INTERDICTION ON THE HIGH SEAS:
THE ROLE AND AUTHORITY OF A
MASTER IN THE BOARDING AND
SEARCHING OF HIS SHIP BY FOREIGN
WARSHIPS

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I. INTRODUCTION

On September 11, 2001, several individuals belonging to the terrorist organization al-Qaeda¹ hijacked four passenger planes of which two crashed into the World Trade Center Towers in New York City, one into the Pentagon—the Department of Defense headquarters, and the fourth, destined for either the United States Capitol or the White House, crashed in Pennsylvania after passengers confronted and fought the hijackers.² As a result, over 3000 men, women, and children from over 80 different countries died or remain missing

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¹ Al-Qaeda, Arabic for “the base,” is an international terrorist network founded in 1989 and led by Osama bin Laden, a Saudi Arabian. It seeks to rid Muslim countries of what they consider profane influence of the West and replace their governments with fundamentalist Islamic regimes. Al-Qaeda is an offshoot of the 1980s Afghanistan resistant Palestinian Moslem Brotherhood. The Palestinian Moslem Brotherhood was formed by Osama bin Laden and Abdullah Azzam in response to the 1979 Soviet invasion of Afghanistan. See Jeffrey F. Addicott, Winning the War on Terror 18-20 (2003). See also Ahmed Rashid, Taliban, Militant Islam, Oil and Fundamentalism in Central Asia 132 (2000).

following the attacks. What commenced thereafter was the United States’ Global War on Terrorism.

Just as multiple aircrafts facilitated the terrorist attacks on innocent civilians on September 11, 2001, terrorists are using ships to carry out their operations. Reports indicate that commercial ships of varying sizes and types are being used, some knowingly and others unwittingly, in carrying out terrorist attacks, in the transportation of terrorists and terrorists’ instrumentalities, and weapons of mass destruction. There is a widely held belief that Osama bin Laden covertly owns a fleet of commercial vessels ranging from as few as fifteen to as many as fifty, flying under various flags of convenience and that these vessels are potentially floating bombs targeted at United States’ interests.

2 The term used by the United States to describe its worldwide military, law enforcement, and diplomatic campaign against al-Qaeda, prompted by the latter’s involvement in the September 11, 2001 terrorist attack. In a speech on October 11, 2001, President George W. Bush, explained the goal of the global war on terrorism. He stated: “The attack took place on American soil, but it was an attack on the heart and soul of the civilized world. And the world has come together to fight a new and different war, the first, and we hope the only one, of the 21st century. A war against all those who seek to export terror and a war against those governments that support or shelter them.” President George W. Bush, White House News Conference (Oct. 11, 2001), available at http://www2.indystar.com/library/factfiles/crime/national/2001/sept11/transcripts/1011bush.html (last visited Oct. 20, 2007).
With over ninety percent of the world’s cargo transported by sea, the global economy depends on maritime shipping. The United States has recognized the threat to both maritime shipping and the nation from maritime-based terrorist activities. The United States National Strategy for Maritime Security states:

Terrorists can also develop effective attack capabilities relatively quickly using a variety of platforms, including explosives-laden suicide boats . . . ; merchant and cruise ships as kinetic weapons to ram another vessel, warship, port facility, or offshore platform; commercial vessels as launch platforms for missile attacks . . . . Terrorists can also take advantage of a vessel’s legitimate cargo, such as chemicals, petroleum, or liquefied natural gas, as the explosive component of an attack. Vessels can be used to transport powerful conventional explosives or WMD for detonation in a port or alongside an offshore facility.

In response to the real and present danger from the sea, and in support of the Global War on Terrorism, the United States and its coalition partners are engaged in “maritime interception operations” in the Gulf of Oman and North Arabian Sea. This boarding and searching of foreign flagged commercial vessels on the high seas allows the United States and its coalition partners to interdict suspected terrorist vessels before the terrorists have the opportunity to attack unsuspecting innocent civilians at sea and on land. Thus, maritime interdiction operations are critical to the disruption of terrorist activities and maritime security.

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7 United States National Strategy for Maritime Security 2 (2005) available at http://www.whitehouse.gov/homeland/4844-nsms.pdf (last visited on 20 January 2007) (According to the strategy, “[s]hipping is the heart of the global economy, but it is vulnerable to attack in two key areas. Spread across Asia, North America, and Europe are 30 megaports/cities that constitute the world’s primary, interdependent trading web. Through a handful of international straits and canals pass 75 percent of the world’s maritime trade and half its daily oil consumption. International commerce is at risk in the major trading hubs as well as at a handful of strategic chokepoints.”).

8 Id. at 4.

9 Peter Grier and Faye Bowers, How Al Qaeda Might Strike the US by Sea, CHRISTIAN SCI. MON., May 15, 2003, at 2 (discussing U.S. government concerns that Al-Qaeda may mount terrorist attacks from the sea or with the use of maritime assets).

10 U.S. and Coalition Forces Bring Global War on Terrorism to the Enemy at Sea, NAVY NEWS STAND, at http://www.news.navy.mil/search/display.asp?story_id=9263 (Aug. 29, 2003) (“Maritime Interception Operations (MIO) has become an important mission for U.S. and coalition forces. Since more than 95 percent of the world's commerce moves by sea, it is likely that terrorists use merchant shipping venues to move cargo and passengers for their purposes, including escaping prosecution or even carrying out terrorist attacks.”).

11 Id. See also Robinson, supra note 8.
One of the tactics available to the United States in the Global War on Terrorism is requesting consent from the master to board and search a foreign flagged merchant ship.\textsuperscript{12} The United States Navy and Coast Guard rely on section 3.11.2.5.2 of \textit{The Commander’s Handbook on the Law of Naval Operations} in seeking master’s consent.\textsuperscript{13} The ability to communicate directly with the master to gain entry to his ship permits the United States naval forces to quickly verify the legitimacy of a ship’s cargo, crew, and records without undue delay to the boarded ship.\textsuperscript{14}

The United Kingdom, a close ally of the United States and a participant\textsuperscript{15} in the maritime interdiction operations, does not share the United States’ position on a master’s authority to consent to the boarding and searching of his ship by non-flag state personnel.\textsuperscript{16} British Naval regulations require the consent of the flag state, not the master or person in charge of the ship, in order to board and search a foreign non-military vessel on the high seas.\textsuperscript{17} The United Kingdom’s policy creates undue delay and unnecessarily hinders the ability to conduct maritime interception operations on the high seas.

This article postulates that a master of a vessel has the authority under international law to consent to searches of his ship, including all individuals on his vessel, if requested by non-flag state warships. Part II starts with a discussion of the historical origin of maritime law and concludes with the current maritime legal regime on the high seas as it relates to searches. Part III examines the flags of convenience phenomenon and its impact on master’s consent. Part IV discusses the customary and codified rules applicable to peacetime interdiction of ships on the high seas. Finally, Part V argues that customary international law, legal commenters, courts, and legislatures have recognized the historical authority a master has over all activities onboard his ship, including the authority to consent to boardings on the high seas.

\textsuperscript{13} U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK OF THE LAW OF NAVAL OPERATIONS, July 2007, para. 3.11.2.5.2. (The Commander’s Handbook as it is commonly referred to by the sea services is a joint publication applicable to Navy, Marine Corps, and Coast Guard. It is designed to provide naval and coast guard personnel with an overview of the rules of law governing United States naval operations in peacetime and during armed conflict).
\textsuperscript{14} Id.
\textsuperscript{15} See supra note 12.
\textsuperscript{17} Id.
II. HISTORY OF MARITIME LAW

The authority of a master to consent to the boarding and searching of his ship is steeped in the annals of maritime law. Therefore, in order to analyze both the United States’ and United Kingdom’s positions on the issue of master’s consent, it is first necessary to trace the evolution of the rules applicable to the conduct of maritime commerce and the conduct of sovereign states vis-à-vis the granting of nationality to ships.

A. Maritime Law — The Early Years

The body of law commonly called the law of the sea for centuries was embodied in customary international law before becoming largely codified in the four 1958 Geneva Conventions18 and the 1982 Convention on the Law of the Seas.19 The customary international law20 rules originated during the period of the Roman Empire.21 In the second century, the Roman jurist, Marcianus, “declared that the sea and the fish in the sea were communis omnium naturali jure (common or open to all men by the operation of natural law).”22 In time, Marcianus’ declaration became part of the Roman Empire civil code and was the accepted doctrine on the sea.23 Although the Romans proclaimed free access of the sea to all, in practice and reality, it exercised complete control because of its navy’s dominance over the Mediterranean.24

The Roman Empire may have formulated the early legal framework on the use of the sea, but the Empire’s disintegration left a vacuum. After the fall of the Roman Empire, disputes over the rights to freely sail the seas in the pursuit of maritime commerce led to several wars in Europe.25 Pursuant to a

20 Article 38 of the statute of the International Court of Justice recognizes customary international law as a source of international law. See Statute of the International Court of Justice, June 26, 1945, art. 38, 39 Stat. 1031, 1060. Customary international law has traditional be defined as a “general and consistent practice of states followed by them from a sense of legal obligation.” The Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) [hereinafter Restatement (Third)].
22 Id.
23 Id. at 10-11. (The rules regarding the sea were ultimately codified in the Code of Justinian in 529 A.D. The Romans never claimed a maritime jurisdiction boundary, not even a three-mile limit).
24 Id.
Papal bull in 1493\textsuperscript{26} granting sovereignty of various parts of the sea, particularly off the African and Indian coasts (East Indies), maritime states such as the United Kingdom\textsuperscript{27} and the Netherlands were excluded from participating in the lucrative East Indies trade.\textsuperscript{28} Consequently, the Netherlands challenged Portugal’s legal authority to claim dominance over the high seas based on the Papal bull.\textsuperscript{29}

As a result of the conflicts between the Dutch and Portuguese over maritime commerce in the East Indies, Hugo Grotius was hired by the Dutch East Indies Company to provide a legal opinion justifying the company’s--the Dutch--right to freely sail the Indian and Atlantic Oceans and engage in maritime commerce on the seas without the interference from other States.\textsuperscript{30} Grotius, a Dutch lawyer and legal scholar, wrote and published \textit{Mare Liberum} (\textit{The Freedom of the Sea})\textsuperscript{31} and is widely considered the father of international law.\textsuperscript{32} \textit{Mare Liberum} was not written as a text or book, but rather as a legal brief meant to argue the Dutch case for equal and uninhibited access to the seas.\textsuperscript{33} Hugo Grotius’ \textit{Mare Liberum} established the doctrine that no nation had the right to prevent another nation from exercising freedom of navigation on the

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\bibitem{27} The British in the last 16th century started to take steps to dispute the Spanish and Portuguese claim of ownership over a large portion of the Atlantic and Indian oceans. In 1580, the Spanish Ambassador vigorously complained to Queen Elizabeth I that Sir Francis Drake’s trip, that included going from the Atlantic Ocean to the Pacific Ocean, violated Spain sovereign waters. In her reply to the Spanish Ambassador, Queen Elizabeth I stated that the oceans were common to all and no nation can claim ownership. \textit{See GERARD J. MANGONE, LAW OF THE WORLD OCEAN 13-14 (1981). See also 4 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 501 (1965)}.

\bibitem{28} \textit{See Anand, supra note 27 at 43-43 (Anand gives an in depth history of the conflicts that led to the writing of \textit{Mare Liberum})}. \textit{See also Clingan, supra note 23, at 22-24}.


\bibitem{32} \textit{See Clingan, supra note 23, at 10}.

\bibitem{33} \textit{See Grotius, supra note 31, at v (Scott’s Introductory Note) (\textit{Mare Liberum} was subsequently published anonymously in 1608)}.

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high seas—the sea was open for all states to engage in such things as maritime commerce.\textsuperscript{34} This was a sound rejection of the idea that national dominion could extend to the high seas and prevent access and use by other sovereign States.\textsuperscript{35} As discussed \textit{infra}, Grotius’ \textit{Mare Liberum} is now permanently weaved into the fabric of the law of the sea as reflected in LOSC Article 87.\textsuperscript{36}

**B. Maritime Law – Mare Liberum to 1982 Law of the Sea Convention**

Grotius’ concept of freedom of navigation on the high seas remained largely in place until the early twentieth century, when the “traditional uses of navigation and fishing became more problematic” because of increased trade and the advance of technology, such as steam powered vessels.\textsuperscript{37} Much as the East Indies trade led to conflicts between the Dutch and the Portuguese in the sixteenth century; the steam powered ships and the corresponding increase in demands for goods in the aftermath of World War II led to conflicts among other sea-going states.\textsuperscript{38} Consequently, the need to codify the rules that had evolved into customary international law and the need for more precise rules to keep the peace became apparent.\textsuperscript{39}

The world’s nations have made four attempts to codify the laws associated with freedom on the seas.\textsuperscript{40} The first attempt was under the auspices of the League of Nations.\textsuperscript{41} The conference convened at the Hague in 1930, but the parties failed to reach an agreement on the limits of the territorial seas.\textsuperscript{42}

The second attempt occurred under the sponsorship of the United Nations, the successor organization to the defunct League of Nations.\textsuperscript{43} This led to the adoption of four conventions in 1958 commonly referred to as “UNCLOS

\begin{itemize}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} Michael A. Becker, \textit{The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea}, 46 \textit{Harv. Int’l L.J.} 131, 169-170 (2005) (The British scholar John Seldon was the proponent of the doctrine of exclusive control by nation states (\textit{Mare Clausum})—the opposite view of Marcianus and Grotius).
\item \textsuperscript{36} LOSC, \textit{supra} note 21, art. 87. (Article 87 states that the high seas are open to all States, among other things, for freedom of navigation, whether coastal or land-locked. LOSC Article 87 will be discussed in greater detail in part IV of the thesis).
\item \textsuperscript{37} Clingan, \textit{supra} note 23, at II.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} See Churchill and Lowe, \textit{supra} note 32, at 14.
\item \textsuperscript{43} \textit{Id.}
\end{itemize}
I"; 44 (1) Convention on the Territorial Sea and the Contiguous Zone; (2) the Convention on the High Seas; (3) the Convention on the Continental Shelf; and (4) the Convention on Fishing and Conservation of the Living Resources on the High Seas. The United States and the majority of states only ratified the first three conventions. 45

Because of problems not satisfactorily resolved in the UNCLOS I, a subsequent conference was convened in 1960--"UNCLOS II," but it failed to produce an agreement. 46 Like the 1930 Hague Conference, the impasse had to do with defining the limits of the territorial seas and a fishing zone boundary. 47

The fourth attempt was convened in 1973--"UNCLOS III"--and resulted in the United Nations Convention on the Law of the Sea, which was opened for signature on December 10, 1982 in Montego Bay, Jamaica 49 and went into force on November 16, 1994. 50 The United States and several states of the developed world, such as the Federal Republic of Germany and the United Kingdom, did not initially sign or ratify the treaty, although Germany and the United Kingdom have since become members. 51

On March 10, 1983, President Ronald Reagan announced that the United States would not sign the Law of the Sea Convention because of concerns with the deep seabed mining provisions. 52 However, the President stated that the United States accepted the remaining substantive provisions as

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44 See supra note 20.  
45 D. W. Bowett, The Law of the Sea 4 (1967). See also Sean D. Murphy, Principles of International Law 339 (2006) (Professor Murphy articulates the position of most legal scholars that customary international law was the authoritative source for rules governing navigation on the seas prior to UNCLOS I). The United States is still a member of the 1958 Convention on the High Seas. See discussion, infra notes 53-61 and accompanying text.  
49 LOSC, supra note 21.  
50 Id.  
reflecting customary international law.\textsuperscript{53} On October 7, 1994, President William Jefferson Clinton forwarded the Law of the Sea Convention, along with newly negotiated provisions on deep seabed mining to the Senate for its consent to United States accession.\textsuperscript{54} The Senate Foreign Relations Committee has held hearings\textsuperscript{55} and voted in favor of consent but the full Senate has not yet voted as of May 2007.\textsuperscript{56} In his transmittal to the Senate, President Clinton restated the United States’ policy to act in accordance with the traditional use of the seas that had passed into customary international law.\textsuperscript{57} The net effect is that although the United States has not yet acceded to the LOSC, it accepts and is adhering to the provisions that reflect customary international law.

C. \textbf{LOSC Rules Applicable to Merchant Vessels on the High Seas}

The rights of merchant ships from any country to freely sail the high seas is now widely accepted as a tenet of international law\textsuperscript{58}--a clear victor of \textit{mare liberum} over \textit{mare clausum}.\textsuperscript{59} Under both customary international law.\textsuperscript{60}

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  \item \textsuperscript{53} Louis B. Sohn, Professor of International Law, The Law of the Sea: Customary International Law Developments, Address at the American University Washington College of Law Edwin A. Mooers Lecture (Oct. 11, 1984), 34 AM. U. L. REV. 271, 279 (1985) (“An agreement between the signatories to the Convention and the United States that most of the provisions of the Convention have become customary international law.”).
  \item \textsuperscript{54} 34 I.L.M. 1393 (1995).
  \item \textsuperscript{55} On October 31, 2007, the Senate Foreign Relations Committee voted 17-4 in favor of sending the treaty, for the second time in three years, to the full Senate for accession. See, Viola Gienger, Senate panel backs sea treaty, SEATTLE TIMES, Nov. 1, 2007, at A11. See also, S. Exec. Rpt. 108-10 (2004) (The Senate Foreign Relations Committee held hearings on October 2003 and voted unanimously on February 25, 2004 in favor of the treaty, but a vote never made it to the floor); and MARJORIE ANN BROWNE, THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003, CONGRESSIONAL RESEARCH SERVICES REPORT RS21890 (Aug. 19, 2004).
  \item \textsuperscript{57} Supra note 56, at 1396.
\end{itemize}
and the Law of the Sea Convention, a merchant ship on the high seas is subjected to the jurisdiction of the state whose flag it flies. LOSC Article 92 states, “[s]hips shall sail under the flag of one State only, and save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.” Consequently, a merchant ship sailing on the high seas falls under the jurisdiction and authority of its flagged state. As succinctly put by one legal commentator, “[i]n common parlance, a ship is regarded as a country’s ambassador and normally none other than a sovereign independent State is entitled to establish diplomatic relations by exchange of ambassadors with other countries.”

The legal result under international law is that a merchant vessel on the high seas is immune from the jurisdiction of another state, unless otherwise

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60 See Sohn, supra note 57, at 279; see also 80 CJS Shipping § 1 (2006); United States v. Flores, 289 U.S. 137, 154 (1933) (Justice Stone cites to an 1882 British appeals court decision, which held that the United Kingdom’s jurisdiction extended not only to its territorial waters, but also to its ships on the high seas and British ships in a foreign state’s territorial waters.); Delany v. Moraitis, 136 F.2d 129, 133 (4th Cir. 1943) (“Vessels are deemed in law a part of the territory of the country whose flag they fly, and as such are subject to the jurisdiction and laws of that country.”); Fisher v. Fisher, 165 N.E. 460, 462 (N.Y. 1929) (“A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries.”).
61 LOSC, supra note 21, Art. 92.
62 Id. See also David Anderson, Freedom of the High Seas in the Modern Law of the Sea, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 333 (David Freestone, Richard Barnes, and David Ong eds., 2006)) (Some nations viewed ships as literally pieces of floating territory, thereby possessing authority of the state wherever the ship sailed).
63 Full text of Article 92 read:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

64 H. A. SMITH, THE LAW AND CUSTOM OF THE SEA 46 (2nd rev. ed. 1950) (“The first and perhaps the most important of the customary rules, is that every state has exclusive jurisdiction over all the ships which fly its flag.”).
provided in the Law of the Sea Convention or under customary international law.  

LOSC Article 92 is a codification of the now well-established principle delineated in 1927 by the Permanent Court of International Justice in the S.S. Lotus (France v. Turkey) case.  In the S.S. Lotus, the Court held that “[v]essels on the high seas are subjected to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, no state may exercise any kind of jurisdiction over foreign vessels upon them.” In commenting on the rights of ships on the high seas to be free from interference by foreign states, Professor Gilbert Gidel explains that:

The essential idea underlying the principle of freedom of the high seas is the concept of the prohibition of interference in the peacetime by ships flying one national flag with ships flying the flags of other nationalities. The prohibition of interference is based on the idea of the flag, that is to say, the symbol of the attachment of the ship to a given State and not on the idea of the nationality of the individuals concerned in the maritime relations in question.

Notwithstanding the Court’s holding and Professor Gidel’s comments, a flag state’s exclusive jurisdiction on the high seas is not absolute--even in peacetime. Over the centuries, several exceptions to the flag state’s exclusive jurisdiction have developed. These exceptions are firmly grounded in both

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66 Id. See e.g., H. MEYERS, THE NATIONALITY OF SHIPS 31 (1967) (suggesting that customary international law is applicable to ships regardless of state of registry). This should be distinguished from situations under LOSC Articles 21 and 27 where a coastal state is permitted to board a ship without the consent of the flagged vessel within the territorial waters of that state to exercise criminal jurisdiction if the laws of the coastal state were violated or to enforce customs laws and regulations.

67 Samuel E. Logan, The Proliferation Security Initiative: Navigating the Legal Challenges, 14 J. TRANSNAT’L L. & POL’Y 253, 267 (2005) (“The exclusive enforcement relationship between a flag state and its vessels on the high seas has long been recognized by international law. As early as 1927, the Permanent Court of International Justice (PCIJ) held in the Lotus Case that vessels on the high seas are subject to no authority except that of the State whose flag they fly. The Convention codifies this principle in Article 92, which reserves to the flag state jurisdiction over ships flying its flags on the high seas.”) (internal quotes omitted).


customary norms and treaty laws.\textsuperscript{71} Those exceptions will be discussed infra in part IV, but first, it is necessary to examine the rules governing the registration--flagging--of ships.

D. Flagging of Merchant Ships

The flying of a state’s flag identifies the ship’s nationality--place of registration--and provides a clear statement to the world of the state’s legal jurisdiction and authority over that ship.\textsuperscript{72} The rule governing the flagging\textsuperscript{73} of merchant vessels is set forth in Article 91 of LOSC.\textsuperscript{74} Under LOSC Article 91, each state formulates its own rules for determining the registration criteria for granting its nationality to ships.\textsuperscript{75} The only caveat placed on the state is the so-called requirement for a “genuine link” between the registering state and the ship.\textsuperscript{76} Article 91 is the formal relationship between the registering state and the ship flying its flag.\textsuperscript{77} Article 91 is virtually identical to Article 5\textsuperscript{78} of the 1958

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\textsuperscript{71} See Shulman, supra note 72, at 803.
\textsuperscript{72} Id.
\textsuperscript{73} The word “flagging” as used in this article refers to the granting of a state’s nationality to a ship.
\textsuperscript{74} Full text of Article 91 (Nationality of ships) reads:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

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

LOSC, supra note 21, Art. 91.
\textsuperscript{75} Id. See also Restatement (Third), supra note 22, § 501, cmt. b.
\textsuperscript{76} LOSC, supra note 21, Art. 91. The issue of genuine link will be discussed in Part III B of this article.
\textsuperscript{77} UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY 104 (3 Satya N. Nandan & Shabtai Rosene eds., 1995).
\textsuperscript{78} Article 91 deleted the portion in Article 5(1) that begins with the subjective clause, “in particular . . .” The deleted portion in Article 5 was an attempted to explain the phrase “genuine link.” Full text of Article 5 (Convention on the High Seas) reads:

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (emphasis added).

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.
\end{quote}
Constitution on the High Seas. Because the United States remains a party to the
High Seas Convention, Article 5 is still the governing norm for the United
States. In addition to the two cited treaties, the flagging of a merchant vessel is
also ensconced in customary international law as well as in United States
jurisprudence.

In the Muscat Dhows case (1905), the Permanent Court of Arbitration
upheld the right of France to allow subjects of the Sultan of Muscat to fly the
French flag. In so doing, the Court was of the opinion that “[g]enerally
speaking it belongs to every sovereign to decide to who he will accord the right
to fly his flag and to prescribe the rules covering such grant.” Thus, even
before the 1958 Convention on the High Seas and the 1982 Law of the Sea
Convention, the right of a state to prescribe conditions for lending its nationality
to ships was recognized by the international community. It is noteworthy to
mention that the Muscat Dhows case made no reference of a genuine link
requirement. Professor D. P. O’Connell, suggests that the Muscat Dhows case
stands for the proposition “that there is no unique connection between the
national identity of a ship for jurisdiction purposes and the flying of a flag.”

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Id.

79 Pursuant to Article 311, the Law of the Sea Convention supersedes the 1958 Conventions, but
only for parties who have ratified the newer convention. Since the United States has not yet ratified
the Law of the Sea Convention, the 1958 Convention on the High Seas and customary international
law governs the United States’ conduct on the high seas. See LOSC, supra notes 54–59 and
accompanying text.

80 Edwin Anderson, III, The Nationality of Ships and Flags Of Convenience: Economics, Politics,
the Muscat Dhows case that each state set the conditions for granting nationality to ships is evidence
of customary international law).

81 See, David Matlin, Note, Re-evaluating the Status of Flags of Convenience Under International

82 Decision of the Permanent Court of Arbitration in the matter of Muscat Dhows, 2 Am. J. Int’l L. 923, 927 (1909). It is believed that the Sultan wanted to use the cover of the French flag to engage
in the slave trade which limited his exposure. See 2 D.P. O’CONNELL, THE INTERNATIONAL LAW OF
THE SEA 753 (I. A. Shearer ed. 1984).

83 McDougal & Burke, supra note 70, at 1059. See also Muscat Dhows, 2 Am. J. Int’l L. at 927. It has
been suggested that Article 5 of the 1958 Convention on the High Seas was the codification of
the Muscat Dhows case. See, e.g., Anderson III, supra note 82, at 146 (argues that both the Muscat
Dhows and Lauritzen v. Larsen, 345 U.S. 571 (1953) stands for the proposition that any state--
cosmopolitan or landlocked--may prescribe rules for granting its nationality to ships).

84 See Anderson III, supra note 82, at 145.

85 See 2 O’Connell, supra note 84, at 753. The United States appears to have followed this premise
when it flagged Kuwaiti oil tankers in the mid-nineteen eighties in order to protect them during the
Iraq-Iran War. In essence, the United States was flagging the vessels out of convenience. See
generally Harvey Rishikof, Symposium: Reflections on the ICJ’s Oil Platform Decision: When
Naked Came the Doctrine of “Self-Defense”: What Is the Proper Role of the International Court of
The right of a state to grant nationality to ships has been formally part of the United States jurisprudence landscape since 1953. In *Lauritzen v. Larsen*, a Danish sailor sued his Danish employer—the owner of a Danish ship in which he was employed—in United States federal court based on United States law for negligent injuries suffered while the ship was in port Cuba. The Supreme Court dismissed the case on jurisdictional grounds because as the flag state, Danish law governed the liability of the Danish ship owner for injuries sustained by a Danish sailor in foreign waters. In so holding, the Supreme Court recognized that “[e]ach state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.”

As the above analysis demonstrates, a ship’s nationality, although not identical, is akin to the nationality of an individual. Like an individual’s nationality, a ship’s nationality identifies which state under international law exercises jurisdiction over the ship and crew and which state exercises diplomatic protection over the same.

### III. IMPACT OF FLAGS OF CONVENIENCE ON MASTER’S CONSENT AUTHORITY

It is of paramount importance to the international community that the customary international law-based doctrine of master’s consent remain a viable option in preventing and suppressing international terrorism on the high seas. Although the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) was drafted to assist in the prevention of terrorism at sea, its enforcement is conditioned upon flag state consent. As will be established *infra*, the widespread use of flag of

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66 See *Lauritzen v. Larsen*, supra note 85.
67 Id. at 573.
68 Id.
69 Id. at 584.

90 See *e.g.*, Meyers, *infra* note 68, at 24-30. Professor Meyers uses the term “allocation” to describe the rights and duties a state has in regards to ships registered under its laws. Id. at 30. It is under this construct of nationality that the United Kingdom claims a master is without the authority to consent to the boarding and searching of his ship by foreign warships on the high seas. This view will be further discussed in Part V.


convenience\textsuperscript{93} states to register much of the world’s merchant vessels can have deleterious effects on the ability of states to obtain flag state consent during exigent situations.\textsuperscript{94}

As part of the Proliferation Security Initiative (PSI),\textsuperscript{95} several flag of convenience states such as Belize, Cyprus, Liberia, the Marshall Islands, and Panama, have all entered into ship boarding agreements with the United States. However, these agreements are vulnerable to political upheavals or governing instability.\textsuperscript{96} For example, Liberia, the second largest flag of convenience state, was embroiled in domestic political chaos for over a decade.\textsuperscript{97} There was barely a functioning government until 2006. The ability to request consent from the flag state is critically impeded in these situations.


\textsuperscript{93} The term “flag of convenience” will be defined in section A below.

\textsuperscript{94} Gone are the days when there were genuine links between a flag state and ships under its registry. Today, so-called open registry states allow for the large-scale registration of ships that have no genuine contacts with the flag state. One author has called for the fixing the serious gap in maritime law caused by the failure of flags of convenience in fulfilling their international duties as flag states. See Catlin A. Harrington, Comment, \textit{Heightened Security: The Need to Incorporate Articles 31BIS(1)(A) and 8BIS(5)(E) of the 2005 Draft SUA Protocol into Part VII of the United Nations Convention on the Law of the Sea, 16 PAC. RIM. L. \\ 

\textsuperscript{95} The Proliferation Security Initiative was launched by the Bush administration on May 31, 2003 in Krakow, Poland. Its purpose is to prevent the proliferation of weapons of mass destruction (WMD) by air, land, and sea. The initial PSI eleven members are: Australia, France, Germany, Italy, Japan, The Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. A number of states have entered into bilateral ship boarding agreements with the United States and other PSI partners to facilitate the interdiction of WMD at sea. See Daniel H. Joyner, \textit{The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law, 30 YALE J. INT’L L. 507, 509-510 (2005) (providing an in-depth analysis of the PSI program). See also Shulman, supra, note 72, at 774-777; United States Department of State, United States Initiatives to Prevent Proliferation (2005), available at \url{http://www.state.gov/documents/organization/47000.pdf} (last visited on Sep. 28, 2007).

This section will demonstrate that because of the absence of a genuine link between flag of convenience states and their ships, the master’s role has evolved to compensate for the failure of flag of convenience states to fulfill their international duties as flag states. 98 It will also be shown that this lack of control by flag of convenience states is further indicia of the master’s inherent authority over the operation of the ship, which includes giving consent for others to board and search his ship, absent specific instructions to the contrary from the flag state. 99

A. Flags of Convenience

It is well-established in both customary international law and treaty law that states are vested with the authority to prescribe the conditions for granting nationality to merchant ships. 100 During the early twentieth century, the ability of each state to set the criteria for formulating the rules for nationality was not seen as a problem because the merchant vessel’s nationality, for the most part, corresponded with its homeported state. 101 In fact, ships were traditionally registered at the site where the owners kept their main business operation. 102

This however started to slowly change during World War II 103 and significantly after the post-World War II economic boom. 104 Ship owners no

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98 In March 2006, the United Nations General Assembly in Resolution 60/30 recognized the need to address the role of a genuine link and its relationship to the duty of flag states. See G.A. Res. 60/30, U.N. Doc. A/RES/60/30 (Mar. 8, 2006). Paragraph 49 of the resolution reads that the General Assembly:

[I]ooks forward to the results of the ongoing work of the International Maritime Organization in cooperation with other competent international organizations, following the invitation extended to it in resolution 58/240 and resolution 58/14 of 24 November 2003, to examine and clarify the role of the “genuine link” in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels, and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments.

99 See generally Karen C. Hildebrandt, Chartering Cruise Ships for Special Occasions, 29 J. MAR. J. & COM. 205, 211 (1998) (noting that the master is ultimately in charge and that he has veto power over anything that jeopardizes the safety of the ship).

100 See Ademumi Odeke, Port State Control and UK Law, 28 J. MAR. J. & COM. 657, 658 (1997). See also LOSC, supra note 21, Art. 92; S.S. Lotus, supra note 70.

101 Nandan, et al., supra note 79, at 107 (“Under general maritime law and the shipping laws of the different law of the different countries, every vessel has a home port or port of registry which constitutes the legal residence of the ship regardless of its physical location at any given moment.”).


103 See, Moria L. McConnell, Darkening Confusion Mounted Upon Darkening Confusion: The Search for the Elusive Genuine Link, 16 J. MAR. L. & COM. 366, 367 (1985) (Some commentators believe that flags of convenience was borne out of the necessity of World War II, because many ship
longer registered their ships out of loyalty to their country of nationality or main place of business, but rather on where they could operate at the lowest cost.\textsuperscript{105}

Commentators divided national shipping registry systems into three generalized categories: “closed register” or “national”, “open register,” and a hybrid category between closed and open sometimes called “second register.”\textsuperscript{106} Generally, a closed register system refers to a system that only allows registration of ships that are owned by individuals or entities located in the flag state (i.e. there is a genuine link between the flag state and the ship).\textsuperscript{107} The hybrid, or second register, is more akin to the closed register, but has some features of an open register.\textsuperscript{108} Typically in a hybrid ship registry system, a majority of the owners and crew are nationals of the flag state.\textsuperscript{109}

Many in the maritime shipping industry use the term “flags of convenience” or “open registry” in reference to ships registered (i.e. flagged) in a state in which both the ships and their owners have little or no contact, but for the registration itself.\textsuperscript{110} Yet another definition defines a flag of convenience “as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”\textsuperscript{111} In 1970, the Rochdale Commission, a body commissioned by the British Government to study the flags of convenience phenomenon, identified six factors unique to flags of convenience states:

owners, including some in the United States, re-registered with neutral nations to avoid becoming targets for German submarines).
\textsuperscript{104} Becker, supra note 37, at 142.
\textsuperscript{105} Id. See Pamborides, supra note 104; Julie A. Perkins, Ship Registers: An International Update, 22 TUL. MAR. L.J. 197 (1997) (By registering their ships in a flag state of convenience, ship owners increase their profit bottom line, while open registry states earns a considerable amount of income).
\textsuperscript{106} Becker, supra note 37, at 142. See also, Simon w. Tache, The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link, 16 INT’L L. 301 303-303 (1983); Perkins, supra note 107, at 197.
\textsuperscript{107} Becker, supra note 37, at 142 (The United States is an example of a closed register).
\textsuperscript{108} Id. (Canada is an example of the hybrid register).
\textsuperscript{109} Pamborides, supra note 104, at 11.
\textsuperscript{110} The International Transport Workers’ Federation, available at http://www.itfglobal.org/flags-convenience/sub-page.cfm (last visited February 2, 2007). The International Transport Workers’ Federation (ITF) is an international trade union federation of transport workers’ unions, including those in the maritime industry. It has launched a worldwide campaign against the use by ship owners of flags of convenience to escape from national laws and national unions. See also Pamborides, supra note 104, at 13 (As one commentator has put it, the International Transport Workers’ Federation “has openly declared war on the system of [flags of convenience] and vouched to fight it by every means available.”).
\textsuperscript{111} BOLESŁAW ADAM BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY 2 (1962) (Although published in 1962, the author’s historical account and analysis of the flags of convenience remains valid today).
(1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens.

(2) Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted.

(3) Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given.

(4) The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments.

(5) Manning of ships by non-nationals is freely permitted.

(6) The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves. \footnote{The Report of the Committee of Inquiry into Shipping (1970), London, H.M.S.O. 197 Cmnd 4337. See also Pamborides, supra note 104, at 10.}

The criteria laid out in the Rochdale Report points to the developing world countries as the ideal location for flags of convenience. \footnote{See Robert Rienow, Test of the Nationality of a Merchant Vessel 25 (1937) (Scholars trace the modern period of the use of flags of convenience to the United States prohibition period of the 1920, when several United States flagged ships were registered in Panama to avoid the law against selling alcohol on United States flagged ships). Since 1977, the Panamanian Registry has been operating from New York. See Panamanian Consulate Houston, Texas web site available at http://www.conphouston.com/maritime_registry.html (last viewed February 12, 2007).} It should not come as a surprise then that the most popular flag of convenience states include: Panama (6,302 ships registered), Liberia (1,553 ships registered), Bahamas
(1,297 ships registered), St. Vincent & the Grenadines (1,219 ships registered), 
Honduras (1,143 ships registered), and Belize (1,040 ships registered).\textsuperscript{116}

Critics of open registry argue that ship owners migrate toward flag of 
convenience states because of lower or no taxes, low labor cost, lax labor 
standards, and loose environmental and safety regulations.\textsuperscript{117} Political 
considerations as well as a desire to mask criminal activity are also suggested as 
possible motives for using flags of convenience.\textsuperscript{118} Unscrupulous individuals 
have taken advantage of flags of convenience’s loose regulations to smuggle 
narcotics.\textsuperscript{119} There is a fear that al-Qaeda will use flags of convenience ships to 
commit terrorist acts at sea against United States’ interests.\textsuperscript{120}

Flag of convenience states also have their supporters. Proponents argue 
that consumers are the beneficiaries, because lower shipping costs translate into 
lower prices for consumer goods.\textsuperscript{121} Additionally, proponents suggest there is a 
symbiotic relationship between flag of convenience states and ship owners.\textsuperscript{122} The flag of convenience states earn income and international prestige, while ship 
owners and their corporate clients earned more profits, which benefit both 
parties.\textsuperscript{123}

B. Genuine Link

The International Transport Workers’ Federation, probably the most 
vocal opponent of flags of convenience, argues that because there is no “genuine 
link” between the merchant ship’s actual owner and the ship’s nationality, (i.e. 
flag state) open registry states fail to enforce labor standards and adhere to

\textsuperscript{116} International Transport Workers’ Federation, Campaign Against Flags of Convenience and Substandard Shipping Annual Report 8 (2004) available at http://www.itfglobal.org/files/seealsodocs/1324/FOCREPORT.pdf (The web site has an exhaustive list of all the states considered flags of convenience by the International Transport Workers’ Federation). \textit{See also}, Anderson III, supra note 82, at 155 (putting the amount of ships registered under the Panamanian flag at 1800 ships. It should be noted however, that Anderson’s figures are at least ten years old).

\textsuperscript{117} See Becker, supra note 37, at 143; \textit{See also} Syrigos, supra, note 94, at 152.

\textsuperscript{118} See Jeremy Firestone and James Corbett, Maritime Transportation: A Third Way For Port And Environmental Security, 9 WIDENER L. SYMP. J. 419, 420 (2003). \textit{See also} Becker, supra note 37, at 142–143; Matlin, supra note 83, at 1049 (Ships flying under flags of convenience have been implicated in the drug traffic trade).

\textsuperscript{119} See Matlin, supra note 83 at, 1049-1050.

\textsuperscript{120} See Robinson, supra note 8.

\textsuperscript{121} See Matlin, supra note 83, at 1044.

\textsuperscript{122} See Anderson III, supra note 82, at 159.

\textsuperscript{123} Id.
international standards.124 Both the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention require a genuine link between the flagging state and a ship that flies its flag.125 But, what exactly is meant by a “genuine link” and how does it work? To answer that question, one must first examine the origin of the principle. The genuine link principle was first articulated in 1955 by the International Court of Justice in the Nottebohm Case (Liechtenstein v. Guatemala).126

1. The Nottebohm Case

In the Nottebohm case, the Court had to decide whether Liechtenstein, which had granted citizenship to Mr. Frederic Nottebohm, a German citizen who resided and operated a business in Guatemala for thirty-four years, could make a claim on behalf of Mr. Nottebohm against Guatemala for seizing his property without just compensation.127 Mr. Nottebohm resided permanently in Guatemala from 1905 until March 1939 before applying for and being granted citizenship by the Principality of Liechtenstein in October 1939.128 Upon leaving Guatemala in March or April 1939, Mr. Nottebohm executed a power of attorney for the continued operation of his business.129 Mr. Nottebohm submitted his naturalization application to Liechtenstein authorities just over a month after the start of World War II.130

In possession of his Liechtenstein passport, Mr. Nottebohm returned to Guatemala in early 1940 and resumed his prior business activities.131 Sometime in 1943, Guatemala enacted a war measure that resulted in the deportation of Mr. Nottebohm and seizure of his property.132 In response to the seizure, Liechtenstein made a claim against Guatemala for the seizure of the property of a Liechtenstein citizen contrary to international law.133 Guatemala countered that Liechtenstein’s granting of citizenship to Mr. Nottebohm was contrary to the generally recognized principle of nationality under international law.134

124 See International Transport Workers’ Federation, supra note 118.
125 See Convention on the High Seas, supra note 20, Art. 5; LOSC, supra note 21, Art. 91.
128 Liechtenstein v. Guatemala, supra, note 128 at 8.
129 Id. (Mr. Nottebohm spent most of his time in Guatemala during the 34 year period (1905-1939), leaving only for business and vacation trips).
130 Id.
131 Id. at 16.
132 Id. at 18 (Guatemala had passed a law to confiscate property from individuals who were believed to be Nazi sympathizers).
133 Id. at 6-7.
134 Id. at 11.
In establishing the “genuine link” principle, at least when applied to individuals, the International Court of Justice went on to hold that “[n]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.” The International Court of Justice by a vote of eleven to three dismissed Liechtenstein’s claim ruling that the connection (i.e. link) between Mr. Nottebohm and Guatemala was strong, as evidenced by his thirty-four years of residence and business activity, while his link with Liechtenstein was extremely tenuous. Therefore, Guatemala was not required under international law to recognize Liechtenstein’s naturalization of Mr. Nottebohm. From the Nottebohm decision, the rule developed that a state is not required to recognize the nationality of an individual if there is no genuine link between the individual and the granting state. It is because of the Nottebohm decision that the “genuine link” concept found its way into both the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention.

2. Historical Background on 1958 Convention on the High Seas and the Effects of the Nottebohm Case

At the London Conference in 1956, where members of the International Law Commission (Commission) had gathered at its Eighth Session to prepare its report and recommendations on the proposed Convention on the High Seas, delegates from the Netherlands, representing the interests of seamen unions and ship owners, were the leading opponents of flags of convenience. In representing those interests, the Netherlands proposed to the Commission that it adopt the genuine link principle from the Nottebohm case. This was not the first time, however, that the Netherlands brought up the idea of tying the genuine link to the granting of nationality to ships.

In its 1955 official comments to the Special Rapporteur on the Regime of the High Seas, the Netherlands Government proposed replacing the draft Article 5 with two new provisions, Article 5a and 5b. The Netherlands’ proposed Article 5a read: “Each State may fix the conditions for the registration of ships in its territory and the right to fly its flags. Nevertheless, for purposes

135 Id at 23.
136 Id. at 24; Pamborides, supra note 104, at 2.
137 See Liechtenstein v. Guatemala, supra, note 128, at 26; Pamborides, supra note 104, at 2.
138 See Boczek, supra note 113, at 116.
139 See McConnell, supra note 105, at 369; Pamborides, supra note 104, at 3.
140 See Boczek, supra note 113, at 72.
141 Id. at 119.
142 Id. at 20.
of recognition of the national character of the ship by other States, there must exist a genuine connexion between the State and the ship.”143

In justifying its proposal, the Netherlands government acknowledged that it would be too difficult to prescribe a detailed set of rules on the granting of nationality to ships, thus the article should “merely state the principle that there must be a genuine connexion between the ship and the State.”144

Although the United Kingdom did not reference the genuine link principle in its comment to the Special Rapporteur’s report, like the Netherlands position, it called for effective jurisdiction and control by the flag state.145 In his report, the Special Rapporteur recommended that the International Law Commission evaluate the Netherlands and United Kingdom view.146

At the Eighth Session, the International Law Commission’s draft of Article 5, which was renumbered Article 29, contained a Netherlands’ backed reference to a genuine link.147 With a few minor edits, the Commission incorporated the Netherlands’ genuine link language in toto.148 Opponents such as France and Guatemala were of the opinion that the genuine link principle from the Nottebohm case was inapplicable to ships.149 The International Law Commission shared the Netherlands and other states’ concerns with the problems of flags of convenience, but could not get enough support for the proposed genuine link language and was forced to compromise, weakening the language, rather than not having any criteria at all.150 The Commission justified its position by noting in its commentary that:

“While leaving States a wide latitude in [determining the nature of the genuine link], the Commission wished to make it clear that the grant of

143 Id. (The proposed Article 5b is not relevant to this discussion.) (emphasis added).
144 Id. at 21.
145 Id.
146 Id. Although the Special Rapporteur recommended the International Law Commission evaluate the Netherlands and United Kingdom viewpoints, he reserved judgment on Article 5. Id at 22.
147 Id. at 28.
148 Id.
149 See Boczek, supra note 113, at 120-123. (arguing against the application by analogy of Nottebohm to ships because that decision was based on attributes of individual, which are not easily transferred over to inanimate object, such as ships).
150 H. GARY KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS (1976-1977) 396-398 (1976) (The Commission abandoned its original position on Article 5 because it could not achieve the criteria it had set for itself--namely a regulation that would solve the flags of convenience problem. It also did not try to define “genuine link” because the laws of the traditional maritime states were too divergent to create an internationally accepted definition). See also Law of the Sea Commentary, supra note 79, at 104-105.
its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possesses a real link with its new State. The jurisdiction of the State over ships, and the control it should exercise . . . , can only be effective where there exists in fact a relationship between the State and the ship other than mere registration or the mere grant of a certificate of registry.”

In the final version of Article 5 the requirement for a genuine link between the state and the ship was kept, but the reference to the phrase “national character of the ship” was dropped and replaced with “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” The inclusion for a genuine link requirement in the 1958 Convention of the High Seas, at least on paper, appears to repudiate, or at a minimum weaken, the unfettered discretion of states to prescribe liberal rules for the granting of its nationality to ships as espoused in the *Muscat Dhows* and *Lauritzen* cases. Conversely, the genuine link principle has been severely criticized as anti-business, pro-union, ambiguous, thereby lacking precision.

3. **The Genuine Link: ICJ Advisory Opinion**

The failure of the 1958 Convention of the High Seas to produce an authoritative genuine link definition did not deter flags of convenience opponents from using other legal maneuvers to tie ships nationality to the *Nottebohm* genuine link test. The Inter-Governmental Maritime Consultative Organization (IMCO), the predecessor to the IMO, asked the International Court of Justice for an advisory opinion on the meaning of Article 28(a) of the approved Article 5 of the 1958 Convention on the High Seas. See supra note 82 for the full text of the (30 states voted against, including the United States, 15 states voted in favor, and 17 states abstained, against the provision which would have given states the authority to withhold recognizing a ship’s nationality if they believed that there was no genuine link between the purported flag state and the ship).

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151 Law of the Sea Commentary, supra note 79 at 104-105 (citing Report of the International Law Commission covering the work of its Eighth Session (A/3159), Article 29 Commentary, para. (3) at 2790). See also Knight, supra note 152, at 396.
152 Law of the Sea Commentary, supra note 79 at 104-105. See supra note 82 for the full text of the approved Article 5 of the 1958 Convention on the High Seas. See also Knight, supra note 152 at 402. (30 states voted against, including the United States, 15 states voted in favor, and 17 states abstained, against the provision which would have given states the authority to withhold recognizing a ship’s nationality if they believed that there was no genuine link between the purported flag state and the ship).
153 See Bowett, supra note 47, at 56; Matlin, supra note 83 at 1033; Pamborides, supra note 104, at 3-4.
154 See Bowett, supra note 47, at 56-58. See also Knight, supra note 152, at 400.
155 See McConnell, supra note 105, at 377; Pamborides, supra note 104, at 5-6.
156 The IMO, established in 1948 and based in Great Britain, is a specialized agency of the United Nations with 167 Member States and three Associate Members. Its primary mission is to develop and maintain a comprehensive regulatory framework for shipping, including safety, environmental concerns, legal matters, technical cooperation, maritime security and the efficiency of shipping. See also International Maritime Organization, http://www.imo.org.
The IMCO sought to have two flag of convenience states, Liberia and Panama, excluded from gaining seats on the influential Maritime Safety Committee, which was open to the eight largest ship owning States. France, Norway, the Netherlands and the United Kingdom asked the Court to apply the *Nottebohm* genuine link test to determine if Liberia and Panama are legitimate ship owning states.

In its 1960 advisory opinion, the Court refused to apply the *Nottebohm* genuine link test and instead held that the determination of the largest ship owning states only depends upon the tonnage registered in the flag state. In arriving at its decision, the Court resorted to traditional treaty interpretation and did not conduct an analysis on whether the ships registered by Liberia and Panama met the requirements of Article 5 of the 1958 Convention on the High Seas.

In judging the effects of the Advisory Opinion, some commentators suggest that the genuine link test is either dead or existing only on life support. Others believe that the opinion has limited applicability, because it was based on a straightforward treaty interpretation. One legal commentator believes it would be a mistake to apply any juridical effect to the Court’s advisory opinion, although the advisory opinion may have some effect on the psyche of the opponents of flags of convenience. As will be discussed in detail, every attempt to give teeth to the genuine link provision has met with frustration and disappointment.

4. The Genuine Link Test under the 1982 Law of the Sea Convention

The campaign to remove the ambiguity from the genuine link test did not fare much better under the Law of the Sea Convention. In fact, arguably the Law of the Sea Convention only weakened the genuine link test by leaving it to the sole discretion of the flag state to determine the amount of control it will exercise.

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158 *Id.* (Article 28(a) provides the criteria for the selection of states to the Maritime Safety Committee).
159 *Id.;* see McConnell, *supra* note 105, at 377; Pamborides, *supra* note 104, at 5-6.
Like its predecessor, the Law of the Sea Convention failed to reach a consensus on the meaning of the term “genuine link.”\(^{165}\) Article 91, “Nationality of Ships” of the Law of the Sea Convention is an identical replica of Article 5 of the 1958 Convention on the High Seas, with one modification.\(^{166}\) A portion of the third sentence in Article 5, which reads “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag,” was deleted from the LOSC Article 91 version.\(^{167}\) The deleted language was subsequently inserted in LOSC Article 94 in the section, which outlines the flag state’s duties.\(^{168}\) Some in the legal community have argued that the decoupling of the genuine link language and the phrase “in particular . . .” preserved the ambiguity that existed in Article 5 of the Convention on the High Seas.\(^{169}\) If so, perhaps the genuine link provision is devoid of any meaning.

In the 1999 \(M/V\) Saiga case,\(^{170}\) the International Tribunal for the Law of the Sea addressed for the first time the legal significance of the term “genuine link” as it is used in LOSC Article 91.\(^{171}\) The \(M/V\) Saiga was registered in St. Vincent and the Grenadines (flag state), owned by a Cyprus company, managed by a Scottish company, and chartered to a Swiss company.\(^{172}\) The master and crew were nationals of the Ukraine.\(^{173}\) On October 27, 1997, \(M/V\) Saiga, an oil tanker serving as a refueling vessel off the coast of West Africa, supplied gas oil to three fishing vessels operating in the Guinean exclusive economic zone (EEZ).\(^{174}\) The refueling occurred within Guinea's EEZ about 22 miles off the Guinea’s island of Alcatraz.\(^{175}\) The next day, October 28, Guinean patrol boats

165 See McConnell, supra note 105, at 382; Pamborides, supra note 104, at 5-6.
166 See McConnell, supra note 105, at 380-381.
167 Id. See Nandan ET AL., supra note 79, at 105-107 (indicating that the Article 5 language was included verbatim in the working papers at the second session in 1974 but was modified at the third session in 1975).
168 See McConnell, supra note 105, at 380-381.
169 See Id. (arguing that although Article 94 list the duties of flag states, it does not have an enforcement mechanism for violations, and that despite the new increased flag state obligations, Article 94 does nothing to help define the genuine link requirement). See also Pamborides, supra note 104, at 7.
172 M/V Saiga (No. 2), supra note 172, at para. 31 (The facts are summarized in paragraphs 31-39 of the Judgment).
173 Id.
174 Id. at para. 32.
175 Id.
fired on, boarded, and seized the *M/V Saiga* off the coast of Sierra Leone, beyond the southern limit of Guinea's EEZ.\(^{176}\)

St. Vincent and the Grenadines filed an action against Guinea with the International Tribunal for the Law of the Sea (ITLOS), alleging among other things, that Guinea wrongfully interfered with the freedom of navigation of one of its flagged ships while in international waters.\(^{177}\) Guinea countered that there was no “genuine link” between the *Saiga* and St. Vincent and the Grenadines and therefore, it was not required to recognize the Vincentian nationality of *M/V Saiga*.\(^{178}\)

In rejecting Guinea’s argument, the Tribunal held that the requirement for a “genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.”\(^{179}\)

The Tribunal’s decision appears to vindicate Professor Boczek, who articulated in his pioneering treatise on flags of convenience that the *Nottebohm* genuine link test was limited to individuals and not to the relationship between a flag state and its ships.\(^{180}\) Under *Nottebohm*, states do not have to respect the grant of nationality to an individual if there is no genuine connection between the granting state and the individual; however, under *M/V Saiga (No. 2)*, states are not supposed to rely on the apparent lack of a genuine link to challenge the validity of a ship’s registration.\(^{181}\)

5. **United Nations Convention on Conditions for Registration of Ships**

The most recent attempt to define “genuine link” is the 1986 United Nations Convention on Conditions for Registration of Ships.\(^{182}\) The convention, opened for signature in May 1986, currently has fourteen parties, twenty-six shy of the number necessary for it to come into force.\(^{183}\) None of the fourteen

\(^{176}\) Id. at para. 33-34. (Two crew members were injured from gunshot wounds. The ship was brought to Guinea, where the ship and crew were detained, the cargo of gas oil was removed, and the master was prosecuted for customs violations).

\(^{177}\) Id. at para. 29.

\(^{178}\) Id. at para. 75.

\(^{179}\) Id. at para. 83.

\(^{180}\) See Boczek, *supra* note 113, at 122-123 (indicating that the Harvard Law School drafters of the draft convention on international responsibility had difficulties extending the *Nottebohm* genuine link test to corporations).

\(^{181}\) Id. at 116-117. *See also* *M/V Saiga (No. 2)*, *supra* note 172, at para. 83.


\(^{183}\) Id.
parties includes any of the flag of convenience states. The convention purported to define for the first time, the requisite elements necessary to satisfy the genuine link requirement.

Articles 8, 9, and 10 are the heart and soul of the convention, because they establish the economic link between the flag state and the ships. Under the language of the 1986 Convention, a genuine link will exist if: (1) flag state nationals are included in the ship ownership; (2) the ship is manned by flag state nationals; or (3) flag state nationals are involved in the management of the ship. Because of the low number of parties, it is unlikely that the convention will have any impact on the registration of ships with flags of convenience. The failure to give teeth to the genuine link provision returns things to the status quo. Ships continue to be flagged by states in which there are little to no genuine link.

C. Analysis

Contrary to the intent of LOSC Article 91, not all flag states are equal. Flag of convenience states are more concerned with the number and tonnage of ships registered, which has a corresponding economic benefit to the state than they are concerned with the well-being of the masters and the condition of the ships.

The lack of a genuine link between the flag state and the ship, as Professor Captain Gold aptly stated, leaves the master to fend for himself if he gets into trouble. Professor Captain Gold cites two cases involving M/V Erika and M/V Prestige, in which the masters were imprisoned by coastal states for oil pollution that occurred while the ships were in international waters. In both cases, the ships were registered to flag of convenience states, Malta and the Bahamas, respectively. In both cases, the flag states failed to come to the

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184 Id.
189 Id. at 4.
190 Id. at 4–7.
191 Id.
assistance of the masters or exercise any flag state jurisdiction. Such abdication of flag state protections exposes the master to criminal liability if the ship is involved in any unlawful activity or if he allows any illegal activity onboard the ship. This lack of control by flag of convenience states is further indicia of the master’s inherent authority over the operation of the ship, which includes giving consent for others to board and search the ship.

The lack of a genuine link between the flag of convenience states and the ships that fly under their flags provide very little incentive for these states to cooperate with interdicting states, such as the United States. The fact that some states are currently cooperating is not dispositive. A review of the Proliferation Security Initiative (PSI) boarding agreements with flag of convenience states reveals that the agreements are not necessarily such good deals for the United States. For example, some of the PSI boarding agreements do not allow for unilateral boardings. Instead, the United States is required to seek permission on individual cases upon a showing of good cause. On the other hand, a boarding premised upon master’s consent is less complicated. The master either consents or not; a showing of good cause is not required.

This paper does not argue or suggest that a master’s consent is superior to that of the flag state. To the contrary, it argues that in the absence of specific directions from the flag state, the master has the inherent authority to consent to the boarding and searching of his ship. It also does not challenge the universally accepted and recognized principle of the exclusive authority of the flag state.

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192 Id.
193 Harrington, supra note 96, at 136 (suggesting that flags of convenience states have little incentive to ensure compliance with international rules and regulation).
194 See supra note 98 and accompanying text.
195 Becker, supra note 37, at 162. The boarding agreements can be lumped into two groups. In the first group, represented by Croatia and Cyprus, there is no implied state consent to board if the flag state has not responded within a certain time limit. In the second group represented by Belize, Liberia, the Marshall Islands, and Panama, if there is no response from the flag state within a certain time period (two to four hours) consent to board is presumed. See Syrigos, supra, note 94, at 191-192. See also Murphy, supra note 47, at 351.
196 Becker, supra note 37, at 162 (arguing that PSI boarding agreements lacks the formal authorization process, including a uniform definition of ‘good cause’ which can cause potential problems).
197 See Commander’s Handbook on the Law of Naval Operations, supra note 15, § 3.11.2.5.2.
198 See infra notes 360-371 and accompanying text (discussing the relationship between the flag state and the master).
199 Meyers, supra note 68, at 52 (noting that exclusive jurisdiction of flag states was widely accepted by the states present at the 1958 Conference on the Law of the Sea). The provision on exclusive flag state jurisdiction (Article 6) received the unanimous votes of all 51 members of the Second Committee and 61 votes in favor, zero against, and two abstentions in the Plenary Meeting. Id. In commenting on the jurisdiction of a flag state, McDougal and Burke state that “It is of course unquestioned practice that the state which is responsible for a ship’s conformity with international
The recognition and continued existence of master’s consent is crucial as a valid alternative where flag state consent is not possible or practical. For example, the lack of a genuine link between flag of convenience states and ships under their registry may cause such states to turn a blind eye not only to safety issues, but also to evidence of illegal activities by ship owners.\textsuperscript{200} It is therefore, the masters, under these conditions, who are in the best position to ensure their ships are not being used for illegal activities.\textsuperscript{201} Of course, if the masters are complicit in the illegal activity on board the ship, one would expect them to refuse to acquiesce to the search of their ship by a foreign warship. However, there are three possible reasons why a complicit master would consent to the boarding and searching of his ship.

First, the master may fear that his refusal will lead to reasonable suspicion that he is engaged in criminal behavior, which would lead to his detention while flag consent is being requested.\textsuperscript{202} For instance, criminal suspects in the United States, who have contrabands in their automobiles, routinely consent to the search of their automobiles by the police when pulled over for traffic infractions.\textsuperscript{203} Second, by consenting the master may later use the fact of the consent as proof that he was unaware of the criminal conduct.\textsuperscript{204} Third, a complicit master may consent in the hope that the search will not find the hidden contraband and the master will be credited as cooperating in the fight against international terrorism.\textsuperscript{205}

\footnotesize

\textsuperscript{200} See McDougal & Burke, \textit{supra} note 70, at 1066. The PSI partners practice this precise scenario in the PSI exercise, Sea Saber, that took place in the Arabian Sea in January 2004. See Syrigos, \textit{supra} note 94, at 190. As part of the scenario, the targeted ship master refused to give consent to board his ship. The PSI partners then sought and received consent from the flag state and boarded the ship notwithstanding the master’s refusal. \textit{Id.}

\textsuperscript{201} This of course assumes that the flag state has not given instructions to the contrary. \textit{See supra} notes 201-203 and accompanying text.


\textsuperscript{203} I recognize there is a difference between a police traffic stop and an interdiction on the high seas, but the analogy is nevertheless relevant to explain why a ship master may consent to the searching of his ship. \textit{See generally} United States v. Rodriguez, 60 M.J. 239, 248 (C.A.A.F. 2004) (After being stopped on an interstate highway for a common traffic infraction, the defendant gave a Maryland State trooper a written consent to search of his car); Yale v. Louisiana, 399 U.S. 30, 35 (1970)(recognized the validity of consent searches); Katz v. United States, 389 U.S. 347 (1967).

\textsuperscript{204} Anderson, \textit{supra} note 204, at 31-32.

\textsuperscript{205} \textit{See e.g., Logan, supra note 69, at 253 (In the M/V So San interdiction, discussed infra notes 247–249 and accompanying text, missiles were hidden underneath 40,000 stacks of cement).}
IV. BOARDING OF SHIPS ON THE HIGH SEAS

It is well settled in international law that no state may claim sovereignty over the high seas. This principle is firmly rooted in both customary international and treaty laws as reflected in LOSC Articles 89 and 87. The general rule concerning the conduct of ships on the high seas is governed by LOSC Article 92. Paragraph 1 of Article 92 provides in part: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”

The effect of LOSC Article 92 is that other states and, more specifically, foreign warships are prohibited from interfering with the ships navigating on the high seas. Interference with ships on the high seas violates the sovereign rights of the flag state unless such interference is authorized by the

207 Id. at 24-26. The historical basis that gave rise to customary international law is discussed at length in Part V.
208 LOSC, supra note 21, Article 89 (“No State may validly purport to subject any part of the high seas to its sovereignty.”).
209 Full text of Article 87 (Freedom of the High Seas) reads:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

210 LOSC, supra note 21, Art. 92.
211 Id.
212 Syrigos, supra note 94, at 152.
flag state or is otherwise permitted by international law.\textsuperscript{213} Like most rules, inevitably, there are exceptions, and LOSC Article 92 “flag state exclusive jurisdiction” is not absolute.\textsuperscript{214} These exceptions are based on customary practices and treaties developed over the centuries.\textsuperscript{215}

A. Peacetime and Wartime High Seas Boarding\textsuperscript{216}

The exceptions to the flag state exclusivity are grouped into two categories: the “right of visit and search” and the “right of approach and visit,” also known as the “right of visit.”\textsuperscript{217} These two concepts are separate and distinct.\textsuperscript{218}

1. The Right of Visit and Search

The concept of “visit and search” dates back to the 14\textsuperscript{th} century and is widely accepted as a customary norm of international law.\textsuperscript{219} The famous

\textsuperscript{213} Exceptions to the exclusive jurisdiction of a flag state are based on both customary international and treaty law. See Robert C. F. Reuland, \textit{Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction}, 22 VAND. J. TRANSNAT’L L. 1161, 1167-1168 (1989); 2 HALLECK, \textit{INTERNATIONAL LAW} 239 (S. Baker 3d ed., 1993) (Halleck wrote over 100 years ago that “to justify [interference] it must be shown that the particular case comes clearly within the exceptions to this rule [of exclusivity of flag state jurisdiction], which have been established by the positive law of nations, or by treaty stipulations between the parties.”); see also LOSC, supra note 21, Art. 97, 92, and 110.

\textsuperscript{214} LOSC, supra note 21, Art. 110.

\textsuperscript{215} See Shulman, supra note 72, at 803 (explaining the importance of the exceptions to highlight the fact that throughout the history of maritime commerce, boarding of foreign ship without legal authority could be considered an act of war and did in fact lead to a few skirmishes).

\textsuperscript{216} These provisions do not apply where the foreign flag vessel is a warship or other government vessel. A warship or other ship owned or operated by a country and used only for government non-commercial purposes enjoys complete immunity from interference from other nations. LOSC, supra note 21, Art. 32 and Art. 110. See also, Restatement (Third), supra note 22, § 522.

\textsuperscript{217} See e.g., Syrigos, supra note 94, at 154; Anna Van Zwanenberg, \textit{Interference with Ships on the High Seas}, 10 INT’L & COMP. L.Q. 785, 786-793 (1961). Article 110 uses the term “right of visit”, LOSC, supra note 21, Art. 110.

\textsuperscript{218} See Joseph Lohengrin Frascona, \textit{Visit, Search, and Seizure on the High Seas} 22-23 (1938). See also A. Shearer, \textit{Problems of Jurisdiction and Law Enforcement against Delinquent Vessels}, in \textit{THE LAW OF THE SEA} 320 (Hugo Caminos ed., 2001) (In the nineteenth century the only recognized peacetime restrictions to freedom of the seas were jurisdiction over pirates, jurisdiction over a flag state’s own ships, and the right of approach and visit for the purpose of verifying a ship’s flag).

\textsuperscript{219} Frascona, supra note 220, at 51 (finding the legal status of the right of “visit and search” has not faced any serious challenges over the centuries nor denied by any state). In a March 28, 1855 letter to the Spanish Foreign Minister complaining about the boarding of an American ship, the \textit{El Dorado}, on the high seas by a Spanish cruiser, Secretary of State William Marcy conveyed that the right of visit and search was not a unique American doctrine and that “it has the sanction of the soundest expositors of international law.” See 2 JOHN BASSETT MOORE, \textit{A DIGEST OF INTERNATIONAL LAW} 890-891 (1906) (The Secretary of the Navy subsequently gave the order for the Navy to protect United States flagged ships from visit and searches on the high seas).
nineteenth century English jurist Lord Stowell is credited with the judicial recognition of the concept in the *Le Louis* case. The right of “visit and search” is strictly a wartime tool. It allows a belligerent warship to stop and search a merchant ship on the high seas to determine whether it is engaged in the war efforts for the other side.

2. The Right of Approach and Visit

Customary international law has long recognized the right of “approach and visit.” The doctrine became part of the American jurisprudence in the nineteenth century prize case, *The Marianna Floria*. In that case, Justice Story writing for the United States Supreme Court stated:

“Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of

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220 See 2 Moore, supra note 221, at 886 (“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. No nation can exercise a right of visitation and search upon the common and unappropriate parts of the sea, save only on the belligerent claim.”), citing *Le Louis*, 2 Dodson 210, 245 (1858); McDougal & Burke, supra note 70, at 798. See also 4 Whiteman, supra note 29, at 670; Zwanenberg, supra note 219, at 786-792.

221 See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA §118 (Louise Doswald-Beck ed., 1995). See also Frascona, supra note 220 at 49. 4 Whiteman, supra note 29, at 670.

222 See Frascona, supra note 220 at 49. See also Zwanenberg, supra note 219, at 791-793; Commander’s Handbook, supra note 15, § 7.6; Reuland, supra note 215, at 1171.

223 See 2 C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA, 311 (6th rev. ed. 1967) (The right of approach and visit (“enquête du verification du pavillon or reconnaissance is a right conferred on war ships of all nations by international maritime usage.”). See also Commander’s Handbook, supra note 15, at 3-4. The British use the term “Right of Approach” vice “Right of Visit,” however, there is no legal significance between the two terms. The doctrine was recognized by the United Kingdom in an 1858 statement by Lord Lyndhurst in reference to the Fur Seal Arbitration. See Zwanenberg, supra note 219, at 792. In doing so, the British Government discarded its practice of conducting visit and search during peacetime. Id.

224 The Marianna Floria 24 U.S. 1 (1826). See also 2 O’Connell, supra note 84 at 802-803 (Although the right of approach and visit has been recognized in international law text for a long time, the traditional rule was that if a warship approaches a foreign merchant ship, it did so at its own peril. In fact, the United States Naval ship, the *Alligator*, was fired upon by the *Marianna Flora* during an approach and visit). See McDougal & Burke, supra note 70, at 887-893.
ascertaining their real characters. Such a right seems indispensable
for the fair and discreet exercise of their authority . . . .”225

Under this customary rule, foreign warships may approach a ship on
the high seas in order to verify the ship’s identity and nationality.226  LOSC
Article 110 is the treaty version of the customary right of “approach and
visit.”227  Unlike the concept of “visit and search,” the right of “approach and
visit” is a peacetime tool.228

B.  Peacetime High Seas Boarding Exceptions

Consistent with the customary international norm of the right of
“approach and visit” and LOSC Article 110, a foreign warship, in peacetime,
may not only exercise the right to “approach and visit” foreign merchant ships
on the high seas, but may also board and possibly seize these vessels without
flag state consent in the following five situations.229

1.  Piracy Exception

The first exception to the exclusiveness of flag state jurisdiction is the
right of foreign warships to stop and board a foreign flagged ship provided there
are reasonable grounds for suspecting that the ship is engaged in piracy.230 The
crime of piracy occurs when the crew or passengers of a private ship commit
any illegal act of violence, detention or raid for private ends on the high seas
against another ship or person or property on board.231  The consent of the
flagged state is not required because piracy is considered a universal crime, thus

225  Marianna Floria, 24 U.S. at 20. See also Zwanenberg, supra note 219, at 792.
226  Frascona, supra note 220, at 23 (“[t]he right of visit is the right solely to inspect the papers and
credentials of the visited vessel to determine the nationality, character, contents, nature, and
respective destinations of the vessel and cargo.”). See also I. BROWNLIE, PRINCIPLES OF PUBLIC
INTERNATIONAL LAW 247 (3d ed., 1979); Zwanenberg, supra note 219, at 792; Reuland, supra note
215, at 1170.
227  See United States v. Williams, 617 F.2.d 1063, 1076 (5th Cir. 1980) (The right of approach and
visit in Article 22 of the 1958 Convention on the High Seas [predecessor to Article 110 of LOSC] is
a codification of the international maritime common law.); Zwanenberg, supra note 219, at 792
(Article 22 of the 1958 Convention of the High Seas was an adaptation general accepted principle of
international law). See also Anderson, supra note 204, at 341.
228  4 Whiteman, supra note 29, at 670; see also, Commander’s Handbook, supra note 15, at 3-4.
229  See Shearer, supra note 220, at 443-444; 2 O’Connell, supra note 84, at 801-802; LOSC, supra
note 21, Art. 110.
230  LOSC, supra note 21, Art. 110. These provisions do not apply where the foreign flag vessel is a
warship or other government vessel.
231  See LOSC, supra note 21, Art. 101. A pirate has also been described as one without legal
authority that attacks a ship on the high seas with the intention to steal its contents. See 2 Moore,
supra note 221, at 953. See also 1 L. OPPENHEIM, INTERNATIONAL LAW 608-609 (Hersch
subject to the jurisdiction of all states. A ship found to be engaged in piracy may be seized and the suspects arrested and brought to justice in any state. The suppression of piracy on the high seas under LOSC Article 105 is a codification of a customary international norm.

2. Transportation of Slavery Exception

The second exception applies to the suppression of slavery. Similar to piracy, the slave trade is a universal crime, and all states have a legal obligation under both customary and treaty laws to prevent and punish the transportation of slaves on the high seas. However, unlike piracy, once a foreign warship boards and finds evidence of slavery, it does not have the legal authority to seize the ship or arrest its crew. Its only option is to notify the flag state, which has the sole authority to affect a seizure and arrest.

3. Unauthorized Broadcasting Exception

Thirdly, a foreign warship may stop and board a ship where there are reasonable grounds to suspect that the ship is engaged in unauthorized broadcasting. This may be seen as a peculiar exception, but the prevalence of the practice in the 1960s of ships positioning themselves just outside the legal reach of coastal states, particularly in Europe, and broadcasting for profit without a license led to its inclusion into the 1982 Law of the Sea Convention. Under this exception, both the flag state and the states subject to the unauthorized broadcasting can arrest and prosecute the violators.

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232 See 2 Colombos, supra note 225, at 444; 2 O’Connell, supra note 84, at 967; Smith, supra note 66, at 50 (“By the ancient custom of the sea, all honest men are entitled to treat the pirate as an outlaw, an Ishmaelite, and a general enemy of mankind.”). See also Reuland, supra note 215, at 1177, (citing 1 W. WYNNE, THE LIFE OF SIR LEOLINE JENKINS, 86 (1724)).

233 LOSC, supra note 21, Art. 105. See also 2 Moore, supra note 221, at 952 (“Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessel of any particular state, and brought within its territorial jurisdiction, for trial in its tribunals.”); Churchill and Lowe, supra note 32, at 209-211.


235 LOSC, supra note 21, Art. 110.

236 LOSC, supra note 21, Art. 99. See also Churchill and Lowe, supra note 32, at 212.

237 See 2 Moore, supra note 221, at 952 (explaining that during the early 1800s, the international community was unsuccessful in its attempts to make the slave trade an international crime like piracy, where each state would be authority to seize the slave ship and prosecute its crew). See also McDougal & Burke, supra note 70, at 1086-1087.

238 See Syrigos, supra note 94, at 157.

239 LOSC, supra note 21, Art. 110.

240 See, e.g., 2 O’Connell, supra note 84, at 815. See also Churchill and Lowe, supra note 32, at 211-212; Reuland, supra note 215, at 1224.

241 LOSC, supra note 21, Art. 109. (Article 109(3) lists other potential prosecution jurisdictions including: the state of registry of the installation, the state of which the person is a national, any
4. **Stateless Ship Exception**

The fourth exception of a flagged state’s exclusive jurisdiction applies when the ship is not authorized by any state to fly its flag. Under this condition, the ship is without nationality\(^\text{242}\) and commonly referred to as the “stateless ship.”\(^\text{243}\) Ships become stateless for a number of reasons, including having its registration revoked or using multiple state flags, thereby causing confusion and deception.\(^\text{244}\) As the name suggests, a stateless ship is a ship without nationality and the concomitant protection of a flagged state is absent, thus it may be boarded.\(^\text{245}\) The most recent and widely reported incident of the approach of a stateless vessel occurred in December 2002, when Spanish Naval forces boarded the *So San*, 600 miles off the Yemeni coast in the Indian Ocean.\(^\text{246}\) Spanish forces boarded the merchant ship because there were no visible sign of nationality: the ship was not flying a flag; the markings on the ship’s hull were obscured by paint; the ship refused to respond to repeated hails.

\(^\text{242}\) LOSC, *supra* note 21, Art. 110.
\(^\text{243}\) McDougal & Burke, *supra* note 70, at 1084.
\(^\text{244}\) LOSC, *supra* note 21, Art. 92. *See also* Churchill and Lowe, *supra* note 32, at 213-214I. The following is a non-exhaustive list of factors to be used in determining whether a ship qualifies as stateless: no claim of nationality; multiple claims of nationality (e.g., sailing under two or more flags); contradictory claims or inconsistent indicators of nationality (e.g., master’s claim differs from vessel’s papers and/or homeport does not match nationality of flag); changing flags during a voyage; removable signboards showing different vessel names and/or homeports; absence of anyone admitting to be the master and/or displaying no name, flag or other identifying characteristics; and refusal to claim nationality. *See J. Ashley Roach & Robert W. Smith, International Law Studies, Excessive Maritime Claims 485* (2nd ed. 1994); Commander’s Handbook, *supra* note 15, at 3-25.

\(^\text{245}\) *See McDougal & Burke, supra* note 70, at 1084 (It is commonly accepted that stateless ships are without protection of any flag state and are thus subjected to interference on the high seas). *See also* A. W. Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law*, 13 MAR. L. & COM. 323, 335 (1982); Syrigos, *supra* note 94, at 157-158 (Stateless vessels do not have the same protection of flagged merchant ships on the high seas). * Cf Churchill and Lowe, supra* note 32, at 214 (suggesting that although a ship is without nationality, that in itself does not give states the right to assert and exercise jurisdiction over the ship and crew).

by various means; the ship increased speed while being hailed; and the ship was making evasive maneuvers.  

5. Ships of Visiting State Nationality Exception

The fifth exception applies to ships of the visiting state’s nationality. Ships that although flying another state’s flag, or refusing to respond to hails or signals, are in fact of the same nationality as the warship. Accordingly, such ships will be subjected to the jurisdiction of the warship.

C. U.N. Security Council Resolution Exception

Although not specifically mentioned in LOSC Article 110, merchant vessels may also be stopped and boarded on the high seas, if authorized by a resolution of the United Nations Security Council. Members of the United Nations are required to comply and enforce the decisions of the Security Council. Recent examples of states stopping and searching ships pursuant to Security Council Resolutions include Iraq, Haiti, and Serbia.

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248 LOSC, supra note 21, Art. 110. See also Shearer, supra note 220, at 443-444. See 1 RENÉ-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 420-421 (1991); Nandan, et al., supra note 79, at 244. See also Shearer, supra note 220, at 443-444.

249 See LOSC, supra note 21, Article 110.


251 See U. N. Charter art. 25. It is in the interest of the boarding state to ensure the boarding and inspection is carried out with the minimum amount of interference with the merchant ship’s operation schedule, because it is liable for any loss or damage that may result due to the boarding. See LOSC, supra note 21, Article 110. See generally Certain Expenses of the United Nations (“Certain Expenses case”), 1962 I.C.J. 151 (1951).


254 See S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992) (authorized member states to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the embargo placed on Serbia).
V. ANALYSIS OF A SHIP MASTER’S AUTHORITY TO CONSENT TO BOARDINGS AND SEARCHES OF HIS VESSEL ON THE HIGH SEAS

Boarding based on the consent of a ship’s master can be a very effective and efficient interdiction tool, since it allows for expeditious verification of a ship’s papers, cargo and navigation documents.\footnote{256} An interdiction conducted pursuant to a master’s consent often results in minimal interference with a ship’s mission because the ship generally need only deviate from its base course and speed for brief intervals to permit the boarding process.\footnote{257} Consensual boarding has the advantage of avoiding the frequent lengthy delays associated with conducting boarding pursuant to specific consent from the flag state.\footnote{258}

The United States’ justification that a ship’s master is empowered to consent to the boarding and searching of his merchant ship is articulated in section 3.11.2.5.2 of the Commander’s Handbook on the Law of Naval Operations.\footnote{259} The section entitled “Consensual Boarding,” provides: “[a] consensual boarding is conducted at the invitation of the master . . . of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and

\footnote{256} Commander’s Handbook, supra note 15, at para. 3.11.2.5.2.
\footnote{257} Id. Master’s consent is crucial in situations where, for any number of reasons, flag state consent is difficult to obtain. See Becker, supra note 37, at 177 (acknowledging that a master’s consensual boarding is presumptively suspect without reference to another source of clear legal authority).
\footnote{258} See e.g., United States v. Juda, 46 F.3d 961 (9th Cir. 1995) (holding that it is legally permissible for Coast Guard to detain a foreign ship on the high seas while awaiting flag consent). See Becker supra note 37, at 178:

("Even if the flag state can be contacted directly, this can be a time-consuming and administrative difficult procedure. . . . [T]he failure to receive timely response can be critical; the requesting ship’s authority to pursue and intercept the suspect vessel evaporates if the vessel reaches the territorial waters of a third state before interception can occur.").

\footnote{259} Commander’s Handbook notes:

Although a master may consent to the boarding and searching of his ship, that consent does not allow the assertion of law enforcement authority—such as arrest or seizure. A consensual boarding is not an exercise of maritime law enforcement jurisdiction. It is undisputed that criminal jurisdiction on the high seas remains the sole prerogative of the flag state, subject to a few minor exceptions contained in LOSC Article 92, 97, and 110.

Commander’s Handbook, supra note 15, at para. 3.11.2.5.2; see also Meyers, supra note 68, at 50-52.
includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.²⁶⁰

This section examines the United States’ rationale to determine if this practice can withstand international legal scrutiny.

A. Master’s Consent Based upon Historical Responsibility and Authority

The historical origins and role of a ship’s master supports the legal premise that a master is vested with the authority to consent to the boarding and searching of a ship under his command. Legal commentators, courts, and legislatures have recognized the historical authority masters have in the operation and command of their ships. This authority extends to a master’s ability to consent to the boarding and searching of a ship under his command on the high seas.

1. Origins of a Ship’s Master

The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages.²⁶¹

The historical role of a master has evolved over time to one where it is widely accepted that the master has the ultimate responsibility for the safety of the crew, passengers, cargo and the safe operation of the ship.²⁶² In this capacity, he has the prerogative to invite guests, including foreign law enforcement and military personnel, to come aboard the ship on the high seas.²⁶³

²⁶⁰ Id. (emphasis added).
²⁶² See Commander’s Handbook, supra note 15, at para. 3.11.2.5.2; U.S. DEP’T OF HOMELAND SECURITY, U.S. COAST GUARD INSTRUCTION MANUAL 16247.1D, UNITED STATES COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, para C.2,(Apr. 15, 2005). The International Federation of Shipmasters’ Associations (IFSMA) Policy Document (2005), available at http://www.ifisma.org/ (last visited on Mar. 6, 2007) (supporting idea that it is a well-settled and known fact that a master has the ultimate responsibility for the safe operation of his the ship).
²⁶³ See infra Part V (D).
Initially, the master and ship owner was often the same person. However, sometime during the fifteenth century, the wealthy maritime merchants in such city states as Genoa, Pisa, Florence, and Venice became more interested in politics and the social benefits of living ashore rather than on the ships, as was the general practice of the times. Consequently, the title and position of master was created to carry on the everyday operation of the ship. The delegation of shipboard duties and responsibilities from the wealthy maritime merchants to the master became the universal practice, which out of necessity led to a significant increase in power and responsibility of the master over time and continues to the present.

2. Legal Commentary on a Master’s Inherent Authority

The historical basis of a master’s inherent authority over the operation of the ship is widely accepted and well documented by legal scholars in the maritime shipping industry. The teaching and practice of legal scholars are appropriate secondary sources when interpreting international law. As aptly put by one British legal scholar, Professor Robert Grime, “[a] ship has been likened to a floating state. It is a closed community which must, of necessity, have its own government and rules. . . . The ship’s master is the person with the final responsibility of running the vessel.” Professor Grime further elaborates that despite the codification of the British Shipping laws, the master’s common law powers and authority have not been abolished.

Another British distinguished legal commentator and recognized expert in maritime law, Professor Christopher Hill of the London School of Economics and Political Science, commented on the master’s inherent authority over the ship in modern times. He argues that a master is still viewed as the ship’s

265 Id. See also Hugo Tiber, Ship Master 11 (1991) (At the end of the fifteenth century ships owners amassed great wealth and increased their ship inventory, which necessitate them moving ashore to manage their affairs. The master took over such roles as hiring the crew and managing all aspects of the ship in the absence of the owner).
266 Wilson & Cooke, supra note 266, at 6.
267 Id. But see Gold, supra note 190, at 7 (arguing that although technology has allowed the master to be in frequent communication with the ship owner or agent, the master still possesses legal authority and responsibility for all acts associated with the sailing of the ship and delivery of the cargo).
268 See International Court of Justice Statute, supra note 22, art. 38(1)(b).
270 Id. (The British Merchant Shipping Act (MSA) was first enacted in 1894. The current applicable version is the MSA of 1995, available at http://www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950021_en_1.htm.)
commander and holds a position of special trust and is responsible for the safe operation of the ship.271

Professor Captain Edgar Gold, an Australian maritime legal scholar, noted in 2003 that the master’s authority and responsibility is entrenched in customary law and has not changed, except where such authority has been clearly stated.272 In fact, under the state marriage laws of many of the United States’ states and territories, a ship captain may perform legal and valid marriage ceremonies. He also points out that the global community has accepted the historical role and authority of a master.273

Other commentators such as Professor H. Holman, provide similar justification for the inherent authority of master.274 In a 1964 publication Professor H. Holman observed:

The Master is charged with the safety of the ship and cargo; in his hands are the lives of passengers and crew. His position demands the exercise of all reasonable care and skill in navigation, of a least ordinary care and ability in the transaction of business connected with the ship and the constant use of patience and consideration in his dealings with those under his command or entrusted to his care.275

Professor Holman’s 1964 statement is consistent with the views of the scholars discussed supra.276 Thus, despite the technological advances in communications, legal commentators still recognize the master’s historical

272 Gold, supra note 190, at 7.
273 Gold writes:

The master’s legal authority and responsibility . . . has been confirmed by numerous legal decisions in many states over a long period of time, despite the fact that it has never been set out in any international instrument. In other words, the master’s authority and responsibility is something that is accepted in terms of customary law on a global basis. Nevertheless, it must be emphasized that these customary rules were not only developed in the sailing ship era, when communications were rudimentary, but also that they were principally created in order to assist shipping as a commercial enterprise.

Id. at 7–8.
275 Id. at 5. See also Meyers, supra note 68, at 110 (suggesting that when the master is performing ship functions as registering births, concluding marriages, issuing death certificates, etc., he is acting in his capacity as an official his flag state to whom he is directly responsible. But in matters such as navigator, he is not acting as an agent of the flag state).
276 See supra notes 270-273 and accompanying text.
responsibility and authority over his ship. Likewise, judicial decisions have solidified the inherent authority of the master over his ship.

3. Judicial Decisions Recognizing a Master’s Inherent Authority

_The Styria_, a 1902 United States Supreme Court decision, gives a window view into the magnitude and scope of the master’s inherent authority over his ship.\(^{277}\) _The Styria_ involved the civil suit of a master for failure to deliver part of his cargo to its intended destination at the appointed due date.\(^{278}\) The _Styria_ was required to load a shipment of sulphur in Sicily and deliver it to New York City.\(^{279}\) However, shortly after the sulphur was loaded onboard the ship, the master learned that the United States and Spain were at war and the Spanish considered sulphur contraband.\(^{280}\) Because his transit from Sicily to New York City would take him by the Spanish coast, the master off-loaded the shipment of sulphur and set sail for New York.\(^{281}\) Unbeknownst to the master, shortly before he set sail for New York, the Spanish Government had exempted sulphur from its contraband list.\(^{282}\)

Justice Shiras, writing for the Court, acknowledged the now entrenched maritime doctrine that a master has plenary authority over the ship by stating: “[t]he master of a ship is the person who is [entrusted] with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention.”\(^{283}\) In arriving at the conclusion that the master’s decision regarding the operation of the ship is entitled to great discretion, the Supreme Court evaluated two British cases from 1872 and 1896, both of which upheld decisions in favor of the master regarding his navigation of the ship.\(^{284}\) The courts’ recognition of a master’s inherent authority over the operation of his or her ship has been further spelled out by states in the form of statutory schemes.

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\(^{277}\) _The Styria_, 186 U.S. 1, 22 S.CT. 731, 46 L.Ed. 1027 (1902).

\(^{278}\) Id.

\(^{279}\) Id.

\(^{279}\) Id.

\(^{280}\) Id. at 3.

\(^{281}\) Id.

\(^{282}\) Id. at 5.

\(^{283}\) Id. at 9.

\(^{284}\) Id. at 17. (In the 1872 case, Geipel v. Smith, 7 Q. B. 404 (1872) the House of Lords held that the master was justified in not transporting his passengers from a port in England to Hamburg, Germany, because of a French blockage of the Hamburg port. Likewise, in Noble’s Explosives Co v. Jenkins, 2 Q. B. 326 (1896), the House of Lords upheld the master’s decision not to sail from Hong Kong because of the danger that the ship and cargo would be seized due to a declared war between Japan and China).
4. Statutory Schemes Recognizing a Master’s Inherent Authority

The recognition of a master’s authority over the ship was not limited to unwritten customs, judicial decision, and commentaries. Some of the maritime states in Europe developed written text on the duties, authorities and responsibilities of a master. For example, section 496 of the 1889 Code of Commerce of the Kingdom of Portugal states that the master “is the person entrusted with the command and conduct of the ship.” The 1886 Code of Commerce of the Kingdom of Spain lists several functions that are inherent in the position of a master: to command the crew and sail with instruction from the ship owners, to keep the ship seaworthy in all respects, punish those who fail to fulfill his orders. As the above excerpts illustrate, the early maritime legislations recognized the historical authority masters have in the operation and command of their ships.

5. Analysis

The master initially inherited the duties and responsibilities of the wealthy ship owners and, over time, his responsibilities and authorities have grown exponentially to where there is universal acceptance that he bears the ultimate authority for navigation and safety of the ship and all within. Notwithstanding advances in communications technology, which arguably makes the master more accountable to the ship owner and agents, the master maintains his plenary authority over all activities concerning the operation of the ship on the high seas, including the authority to consent to the boarding of the ship by foreign military or law enforcement personnel.

B. Has Master’s Consent Crystallized into a Customary Norm of International Law?

Customary international law, or the “laws of nation” as it was called in the nineteenth century, is not an American creation, but it has been part of the American legal landscape since Chief Justice Marshall’s landmark opinion in

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286 Id. at 138.
287 Id. at 14–15.
288 See supra, notes 217-257 and accompanying text (discussing the exceptions to flag state exclusive jurisdiction).
289 Id. The International Federation of Shipmasters’ Associations (IFLSMA) defines a master as the person in charge and having ultimate responsibility for the command of the vessel. The IIFLSMA is non-profit making organization that represents the interest of Shipmaster. Available at http://www.iflms.org/tempanounce/captain.html (last visited Mar. 6, 2007).
The Paquete Habana.\textsuperscript{291} In order for state practice to qualify as a norm of customary international law, two elements must be satisfied.\textsuperscript{292} First, the norm must result from a general and consistent practice by states (state practice).\textsuperscript{293} In order to qualify as a general practice, the number of states is not controlling.\textsuperscript{294} Second, there must be evidence of opinio juris.\textsuperscript{295} Opinio juris occurs when there is proof that states comply with the customary norm out of a sense of legal obligation.\textsuperscript{296} As described by Judge Tanaka in the North Sea Continental Shelf case:

\[\text{to decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances.}\textsuperscript{297}\]

1. State Practice

Evidence of state practice can be derived from various sources to include public statements of government officials, military manuals, and actions by military commanders.\textsuperscript{298} In the case of the United States, the practice of

\textsuperscript{291} The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.).


\textsuperscript{293} See Restatement (Third), supra note 22, 102(2); Michelle M. Kundmueller, The Application of Customary International Law in U.S. Courts: Custom, Convention, Or Pseudo-Legislation? 28 J. LEGIS. 359, 361 (2002). See also, International Court of Justice Statute, supra note 22, art. 38 (stating that customary International Law is a source of international law).

\textsuperscript{294} Karol Wolffe, CUSTOM PRESENT IN INTERNATIONAL LAW 53 (3d rev. ed. 1993) (“An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.”). But see Kundmueller, supra note 295, at 362 (opining that in order to qualify as general practice, it must be general, although it does not need to be universal practice).

\textsuperscript{295} See Churchill and Lowe, supra note 32, at 7.

\textsuperscript{296} But see Goldsmith & Posner, supra note 292, at 641.

\textsuperscript{297} See supra note 297 at 175-176 (citing North Sea Continental Shelf Case (Germany v. The Netherlands/Denmark) 1969 I.C.J. 175-176 (Tanaka, J., dissenting)).

\textsuperscript{298} Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 176, 486 (indicating that military manuals are evidence of state practice); Jeffery L. Dunoff, ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS 79 (providing a non-exhaustive list of possible
requesting master’s consent is clearly delineated in section 3.11.2.5.2 of the Commander’s Handbook.299 The Commander’s Handbook is an authoritative military publication that applies to naval operations of the United States Navy, United States Marine Corps and the United States Coast Guard.300 The Commander’s Handbook is widely accepted in the international military community as a leading reference in naval operations.301 Furthermore, additional guidance for seeking master’s consent can be found in the United States Coast Guard Maritime Law Enforcement Manual (MLEM), another authoritative military/law enforcement source.302

The United States Department of State also affirms the Navy and Coast Guard’s position on master’s consent.303 In a September 15, 1990 telegram, the State Department stated:

Master’s Consensual Boarding: Consent by the master of a foreign vessel to boarding by law enforcement officials of another state in international waters, for the purpose of gathering information. The master determines the scope, conduct and duration of the boarding. Flag state authorities are not contacted before the boarding. No enforcement jurisdiction, such as arrest or seizure, may be exercise during a consensual boarding of a foreign flag vessel without the permission of the flag state (whether or not the master consents), even if evidence of illegal activity is discovered.304

The State Department telegram is further evidence of the United States’ view that consensual boarding is a general and consistent state practice. As discussed below, masters routinely give their consent, thereby providing additional support sources of state practice: diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals, and actions by military commanders, treaties and executive agreements, decisions of international and national courts, declarations, and resolutions of international organizations).

300 Id. (The Commander’s Handbook sets out the fundamental principles of international and domestic law that govern U.S. Naval operations at sea. It applies to U.S. naval operations (Navy and Marine Corps) during time of peace and Part I complements the more definitive guidance on maritime law enforcement promulgated by the U.S. Coast Guard).
301 See Guilfoyle, supra note 249, at 742 (indicating that 25 nations use the Commander’s Handbook as their principal reference guide).
303 See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1989-1990 449 (Margaret S. Pickering et al. eds., 2003) (containing documents produced and prepared under the auspices of the Office of Legal Adviser, Department of State).
304 Id.
The practice of master’s consent is not solely an American innovation. The right of a master to consent to the boarding of his ship on the high seas is recognized by at least nineteen states. Currently, nineteen states have entered into bilateral maritime counter-drugs and proliferation security initiative agreements with the United States in which each state has expressly recognized the right of a master to consent to boardings on the high seas. These nineteen states are: Antigua and Barbuda, Barbados, Belgium, Belize, Costa Rica, Croatia, Dominica, Dominica, Grenada, Guatemala, Guyana, Honduras, Malta, Nicaragua, Panama, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad & Tobago. Six of these nineteen states, Panama, Malta, St. Vincent and the Grenadines, Antigua and Barbuda, Belize, and Honduras, as flag states collectively account for over fifty percent of world shipping fleet. Thus, although only nineteen of the one hundred and ninety-two United Nations

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305 See infra notes 344–352 and accompanying text (discussing a United States Coast Guard master’s consent operation).
307 Id.
328 See Liberian International Ship & Corporate Registry (LISCR) Vessel Registration web site, supra note 120 (referring to the amount by gross tonnage).
member states recognize the right of a master to consent to boardings on the high, these nineteen states (twenty including the United States), as flag states, are home to the majority of the world shipping fleet.329

Paragraph 9 in the bilateral agreement between the United States and Belize is replicated in the other eighteen agreements. It provides:

Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels conducted by either party seaward of any nation's territorial sea, whether based on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel master, or an authorization from the flag state to take law enforcement action.330

Paragraph 9 explicitly states that the agreement does not apply to a boarding based upon the consent of a master. This should be distinguished from a prospective flag state consent, such as the PSI boarding agreements, where consent is presumed if there is no response from the flag state within a certain time period.331 The reference to master’s consent in the nineteen bilateral agreements merely preserves the parties’ position on that issue.332 The agreements make it clear that boardings premised upon master’s consent are outside the four corners of the document. To hold otherwise would be inconsistent with positions of the State Department,333 the Navy, the Coast Guard, and the nineteen bilateral agreements.334 It is reasonable to conclude that the nineteen bilateral agreements would not have mentioned the master’s consent principle if the states that entered into them did not believe the principle existed. It is highly unlikely that states would arbitrarily enter into international agreements without fully understanding the implications of their decision.335

The German Navy’s position is additional evidence of the general practice of master’s consent.336 During a speech at the Fifth Regional Sea power Symposium in Venice, Italy in October 2004, Vice Admiral Lutz Feldt,

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329 Id. Because most of the nineteen states can be characterized as developing states (with the exception of Belgium and Malta), critics may argue that the agreements merely reflect a hegemonic relationship, and that the United States is using its economic and military strength to impose a desired outcome. See generally JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 199-200 (2006).

330 See supra note 313 (emphasis added).

331 See, e.g., Becker, supra note 37, at 162.

332 See supra notes 305-306 and accompanying text.

333 Id.

334 See supra notes 260-261 and accompanying text.

335 See Murphy, supra note 47, at 154; See also Alvarez, supra note 331, at 588.

then, the German Navy Chief of Staff indicated that although the issue of master’s express consent is not well-settled in international law, in order to board a non-German merchant ship on the high seas, a German warship requires the consent of the ship owners, shipping authorities or the master.\textsuperscript{337} He, however, left open the question whether master’s consent to boarding would encroach on the rights of the flag state.\textsuperscript{338} For this reason, he recommended entering into bilateral agreements with the main shipping states to facilitate interdiction on the high seas.\textsuperscript{339} The fact that Vice Admiral Feldt recommends the use of bi-lateral boarding agreements does not defeat the fact that the German Navy believes a master has the authority to give consent.\textsuperscript{340}

While the above discussion provides credible evidence of a general practice of master’s consent by states with the most registered ships, it falls short of meeting the uniform and consistent practice threshold necessary to become a customary norm of international law.\textsuperscript{341} However, for the nineteen states mentioned, there is ample evidence to support the notion that master’s consent has matured into a general and consistent practice among those states.

2. The Doctrine of Opinio Juris

As described below, the United States, through the Coast Guard, routinely requests and receives master’s consent to board foreign flag vessels.\textsuperscript{342} In July 1966, at the Twentieth Annual Meeting of the Law of the Sea Institute held at the University of Miami Law School, a distinguished panel of law of the sea experts gathered to discuss interdiction at sea.\textsuperscript{343} At that conference, Commander Andrew W. Anderson, an active duty United States Coast Guard

\textsuperscript{337} \textit{Id.} (While showing the picture of a dhow off the Horn of Africa, VADM Lutz stated, “[t]o be able to stop and inspect this Dhow, German Combat Support Ship FGS Frankfurt am Main would need the consent of the ship owners, shipping authorities or the [master] of this suspected vessel because it is obviously not flying a German Flag.”) (internal quotes omitted).
\textsuperscript{338} \textit{Id.} at 4.
\textsuperscript{339} \textit{Id.} at 6.
\textsuperscript{340} \textit{Id.} at 4.
\textsuperscript{341} See also Goldsmith & Posner, supra note 292, at 641 (In order to satisfy the customary international law first prong, the practice must be a widespread and uniform practice among states).
\textsuperscript{342} See, e.g., United States v. Greene, 671 F.2d 46, 49 (1st Cir 1982) (The Coast Guard was tracking a British flag vessel in international waters under suspicion of drug smuggling. It was only after the Coast Guard commander requested permission to board and the master refused, did the Coast Guard request and obtain permission from the British government.
\textsuperscript{343} The Panel included Professor Louis Sohn, Professor, Irwin Stotzy, Professor, Stefan Riesenfeld, Professor Jonathan Charney, and Professor Thomas A. Clingan. \textit{See THE LAW OF THE SEA: WHAT LIES AHEAD?} 3–10 (Thomas A. Clingan, Jr. ed., 1986).
officer and former commanding officer of a Coast Guard cutter, gave a presentation on maritime interdiction operations.344

In describing a typical interdiction operation on the high seas he explained that if the target ship is not a United States flagged ship the first step is to seek the master’s consent for a voluntary boarding.345 He added that "[i]t is the position of the Coast Guard that [a master’s] consent boarding is not violative of international law since the master may voluntarily waive his right to proceed without interference and allow the Coast Guard to come aboard."346 The Coast Guard’s basis for master’s consent is grounded in the United States’ recognition that as a matter of customary international law, a master has complete authority over all activities onboard his ship, which includes the discretion to invite anyone to come aboard.347 Commander Anderson further explains that the scope of the boarding and inspection is limited by terms laid out by the master.348 In other words, the master determines the scope, conduct and duration of the boarding.349 In fact, Commander Anderson relates that “[i]n practice, the vast majority of masters readily consent to such boardings, sometimes placing conditions on the boarding such as continuing to proceed on their voyage while the boarding is in progress.”350

Legal commentators in the international law field also recognize the principle of master’s consent.351 According to Professor Louis Henkin, the Chief Reporter of the Restatement (Third) of the Foreign Relations Law of the United States, a master has the right to invite anyone to come aboard the ship as his guest, including foreign law enforcement personnel.352 Another legal commentator, Mark R. Shulman, has likewise opined that in addition to the flag state, the master as well as the ship’s owner has the authority to consent to board by foreign warships on the high seas.353

344 See Anderson, supra note 204, at 11. (Commander Anderson was the commanding officer of the USCG cutter DAUNTELESS and was heavily involved in interdiction operations in the Caribbean Sea).
345 Id. at 32.
346 Id.
348 Id.
349 See, e.g., Commander’s Handbook, supra note 15, at para. 3.11.2.5.2 (“The scope and duration of a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion.”).
350 See Anderson, supra note 204, at 11.
351 The teachings of experts in the legal field are secondary sources in the interpretation of international law. See International Court of Justice Statute, supra note 22, art. 38.
352 See Restatement (Third), supra note 22, § 522, cmt. e, nn. 4 (Modern practice accepts the right of master to consent to foreign flag boarding in drug trafficking cases).
353 See Shulman, supra note 72, at 809 (“There are notable exceptions to the general rule of freedom of navigation. First of all, the [master] or the owner of a ship can waive it. There may be instances
The above analysis demonstrates that the United States’ actions in seeking master’s consent satisfy the opinio juris prong. However, the difficulty lies in establishing whether other states also act in conformity with the master consent principle. As argued above in Part V(B)(1), the nineteen states that acknowledge the right of master’s consent in the bilateral agreements with the United States arguably have demonstrated a willingness to be bound by the terms, thus demonstrating opinio juris. The counter argument is that nineteen states (twenty when including the United States) only represent ten percent of the member states of the United Nations and are insufficient to bind the other ninety percent.

Notwithstanding these hurdles, the practice of requesting and receiving master’s consent is a general and consistent practice by a significant amount of interested states. The practice of obtaining master’s consent is also sufficiently ripe to justify at least a presumption that a master’s consent has been accepted by other interested states as an expression of law.

C. Master’s Consent - LOSC Article 110

Consensual boarding on the high seas is a ratification of the long-recognized authority under international law of a master to invite anyone to visit the ship, subject to conditions he may impose. As discussed in Part IV supra, LOSC Article 110 lists the codified grounds for visit and approach. While

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when that permission could be secured; for instances, when the boarding party notifies the owner or [master] that the ship is suspected of carrying contraband.

355 See id.
356 But see Wolfke, supra note 296, at 53 (asserting that to qualify as a general practice, the number of states is not controlling).
357 See id.; Kundmueller, supra note 295, at 216.
358 Article 110 (Right of visit)

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.
it is a correct statement that LOSC Article 110 does not list a master’s consent as a justification for boarding a foreign flagged merchant ship, it is also equally accurate to state that neither LOSC Article 110 nor any positive international law expressly prohibits military warships or law enforcement officials from relying solely on a master’s consent when conducting a search.360

While there is no clear positive rule under international law that prohibits master’s consent, the general consensus among legal scholars is that the flag state, exercising its authority under LOSC Article 92, may prohibit the master from giving such consent.361 Professor H. A. Smith writes that the breadth of the flag state’s exclusive jurisdiction governs all acts on board the ship.362 McDougal and Burke do not go as far as Professor Smith, but suggest it is unquestioned that the state is responsible for a ship’s conformity with international law and may control its movement and activities pursuant to community obligations and national policies.363

An example of this principle is illustrated by the 1917 British case of Furness, Withy & Co. v. Rederiaktiegolabet Banco.364 In Rederiaktiegolabet Banco, the steamship Zamora, registered in Sweden and flying a Swedish flag, was chartered by a British entity to transport goods between the United Kingdom and several ports outside of the Kingdom of Sweden.365 While the Zamora was in Cardiff, United Kingdom, Sweden passed an emergency legislation preventing its flagged ships from transporting goods and cargo

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.

LOSCh, supra note 21, Article 110.
359 See supra notes 208-230 and accompanying text.
360 LOSC, supra note 21, Art. 110.
361 See Smith, supra note 66, at 46; 2 Colombos, supra note 225, at 297.
362 See Smith, supra note 66, at 46.
363 McDougal & Burke, supra note 70, at 1066.
365 Id. (The trading destinations included ports in Sicily, Africa, and North and South America).
outside of the Swedish Kingdom.\textsuperscript{366} As a result of the emergency legislation, the master refused to transport his cargo from Cardiff to Genoa, Italy.\textsuperscript{367} A suit ensued for a breach of contract. The Court dismissed the suit and held that the master was duty bound to obey the rules and regulations of the flag state, even if it means violating his contract obligations.\textsuperscript{368}

Therefore, if the flag state has a rule prohibiting master’s consent, then the master is obligated to comply.\textsuperscript{369} However, in the absence of such directive, there is nothing that prohibits the master from consenting to the boarding and searching of his ship.

Relying on LOSC Article 110 as a basis to argue against master’s consent is misplaced. A master’s consent does not depend on any of the exceptions enumerated in LOSC Article 110. A foreign warship on the high seas does not need the master’s consent to approach and request verification of the ship’s nationality.\textsuperscript{370} The foreign warship would, however, need the master’s consent to conduct a search, unless there is reasonable suspicion that the ship is engaged in piracy, the slave trade, unauthorized broadcasting, without nationality, or though flying a foreign flag, or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.\textsuperscript{371} Therefore, a warship under customary international law may approach a merchant ship on the high seas for the sole purpose of checking nationality.\textsuperscript{372} The warship does not need to satisfy any of the LOSC Article 110 five specified circumstances in order to approach a foreign flagged merchant ship.\textsuperscript{373}

Critics of the master’s consent policy argue that LOSC Article 110 is an all-inclusive provision; therefore, if a boarding circumstance is not listed or made pursuant to a treaty, it is expressly prohibited.\textsuperscript{374} In support of their

\textsuperscript{366} \textit{Id.} at 874 (Violations of the Swedish emergency statute subjected the Zamora’s master and owner to criminal penalties).

\textsuperscript{367} \textit{Id.}

\textsuperscript{368} \textit{Id.} at 877.

\textsuperscript{369} See supra notes 200-203 and accompanying text.

\textsuperscript{370} See Odeke, supra note 102, at 659.

\textsuperscript{371} See LOSC, supra note 21, Art. 110; supra notes 101–127 and accompanying text.

\textsuperscript{372} See supra notes 225-230 and accompanying text.

\textsuperscript{373} \textit{Id.}

\textsuperscript{374} This is the view shared by the British Government and the reason for not recognizing the right of master’s consent. E-mail from Commander Bob Wood, Directorate of Naval Legal Services, United Kingdom, Minister of Defense, to Commander David G. Wilson, LLM candidate, The George Washington University School of Law (Jan. 23, 2007, 12:14:30 EST) (on file with author) (Boardings must be based on one of the circumstances listed in article 110 or pursuant to a treaty as provided for in article 110. The Narcotic boarding agreement between the United States and the United Kingdom (T.I.A.S, No. 10286) is an example of an agreement envisioned by article 110). See also Clingan, supra note 23 at 61 (“Note that [article 110] does not refer to ships carrying illegal
argument, the critics point to the LOSC negotiations where there was an attempt to add narcotics smuggling as a sixth basis for boarding, but a number of states resisted. Instead, a compromise was reached and LOSC Article 108 now requires flag state consent if a foreign flagged ship on the high seas is suspected of engaging in narcotics smuggling. Another argument is that subsequent treaties, such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 2005 Protocol, in particular, do not contain a provision on master’s consent.

These arguments are not persuasive for a number of reasons. First, both the SUA and Narcotics Smuggling conventions are focused on the actual boardings. Under customary international law and LOSC Article 110, a foreign warship is prohibited without flag consent from boarding a merchant ship, even where there is reasonable grounds to believe that the merchant ship is engaged in acts violating either of the above two conventions. However, nothing prevents the warship from approaching the merchant vessel to verify its nationality. The right to approach and verify a ship’s nationality or enquête ou vérification du pavillon is firmly rooted in international law texts.

Second, the customary right to approach a ship on high seas to verify nationality has not been superseded by LOSC Article 110. The customary right to verify a ship’s nationality is separate and distinct from the right to board and search based on the LOSC Article 110 criteria. There is a split of legal narcotic drugs. Thus, if boarding is to be carried out on the high seas, it must be done with the consent of the flag State...”.

375 Clingan, supra note 23 at 61.
377 Commander Wood E-mail, supra note 376. Similar to the Convention Against Illicit Traffic in Narcotic Drugs, the SUA 2005 Protocol requires consent of the flag state. See International Maritime Organization, LEG/CONF. 15/21, Nov. 1, 2005.
378 Professor O’Connell explains that it is a fundamental principle of international law that the peacetime interference by a warship with a foreign ship while sailing on the high seas constitutes a violation of flag state’s sovereignty. See 2 O’Connell, supra note 82, at 808.
379 Marianna Floria, supra note 226, at 49.
380 See 2 O’Connell, supra note 82, at 802. See also 4 Whiteman, supra note 29, at 667-668 (In December 1960, the Soviet Union lodged a complaint with the United States Secretary of State alleging a United States warship violated the principle of freedom of navigation when it approached a Soviet merchant ship on the high seas. The United States responded stating in part that “[i]t is common practice for ships moving in international waters to establish mutual identification.”).
381 See supra notes 225-230 and accompanying text.
opinion whether there is a customary international law right of “approach and visit.”

Some legal scholars are of the opinion that in the absence of a treaty, there is no right to “approach and visit,” because such a right is contrary to the freedom of the seas and the principle of exclusive flag state authority. The other group of legal scholars believes that the absence of an international police force on the high seas justifies the right of approach for the purpose of verifying a ship’s nationality. Dupuy and Vignes seem to fall within the first group. Other international law experts such as Marjorie M. Whiteman and Professor H. A. Smith write that right of “approach and visit” is reflective of customary international law.

Finally, the Reporters note to section 522 of the Restatement (Third) of the Foreign Relations Law of the United States validates the customary practice of master’s consent. The Restatement makes clear that master’s consent is acceptable as the modern practice of states.

D. Master’s Consent Based Upon Analogy with LOSC Article 27

Additional support demonstrating the historical and inherent authority of a master is found in LOSC Article 27. Although Article 27 addresses the coastal state’s criminal jurisdiction over foreign merchant ships exercising the...

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383 See 1 Dupuy & Vignes, supra note 251, at 420.
384 Id.
385 Id. at 420-421 (believing that both Article 22 of the Convention on the High Seas and LOSC Article 110 are the legal basis for the right of “approach and visit”).
386 See 4 Whiteman, supra note 29, at 667; Smith, supra note 66, at 47. See also 2 O’Connell, supra note 84, at 802.
387 Restatement (Third), supra note 22, § 522, cmt. e, nn. 4.
388 Id.
389 See LOSC, supra note 21, Article 27; Sandra L. Hodgkinson, et al., supra note 14, at 593 (suggesting that LOSC Article 27 provides a potential basis to support the master’s ability to consent to the boarding and searching of his ship).
right of innocent passage, it provides tangible support that the Law of the Sea Convention recognizes the historical inherent authority of a master.

Article 27(1) provides that a coastal state should not exercise its criminal jurisdiction for crimes committed on board a merchant ship while it is traversing through the coastal state’s territorial sea; however, Article 27(1)(c) allows the coastal state to exercise its criminal jurisdiction if assistance is requested by the ship’s master. The most striking part of Article 27 is the provision in subparagraph three. Under Article 27(3), the master is not required to first seek the consent of the flag state before requesting the assistance of the coastal state.

Article 19 of the Geneva Convention on the Territorial Sea and Contiguous Zone was the precursor to LOSC Article 27(1). Its provision was adopted entirely into LOSC Article 110, with one slight modification. Both articles support the views articulated in Part V (A) that a ship’s master has inherent authority to consent to activities involving a ship under his command without first seeking the consent of the flag state. If the master is authorized to request assistance involving boarding by the coastal state while in the coastal state’s territorial sea, it is both reasonable and logical that the master, similarly,

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391 In its simplest meaning, the term innocent passage refers to the movement of vessels through a state’s territorial waters. See LOSC, supra note 21, Art. 21.
392 Article 27(1) reads:
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;
   (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
   (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
   (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

393 Id. (Article 27(1) added subparagraph (d), which was not included in the previous Article 19 of the Geneva Convention on the Territorial Sea and Contiguous Zone).
394 This further indicates the historical authority of the master and the confidence that was placed upon him. See also, Sandra L. Hodgkinson, et al., supra note 14, at 593-594.
should be empowered when the ship is on the high seas to consent to the boarding of his ship by non-flag state personnel.399

VI. CONCLUSION

The master's inherent authority to voluntarily consent to the boarding and searching of his ship is predicated on a plethora of documented historical customs and practices dating back to the fifteenth century.

The master’s consensual authority is also reflected in several Bilateral Maritime Counter-Drug Operations and Proliferation Security Initiative agreements between the United States and nineteen other coastal states. These agreements constitute compelling evidence of the recognition that a master has the authority to invite guests onboard his ship, regardless of whether the invited guests are private individuals or official representatives of foreign governments.

The United Kingdom’s view that a master’s consent is violative of LOSC Article 110 is against the prevailing weight of opinion. Master’s consent is grounded in the customary norms of mariners and there is no evidence that LOSC Article 110 was meant to overrule that custom.

The paper illustrates that while flags of convenience provide some amount of economic benefits, they do so at the expense of the security of the world community by advancing the cause of international terrorists. However, the loose regulations and lax oversight by flag of convenience states also highlight the critical role of the master because of the increased responsibility that he has to assume in the absence of a detached flag state. The masters and ship owners, not the flag states, are the ones most interested in ensuring that their ships are not used to transport illicit drugs, terrorists, or any instrumentalities of terrorism. This increased responsibility, by default, further contributes to the master’s inherent authority over the operation of the ship, thereby lending further support for his authority to voluntarily consent to searches.

The United States should continue its practice of seeking master’s consent on the high seas; however, because consent is at the master’s discretion, the prudent course of action is to follow Vice Admiral Feldt’s recommendation and negotiate bilateral boarding agreements.

399 See Id.