State, in activities hostile to the State of the warship.”⁶⁶ This proposal was supported on the basis of the general principle of self-defense, but it was objected that this principle cannot be applied to boarding a vessel on the high seas on mere suspicion that it was threatening the security of a state, as such “exception to the principle of the freedom of navigation might destroy that freedom altogether, since States would tend to invoke the argument of legitimate defense to justify any act of interference.”⁶⁷ As a result of that discussion, the Commission’s comment to the article on the right of visit explained that the Commission found it inadvisable to provide for the right to board a vessel being suspected of committing acts hostile to the state to which the warship belongs, at a time of imminent danger to the security of that state, as there was a danger of abuse because of the vagueness of terms like “imminent danger” and “hostile acts.”⁶⁸

The draft of text and comments approved by the Commission in 1955 was only slightly changed in 1956, when the Commission adopted the final report for the Law of the Sea Conference. In this report the Commission extended the right to visit also to the situation where there is reasonable ground for

suspecting that “while flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.” The Commission explained that in this case “it can be presumed that the vessel has committed unlawful acts and the warship should be at liberty to verify whether its suspicions are justified.” At the same time, the Commission limited the boarding of ships suspected of slavery to maritime zones treated as suspect in the international conventions for the abolition of slave trade, in order to ensure that the right of control would not be used as a pretext for exercising the right of visit in waters where the slave trade would not normally be expected to exist.⁶⁹

At the 1958 Law of the Sea Conference, the provisions on slave trade were strongly attacked by delegations of several African and Eastern European states. For instance, Mr. Ben Salem (Tunisia) argued that:

No state had the right to police the high seas. No state had the right to interfere with the ships of another State on the high seas. The provisions relating to the slave trade and piracy were of purely historical interest. The provision regarding action based on a suspicion that a ship was engaged in the slave trade should not be used as a pretext for inspecting a ship when there was no warrant for such suspicion. Warships, although they had the right to determine what flag a foreign ship was flying, did not have the right to determine whether it had the right to fly the flag, or *a fortiori*, the right to visit the ship. Unfortunately, the fears he was voicing on the subject were justified by a number of acts of interference which had been committed recently . . . [C]ertain states had arrogated to themselves the right to inspect and detain ships of other states on the high seas as if they owned the high seas. Such an act was an infringement of the law and a violation of the principle of the freedom of the seas.⁷⁰

Mr. El Erian (United Arab Republic, later Egypt) considered that there was no justification for a provision allowing warships to board ships suspected of engaging in slave trade in certain maritime zones specified in the 1890 Act of Brussels. While such provision had perhaps been justified in the nineteenth century, conditions had changed since, as was recognized in the 1919, 1926, and 1956 conventions on abolition of slavery which contained no such provisions. Such a provision “was objectionable and a potential source of disputes.”⁷¹ Egypt proposed, therefore, the deletion of the provision presented by the International Law Commission.⁷² Mr. Keilin (Soviet Union) supported such deletion for several reasons:

In the first place, would it not be discriminatory automatically to regard certain maritime zones as suspect in the matter of the slave trade? It was well known which countries had warships cruising in those neighbourhoods and had interests which would be served by the right of visit thus established. Secondly, it was inadmissible and unjustified to presume that ships in the “suspect” zones were engaged in the slave trade; such a suspicion would probably only be a pretext for controlling maritime trade in violation of the principle of the freedom of the high seas. Thirdly, the sub-paragraph was in no way necessary for effectively combating the slave trade, and it seemed that the International Law Commission had allowed itself to be influenced by happenings in a former age in an entirely different set of circumstances, of which the memory lay sleeping in the dust of archives. Finally, the provision ran counter to the Supplementary Convention on Slavery of 1956, article 3 of which laid down that the transport or

attempted transport of slaves from one country to another was a penal offence and that persons found guilty of such offences were liable to severe penalties. The suppression of such offences could and should be undertaken by the States of which the flag was flown by the ships attempting to engage in the transport of slaves.⁷³

The Egyptian amendment was defeated in the Second Committee of the Law of the Sea Conference by 22 votes to 16, with 11 abstentions.⁷⁴ One of the abstainers was Ghana, which objected primarily to the restriction of the right to board ships suspected of slave trade to a specific region. Its delegation preferred a provision that would allow the boarding of “ships suspected of slaving wherever they might be.”⁷⁵ The idea was revived at the time of the final vote in the plenary meeting of the Conference, where South Africa proposed the deletion of the reference to the maritime zones suspected of slave trade, as a counterproposal to the proposal by the United Arab Republic and Saudi Arabia to completely delete the provision granting the right to board ships suspected of slave trade. The South African proposal was approved by 32 votes to 25, with 15 abstentions, and the other proposal was withdrawn. The right to board article was then approved by 62 votes to none with 9 abstentions.⁷⁶

As a result of these developments the 1958 Convention on the High Seas,⁷⁷ which—according to its preamble—is “generally declaratory of established principles of international law,” contains eight elaborate articles on piracy, a general article concerning national measures to prevent and punish the transport of slaves, and an article allowing boarding of foreign merchant vessels on the high seas in three specified cases.

One of the piracy articles is the only article which provides expressly for the seizure of the pirate vessel or aircraft, the arrest of the persons and a decision of all issues by the court of the state of the warship that captured the private ship or aircraft. Article 19 provides, in particular, as follows:

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

Article 13 imposes on each state the following general obligation with respect to the maritime slave trade:

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

Finally, Article 22 authorizes the following minimal rights of interference with foreign ships on the high seas:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

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

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

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

The corresponding articles of the 1982 Law of the Sea Convention⁷⁸ contain only minor changes. Article 99, now entitled "Prohibition of the transport of slaves," and Article 105, now entitled "Seizure of private ship or aircraft," repeat word for word Articles 13 and 19 of the High Seas Convention. Only a few changes were made in Article 110 on the "Right to visit," which corresponds to Article 22 on the High Seas Convention. In the text of Article 110, which follows, the changes and additions have been highlighted:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, *other than a ship entitled to complete immunity in accordance with Articles 95 and 96*, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) *the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109;*
- (d) *the ship is without nationality; or*
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

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

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

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

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

It may be noted that the 1958 text deals only with the interference by a warship with a "foreign merchant ship" on the high seas. It does not apply to an encounter between two warships, or between a warship and a government ship operated only for non-commercial purposes.⁷⁹ This last point was made more explicit in the new text, which makes it clear that a foreign ship can be boarded in the specified limited circumstances only if it is "other than a ship entitled to complete immunity in accordance with articles 95 and 96," namely, if it is a warship (Article 95) or a ship "owned or operated by a State and used only on government non-commercial service."

While the "warship" that is permitted to interfere is narrowly defined in the 1958 Convention as a ship belonging to the naval forces of a State, properly marked as such, commanded by a duly commissioned naval officer and manned by a crew under regular naval discipline,⁸⁰ the 1982 Convention on the Law of the Sea permits action under Article 110 to be taken also by a military aircraft, as well as "duly authorized ships or aircraft clearly marked and identifiable as being on government service."⁸¹ Thus, even though it might have been doubtful whether the Coast Guard was entitled to act under the 1958 Convention, it has a clear right to take action under the 1982 Convention provisions to the extent that they are generally accepted as rules of customary international law.⁸²

The 1958 and 1982 Conventions have broadened in two ways the field of applicability of the 1890 General Act of Berlin: their provisions are applicable to all vessels, not as previously only to vessels of less than 500 tons; and they are applicable to all the oceans, not only to a small part of the Indian Ocean and its subsidiary seas and gulfs.⁸³

Finally it should be noted that originally there were only two grounds for stopping a foreign ship, namely the existence of reasonable grounds for suspecting that the ship is engaged in piracy or slave trade. Later, the case was added of a ship suspected of concealing the fact that it was of the same nationality as the warship. The 1982 Convention went two steps further, adding ships suspected of being "without nationality," and—under strong pressure by Western European countries—ships suspected of engaging in unauthorized broadcasting.⁸⁴ In the latter case, only warships of three categories of countries and two specific groups of countries were allowed to board such ships, namely, those of the flag State of the ship; the State of registration of a high seas installation; the State of which the person engaged in broadcasting is a national; any State where the transmissions can be received; or any State where authorized radio communication is suffering interference.⁸⁵ While illegal broadcasting belongs clearly to a special

category, it was included because of the existence of the European regional convention on the subject.⁸⁶

The question of control over stateless vessels arose several times in previous discussions, especially after the controversial British law of 1839,⁸⁷ and more recently at the 1958 Conference on the Law of the Sea, where the subject became complicated by the fear that a warship might be able to stop any vessel on the high seas by claiming that the vessel is stateless because there was no genuine link between the vessel and the flag state.⁸⁸ The inclusion of the right to board stateless vessels in the 1982 Convention was due to the general acceptance of the proposition that it was dangerous to have ships sailing on the high seas which were not subject to the jurisdiction of any State, and being law unto themselves did not comply with any generally accepted international regulations to ensure safety at sea. Consequently, the rule was adopted that such a ship can be stopped by any warship and dealt with according to the law of the warship's State.⁸⁹ It is not clear what would happen if the examination should show that the stopped ship has complied with all international regulations and there was no valid reason for interfering with its navigation. In any case, the persons on board the ship should be treated in accordance with the internationally recognized human rights, and if they have not been found engaged in any illegal activity, their basic "right to life, liberty and the security of person" should be recognized.⁹⁰ Unless these persons are also stateless, they may be entitled to the protection of the State of their nationality regardless of the fact that they are travelling on a stateless vessel.⁹¹ Even if they are stateless, they are entitled to basic human rights.⁹²

An additional complication is caused by the provisions in the 1958 Convention on the High Seas and of the 1982 Law of the Sea Convention, which establish the rule that a "ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality."⁹³ Some states have considered this provision as a license to treat such a ship and its crew in any way they please, forgetting their obligations under international law of human rights. In particular, the rules about equal treatment and non-discrimination are applicable to the persons on these ships, and regardless of the place in which the alleged crime was committed they are entitled to be protected against governmental violations of internationally recognized human rights.⁹⁴

III. Campaign Against Illicit Traffic in Narcotic Drugs

There is another important difference between the 1958 and 1982 Conventions. While the 1958 Convention on the High Seas contained no provision on illicit traffic in narcotic drugs, the 1958 Convention on the

Territorial Sea and the Contiguous Zone had a limited provision on the subject in Article 19, which read as follows:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) If the consequences of the crime extend to the coastal State; or
- (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
- (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.⁹⁵

This convention thus authorized the coastal states to arrest any person or to conduct any investigation on board a foreign ship passing through their territorial sea, if it is necessary for "the suppression of illicit traffic in narcotic drugs," subject to conditions specified in paragraphs 3 and 5, and paying "due regard to the interests of navigation" (paragraph 4).

This provision can be traced to a more limited suggestion of the International Law Commission, that was due to an initiative of the Government of Israel which called to the attention of the Commission the fact that its draft on the regime of the territorial sea contained no mention of the right of the coastal state to take steps to suppress illicit traffic in narcotic drugs.⁹⁶ In 1956, at the last session of the Commission devoted to the law of the sea, Professor Francois, the Rapporteur of the Commission on the regime of the territorial sea, was asked whether a reference on this subject should be added in the text of the article relating to the arrest on board a foreign vessel in the territorial sea. He replied that the paragraph allowing coastal state action if the consequences of a criminal act extended beyond the vessel would almost always apply to the illicit traffic in narcotic drugs.⁹⁷

The final report of the Commission added a sentence in the commentary to Article 20, stating that an "arrest for the purposes of suppressing illicit traffic in narcotic drugs may be justifiable, if the condition in sub-paragraph (a) is fulfilled," i.e., if "the consequences of the crime extend beyond the ship."⁹⁸

At the 1958 Conference on the Law of the Sea the issue was revived by Pakistan, which proposed the addition of a sub-paragraph in Article 20, which would allow the coastal state, in certain specified circumstances, to arrest a person on board a foreign ship passing through the territorial sea, "[i]f it is necessary for the suppression of illicit traffic in narcotic drugs."⁹⁹

The First Committee of the Conference adopted this proposal by 33 votes to 8, with 30 abstentions, after a short discussion.¹⁰⁰ On the one hand, it was argued by the representative of Turkey that this proposal dealt with an issue of such importance that the proposal should be broadened; it should not be limited to the territorial sea as "the question of illicit traffic in narcotic drugs was of universal concern."¹⁰¹ On the other hand, some delegates thought that this addition was not necessary, as it was covered by other subparagraphs of Article 20, relating to the right of arrest if "the consequence of the crime extend beyond the ship," or "the crime is of a kind to disturb the peace of the country or the good order of the territorial sea."¹⁰² The representative of Norway doubted whether such provision would assist in suppressing illicit traffic in narcotic drugs, as "it was difficult to imagine cases where crimes of the kind envisaged in the Pakistan proposal would actually have been committed on the ship during its passage." He also noted that the proposed text would enable the coastal state to detain and search ships on mere suspicion, causing delays and derogating considerably from the right of innocent passage. He suggested that a "coastal State which had good reason to suspect that a ship passing through the territorial sea was being used for purposes of illicit traffic in narcotic drugs would be better advised to alert the ship's first port of call, where appropriate action could be taken."¹⁰³

Article 20 of the Territorial Sea Convention with only minor drafting changes became Article 27 of the 1982 Law of the Sea Convention. In particular, the provision relating to narcotic drugs was changed slightly, allowing arrest of any person on board or an investigation, if "such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances."¹⁰⁴

Although the 1958 Convention on the High Seas contained no provision on narcotic drugs, a basic provision on the subject was included in Article 108 of the 1982 Convention on the Law of the Sea. No complementary provision was included, however, in Article 110 relating to the right of visit. This is especially surprising in view of the fact that the other new 1982 version, the one relating to unauthorized broadcasting—discussed above—is followed up by listing that activity as one of those justifying boarding a suspected vessel. In addition, Article 109, paragraph 4, makes clear that any one of the states

specified in that article “may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.” There are no parallel provisions with respect to illicit traffic in narcotic drugs.

It has to be noted, however, that during the drafting of Articles 108 and 109 suggestions were made for strengthening these provisions for the control of illegal traffic in narcotic drugs. The United Kingdom delegation, true to its tradition of support for the policing of the high seas, suggested in 1974 that the convention on the law of the sea should contain provisions with regard to ships found trafficking in narcotics.¹⁰⁵ A draft was soon presented which, in addition to language that, with minor changes, became the text of paragraphs 1 and 2 of Article 108 of the Convention, contained the following proposal:

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

This proposal was included in this form in the Second Committee’s basic compilation of proposals expressing the “main trends” at the Conference on a particular topic, together with a suggestion that a reference to psychotropic substances should be added in appropriate places.¹⁰⁶ Nevertheless, when the Chairman of the Second Committee prepared in 1975 the first “informal single negotiating text,” he included the two other paragraphs in Article 94 of his text, but omitted the clause allowing the seizure of illegal cargo by any state, and providing for the punishment by the flag state of the persons responsible for the illegal traffic.¹⁰⁷ The delegation of Peru revived the issue in 1980, when it recommended both adding in Article 108 a provision on cooperation with the coastal state in case of seizure of a foreign vessel in that state’s exclusive economic zone by a warship of a third state, and an addition in Article 110 of a provision allowing boarding on the high seas of vessels engaged in the illicit traffic in narcotic drugs or psychotropic substances.¹⁰⁸ Neither of these proposals was incorporated in the final text.

Consequently, there is no mention of illicit traffic in narcotic drugs in Article 110, and Article 108 provides only that:

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

Three issues raised by this provision need to be emphasized. In the first place, the obligation to “co-operate” is generally considered as a “weak”

obligation, merely a promissory note, which requires implementation by more detailed provisions, such as those relating to piracy (1982 Convention on the Law of the Sea, Articles 101-107) or unauthorized broadcasting (Article 109, paragraphs 2-4 and 110, paragraph 1(c)).

Second, paragraph 2 is carefully restricted. Only the flag state is entitled to ask other states for co-operation in catching one of its ships, if it has reasonable grounds for believing that this ship is engaged in illicit traffic in narcotic drugs. The opposite side is not mentioned—whether another state is entitled to ask the flag state to allow the boarding of a suspected vessel sailing under that flag. This is a clear case of “don’t call me, I’ll call you,” designed to protect the flag state against finding itself in the unpleasant situation where it would have to permit boarding, as otherwise it would be suspected of assisting the drug trafficker. Its right to protect its vessels against possibly unwarranted interference is thereby destroyed for all practical purposes. Consequently, instead of a practice of *ad hoc* arrangements, flag states are likely to prefer the conclusion in advance of a basic agreement that would spell out the permitted measures and would provide some guarantee against possible abuses.¹⁰⁹

Third, paragraph 1 allows only the suppression of high seas traffic in narcotic drugs and psychotropic substances which is “contrary to international conventions.” The obligation to co-operate thus depends on the content of several conventions relating to such drugs and substances which have been adopted since 1912.¹¹⁰ These conventions developed a system of co-operative arrangements for the suppression on illicit traffic in narcotic drugs and psychotropic substances through control of manufacture, and of export and import, of such drugs and substances, exchange of information on illicit activities, and acceptance of an obligation to punish or extradite the offenders.

All the previous conventions on the subject were replaced in 1961 by the Single Convention on Narcotic Drugs,¹¹¹ which in turn was amended by a 1972 Protocol.¹¹² This convention improved the system of international control through strict limitation of manufacture, exports and imports of an increasing list of drugs. The States Parties to the convention agreed to co-operate closely in a co-ordinated campaign against the illicit traffic in narcotic drugs and to assist each other in the campaign;¹¹³ they agreed also to punish adequately the persons involved in such traffic, including those found guilty of intentional participation in, conspiracy to commit and attempts to commit, the offenses (listed in the convention) that were connected with such traffic.¹¹⁴ It should be noted, however, that no mention was made of any special co-operation with respect to any activities at sea, although it was known that a large proportion of illicit traffic was using ships for smuggling the drugs. The 1972 Protocol strengthened the extradition provisions of the 1961 Convention, but again was silent on facilitating action against vessels engaged in illicit

traffic.¹¹⁵ Similarly, the parallel provisions of the 1971 Convention on Psychotropic Substances did not mention enforcement at sea.¹¹⁶

During the 1970s the United States mounted a comprehensive effort to stem the increasing flood of illicit drugs into the United States, and developed a program of interdiction on the high seas of vessels suspected of carrying narcotics to the United States. To justify the program under international law, the United States relied sometimes on the analogy to slavery, arguing that persons addicted to drugs are enslaved both to a dangerous habit and to the drug traffickers on whom they slavishly depend, willing to do anything to obtain the drugs needed to satisfy their constant craving for narcotics.¹¹⁷ Although the United States was reluctant to utilize the treaty process envisaged by the introductory phrase in Article 22 of the Convention on the High Seas and by the parallel provision in Article 110 of the Law of the Sea Convention, it started concluding informal arrangements with other countries, especially Latin American ones, which established an informal procedure for obtaining in each case a permission to board a particular vessel. A 1980 note by the United States to the United Kingdom describes these arrangements as follows:

Upon initially intercepting a suspicious vessel the Coast Guard seeks, without boarding the vessel, to establish its identity and to develop other pertinent information. On the basis of this information, the government of the claimed or displayed nationality of registration is contacted to verify the claim or display of nationality. If this claim is not verified or is otherwise demonstrated to be false, the United States Coast Guard may then approach the suspected vessel and proceed against it, as if it were a United States flag vessel, in accordance with the principles relating to stateless vessels embodied in Articles 6 and 22 of the Geneva Convention on the High Seas. If, however, the claim or display of nationality is verified, and absent other facts, a special arrangement must be entered into with the flag state if the Coast Guard is to be allowed to board, search, and, if contraband is found seize the foreign flag vessel. Only after an arrangement has been reached does the United States Coast Guard take action with respect to the suspected vessel, and then only in strict compliance with the arrangement.

In some cases the government concerned grants the Government of the United States permission to board, search and, if contraband is found indicating a violation of United States law, seize the vessel under United States law and take all further actions concerning the vessel under United States law. Alternatively, some governments grant the Government of the United States permission to board and search and, if contraband is found, seize the suspected vessel and hold it for further action by the flag state. In the latter case, the suspected vessel is normally taken to a port in the United States where it is held for flag state authorities. The contraband is destroyed by the Government of the United States, with only evidentiary samples being retained. The crew is either expelled from the United States to their country or countries of nationality or prosecuted under United States law if there is sufficient evidence of intent to smuggle the narcotics into the United States. Due to United States constitutional restraints the Government of the United States cannot normally enter into undertakings with the flag state to hold the crew for flag state prosecution. Furthermore, in pursuing the alternative of holding the vessel for flag state action, it is made clear to the flag state that once the vessel

is in the United States the claims of third parties against the vessel may make it impossible for the Government of the United States to release the vessel to the flag state.¹¹⁸

As the United Kingdom authorities were not willing to proceed in such an informal manner, an agreement was negotiated by the United States with that country, in the form of an exchange of notes,¹¹⁹ modelled to some extent on the liquor smuggling treaty of 1924.¹²⁰ This agreement is a unilateral one; it allows the United States to board on the high seas (for which the agreement substituted the phrase "outside the limits of the territorial sea and contiguous zone of the United States") vessels under the British flag. It does not give the reciprocal right to the United Kingdom to board vessels under the United States flag, perhaps because the United States Congress may be still reluctant to allow United States citizens to be arrested on the high seas by foreign officials and tried by foreign courts. The boarding is permitted only in two geographically limited areas, comprising, in the first place, the Gulf of Mexico, the Caribbean Sea, and a portion of the Atlantic Ocean West of longitude 55 West and South of latitude 30 North (i.e., a line drawn slightly East of the Antilles and then West to Florida), and, in the second place, an area extending 150 miles from the Atlantic coast, North of Florida. United States authorities are allowed to board in those areas private vessels under British flag "in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the law of the United States."

The agreement relies on the generally recognized reason for boarding, namely the right of a warship (or Coast Guard vessel) to establish the nationality of a vessel on the high seas. The boarding party may for this purpose "examine the ship's papers;" it may also, in this instance, "address enquiries to those on board," and "take such other measures as are necessary to establish the place of registration of vessel." Then comes the shift: "When these measures suggest that an offense against the laws of the United States relative to the importation of drugs is being committed, the Government of the United Kingdom agrees that it will not object to the authorities of the United States instituting a search of the vessel." While this provision is far-reaching, it may be noted that it implies that the starting point for this reinforced suspicion cannot be a physical search of the ship (as this is the *next* step), but must be the result of findings derived from documents or statements by the captain or the crew. Finally, if the authorities of the United States have been led by the search to the belief that an offense against the anti-drug laws of the United States is being committed, then they are allowed to seize the vessel and take it into a United States port.

As all these steps are to a large extent in the discretion of the authorities of the United States and lend themselves easily to abuse, the United Kingdom Government reserved to itself the right to object, within 14 days of the vessel's

entry into port, to further exercise of United States' jurisdiction, and the United States agreed that thereupon it would release the vessel without charge. Similarly, if the United Kingdom, within 30 days of the vessel's entry into port, objects to the prosecution of any United Kingdom national found on board, such person has to be released by the United States. On the other hand, in a departure from the traditional rule that the flag state is entitled, and perhaps even obliged, to protect the members of the crew of its vessels regardless of their nationality,¹²¹ the United Kingdom agreed that it "will not otherwise object to the prosecution of any other person found on board the vessel." In order to enable the United Kingdom to make these requests, in every case of boarding of a vessel under the British flag the United States "shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent development."

There is finally a weak provision for the settlement of disputes under this agreement, especially those relating to any loss or injury "suffered as a result of any action taken by the United States in contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto." In such a case, "representatives of the two Governments shall meet to decide any question relating to compensation." If they don't agree, there is no other recourse, as surprisingly there is no arbitration treaty between the two countries despite the fact that in the past they have found it possible to submit many claims to arbitration.

There is not a perfect model, but a good beginning. Perhaps it is even too good, as the United States has not embarked, as it did in 1924, on a diplomatic effort to have similar agreements with all other interested States. It is possible that the mild restrictions of the United Kingdom agreement on possible abuse of power by the United States authorities are found too uncomfortable; and that these authorities prefer instead to obtain *ad hoc* consent for each search and seizure,¹²² or even to pretend that the fact that the flag State did not later object is equivalent to an *ex post facto* ratification of the seizure.¹²³ It is in order to avoid such abuses of the basic rules of the international law of the sea and of the interrelated rules of international human rights law, that the Law of the Sea Conventions require "a treaty" properly defining the allowable searches and seizures and providing at least some minimum guarantees that the fate of the ship and of the captain and the crew will not be at the complete mercy of the foreign warship.¹²⁴

At the same time, other countries became concerned about the growth of illicit traffic in narcotic drugs and the need for adequate international arrangements to deal with this issue. When the Commission on Narcotic Drugs established in 1982 an expert group to study the functioning, adequacy and enhancement of the 1961 Single Convention on Narcotic Drugs, Canada used this occasion to propose to that group the preparation of an "arrangement for law enforcement authorities to board vessels flying foreign flags."¹²⁵ The

group of experts noted that "bilateral arrangements had been made in certain specified geographic areas whereby ships flying the flag of the other country concerned could be boarded and inspected in order to apprehend drug traffickers or to seize illicit narcotic drugs," and recommended the preparation of a study of existing agreements, analyzing their structure and functioning, and assessing their usefulness and advisability.¹²⁶

On the basis of the experts' report, Canada, Italy, Pakistan and the United States presented a resolution to the Commission on Narcotic Drugs suggesting the adoption of certain modest measures "to improve international cooperation in the maritime interdiction of illicit drug traffic."¹²⁷ This proposal was adopted by the Economic and Social Council, with slight drafting changes; it emphasized the need for "effective steps by all States to provide, in accordance with relevant domestic constitutional safeguards and legislations, for prompt, positive and unmistakable identification of private vessels registered under their flags," and recommended several steps to achieve this goal.¹²⁸ Neither the four states' proposal, nor the Council's resolution mentioned, however, the problem of boarding foreign vessels.

Nevertheless, a report by the Secretary-General noted that the Commission on Narcotic Drugs and the United Nations Secretariat's Division on Narcotic Drugs have started studying the possible ramifications of the 1982 Law of the Sea Convention, especially of Article 27 (criminal jurisdiction on board a foreign ship in the territorial sea) and Article 108 (cooperation with respect to illicit traffic on the high seas), as well as of the effect of provisions broadening the jurisdiction of the coastal States by increasing the breadth of the territorial sea and the contiguous zone and the establishment of the exclusive economic zone and archipelagic waters. The view was expressed that some States seem to expect that "the complex problems States face in intercepting vessels suspected of smuggling drugs may be overcome with the entry into force of the Convention, in particular, that drug law enforcement agencies of States Parties would have a greater ability to take action in respect of foreign ships in extended areas under their jurisdiction."¹²⁹ It was this approach that the United Kingdom and the United States were trying to avoid in their 1981 agreement¹³⁰ by substituting for the "high seas" a reference to the area "outside the limits of the territorial sea and the contiguous zone," thus indicating indirectly that a coastal State's jurisdiction with respect to the control of drug trafficking does not extend beyond the limits of the contiguous zone and does not, in particular, apply to the vast extent of the exclusive economic zone.

Another approach was tried by two (partly overlapping) groups of Latin American countries, which proposed in 1984, respectively, that "traffic in narcotic drugs should be considered a crime against humanity, with all the legal consequences implicit therein," and that a "special conference should consider declaring drug trafficking to be a crime against humanity, since it

seriously affects people's lives, health and welfare, has a negative impact on the economic and social system and poses a danger to the stability of democratic processes in Latin America."¹³¹ These proposals led to the adoption by the General Assembly of a resolution, supported by several additional countries of the Americas, Asia and Africa, including Canada and the United States, requesting the Commission on Narcotic Drugs to initiate the preparation of a "draft convention against illicit traffic in narcotic drugs" which would deal, in particular, with problems "not envisaged in existing international instruments."¹³² A draft convention, prepared by Venezuela, was annexed to the resolution; it would have condemned trafficking in narcotic drugs or psychotropic substances as "a grave international crime against humanity," and would have provided also for "imprescriptibility of the crimes" and "mutual assistance in combating illicit trafficking."¹³³ A parallel Declaration on the Control of Drug Trafficking and Drug Abuse was adopted by the General Assembly at the same time; it also condemned drug trafficking, but called it only "an international criminal activity."¹³⁴ The delegate of the United Kingdom immediately objected to the application of the concept of the crime against humanity, which had "specific connotations in international law," and "would give rise to prolonged and unproductive discussion."¹³⁵ On the other hand, the delegate of Argentina considered that drug trafficking was "a crime against humanity, and its declaration as such would make way for the formulation of precise legal definitions which would ensure that the crime was punished and that national borders were no longer used as shields for committing it."¹³⁶

At the 1985 meeting of the Commission on Narcotic Drugs, several representatives made clear that their governments would find it impossible to accept a convention that included drug trafficking in the definition of crimes against humanity which had "specific historical and legal connotations," or included the proposal to make drug traffic crimes imprescriptible, as this proposal would "run counter to the principles of widely accepted penal policy." Many representatives supported the inclusion in the proposed new convention of provisions designed "to strengthen the capacity of Governments to render mutual law enforcement and judicial assistance;" in particular, it was emphasized that "the present opportunity should be taken to consider the problem of drug smuggling by ship," especially in view of "the difficulty encountered in intercepting suspect vessels on the high seas." It was also suggested that drug trafficking on the high seas "be given the same status as piracy, in international law."¹³⁷

The Commission asked in 1985 for comments and suggestions concerning the elements to be included in the proposed convention. Australia replied that it might prove difficult to incorporate in the convention "the concept of interception on the high seas of vessels involved in drug trafficking." The United Kingdom emphasized the importance of maintaining "the principle

of free right of passage for ships on the high seas.” Consequently, it proposed—together with the United States and Turkey—that any “provision allowing the stopping and boarding of vessels on the high seas . . . would have to make such intervention conditional upon the consent of the flag State.” Egypt and Spain called attention to the 1982 Convention of the Law of the Sea and suggested that Article 108 of that convention could be elaborated upon in the new convention. Egypt and the United States revived the idea that “illicit traffic on the high seas might be assimilated to piracy and treated as such under applicable international law.” To implement that concept, the United States proposed that the convention should provide “that a State may request another State [for] authority to board a vessel flying the latter’s flag and seize, arrest and prosecute as appropriate when there are reasonable grounds to believe that such vessel is engaged in drug trafficking;” and that, upon receipt of such request, “the flag state would be required to take action to ensure that the vessel is not engaged, or permitted to engage further, in trafficking.” Egypt, on the other hand, suggested that the new convention should take advantage of Articles 27 (criminal jurisdiction on board a foreign ship passing through the territorial sea) and 33 (contiguous zone) in order to cover also cases of illicit traffic in the territorial sea and the contiguous zone.¹³⁸

Some of these comments were echoed at the next meeting of the Commission on Narcotic Drugs. Strong opposition was expressed to the “qualification of illicit traffic as a crime against humanity,” and to imprescriptibility of traffic offenses. On the other hand, several representatives supported the inclusion of provisions allowing for “appropriate intervention on the high seas in cases of illicit drug traffic,” and of provisions encouraging “[i]mproved co-operation and bilateral and regional agreements in this field.”¹³⁹ The Commission decided accordingly to include as one of the elements in its guidelines for the drafting of the convention the strengthening of “mutual co-operation among States in the suppression of illicit drug trafficking on the high seas.”¹⁴⁰

In June 1986, the Division of Narcotic Drugs of the United Nations Secretariat, with the assistance of a group of experts volunteered by several nations (including the United States), prepared a preliminary draft on the convention, Article 12 of which dealt with “illicit traffic by sea.”¹⁴¹ At its 1987 session, the Commission on Narcotic Drugs had also before it another series of comments by the governments,¹⁴² including elaborate comments by the United States.¹⁴³ The Commission was able to engage only in a general discussion and a preliminary consideration of non-controversial articles and of the difficult definitional article (Article 1); there was no discussion of Article 12.¹⁴⁴ In the general debate, some representatives mentioned the need to strengthen Article 12, in order to make the high seas “off limits” to drug traffickers; others wanted to delete the provisions relating to search and

seizure of vessels, "because of the serious implications which their implementations could have in certain areas of international trade and also in view of their possible abuse by certain States."¹⁴⁵

The Commission asked the Division of Narcotic Drugs to prepare a working document, consolidating all proposals, and recommended to the Economic and Social Council the establishment of an open-ended intergovernmental expert group to review that document, "to reach agreement on the articles of the convention, wherever possible, and to prepare a revised working document," to be reviewed by the Commission at the beginning of 1988.¹⁴⁶ The Economic and Social Council approved this proposal in May 1987,¹⁴⁷ and a group of 135 experts from 57 countries met promptly in Vienna in June and July 1987, reviewed the Secretariat document,¹⁴⁸ and redrafted a number of articles of the draft convention, including Article 12.¹⁴⁹

One further development should be mentioned, which stimulated action in this field. The International Conference on Drug Abuse and Illicit Trafficking, held at Vienna in June 1987, approved as Target 28 for suggested courses of action on national, regional and international levels, to establish control over ships on the high seas and aircraft in international airspace. In particular, the Conference suggested the following courses of action:

At the national level. Should the ministry or authority concerned have reasonable grounds for suspecting that a vessel or aircraft registered under the laws of the State is illicitly carrying drugs, it may request another State to assist in carrying out a search: for example, that other State may be asked to direct its authorities to board and inspect the vessel and, if drugs are found, to seize them and arrest persons involved in the trafficking. In such circumstances, the State's own authorities may board or seize a vessel or aircraft registered under its laws. Subject to the provisions of international law, the law enforcement authorities should, to the fullest extent permitted by national law, undertake to board and seize a vessel unlawfully carrying drugs, provided that the authorization of the State of registry and, when applicable, of a coastal State has been obtained. A State should endeavour to respond promptly when asked for permission to stop, board and search a vessel under its registry for reasons of illicit drug trafficking control. Subject to the same considerations, an aircraft may be subject to search upon landing at a designated airport.

The appropriate ministry or authority should, after the seizure of such a vessel or aircraft, deal promptly with illicit drugs and traffickers found thereon under the country's own laws if the conveyance is registered under that country's laws or, if registered under the laws of another State, pursuant to such agreement as is reached with the State of registry without unnecessary delay.

States could authorize the appropriate agency or responsible authority to take appropriate action in these matters. This action might include the prompt communication of information indicating whether a particular vessel or aircraft is registered under the laws of the requested State and also authority to empower a requesting State to seize the suspect vessel or aircraft.

At the regional and international levels. International bodies and States could consider whether international standards can be established for the identification, seizure and disposition of vessels and aircraft on the surface suspected of carrying drugs illicitly, and of the

drugs and traffickers found thereon. States should also make every effort to conclude bilateral, multilateral and regional agreements to strengthen such co-operation between States.¹⁵⁰

At the same time, the Conference made clear that “appropriate co-operative procedures need to be devised which do not interfere with legitimate passage of commerce,” and which comply with “existing relevant conventions.”¹⁵¹

In settling these issues, as shown over almost two hundred years of efforts, it did not prove easy to establish the balance between two aspects of national sovereignty—the freedom of a state’s ship to navigate the oceans without interference by other states, and the right of other states to protect some important interests against a possibility of interference by foreign vessels engaged in a generally condemned activity. In the field of slavery, despite repeated efforts by some governments, international conferences consistently rejected any interference with foreign vessels which would go beyond the right to approach and to ascertain a vessel’s flag and registration, and all attempts to equate slavery with piracy were unsuccessful. Once a vessel’s nationality has been ascertained, any further action had to be deferred to the flag state.

Are coastal states entitled to go further as far as illicit traffic in narcotic drugs is concerned? At the Third Law of the Sea Conference, only a few years ago, the decision went in the opposite direction, and the proposals to put drug trafficking on the same level as slavery were clearly rejected. In other negotiations, attempts to include illicit drug traffic among “crimes against humanity” were strongly opposed. There is clearly a hierarchy here—piracy, slavery, drug traffic; and the measures that may be taken against a vessel engaging in such activities diminish gradually.

In the recent negotiations on the new convention against illicit traffic in narcotic drugs and psychotropic substances, the old arguments were often repeated, though sometimes in new, more modern guises.

In particular as was noted previously, several proposals were made to declare that the traffic in illicit drugs was a “crime against humanity” or that it should be assimilated to “piracy.”¹⁵² In view of the strong opposition to these proposals by other Governments,¹⁵³ the Secretariat of the United Nations did not include this concept in its early drafts,¹⁵⁴ and no further mention was made of this issue. The United Kingdom was not able to achieve this objective with respect to slavery; now, it was the United States that was trying to achieve a similar goal with respect to the illicit drug traffic, but the opposition of the United Kingdom and other States made it impossible.

Article 12 of the Secretariat’s 1986 Draft¹⁵⁵ became the focus of the debate on the “illicit traffic by sea.” To facilitate the comparison, the semifinal text, referred by the Commission on Narcotic Drugs in 1988 to the Plenipotentiary Conference, is also included here, the changes in the two texts being italicized, together with additions or omissions.

1986 Text:

1. The Parties shall co-operate to the fullest extent possible to suppress the illicit traffic *in controlled substances* by sea.

2. A Party which has reasonable grounds to suspect that a vessel *registered under its laws* is being used for the illicit traffic *in controlled substances* may request the assistance of other Parties in suppressing its use for that purpose. Parties so requested shall render such assistance, within the means available to them.

3. A Party which has reasonable grounds to believe that a vessel is engaged in illicit traffic *and is on the high seas as defined in Part VII of the United Nations Convention on the Law of the Sea* may board, search and seize such a vessel if:

(a) *The vessel is registered under its law; or*

(b) *That Party seeks and receives permission from the Party of registry; or*

(c) *The vessel is not displaying a flag or markings of registry.*

4. A Party shall respond in an expeditious manner to requests from another Party to determine, *for the purpose of paragraph 3 of this article*, whether a vessel is registered under its laws, and to requests for permission made pursuant to the provisions in that paragraph. Each Party shall designate an authority to receive and *act upon* such requests. The authority designated by each Party for this purpose shall be notified through the Secretary General to all other Parties.

1988 Text:

1. The Parties shall co-operate to the fullest extent possible to suppress the illicit traffic by sea.

2. *If* a Party, which has reasonable grounds to suspect that a vessel *flying its flag or not displaying a flag or markings of registry* is being used for the illicit traffic, *requests* the assistance of other Parties in suppressing its use for that purpose, *the* Parties so requested shall render such assistance, within the means available to them.

3. *Without prejudice to any rights provided for under general international law*, a Party, which has reasonable grounds for believing that a vessel that is beyond the external limits of the territorial sea of any State and is flying the flag of another Party is engaged in illicit traffic, may, if that Party has received prior permission from the flag State, board, search and, if evidence of illicit traffic is discovered, seize such a vessel.

4. *For the purposes of paragraph 3 of this article*, a Party shall respond in an expeditious manner to requests from another Party to determine whether a vessel is registered under its law and to requests for permission made pursuant to the provisions in that paragraph. *At the time of adhering to the Convention*, each Party shall designate an authority to receive and respond to such requests. The authority designated by each Party for this purpose shall be notified through the Secretary-General to all other Parties *within one month of the designation*.

5. Where evidence of illicit traffic is found, the Party having custody of the vessel shall take appropriate action with respect to the vessel and persons on board, in accordance with:

(a) *Its own judicial requirements if the vessel is registered under its laws; or*

(b) *Existing bilateral treaties, where applicable, or any agreement or arrangement otherwise reached at the time of seizure with the Party of registry.*

6. *The right to challenge the nature or effect of the agreement or arrangement referred to in paragraph 5 (b) of this article shall rest exclusively with the Party of registry.*

7. The Parties shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of this article.

No change was made in paragraph 7, and only minor changes were made in paragraphs 1 and 4. Paragraph 2 was redrafted slightly to include some phrases from the original paragraph 3 relating to a vessel that is not displaying a flag or markings of registry. Paragraphs 3 and 5 were the most controversial provisions.

As far as paragraph 3 was concerned, it was already mentioned that the controversy over the status of the exclusive economic zone, which has plagued the Third United Nations Conference on the Law of the Sea,¹⁵⁶ was revived during the preparation of the draft convention against the illicit traffic in narcotic drugs and psychotropic substances.¹⁵⁷ The 1986 Secretariat Draft allowed the boarding of a suspected vessel "on the high seas as defined in Part VII of the United Nations Convention on the Law of the Sea."¹⁵⁸ Part VII, entitled "High Seas" does not actually define the high seas, but in Article 86 merely states that it applies "to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." At the same time, Article 86 makes clear, however, that this provision "does not entail any abridgement of the freedoms [of the high seas] enjoyed by all States in the exclusive economic zone in accordance with Article 58." Article 58, in turn, mentions expressly the freedom of navigation and the applicability

5. Where evidence of illicit traffic is found, the Party having custody of the vessel shall take appropriate action with respect to the vessel and persons on board, in accordance with treaties, where applicable, or any prior agreement or arrangement otherwise reached with the flag State.

6. *A Party which has taken any action contemplated in this article shall promptly inform the flag State concerned of the results of that action.*

7. The Parties shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of this article.

in the exclusive economic zone of Articles 88 to 115 and other pertinent rules of international law, thus including Articles 92 (exclusive jurisdiction of the flag State), 108 (illicit traffic in narcotic drugs), 110 (right of visit) and 111 (right of hot pursuit ceases "as soon as the ship pursued enters the territorial sea of its own State or of a third State").¹⁵⁹

To avoid any conflict with respect to the meaning of the "high seas" phrase, the United States immediately proposed that the right to board a suspected vessel should extend to the whole area "outside the territory and the territorial sea of any State," thus including the contiguous zone and the exclusive economic zone within the area in which boarding does not require the consent of the coastal State. This proposal was without prejudice to the requirement of "prior consent of the State of registry."¹⁶⁰ The United States proposal was accepted by the Intergovernmental Expert Group, whose draft authorized the boarding of a suspected vessel "beyond the external limits of the territorial sea of any State." The group also added, at the beginning of paragraph 3, the phrase "[w]ithout prejudice to any rights provided for under general international law."¹⁶¹

At the 1988 session of the Commission on Narcotic Drugs, several representatives expressed reservations about paragraph 3. One of them proposed redrafting the first phrase to read: "Without prejudice to any rights conferred on the coastal State under the United Nations Convention on the Law of the Sea . . ." Another one proposed, more elaborately, to revise that sentence as follows: "Without prejudice to the right deriving from the rules and principles of international law, particularly in the zone contiguous to the territorial sea." Alternately, that representative suggested a new paragraph 3 reading: "The provisions of the preceding paragraph shall not affect the rights which the coastal State may exercise, in conformity with international law, in the zone contiguous to its territorial sea." Other representatives pointed out that the text adopted by the Expert Group "could imply that third States would be given certain rights in the area between 12 and 200 miles (Exclusive Economic Zone) which were not contemplated in the Convention on the Law of the Sea." They argued, therefore, for restoring the original phraseology proposed by the Secretariat. In response, one representative supported the language proposed by the Expert Group on the ground that the International Maritime Organization, when faced with a similar issue in drafting the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,¹⁶² decided also to use a phrase referring to jurisdiction "beyond the outer limits of the territorial sea."¹⁶³

Other issues were also raised. One representative, taking into account Article 107 of the Convention on the Law of the Sea, suggested that "a search or seizure may be effected only by a ship and/or aircraft which was clearly marked and identifiable as being on government service and authorized to undertake such activities."¹⁶⁴ Another representative commented on

paragraph 5, according to which, where evidence of illicit traffic is found, "the Party having custody of the vessel shall take appropriate action." He pointed out that the notion of "custody of the vessel" covered a legal situation not contemplated by the draft convention, and proposed that the main part of the sentence be simplified to read: "the Party which has intercepted a vessel pursuant to paragraph 3 shall take appropriate action with respect to the vessel and persons on board, in accordance with treaties or with any prior agreement or arrangement reached with the flag State."¹⁶⁵ It may be noted that this text and the Commission's 1988 version differ here from the 1986 text by emphasizing the need for a "prior" agreement or arrangement, thus coming closer to Article 108 of the Convention on the Law of the Seas which allows measures going beyond a visit to verify the ship's right to fly its flag only "where acts of interference derive from powers conferred by a treaty." Two steps seem to be thus required: a prior agreement (under paragraph 7) establishing the means for obtaining permission allowing a foreign authority to go beyond a visit and to search or seize a ship; and an actual grant of approval for a particular action, i.e., to search the ship only, or to search and, if evidence of illicit traffic is found, to seize that evidence (and transmit it to the flag State for further action), or to seize the ship and arrest the persons engaged in illicit traffic.

Several representatives, by analogy to Articles 106 and 110, paragraph 3, of the Convention of the Law of the Sea, proposed that a new paragraph should be inserted in Article 12 to guarantee compensation for vessels that were subjected to unjustified search measures, to be paid by the State that organized the search and determined its scope. Although the flag State had granted its approval for a search, it should not bear responsibility as its permission was dependent on the information provided by the State requesting a search.¹⁶⁶

Finally, one more general comment was made. One representative stressed that it should be stipulated in the preamble to the Convention that the measures envisaged in the Convention "must be consistent with human rights, respect the traditions and customs of national or regional groups and protect the environment." He also proposed that the Convention should indicate that "international co-operation, whether bilateral or multilateral, should develop free of pressures of any kind."¹⁶⁷

At the end of the debate, several representatives expressed the following conclusions: that Article 12 provided "a workable mechanism to facilitate international co-operation against illicit traffic on the high seas;" that it "took into account the need not to interfere with legitimate rights of passage;" that, by requiring "the consent of the flag State prior to intervention, [it] preserved the important principle of flag State responsibility;" and that, in spite of the difficulties faced by some States, the article reflected the compromise reached

by the Expert Group, which merited consolidation by the Plenipotentiary Conference.¹⁶⁸

Without making any changes itself, the Commission on Narcotic Drugs decided to forward draft Article 12 to the Plenipotentiary Conference “for appropriate consideration.”¹⁶⁹

On the Commission’s recommendation,¹⁷⁰ the Economic and Social Council decided to convene a further group of experts to review the outstanding issues, and to convene thereafter a plenipotentiary conference to complete the negotiations and adopt the final version of the Convention.¹⁷¹

The United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met in Vienna from November 25 to December 20, 1988. The final text was adopted by consensus, without vote, on December 19, 1988, and 43 of the 106 States participating in the Conference signed it on December 20. The signatory states ranged from Afghanistan to Zaire, including China, the United Kingdom and the United States; France and the Soviet Union were not, however, among the original signatories.¹⁷² The 35 substantive articles of the Convention impose upon the parties an obligation to take specific law enforcement measures to improve their ability to deal more effectively with various aspects of illicit traffic in narcotic drugs having an international dimension (Article 2).¹⁷³ In the preamble to the Convention, the parties recognize that “the illicit traffic is an international activity, the suppression of which demands urgent attention and highest priority;” and express, in particular, their determination “to improve international cooperation in the suppression of illicit traffic by sea.”

The final text, as revised by the May 1988 Review Group¹⁷⁴ and the Conference, deals with maritime interdiction in Article 17; in addition, certain jurisdictional aspects are dealt with in Article 4(1)(b)(ii).

The final text of Article 17 reads as follows:

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.
4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:

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

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

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

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

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

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

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

The next text is an amalgamation of the previous drafts, using some language of both the 1986 Secretariat text and that of the earlier Review Group, which the Commission on Narcotic Drugs forwarded to the Conference,¹⁷⁵ with certain changes and several additions. In particular, two references were added to the “international law of the sea,” it being generally understood, and expressly stated by the United States delegation, that these references relate to international customary law, as reflected in the 1982 United Nations Convention on the Law of the Sea. Thus paragraph 1 follows clearly Article 108(1) of that Convention, and paragraph 2 is based on its Article 108(2), and, following recent practice, expands the right to request assistance to include the case of illicit traffic by stateless vessels. It is also necessary to note that new paragraph 11 requires that any interdiction action “shall take due account of the need not to interfere with or affect the rights and obligations of the coastal States in accordance with international law,”

which have been considerably broadened by the 1982 Convention. The United States delegation made clear, however, during the negotiations that this paragraph refers only to those situations in which a coastal state has generally recognized rights beyond the outer limit of the territorial sea, as in the case of hot pursuit in the exclusive economic zone and on the high seas, and the right to take action in the contiguous zone for the limited purposes recognized in Article 33 of the LOS Convention.

Paragraphs 3-6 expand considerably the text contained in earlier drafts and define more clearly the respective rights of the flag state and of the state wishing to search a foreign ship. A state having reasonable grounds to suspect that a vessel flying the flag of another state is engaged in illicit drug traffic may take three steps: (a) notify the flag state so that this state itself may take the necessary action; (b) request confirmation of registry; and (c) if registry is confirmed, request authorization from the flag state to "take appropriate measures in regard to that vessel." It is thus made clear that, once it is confirmed that the vessel is actually entitled to fly the flag of another state, no action can be taken against the vessel without express authorization of the flag state.

The authorization can be made directly "pursuant to this article" of the 1988 Convention, and in such case no additional agreement or arrangement is required. The Convention encourages the parties, however, to enter into bilateral or regional agreements or arrangements to carry out the provisions of this article (paragraph 9); and the United States has already started to conclude such agreements.¹⁷⁶ It is not clear what is meant by "arrangements;" it probably means exchanges of notes or other executive agreements not requiring ratification, but does not include informal *ad hoc* agreements reached by telephone at the time of a request for authorization.

Whether or not there is an agreement or arrangement, the flag state has several choices. In the first place, it may authorize the requesting state only to board the vessel (e.g., to ascertain the registration); or it may authorize a search of the vessel; or, if that search finds evidence of involvement in illicit traffic, the flag state may authorize the requesting state to "take appropriate action with respect to the vessel, persons and cargo on board" (paragraph 4). In the second place, the flag state may, consistent with its obligation to "cooperate to the fullest extent" (paragraph 1), "subject its authorization to conditions to be mutually agreed" by the two states concerned. If the requesting state is not able or willing to comply with those conditions, the authorization can be denied. One of the conditions may be that the requesting state should agree to be responsible for any damage caused by its action against the vessel (paragraph 6). This may be onerous, as the Convention also provides that in any action to be taken under this article, the requesting state must "take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo." More broadly, it shall not "prejudice

the commercial and legal interests of the flag State or any other interested State" (paragraph 5).

Paragraphs 7 and 8 reflect the prior drafts, with only minor changes. Paragraphs 9 and 11 have already been discussed above. In accordance with the new paragraph 10, action under this Article can be taken only by "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect." This provision reflects several articles of the 1982 LOS Convention.¹⁷⁷

By thus codifying the rules on interdiction of foreign vessels, the Conference took an important step which would bring the campaign against illicit drugs to a point beyond that ever reached by the crusade against slave trade. Whether this step will endanger the freedom of the high seas will depend on the interpretation of the provisions relating to the obligation requiring the prior consent of the flag state, not merely in a particular case, under pressure of the circumstances, but through a properly ratified, bilateral or multilateral agreement, containing proper safeguards against abuse.¹⁷⁸ In the 1920s it proved possible for the United States to conclude sixteen such agreements in order to combat liquor traffic.¹⁷⁹ Perhaps it may be possible to conclude agreements similar to the one made with the United Kingdom in 1981,¹⁸⁰ which would permit the United States—in the words of paragraph 9 of Article 17 of the Convention—"to carry out, or to enhance the effectiveness of, the provision of [that] article." Only that kind of action would maintain the integrity of Article 110 of the Convention on the Law of the Sea, and would protect the United States and its Navy against the disintegration of the concept of the freedom of the high seas, on which the security of the United States depends.¹⁸¹

Notes

*Woodruff Professor of International Law, School of Law, University of Georgia.

1. As Professors McDougal and Burke have pointed out, the story of the attempts to broaden the right to visit and search slave-trading vessels "possesses current interest as testimony of the traditional aversion of interference by foreign warships with national vessels on the high seas." Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven and London: Yale University Press, 1962), p. 881.

2. This comment will not consider such issues as the extent of a coastal state's jurisdiction in a contiguous zone, right of hot pursuit from coastal waters into the high seas, jurisdiction over activities on the continental shelf and in the exclusive economic zone, the protection of certain living resources of the high seas, or the exploration of the mineral resources of the seabed area beyond the limits of national jurisdiction. For an early collection of treaties, laws and regulations dealing with some of the issues mentioned in this footnote, which was prepared by this author for the International Law Commission, see United Nations Legislative Series, v. 1, *Laws and Regulations on the Regime of the High Seas*, U.N. Doc. ST/LEG/SER.B/1 (1951), U.N. Publ. Sales No. 1951.V.2.

3. See the *I'm Alone* case, where the United States was ordered to pay \$25,000 in punitive damages for the intentional sinking by a United States Coast Guard vessel of a British ship of Canadian registry suspected of smuggling alcoholic beverages. Report by a Joint Commission, January 5, 1935, United Nations, *Reports of International Arbitral Awards*, v. 3, pp. 1609, 1617-18.

For punishment of British commanders for illegal captures of slave ships, see *infra* note 21. See also the treaty of 1862, *infra*, note 31, Article 7, and the text preceding that note.

The Treaty of Amity and Commerce with Prussia, September 10, 1785, provided in Article XV that even in time of war between one party and a third power, if a vessel of war of the belligerent party should encounter the vessel of the neutral party on the high seas, it would not be permitted to approach the neutral vessel within a cannon-shot, nor send more than two or three men in their boat on board that vessel, to examine her sea-letters or passports (i.e., documents proving their neutral nationality); and should the persons belonging to the war vessel "molest or injure in any manner whatever the people, vessels, or effect of the other part," they would be "responsible in their persons and property for damages and interest." As at that time, the United States Navy had to rely for assistance on privateers, there was the additional provision that "all commanders of private owned vessels" must give sufficient security for such damages "before they are commissioned." William M. Malloy, *Treaties, Conventions, etc., between the United States of America and Other Powers, 1776-1909* (Washington, D.C.: Government Printing Office, 1910), v. 2, pp. 1477, 1482.

For a spirited defense of the United States' need for privateers, see the statement of U.S. Minister at London, Mr. James Buchanan (later President of the United States), March 24, 1854, reprinted in John Basset Moore, *A Digest of International Law* (Washington D.C.: Government Printing Office, 1906), v. 7, p. 550. In 1856, the United States Government announced its willingness to adhere to the Declaration of Paris abolishing privateering, provided that at the same time the other powers would agree that "the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent, except it be contraband," thus evening the odds between Great Britain, then the biggest naval power, and the United States, then having the biggest merchant marine (easily changeable to privateering). See *id.*, pp. 563-65. See also the statement by Secretary of State Marcy, July 28, 1856, *id.*, pp. 552-54.

4. *Le Louis*, 2 Dodson 210, 243-44 (High Court of Admiralty, 1817); reprinted in James Brown Scott, ed., *Cases on International Law* (St. Paul: West Publishing Co., 1905), pp. 352, 356-357 (1905).

In a similar spirit, Justice Story stated that:

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum laedas*.

The *Marianna Flora*, 24 U.S. (11 Wheaton) 1, 42 (1826).

5. U.N. Secretariat, *Memorandum on the Regime of the High Seas*, U.N. Doc. A/CN.4/32 (1950), p. 4 (prepared by Professor Gilbert Gidel).

6. [First] United Nations Conference on the Law of the Sea, Official Records, v. 4 (Second Committee: High Seas; General Regime), U.N. Doc. A/CONF.13/40 (1958), U.N. Publ. Sales No. 58.V.4, Vol. 4, p. 15 (hereafter cited as 1958 LOS Conference). Admiral Colclough emphasized that the principle of the freedom of the seas had two vital elements: first, that the high seas were open to all nations; and second, that certain restraints and regulations were necessary to safeguard the exercise of the freedom in the interests of the whole international community." *Id.*

7. See Moore, *supra* note 3, pp. 987-1001; and Green H. Hackworth, *Digest of International Law* (Washington, D.C.: U.S. Government Printing Office, 1941), v. 2, p. 659.

In the *Trent* incident in 1861, a United States warship removed Confederate commissioners from a British mail steamer. When they were later released to the British ambassador, Secretary of State Seward explained that United States action was inconsistent with the principles espoused by the United States in the impressment of seamen case. He quoted from an 1804 statement of James Monroe, then Secretary of State in the Jefferson Administration, that leaving the decision about the future of an individual to a naval officer rather than a tribunal would be contrary to "[r]eason, justice and humanity." Moore, *supra*, note 3, v. 7, pp. 626-29. See also *id.*, pp. 768-79.

8. Reproduced in Moore, *supra* note 3, v. 2, p. 998.

9. *Id.*, at p. 999.

10. Act for the Abolition of Slave Trade, March 25, 1807, British Statutes, v. 21, 47 George III, 1st session, ch. 36.

11. Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, March 2, 1807, U.S. Statutes at Large, v. 2, p. 426.

12. See *The Amedie*, 1 Action 240 (Lords Commissioners of Appeal, 1810), and *The Fortuna*, 1 Dodson 81 (High Court of Admiralty, Sir William Scott, 1811), digested in Moore, *supra* note 3, v. 2, pp. 914-16. For a criticism of these cases, see William Beach Lawrence, *Visitation and Search* (Boston: Little, Brown

and Company, 1858) p. 18 (an excellent brief for freedom of vessels from visit and search by foreign warships).

13. *Le Louis*, *supra* note 4, pp. 240, 253-58. This decision was followed closely by Chief Justice Marshall in *The Antelope*, 23 U.S. (10 Wheaton) 66, 118-23 (1825). His main conclusion was:

No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say, in this court, that the right of bringing in for adjudication, in time of peace even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another; and the course of the American government, on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors. It follows, that a foreign vessel engaged in the African slave-trade, captured on the high seas, in time of peace, by an American cruiser, and brought in for adjudication, would be restored. [*Id.*, p. 120.]

14. Letter to British Minister at Washington, August 15, 1821, reproduced in Moore, *supra* note 3, v. 2, p. 919. When John Quincy Adams was Ambassador to Great Britain, he was asked whether there could be a worse evil than the slave trade. He replied tartly that it would be a much worse evil if the United States Government should allow any vessel flying the Stars and Stripes to be stopped and examined by a British cruiser, for that would be to make slaves of the whole American people. Quoted from W. E. F. Ward, *The Royal Navy and the Slavers: The Suppression of the Atlantic Slave Trade* (New York: Schocken, 1970), p. 161. For a slightly different version of this statement, see Hugh G. Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations, 1814-1862* (Baltimore: Johns Hopkins Press, 1933), p. 18, published in 51 Johns Hopkins University, Studies in Historical and Political Science (1933), No. 2, p. 18.

15. Letter from Mr. Adams to Mr. Canning, June 24, 1823, *American State Papers, Foreign Relations*, Second Series, v. 5 (1858) pp. 330, 331-32. The text of the draft convention prepared by Mr. Adams may be found in *id.*, pp. 335-37.

16. Act to Punish the Crime of Piracy, May 15, 1820, U.S. Statutes at Large, v. 3, p. 600; Act for a More Effectual Suppression of the African Slave Trade, March 31, 1824, British Statutes, v. 27, 5 George IV, ch. 17, reprinted in *American State Papers*, *supra* note 15, v. 5, p. 342.

17. U.S. Congress, Resolution on Slave Trade, 1823, *Annals of Congress*, 17th Congress, 2d session, pp. 928, 1147-55.

18. *British and Foreign State Papers*, v. 12, 1824-25, p. 838, Articles V and X.

19. See Moore, *supra* note 3, v. 2, pp. 924-26.

20. This clause, which is the source of the modern clause authorizing the boarding of stateless vessels (see *infra*, text preceding note 89), was suggested to the British Foreign Secretary, Lord Palmerston, by Lord Minto, First Lord of Admiralty, who pointed out the practice of slave traders, when threatened with capture, to dispense completely with flag and papers. As the jurisdiction of courts over slave trade offenses was based either on the trader's British nationality or on a treaty with his flag state, the courts have held that "[i]f a ship's nationality could not be established with any certainty, neither a mixed court nor a national court had jurisdiction over it, and it could not be condemned." On the other hand, such a ship could not claim the protection of any government, and a British law could empower British cruisers to search and capture slave ships not entitled to the protection of any state, and to take them before British admiralty courts. See Leslie M. Bethell, "Britain, Portugal and the Suppression of the Brazilian Slave Trade: The Origins of Lord Palmerston's Act of 1839," *English Historical Review*, v. 80 (1965), pp. 761, 777.

21. For the text of the act, see 2 & 3 Vict., ch. 73. For its discussion, see William Law Mathieson, *Great Britain and the Slave Trade, 1839-1865* (London, 1929; reprinted by Octagon Books: New York, 1967), p. 23. Mathieson also points out that to escape the British warships, the slave ships progressed from the French flag to the Spanish one, then to the Portuguese flag, and finally to the American one, "ending

naturally and inevitably with the only Power which had refused to concede the right of search." *Id.*, p. 25.

The provision abolishing the jurisdiction of courts to award damages in cases of captures of vessels which were not based on a treaty with the flag state was necessary as British courts considered such captures illegal and imposed on the commanders of warships responsible for such captures the obligation to pay heavy compensation for all damages and losses. See, e.g., the case of the *Gaviao*, Ward, *supra* note 14, pp. 84-86; and the cases cited in Soulsby, *supra* note 14, pp. 73-75. *But see* *Buron v. Denman*, *id.*, pp. 186-87, discussed in Christopher Lloyd, *The Navy and the Slave Trade* (London: Frank Cass, 1949, reprinted 1968), pp. 97-99; Mathieson, *supra*, pp. 92-93 (citing Exchequer Reports, (1848), v. 2, p. 167) (decided for Denman "because his proceedings, though contrary to the law of nations as laid down by Sir William Scott in the [*Le Louis*] case, had been endorsed by the British Government").

22. See Bethell, *supra* note 20, pp. 778-79

23. See *id.*, pp. 780-81. A similar crisis arose in 1845, when the 1826 Brazilian-British treaty for the suppression of slave trade expired and Brazil notified the British Government that the British cruisers had lost, therefore, their right to visit and search Brazilian ships. The British response was contained in the so-called "Lord Aberdeen's Act," British Statutes, v. 35, 8-9 Vict., ch. 122, of August 8, 1845, which relied on the provision of the 1826 treaty which condemned slave trade as piracy, and on that basis applied to Brazil provisions similar to those enacted in 1839 against Portugal (*supra*, note 21), allowing search and capture, and empowering British admiralty courts to condemn the vessels found guilty of slave trade, etc. For the history of the 1845 Act, see Wilbur Devereux Jones, "The Origins and Passage of Lord Aberdeen's Act," *Hispanic American Historical Review*, v. 42 (1962), pp. 502, 512-20.

24. Ward, *supra* note 14, p. 140.

25. Soulsby, *supra* note 14, pp. 58-59. See also *id.*, pp. 56-57, for an earlier United States note on this subject, and *id.*, pp. 60-61, for an elaborate reply by Lord Palmerston. The dispute did not stop there; for further correspondence on the subject, see *id.*, pp. 61-72. The British Government has, however, indemnified the United States for unjustified seizures, though sometimes after long delays, *id.*, pp. 73-76.

26. Treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America, for the final suppression of the African slave trade, etc., August 9, 1842, Articles VIII and IX, 8 Statutes at Large 572, U.S. Treaty Series 119, 12 Bevans 82.

27. Concerning the drafting of the treaty, the acrimonious debate in Congress, and the difficulties that arose as to its interpretation, see Soulsby, *supra* note 14, pp. 78-106. See also Moore, *supra* note 3, v. 2, pp. 930-41.

28. See Lloyd, *supra* note 21, p. 41.

29. Note on April 10, 1858, reprinted, in part, in Moore, *supra* note 3, v. 2, pp. 942-43.

30. See Mathieson, *supra* note 21, p. 156. See also Moore, *supra* note 3, v. 2, pp. 941-45; Soulsby, *supra* note 14, pp. 139-66. Seizures of American flag vessels did not cease, however, and a new controversy arose with respect to the right of a warship to compel a merchant vessel to display its flag, as some masters of American vessels manifested a disinclination to hoist a flag when asked by a British warship. This problem was finally solved by the issuance of instructions that captains in the merchant service should "display their colors as promptly as possible, whenever they meet upon the ocean an armed cruiser of any nation." See Soulsby, *supra*, pp. 166-72.

31. Treaty for the Suppression of African Slave Trade, April 7, 1862, as amended on February 17, 1863, U.S. Statutes at Large, v. 12, p. 1225; v. 13, p. 645; Malloy, *supra* note 3, v. 1, pp. 674, 687.

Annex B to the treaty (*id.*, pp. 681-87) contained detailed Regulations for the Mixed Courts of Justice, which provided, for instance, in Article IV that in case of a disagreement between the two judges "they should draw by lot the name of one of the two arbitrators," who shall consult with the two judges, the final decision being rendered by the majority of the three.

32. See W. E. B. DuBois, *The Suppression of the African Slave-Trade to the United States of America, 1638-1870* (1896, reprinted by Schocken Books: New York, 1969), pp. 287-88. This book contains also an excellent "chronological conspectus of state, national, and international legislation," with a summary of legislative history, and citation of sources for each item. *Id.*, pp. 230-88.

According to Moore, *supra* note 3, v. 2, p. 467, no vessels were known to have been condemned in the British-American Mixed Courts by 1868. See also Warren S. Howard, *American Slavers and the Federal Law, 1837-1862* (Berkeley and Los Angeles: University of California Press, 1963), pp. 63-64. For a report from the United States members of the Mixed Court at Freetown, Sierra Leone, see the Message of the President of the United States on African slave trade, July 2, 1864, 38th Congress, 1st session, Senate Exec. Doc. No. 56, pp. 24-26 (containing recommendations, *inter alia*, for technical assistance in labor-saving devices to tribes willing to abandon slavery). An analysis of the work of all the Mixed Commissions and

Courts may be found in Leslie M. Bethell, "The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century," *Journal of African History*, v. 7 (1966), p. 79-93.

33. Convention for the Suppression of Slave Trade, June 3, 1870, Malloy, *supra* note 3, v. 1, p. 693. Article 2 of the accompanying Instructions provided that any search authorized by the Convention "shall be conducted with the courtesy and consideration which ought to be observed between allied and friendly nations."

34. See Suzanne Miers, *Britain and the Ending of the Slave Trade* (London: Longman, 1975), p. 16, no. 40 and pp. 19-20, n. 61.

35. *Id.*, pp. 211-21. See also Christopher Lloyd, *supra* note 21, pp. 187-274.

36. Miers, *supra* note 34, pp. 233-34, 238, 240.

37. *Id.*, p. 241.

38. *Id.*, pp. 241-42.

39. 27 Statutes at Large 886; U.S. Treaty Series 383; 1 Bevans 134. Chapter I dealt with measures to be taken in the places of origin of the slave trade; chapter II with transportation of slaves by land; chapter III on trade by sea is discussed in the preceding text; chapter IV prohibited the importation of slaves by countries where domestic slavery still existed; chapter V provided for the establishment of an international information office in Zanzibar (with a supplementary, more limited office in Brussels), which was given the task to centralize all documents relating to the capture of vessels and their condemnation or release, and all information that might lead to the discovery of persons engaged in slave trade.

40. See Miers, *supra* note 34, pp. 244-45.

41. *Id.*, p. 293.

42. See, e.g., the Report of the *Ad Hoc* Committee on Slavery, U.N. Doc. E/1988 (1951), 13 ESCOR, Annexes Ag. Item 21, p. 1, para. 8-19; Benjamin Whitaker, *Slavery: Report to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc E/CN.4/Sub. 2/1982/20/Rev. 1 (1984); U.N. Publ. Sales No. E.84.XIV.I (1984), pp. 10-20, especially 18-20.

43. Convention on the Revision . . . of the General Act . . . of Brussels, St. Germain-en-Laye, September 10, 1919, Articles 11 and 13, 49 Stat. 3027; U.S. Treaty Series 877; 2 Bevans 261. See also Miers, *supra* note 34, pp. 309-14. In consequence of the 1919 Convention, the 1890 Brussels Act does not apply any longer as between the United States, Belgium, France, Germany, Italy, Portugal and the United Kingdom.

44. See United Nations, *The Suppression of Slavery* (Memorandum submitted by the Secretary-General to the *Ad Hoc* Committee on Slavery of the Economic and Social Council), U.N. Doc. ST/SOA/4 (1951), U.N. Publ. Sales No. 1951.XIV.2), pp. 12-14, 16-19, See also Joyce A. Gutteridge, "Supplementary Slavery Convention, 1956," *International Comparative Law Quarterly*, v. 6, pp. 449, 454-56. For the text of the Anti-Slavery Convention, Geneva, September 25, 1926, see 46 Stat. 2183, U.S. Treaty Series 778, 2 Bevans 607, 60 League of Nations Treaty Series 253. A protocol of December 7, 1953, transferred the functions of the League of Nations under the 1926 Convention to the United Nations, 7 UST 479; TIAS No. 3532; 182 UNTS 57.

For the text of the Convention on the Suppression of International Trade in Arms and Ammunition and in Implements of War, June 17, 1925, see Malloy, *supra* note 3, v. 4 (ed. by E. J. Trenwith, 1938), p. 4903; Manley O. Hudson, ed., *International Legislation*, v. 3 (Washington, D.C.: Carnegie Endowment for International Peace, 1931), p. 1634. The convention was ratified by the United States, but it did not enter into force, as it did not seem to have received the necessary 14 ratifications. See Hackworth, *supra* note 7, v. 2, p. 672. The relevant provisions of that convention were Articles 12, 20-24, and Annex II, section II (Maritime Supervision).

45. See Gutteridge, *supra* note 44, p. 460. See, however, the exchange of notes accompanying the treaty of friendship and mutual co-operation of February 10, 1934, between the British Government and the Imam of Yemen, in which the Imam agreed to the prohibition of the African slave trade and commended his governors to do their utmost to prevent it in both the country and the ports. 157 LNTS 63, 73.

46. U.N. Doc. E/1988 *supra* note 42, para. 27, and recommendation B.2. See also Gutteridge, *supra* note 44, 460.

Slavery and slave trade have been considered by the United Nations as prohibited activities, as violations of basic human rights. The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, provided that "[n]o one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all these forms." General Assembly Resolution 217 A (III), December 10, 1948, Article 4, 3 GAOR, Part I, Resolutions, p. 71. An almost identical provision is contained in the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 A (XXI), December 16, 1966, Article 8, 99 UNTS 171. (By December 31, 1987, this Covenant has been ratified or acceded to by 87 states; the United States has signed this document but has not ratified it.) For a summary of action taken by the United Nations in the field of slavery, see Whitaker, *supra* note 42, pp. 27-30.

47. Letter from the Permanent Representative of the United Kingdom to the Secretary-General of the United Nations, U.N. Doc. E/2540/Add.4 (1954); 17 ESCOR, Annexes, Ag. Item 15, p. 9, Annex (Draft Convention), Article 2. For comments on that document, see U.N. Docs. E/AC.43/L.1 (1955) and Adds. 1 and 2 (1956).

48. U.N. Doc. E/2824 (1956), 21 ESCOR, Annexes, Agenda Item 12, p. 1, paras. 97-139, and Annex I (Draft Convention), Article 3; Gutteridge, *supra* note 44, p. 466.

49. Gutteridge, *supra* note 44, pp. 466-69; U.N. Secretariat, Memorandum on the Relation between the Articles concerning the Law of the Sea Adopted by the International Law Commission and International Agreements Dealing with the Suppression of the Slave Trade, U.N. Doc. A/CONF.13/7 (1957), paras. 17-25, reprinted in 1958 LOS Conference *supra* note 6, v. I, pp. 165-68.

50. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, September 7, 1956, Articles 3 and 4, 18 U.S.T 3201, T.I.A.S 6418, 266 U.N.T.S 3.

51. U.N. Doc. A/CN.4/17 (1950), p. 12.

52. U.N. Doc. A/CN.4/42 (1951), p. 22. Professor Francois relied on a statement by Justice Story that a warship seizes a foreign vessel at its peril and, if unjustified, "must make full compensation." *The Marianna Flora*, *supra* note 4, p. 42 (1826).

53. See *supra* notes 42 and 46.

54. See *supra* text preceding note 40.

55. U.N. Doc. A/CN.4/42, *supra* note 52, pp. 23-29.

56. See *supra* note 46.

57. See *Yearbook of the International Law Commission*, 1951, v. 1, pp. 350-54, especially 123rd meeting, paras. 91, 109-10, 124, 127-28, 132.

58. Report of the International Law Commission, 6 U.N. GAOR, Suppl. No. 9, U.N. Doc. A/1858 (1951) p. 16, reprinted in *Yearbook*, *supra* note 57, v. 2, pp. 139-40.

59. U.N. Doc. A/CN.4/51 (1952), p. 9.

60. *Id.*, p. 11.

61. Francois, Sixth Report, A/CN.4/79 (1954), pp. 23-27; International Law Commission, Seventh Session, Report, 10 GAOR, Suppl. No. 9, U.N. Doc. A/2934 (1955), pp. 6-8, reprinted in *Yearbook*, *supra* note 57, 1955, v. 2, pp. 24-27. Francois acknowledged that the piracy articles were a condensation of a more elaborate draft convention prepared by the Harvard Research in International Law in 1932, reprinted in the *American Journal of International Law*, v. 26 (1932), Suppl., pp. 739-885. See *Yearbook*, *supra*, 1955, v. 1, p. 39.

62. *Yearbook*, *supra* note 57, 1955, v. 1, p. 20.

63. *Id.*, pp. 26-27.

64. *Id.*, pp. 28-29, 31-33.

65. *Id.*, pp. 29, 31.

66. Proposal by Mr. Edmonds (Commission member from the United States), *id.*, p. 32. See also statement by Mr. Garcia Amador, *id.*, p. 29.

67. *Id.*, pp. 33-34. See also *id.*, p. 229.

68. See the Commission's 1955 report, 10 GAOR, Suppl. No. 9, U.N. Doc. A/2934 (1955), p. 8, reprinted in *Yearbook*, *supra* note 57, 1955, v. 2, p. 27.

69. 1955 Report, *supra* note 68, Article 21, p. 8, reprinted in 1955 *Yearbook*, *supra* note 68, v. 2, pp. 26-27; Commission's 1956 Report, 11 GAOR, Suppl. No. 9, U.N. Doc. A/3159 (1956), Article 46, pp. 29-30, reprinted in *Yearbook*, *supra* note 57, 1956, v. 2, pp. 283-84. See also Francois Report, U.N. Doc. A/CN.4/97 and Adds. 1 to 3 (1956), reprinted in *Yearbook*, *supra* note 57, 1956, v. 2, p. 20.

70. 1958 LOS Conference, *supra* note 6, v. IV, p. 21. The Tunisian delegate recalled a recent incident, when the Yugoslav merchant vessel *Slovenija* was stopped on the high seas and escorted to Oman where a part of its cargo was confiscated. See the Yugoslav complaint about this incident, *id.*, pp. 8-9, where the Yugoslav delegate also noted that "no state was entitled to arrogate to itself, without the consent of the international community, any rights regarding the high seas except those laid down in rules adopted by joint agreement."

71. *Id.*, p. 31. For similar statements by the delegate of the Ukrainian S.S.R., see *id.*, pp. 32 and 81-82.

72. See *id.*, p. 31. In support of such deletion, another delegate of the U.A.R. pointed out that proposals similar to the one suggested in 1958 had been heavily defeated at the three recent conferences dealing with slave trade which were mentioned by Mr. El Erian. *Id.*, p. 80.

73. *Id.*, pp. 82-83.

74. *Id.*, p. 90.

75. *Id.*, p. 83.

76. 1958 LOS Conference, *supra* note 6, v. 2 (Plenary Meetings), U.N. Doc. A/CONF.13/38 (1958), U.N. Publ. No. 58.V.4, Vol. 2, p. 22.

77. Convention on the High Seas, April 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82.

78. United Nations Convention on the Law of the Sea, December 10, 1982, reprinted in United Nations, *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea*, U.N. Publ. Sales No. E.83.V.5. (Hereafter cited as the 1982 LOS Convention.)

79. See the discussion on this point in the Second Committee of the 1958 LOS Conference, *supra* note 6, v. 4, pp. 80, 90, 109, 149 (rejection of the Bulgarian proposal which would have granted immunity also to government vessels used for commercial purposes).

80. Convention on the High Seas, *supra* note 77, Article 8, paragraph 2, and Article 22, paragraph 1. Only Article 21, relating to piracy, allows seizure also by "military aircraft" and "other ships or aircraft on government service authorized to that effect." With respect to the applicability of that provision also to Article 22, see the rather ambiguous statements by the United Kingdom in the Second Committee of the First LOS Conference, summarized in 1958 LOS Conference, *supra* note 6, v. 4, pp. 108-9, and in the Plenary, *id.*, v. 2, p. 22.

81. See 1982 LOS Convention, *supra* note 78, Article 110, paras. 4 and 5, which parallel Article 107 relating to ships and aircraft which were entitled to seize a foreign ship on account of piracy. On the one hand, it broadens its application to boarding of ships suspected of other illegal activities or flag misuse, and, on the other hand, it narrows it from seizure to boarding only.

82. For U.S. acceptance of the navigation provisions of the 1982 Convention, see the Statement of the President on United States Ocean Policy, *Weekly Compilation of Presidential Documents*, v. 19, No. 10, pp. 383-85 (1983), reprinted in *International Legal Materials*, v. 22 (1983), p. 464.

83. 1958 High Seas Convention, *supra* note 77, Article 22; 1982 LOS Convention, *supra* note 78, Article 110, paragraph 1.

84. *Id.*, Article 110, subparagraphs (1)(c) and (d).

85. *Id.*, Article 109.

86. European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside of National Territories, January 22, 1965, 634 U.N.T.S. 239. For the proposal by a group of European countries to add a provision relating to unauthorized broadcasting from the high seas, see U.N. Doc. A/CONF.62/C.2/L.54 (1954), reprinted in Third United Nations Conference on the Law of the Sea, Official Records (hereafter cited as the 1982 LOS Conference), v. 3, pp. 229-30, Article 21 *ter*. See also *id.*, v. 2, p. 236, paragraph 59, and p. 292, paragraph 2; *id.*, v. 3, p. 134 (main trends, Provision 177); *id.*, v. 4, p. 166 (Informal Single Negotiating Text, Article 95 and Article 96, paragraph 1c).

The delegation of Israel made a proposal to delete Article 109, paragraph 3, relating to the right of various states to arrest and punish persons engaged in unauthorized broadcasting, to delete also Article 110, paragraph 1(c) relating to boarding of ships engaged in that activity, and to allow instead the coastal state to exercise control over such broadcasting in the 24-mile contiguous zone. See *id.*, v. 15, p. 20, paragraph 34; and Doc. C.2/Informal Meeting/38 (1978), reprinted in Renate Platzoder, *Third United Nations Conference on the Law of the Sea: Documents* (Dobbs Ferry, N.Y.: Oceana Publications, 1984), v. 5, p. 44. No action was taken on this proposal as by that time the text prepared by the Second Committee became practically immutable.

87. See the text preceding footnote 20 *supra*.

88. See 1958 LOS Conference, *supra* note 6, pp. 11-12 (para. 8).

89. A United States court in *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979), quotes Oppenheim's statement that it is "[i]n the interest of order on the open sea" that a stateless vessel enjoy no protection. L. Oppenheim, *International Law* (7th ed. H. Lauterpacht, London: Longmans, Green & Co., 1948), v. 1, p. 546. According to another author, statelessness "robs a ship of privileges, and deprives it of a State to espouse its cause when it suffers injustice at the hands of another State." Robert Reinow, *Test of the Nationality of a Merchant Vessel* (New York: Columbia University Press, 1937), p. 13.

In *Naim Molvan v. Attorney-General of Palestine*, [1948] A.C. 351, 369-70, the Judicial Committee of the Privy Council stated that "[n]o question of comity or breach of international law can arise if there is no State under whose flag the vessel sails." It added that, having no flag, a vessel cannot claim the protection of any State, nor can "any State claim that any principle of international law was broken by her seizure."

A stateless vessel can be stopped by any warship, because, as the United States courts view the situation, stateless vessels do not have the protection provided by a flag state. *United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). "International law shelters only members of the international community of nations from unlawful boarding and searches on the high seas." *United States v. Cortes*, *supra* at 110.

It has to be remembered, however, that, as Mr. Francois has pointed out, a stateless vessel "should not be treated as a pirate unless it actually commits acts of piracy." U.N. Doc. A/CN.4/17, *supra* notes 51, pp. 6-7.

90. The Congress of the United States has denied assistance to countries which engage in "a consistent pattern of gross violations of internationally recognized human rights," including a "flagrant denial of the right to life, liberty and the security of person." Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151n. Clearly, any United States legislation should be interpreted also in the spirit of these pronouncements, thus avoiding any gross violation of internationally recognized human rights, both substantive and procedural. See, e.g., Judge Faye, dissenting in *United States v. Warren*, 578 F.2d 1058, 1081-82 n. 2 (5th Cir. 1978), cert. denied, 446 U.S. 956 (1980) ("I see no reason why a possible drug importer on the high seas should have fewer rights when confronted by the Coast Guard than should a person on land near the Mexican border when confronted by an officer of the Border Patrol").

It may be also noted that there is a strong connection between human rights and international security. As President Reagan stated at Helsinki on May 27, 1988, "[t]here is no true international security without respect for human rights," and "[s]ecurity and human rights must be advanced together, or cannot truly be secured at all." *Weekly Compilation of Presidential Documents*, v. 24 (1988), p. 677, at 678, 679.

It seems however, that some United States courts do not recognize any individual rights in the drug interdiction cases beyond those guaranteed by the Fourth Amendment. Even this fundamental constitutional guarantee is diluted on the high seas. *United States v. Williams*, 617 F.2d 1063, 1082-84, 1089-90 (5th Cir. 1980). But see the concurring opinion by Judge Roney, in which five other judges joined, *Id.*, at 1093 ("Williams, as a United States citizen on a foreign ship, just as on foreign soil, does have constitutional rights against an unreasonable search and seizure by United States Government authorities").

For a more detailed discussion of the relationship between the arrest of foreign nationals on foreign ships and the international law of human rights, see Louis B. Sohn, "International Law of the Sea and Human Rights Issues," in Thomas A. Clingan, Jr., ed., *The Law of the Sea: What Lies Ahead?* (Honolulu, Hi.: University of Hawaii, 1988), pp. 51-71.

91. See, for instance, the treaty of friendship, commerce and consular rights between the United States and Honduras, December 7, 1927, which provides in Article I that the "nationals of each High Contracting Party shall enjoy freedom of access to courts of justice of the other . . . for the defense of their rights," and "shall receive within the territories of the other . . . the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law." 45 Statutes at Large 2618; Treaty Series No. 764, 8 Bevans 905; 87 LNTS 421. Similar provisions may be found also in the treaty of friendship, commerce and navigation between the United States and Liberia, August 8, 1938. 54 Statutes at Large 1739; Treaty Series No. 956; 9 Bevans 595; 201 LNTS 163. According to the treaty of friendship, commerce and navigation between the United States and Japan, April 2, 1953, "[n]ationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than required by international law," and "shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." Articles 2 and 4, 4 UST 2063, TIAS No. 2863, 206 UNTS 143.

92. See Convention relating to the Status of Stateless Persons, September 28, 1954, 360 U.N.T.S. 130 (in force with respect to more than thirty states, but not ratified by the United States). The Convention contains generally accepted standards on the subject. After all, stateless persons retain their status as human beings and should be treated as such. A state should accord such persons treatment at least as favorable as that accorded to its own nationals or to aliens generally; in the latter case the requirement of reciprocity should be waived. See *id.*, Articles 3, 4, 7, 16. There is even a special provision for stateless seamen. *Id.*, Article 11.

93. High Seas Convention, *supra*, note 77, Article 6, paragraph 2, 1982 LOS Convention, *supra*, note 78, Article 92, paragraph 2.

94. The persons on board a ship assimilated to a stateless ship should be treated at least as well as stateless persons (*supra*, note 92), or in accordance with their national status (*supra*, note 91).

95. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205.

96. Yearbook of the International Law Commission, 1956, v. 2, p. 59; *id.*, v. 1, p. 207.

97. *Id.*

98. 1956 Report of the Commission, *supra* note 69, p. 21; Yearbook of the Commission, 1956, v. 2, p. 275.

99. U.N. Doc. A/CONF.13/C.1/L.53 (1958); reprinted in 1958 LOS Conference, *supra* note 6, v. III, (First Committee), p. 226.

100. *Id.*, p. 117, para. 43.

101. *Id.*, p. 116, para. 36. This issue was also raised by the representative of Norway who pointed out that if such a rule is going to be introduced, "it would not be natural to limit the new possibilities of action against ships involved in the traffic [in narcotic drugs] to foreign ships in the territorial sea." *Id.*,

p. 116, para. 40. The representative of Turkey tried again to broaden his proposal "to empower the coastal State to exercise its criminal jurisdiction even if the offense had been committed outside the territorial sea," but the proposal was not pressed to a vote, when the Drafting Committee opposed it. *Id.*, p. 202, paras. 46-49.

102. *Id.*, p. 116, paras. 34, 39.

103. *Id.*, paras. 40-41.

104. This change was suggested early in the Conference, and was incorporated promptly in the negotiating text, with a minor amendment. See 1982 LOS Conference, Official Records, v. 3, p. 114; *Id.*, v. 4, p. 156; *Id.*, v. 5, p. 157.

105. *Id.*, v. 2, p. 237, para. 69.

106. *Id.*, v. 3, p. 133, Provision 174.

107. *Id.*, v. 4, p. 166.

108. See Platzoder, *supra* note 86, v. 5, pp. 66-70. The suggestion relating to an addition in Article 110 appeared earlier in 1975, in the anonymous "blue papers" of the Second Committee, suggesting changes in the "main trends papers." See Platzoder, *supra*, v. 4, p. 137 (Provision 174B, para 1(c)) and 145 (same provision, with a note that consultations with respect to this matter have not been completed).

109. This procedure was suggested by Sir William Scott in 1817 (see *supra*, text preceding note 13), and was followed by Great Britain throughout the nineteenth century. See, however, the objections to this approach by the United States, *supra*, text preceding notes 14 and 16.

110. See Convention Relating to the Suppression of the Abuse of Opium and other Drugs, January 23, 1912, 38 Statutes at Large 1912, Treaty Series No. 612, 1 Bevans 855; Agreement Concerning the Suppression of the Manufacture of, International Trade in, and Use of, Prepared Opium, February 11, 1925, 51 League of Nations Treaty Series, p. 337, *Hudson, International Legislation, supra* note 44, v. 3 (1931), p. 1580; Convention on Traffic in Opium and Drugs, February 19, 1925, 81 League of Nations Treaty Series, p. 317, *Hudson, supra* p. 1589; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Statutes at Large 1543, U.S. Treaty Series No. 863, 139 League of Nations Treaty Series, p. 301; Agreement Concerning the Suppression of Opium Smoking, November 27, 1931, 177 League of Nations Treaty Series, p. 373, *Hudson, supra*, v. 5 (1936), p. 1149; Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 12 U.N.T.S. 208, *Hudson, supra* v. 7 (1941), p. 359; Protocol of December 11, 1946, amending the Agreements, Conventions, and Protocols on Narcotic Drugs of January 23, 1912, February 11, 1925, February 19, 1925, July 13, 1931, November 27, 1931, June 26, 1936, 61 Statutes at Large 2230, T.I.A.S. No. 1671, 4 Bevans 267, 12 U.N.T.S. 179; Protocol of November 19, 1948, Bringing under International Control Drugs outside the Scope of the Convention of July 13, 1931, as amended, 2 U.S.T. 1629, T.I.A.S. No. 2308, 44 U.N.T.S. 277; Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, June 23, 1953, 14 U.S.T. 10, T.I.A.S. No. 5273, 456 U.N.T.S. 3.

111. Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204. For the amended text of the Convention, see 976 U.N.T.S. 105.

112. Protocol of March 25, 1972, Amending the Single Convention on Narcotic Drugs, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.S.T.S. 3.

113. Single Convention on Narcotic Drugs, *supra* note 111, Article 35.

114. *Id.*, Article 36.

115. Protocol Amending the Single Convention, *supra* note 112, Article 14.

116. See Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543, 564-66, T.I.A.S. No. 9725, 1019 U.N.T.S. 175, 191-92.

117. See, e.g., the 1972 statement by John E. Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, U.S. Department of Commerce, who pointed out at a Congressional hearing that the international narcotics traffic "is a production and merchandising system based on the slavish demands of addicted individuals," whose demand is constant and whose purchasing power, "whether earned through wages or in crime, is considerable." Protocol Amending the Single Convention on Narcotic Drugs: Hearing before the Senate Committee on Foreign Relations, 92nd Congress, 2nd Session, p. 2 (1972).

118. U.S. Note to the British Embassy, November 21, 1980, published in Department of State, *Digest of United States Practice in International Law*, 1980, pp. 484-85. (Cited hereafter as *U.S. Digest*). For a list of cases upholding such arrangement with foreign governments, see *id.*, p. 486; see also the memorandum from the Office of the Legal Counsel of the Department of Justice to the Department of State, February 19, 1980, *id.*, pp. 475-84.

119. Agreement to facilitate the interdiction by the United States of vessels of the United Kingdom suspected of trafficking in drugs, November 13, 1981, TIAS 10296. It was an exchange of notes, not requiring advice and consent of the Senate, which was probably based on the general authorization by Congress permitting the President "to conclude agreements with other countries to facilitate control of the . . . transportation and distribution of . . . controlled substances." 22 U.S.C. 2291(a)(2) (enacted by

the Foreign Assistance Act of 1971, sec. 109). See also the Justice Department memorandum, *supra* note 118, pp. 476-77, which relies on this provision and on the general international co-operation article (Article 35) of the 1961 Single Convention on Narcotic Drugs, *supra* notes 111 and 113.

120. Convention for the Prevention of Smuggling of Intoxicating Liquors, January 23, 1924. 43 Statutes at Large 1761, U.S. Treaty Series No. 685, 12 Bevans 414, 27 League of Nations Treaty Series 182.

121. See Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston: Little, Brown and Company, 1945), v. 2, pp. 1179-80.

122. According to Morris Busby, Office of Ocean Affairs, U.S. Department of State, the United States should not take the initiative to define the means of boarding foreign vessels on the high seas, but should continue to request permission on a case-by-case basis. Coast Guard Drug Law Enforcement: Hearings before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, 96th Congress, 1st session, p. 55 (1979).

123. The United States courts have held that the failure of the flag State to object is equivalent to consenting to the seizure after the fact. The Court in *United States v. Hensel*, 699 F.2d 18, 28 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983), decided that "[g]iven the need for speedy action, the hostility shown by all nations including Honduras to the international drug trade, and the fact that Honduras apparently did not protest the seizure, Honduras may arguably be said to have ratified the search." The Court cited *United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979), *cert. denied* 444 U.S. 1014 (1980), for support of this statement; in *Dominguez*, the Bahamas government consented to the search of a ship on the basis of a registration number that proved to be wrong, but did not protest when a vessel with a different number was searched instead.

124. See *supra* texts preceding and following note 78.

125. U.N. Doc. E/CN.7/1983/2/Add. 1 (1982), p. 3, para. 4(a).

126. *Id.*, p. 12, paras. 39-40.

127. Commission on Narcotic Drugs, Report on the 30th Session, ESCOR, 1983, Suppl. No. 5 (E/1983/15), pp. 3, 20 (para. 77).

128. U.N. Doc. E/RES/1983/4. The Economic and Social Council, *inter alia*, noted that "illicit drug traffickers also engage in fraudulent practices with respect to the flag State registration of these vessels," and that "registry information must be readily accessible to and verifiable by law enforcement personnel aboard the vessel and within the claimed flag State." It requested Governments "to explore methods of strengthening international co-operation in combating illicit maritime drug trafficking, and to respond promptly to enquiries made for law enforcement purposes by other States regarding the registry of vessels." *Id.*

129. Law of the Sea: Report of the Secretary-General, U.N. Doc. A/39/647 (1984), p. 15, para. 49.

When a later draft included the United States-United Kingdom formula applying the "illicit traffic by sea" provision to the area "beyond the external limits of the territorial sea," one representative objected to it, as implying that "third States had been attributed certain rights in the area between 12 and 200 miles (Exclusive Economic Zone) not contemplated in the United Nations Convention on the Law of the Sea." He expressed preference for an earlier formula applying to ships "on the high seas as defined in Part VII" of that Convention. Commission on Narcotic Drugs, Report of the Tenth Special Session, ESCOR, 1988, Suppl. No. 3 (E/1988/13), p. 24 para. 28.

130. See *supra* note 119 and the text that follows it.

131. U.N. Docs. A/39/407 (1984) and A/C.3/39/8 (1984).

132. General Assembly Resolution 39/141, December 14, 1984, 39 GAOR, Suppl. No. 51 (A/39/51), p. 229. For the report of the Third Committee of the General Assembly on the preparation of this resolution, see U.N. Doc. A/39/710 (1984), paras. 7-9, 16.

133. 39 GAOR, Suppl. No. 51, *supra* note 132, pp. 229-31, Annex, Articles 2, 6 and 9.

134. General Assembly Resolution 39/142, December 14, 1984, *id.*, p. 231. Even more strongly, in a later resolution on the preparation of the draft convention against illicit traffic in narcotic drugs and psychotropic substances, the General Assembly condemned "unequivocally drug trafficking in all its illicit forms—production, processing, marketing and consumption—as a criminal activity," and requested "all States to pledge their political will in a concerted and universal struggle to achieve its complete and final elimination." General Assembly Resolution 41/127, December 4, 1986, 41 GAOR, Suppl. No. 53 (A/41/53), pp. 184, 185, para. 1.

135. U.N. Doc. A/C.3/39/SR.42 (1984), para. 37. According to an Australian delegate, drug trafficking was not of the same nature as the crimes against humanity listed by the International Law Commission in its draft Code of Offenses against the Peace and Security of Mankind; he considered that "[c]aution was necessary before a new offence was branded as a crime against humanity without proper consideration by competent legal bodies." U.N. Doc. A/C.3/39/SR.44 (1984), para. 6. A similar view was expressed by the delegate of Nigeria, who cited in support the latest report of the International Law Commission

(U.N. Doc. A/39/10 (1984) para. 45), which did not include drug trafficking among the crimes against humanity. U.N. Doc. A/C.3/39/SR.53 (1984), para. 4.

136. U.N. Doc. A/C.3/39/SR.43 (1984), para. 23.

137. Commission on Narcotic Drugs, Report on the 31st Session, ESCOR, 1985, Suppl. No. 3 (E/1985/23), pp. 14-16.

138. Comments and Proposals Received from Governments Concerning a Draft Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Report of the Secretary-General, U.N. Doc. E/CN.7/1986/2 (1985), pp. 21-22.

139. Commission on Narcotic Drugs, Report on the Ninth Special Session, ESCOR, 1986, Suppl. No. 3 (E/1986/23), p. 8.

140. *Id.*, pp. 9, 26 (para. 3(j)).

141. Preparation of a Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Report of the Secretary-General. U.N. Doc. E/CN.7/1987/2 (June 17, 1986) (hereafter cited as the 1986 Draft). The text of this draft, together with the United States comments on it, was reprinted in United States Senate Caucus on International Narcotics Control, *The U.N. Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: A Report on the Status of the Draft Convention, the U.S. Negotiating Position, and Issues for the Senate*, 100th Congress, 1st Session, Committee Print, Senate Print No. 100-64 (1987) (hereafter cited as the 1987 Senate Report), pp. 22-38.

142. U.N. Secretariat, Compilation of Comments and/or Textual Changes Submitted by Governments Concerning the Preliminary Draft Convention, U.N. Doc. E/CN.7/1987/2/Add. 1 and Add. 2 (1987).

143. For the full text of U.S. comments (October 1986), see 1987 Senate Report, *supra* note 141, pp. 39-62. That report contains also an article-by-article comparison of U.S. position with the 1986 preliminary draft, *id.*, pp. 13-21.

144. Commission on Narcotic Drugs, Report on the 32nd Session, ESCOR, 1987, Suppl. No. 4 (E/1987/17), pp. 14-25.

145. *Id.*, p. 19, para. 42.

146. *Id.*, pp. 1-2.

147. U.N. Doc. E/RES/1987/27 (1987).

148. U.N. Division of Narcotic Drugs, Working Document on the Draft Convention, U.N. Doc. DND/DCIT/WP.1 (April 6, 1987) (hereafter cited as 1987 Working Document), reprinted in Senate Report, *supra* note 141, pp. 63-79.

149. Interim Report of the Open-Ended Intergovernmental Expert Group Meeting on the Preparation of a Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. DND/DCIT/WP.12 (July 22, 1987), reprinted in Senate Report, *supra* note 141, pp. 80-89.

150. Report of the International Conference on Drug Abuse and Illicit Trafficking, U.N. Doc. A/CONF.133/12, U.N. Publ. Sales No. E.87.L.18 (1987), pp. 70-71, paras. 327-31.

151. *Id.*, p. 70, para. 326.

152. See *supra*, text accompanying notes 133, 136 and 138.

153. See *supra* note 135 and accompanying text, and text accompanying notes 137 and 139.

154. *Supra* notes 141 and 148.

155. *Supra* note 141.

156. See, e.g., American Law Institute, Restatement of the Law Third, *The Foreign Relations Law of the United States*, v. 2, p. 57, 514, Comment *b* and p. 62. Reporters' Note 2; International Law Association, "The Freedom of the High Seas and the Exclusive Economic Zone: The Problem of Interactions," Report of the 61st Conference (1984), pp. 183-200; Horace B. Robertson, Jr., "Navigation in the Exclusive Economic Zone," *Virginia Journal of International Law*, v. 24 (1984), p. 865, at 870-80.

157. See *supra* note 129 and accompanying text.

158. *Supra* note 141.

159. *Supra* note 78.

160. 1987 Senate Report, *supra* note 141, p. 39, at 60-62.

161. *Id.*, p. 80, at 88. According to the 1987 Report of the Secretary General on the Law of the Sea (U.N. Doc A/42/688, pp. 13-14, para. 44), the Expert Group considered also a version of the provision referring to the area "beyond the external limits of the territorial sea without prejudice to any rights enjoyed by the coastal State seaward of those limits," but objections were made to this formula on the ground that it was incompatible with the Convention on the Law of the Sea.

162. For text, see International Maritime Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, March 10, 1988, Article 4 ("The Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States"), IMO Doc. SUA/CONF/15 (1988), reprinted in *International Legal Materials*, v. 27 (1988), p. 672, at 675.

163. For a summary of the discussion in the Commission, see Commission on Narcotic Drugs, Report on the Tenth Special Session, ESCOR, 1988, Suppl. No. 3 (E/1988/13), p. 29, paras. 59-61.
164. *Id.*, p. 30, para. 64.
165. *Id.*, para. 65.
166. *Id.*, p. 29, para. 63.
167. *Id.*, p. 41, para. 139. The representative cited in this connection paragraphs 4 and 7 of the principles and objectives of the Inter-American Program of Action Against the Illicit Use and Production of Narcotic Drugs and Psychotropic Substances and Traffic Therein, adopted by the Inter-American Specialized Conference on Traffic in Narcotic Drugs, Rio de Janeiro, April 1986.
168. Report, *supra* note 163, p. 30, para. 66.
169. *Id.*, para. 67.
170. *Id.*, Draft resolution A.I, paras. 7-9.
171. U.N. Doc. E/RES/1988/8 (1988).
172. U.N. Press Release SOC/NAR/473 (1988).
173. For text of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, see U.N. Doc. E/CONF.82/15 (1988), reprinted in *International Legal Materials*, v. 28 (1989), p. 497.
174. For the text, as revised by the Review Group, see U.N. Doc. E/CONF.82/3 (1988).
175. These two texts are reproduced in the text following note 155, *supra*.
176. In addition to the 1981 agreement with the United Kingdom cited in n. 119, *supra*, the United States has concluded an agreement with the Bahamas in February 1989 (not yet published in TIAS).
177. See LOS Convention, Articles 29 (definition of warship), 107 (piracy), 110(5) (right of visit), 111(5) (hot pursuit), and 224 (protection of marine environment).
178. During the July 1987 meeting of the Intergovernmental Group of Experts, it was emphasized that "any action against ships by States other than the flag States in cases where the evidence of the illicit traffic was not clear and manifest could lead to abuses and might undermine important legal principles." 1987 Report of the Secretary General on the Law of the Sea, U.N. Doc. A/42/688 (1987), p. 13, para. 43.
179. *Supra* note 120. For a list of these treaties, see Hackworth, *supra* note 7, v. 1, p. 679.
180. *Supra* note 119.
181. According to the 1954 Statement of Policy of the United States on the Freedom of the Seas (*Foreign Relations of the United States, 1952-1954*, v. 1, p. 1721):

It is a traditional policy of the United States to support the principle of freedom of the seas. Such freedom is essential to its national interests. The effective defense of its security, the maintenance of its pre-eminence in commercial shipping and air transport, and the prosperity of its fishing industry would all be hampered by any serious compromise of the principle of freedom of the seas.