ARTICLE 110 OF THE LAW OF THE SEA CONVENTION 1982
AND JURISDICTION OVER VESSELS
WITHOUT NATIONALITY

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I. INTRODUCTION

On 24 February 2018, a Japan Maritime Self-Defense Force (JMSDF) maritime patrol aircraft (MPA) observed a North Korean flagged vessel conducting a sanctions evading ship-to-ship at sea transfer with a vessel subsequently identified as the Maldivian registered Xin Yuan 18.\footnote{1} The Diplomat reported, however, that there was an issue: “the vessel was never registered by the Maldives.”\footnote{2} “After Cambodian authorities decided to close their registry, which had been used by North Korean-controlled vessels looking to evade U.N. sanctions, some of those vessels continued—in violation of national law—to fly the Cambodian flag.”\footnote{3} Indeed, all existing registrations under the Cambodian ship registry expired at the end of August 2016,\footnote{4} and the Cambodian government strenuously rejected the use of the Cambodian flag by (in some reported cases)

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3. Vassalotti & Trainer, supra note 1.

North Korean vessels as late as October 2017.\(^5\) Indeed, a North Korean vessel flying the Cambodian flag had been boarded and seized off the coast of Egypt in August 2017, carrying “more than 30,000 rocket-propelled grenades hidden under iron ore” in clear breach of the United Nations Security Council (UNSC) sanctions regime.\(^6\) In both cases, the vessel was not of the nationality claimed, so the obvious question that arises is: what nationality, if any, are they, and whose jurisdiction might they fall under?

Despite a settled understanding that Article 110 of the Law of the Sea Convention 1982 (LOSC or LOSC 1982) permits a right of visit over a vessel suspected of being without nationality when encountered in international waters,\(^7\) there remains some opacity—even confusion—as to the degree and scope of subject matter jurisdiction\(^8\) which the boarding State warship\(^9\) (or other authorized vessel)\(^10\) may assert over the boarded vessel. This is counter-intuitive for two reasons. First, as Robert Reuland has observed, is the significance of the proposition that “[u]nless a ship lawfully sails under the flag of a recognized state, the elaborate system of rules established for the maintenance of order upon the high seas...


\(^7\) This term is employed as shorthand for all waters seaward of territorial sea outer limits; it is found in operational publications such as U.S. NAVY, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP1-14M, ¶ 1.6 (Aug. 2017) [hereinafter COMMANDER’S HANDBOOK] (“For operational purposes, international waters include all ocean areas not subject to the territorial sovereignty of any State. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and over-flight are preserved to the international community. International waters include contiguous zones, EEZs, and high seas.”).


\(^10\) The immunities of warships and other government vessels operated for non-commercial purposes are codified in LOSC 1982 Articles 32, 95, and 96; the powers afforded to warships under LOSC 1982 Article 110 are also available to “other duly authorised ships . . . clearly marked and identifiable as being on government service.” Id. art. 110(5).
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is meaningless” and second, as Martin Fink has noted, is the fact that this authority (in a range of guises) is regularly and routinely employed.11 In this short Article, I will attempt to describe what I understand to be the current state of the law in relation to the assertion of jurisdiction over vessels without nationality.12

In Part II of this Article, I address the first question that arises when assessing jurisdiction over vessels without nationality—defining the three terms, often interchangeably employed, that coalesce around this issue. To this end, it is essential to ask whether the concepts of ‘unflagged,’ ‘vessel without nationality (VWon),’ and ‘stateless vessel’ are synonymous, or whether—in terms of usage and content—they each indicate a distinct status entailing different jurisdictional consequences. The preliminary conclusion is that each of these terms is different, and although the third is to some extent a subset of the second, they do carry with them different jurisdictional consequences. With this terminological analysis as background, Part III comprises an interrogation of the current rule set—primarily LOSC 1982 Article 110, in conjunction with LOSC Articles 91 and 9213—to examine the implications of this rule set.


13. These provisions are accepted by the United States, as a non-party to the LOSC 1982, as indicative of the parallel applicable customary international law. See Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989 (“The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance.
regarding the degree and scope of jurisdiction available to a boarding State warship. In particular, I will examine the situation of a vessel boarded in accordance with the right of visit under Article 110(1)(d) where the conduct of the vessel or those in it raises the prospect of application of additional rules of international (and national) law. This is an essential inquiry for the conjunctive employment of the ‘right of visit’ basis for boarding, which alongside other triggers for jurisdiction can be a significant ‘force multiplier’ from the perspective of a boarding State. Part IV summarizes the outcomes of the analysis in order to distill the limits of boarding State jurisdiction over VWON encountered in international waters.

II. DE-CONFLICTING THE TERMINOLOGY

The first step in any analysis of jurisdiction in relation to VWON is to disentangle the terminology. As stated above, there are three key terms at play: ‘unflagged vessel,’ ‘vessel without nationality,’ and ‘stateless vessel.’ The main question is whether each of these labels effectively share the same meaning, and can thus be used interchangeably, or whether they point to differences in status and consequence. Certainly, for some States, some of these terms appear interchangeable. The U.S. Navy’s Commander’s Handbook on the Law of Naval Operations, for example, provides the following:

4.4.4.1.5 Vessels Without Nationality

Vessels that are not legitimately registered in any one State are without nationality, and are referred to as stateless vessels. Such vessels are not entitled to fly the flag of any State and, because they are not entitled to the protection of any State, they are subject to the jurisdiction of all States. Additionally, a ship that sails under more than one flag, using them according to convenience, may not claim any of the nationalities in question and may be assimilated to a ship without nationality. If a warship encounters a stateless vessel or a vessel that has been assimilated to a ship without nationality on the high seas, it may board and search the vessel without the consent of the master.14

Although, as I shall argue, there is much similarity and cross-over (and indeed, their use is often mixed in commentary), these terms are differently nuanced and are not—in legal terms—identical.

fairly the interests of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices, with those provisions”); see also Commander’s Handbook, supra note 7, § 4.4.4.1.4.

A. ‘Unflagged vessel’

The term ‘unflagged vessel’—although routinely used in operational parlance—is only rarely found in legal instruments and analyses. This particular term, consequently, appears to be employed as operational and legal shorthand to indicate a ‘state of affairs.’ That is, the label ‘unflagged’ is arguably an observation in relation to a suspect vessel, and often an operational trigger for boarding, rather than a firm or definitive legal status. An important recent usage of this term is found in U.N. Security Council Resolutions (UNSCR) 2240 (2015) and associated subsequent resolutions, dealing with the migrant smuggling crisis in the Mediterranean Sea as follows:

5. Calls upon Member States acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking to inspect, as permitted under international law, on the high seas off the coast of

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16. For example, see reports concerning the March 2016 seizure by the Royal Australian Navy of an illicit weapons cargo suspected to be intended for delivery to Al Shabaab in Somalia. Ryan Healy, Australian Navy Prevents Cache of Weapons from Reaching Somalia, CTR. FOR SECURITY POL’Y. (Mar. 11, 2016), http://www.centerforsecuritypolicy.org/2016/03/11/australian-navy-prevents-cache-of-weapons-from-reaching-somalia/ (“Sailors from the HMAS Darwin boarded the craft when they noticed it did not have a state flag for identification.”) [https://perma.cc/V5HE-G7PL].

17. Efthymios Papastavridis has noted, for example, that “[i]t is very often the case that the transportation of the persons in question is carried out using non-registered small vessels, without name or flag, i.e. stateless vessels.” Efthymios Papastavridis, Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law, 36 SYRACUSE J. INT’L L. & COM. 145, 159 (2009). However, as he has observed elsewhere, statelessness may not on its own be a sufficient condition to confer enforcement jurisdiction on a third State; an additional source of jurisdiction must also be enlivened in order for that third State to exercise rights beyond stop and search. PAPASTAVRIDIS, supra note 12, 264–67.

18. See S.C. Res. 2240 (Oct. 9, 2015); S.C. Res. 2312 (Oct. 6, 2016); S.C. Res. 2380 (Oct. 5, 2017); Presidential Statement 2015/25 (Dec. 16, 2015). This was not the first occasion for a UNSCR authorization based on observable indicia of a flag. For example, the sanctions regime in relation to the illicit trade in Somali charcoal (originating in S.C. Res 2036, ¶ 22 (Feb. 22, 2012), as extended in S.C. Res. 2182, ¶¶ 15–16 (Oct. 24, 2014), included authority for “Member States to make good-faith efforts to first seek the consent of the vessel’s Flag State prior to any inspections pursuant to paragraph 15”. This Resolution “authorize[d] Member States conducting inspections pursuant to paragraph 15 to use all necessary measures commensurate with the circumstances to carry out such inspections and in full compliance with international humanitarian law and international human rights law, as may be applicable, and ur[ges] Member States conducting such inspections to do so without causing undue delay to or undue interference with the exercise of the right of innocent passage or freedom of navigation . . . .”
Libya, any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts and dinghies . . . .

Section III further discusses UNSCR 2240 with particular reference to the continuing jurisdictional consequences (if any) of a boarding conducted upon the basis of this operational trigger. Nevertheless, this form of operational rather than legal employment of the term ‘unflagged’ is entirely coherent with the point made by Arthur Watts in 1957 to the effect that, as the foundation of the right to exercise protection, the flag is of less value than registration, for it is widely recognized that the flag is a mere symbol of some other connection with a State; reliance on the flag can, therefore, hardly be helpful, especially since it may, on occasion, be flown without any justification.\(^{19}\)

The state of affairs of a vessel being ‘unflagged’ is, consequently, of limited legal nuance but significant as an operational trigger.

B. ‘Vessel/ship without nationality’

VWON, or alternatively ‘ship without nationality,’ is used in LOSC 1982 as a description of a type of vessel that can be made liable to a further consequence—most particularly via Article 92(2) and Articles 110(1)(d) and 110(2). As James Kraska has noted, absent, revolving, misleading, or false indicia of nationality—flag, vessel name, home port, responses to queries—may provide grounds for authorized vessels to characterize such delinquent vessels as a ship without nationality.\(^{20}\)

In essence, the state of affairs of being a VWON is perhaps best understood as a legal status that brings into play a series of LOSC 1982 (as well as customary international law and other treaty) authorizations, which in turn create the potential for additional exercises of boarding State jurisdiction. That is, the status of ‘being a VWON’ opens the vessel to a wider scope of assertions of jurisdiction. However, many of the treaty-based extensions of jurisdiction over a VWON genuflect to customary international law for detail. One example of a treaty-based jurisdiction that relies upon the state of affairs of being a VWON as its legal trigger, but which then requires a further interrogation of customary international law (or in some cases a specific treaty) for detail, is Article 8(7) of


the Migrant Smuggling Protocol 2000,21 of which Klein notes the following:

If it is established that the vessel is engaged in people smuggling, the boarding state is authorised to take “appropriate measures in accordance with relevant domestic and international law.” The question then returns to what enforcement powers may be exercised against stateless vessels on the high seas and whether a jurisdictional link is necessary and may be established in any given situation.22

Additionally, and more contentiously, the state of affairs of being a VWON may also, as a minimum, support jurisdiction insofar as the boarding state has on its books any offence of operating a vessel without nationality. In relation to environmental group vessels seeking to interfere with Japanese whaling activities in the Southern Ocean, for example, it was reported in 2007 that New Zealand had threatened to arrest two such vessels if they entered a New Zealandic port, on the grounds that they were VWON.23

One well litigated example of such a domesticated offence is found in the U.S. Drug Trafficking Vessel Interdiction Act of 2008 (DTVIA):

(a) Offense – Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of any single country or a lateral limit of that country’s territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both . . . .

(c) Extraterritorial jurisdiction – There is extraterritorial Federal jurisdiction over an offense under this section, including an attempt or conspiracy to commit such an offense.24

21. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime art. 8(7), Nov. 15, 2000, 2241 U.N.T.S. 507 (stating that “[a] State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.”).

22. Klein, supra note 8, at 10.

23. Andrew Darby, All at Sea, MELBOURNE AGE (Feb. 9, 2007), https://www.theage.com.au/national/all-at-sea-20070209-ge46os.html (“The Farley Mowat has been struck off the Belizean ship register, and the Robert Hunter is set to lose its British flag after Japanese diplomatic pressure . . . . Captain Watson said the New Zealand Government had told him that as an unflagged vessel, the Farley Mowat would be arrested if it arrived there.”) [https://perma.cc/LQ4E-H38L].

24. 18 U.S.C. § 2285 (2008). For non-DTVIA related comment on earlier iterations of U.S. domestic law dealing with this issue, such as the Marijuana on the High Seas Act, 21
The DTVIA is itself but the most recent in a line of similarly expansive U.S. statutes dealing with drug trafficking and VWON (on which see more below).

For the moment, however, the point is that given its wide employment in treaty law and commentary, VWON is the most useful legal term of art to interrogate in respect of ascertaining the scope and extent of permissible ‘follow-on’ enforcement jurisdiction by a boarding State over a boarded VWON now under its temporary control. However, prior to doing so, it is vital to differentiate one further legal concept that also covers some of the same substantive ground as VWON, and which is also regularly referenced in discussions of jurisdiction—the status of ‘stateless vessel.’

C. ‘Stateless vessel’

1. Background

In relation to this category of vessel of inconclusive nationality, it is absolutely clear that continuing boarding State jurisdiction may be asserted—arguably up to and including the full panoply of jurisdiction as claimed over vessels of own nationality in domestic law. The legal status of ‘stateless vessel’ is thus most relevant where there is no apparent claimable nationality or—if there is a potential nationality—that State has rejected that claim. This term predominantly appears to be one of customary international law and is found in pre-LOSC 1982 cases and writings of the most respected publicists. For example, in the case of the “Asya”

U.S.C. §§ 955a–d (Supp. V 1981) (Section 955b(d) provided that a “[v]essel subject to the jurisdiction of the United States” included a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with Article 6, paragraph 2 of the 1958 Convention on the High Seas), see, inter alia, Joseph Brendel, The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels, 25 Wm. & Mary L. Rev. 313 (1983). Leaving aside the contentious question of whether it is an offense founded in international law to ‘be’ a VWON, an equally interesting question is the extent, in international law, to which assertions of other continuing subject matter jurisdiction can be supported or caveated by a subsequently (post-boarding) asserted right to validly claim a nationality; this issue will be addressed infra Sections III and IV below.

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(Molvan v. The Attorney-General for Palestine), the Privy Council, citing Oppenheim, concluded the following:

the freedom of the open sea, whatever those words may con-note, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The ‘Asya’ did not satisfy these elementary conditions. No question of comity or any breach of international law can arise, if there is no State under whose flag the vessel sails.26

2. Status and Jurisdiction

The essence of this status, consequently, is that there is no superior jurisdiction to override that of the boarding State. If a vessel has no State, it cannot be ‘foreign,’ and it is only ‘foreign’ vessels that are immune from interference by warships on the high seas.27 Traditionally, as Meyers asserts, “every state may declare its law applicable to any stateless ‘ship.’ For such a ‘ship,’ this seems to be one of the detrimental consequences of the fact that stateless ship-users cannot appeal to the freedom of the seas.”28 Consequently, he continues, “the state first to take action on board may take enforcement measures.” Therefore, “[e]very state is permitted, within the limits indicated above, to extend its own national law over the stateless ship, and this means that ship-users will probably be subject to contradictory injunctions of national law, that the difficulties of so-called ‘concurrent jurisdiction’ will probably arise.”29

The Virginia Commentary, however, refers to ‘stateless’ vessels as a subset of VWON as follows:

A ship not sailing under the flag of any State (that is, a ‘stateless’ ship) is regarded as a ship without nationality, and as such is not protected under international law . . . .30 By implication, paragraph 2 [of article 92] also applies to a ship that flies a flag to which it is not entitled under article 91. Such a ship may be assimilated to a ship without nationality, and there-

26. Naim Molvan, Owner of Motor Vessel “Asya” v. Attorney-General for Palestine [1948] AC 351 (PC) 369–70 (appeal taken from Palestine) (“‘In the interest of order’ on the open sea, a vessel not sailing under the maritime ‘flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only ‘as sail under the flag of a State.’” (quoting 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 546 (6th ed. 1944)). See also William W. Bishop, Jr., Judicial Decisions, Molvan v. Attorney General for Palestine, 42 AM. J. INT’L L. 927, 954 (1948); Anne Bardin, Coastal State’s Jurisdiction over Foreign Vessels, 14 PACE INT’L L. REV. 27, 50 (2002).

27. See LOSC 1982, supra note 9, arts. 90–92, 94, 97, 110.


29. Id. at 321.

fore forfeits protection of its flag State under international law.\textsuperscript{31}

In like form, the terms ‘stateless vessel’ and ‘ship without nationality’ have in U.S. jurisprudence often been used interchangeably, as evidenced by Judge Rubin in the iconic case of \textit{United States v. Cortes}, where he asserted the following:

The defendants argue that, even if they cannot invoke the protection of the [1958 High Seas] Convention, the treaty, or the international law it recognizes, operates to restrict the actions of signatory nations towards \textit{stateless vessels}. The only mention of \textit{statelessness} in the Convention is in Article 6 which provides in part:

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 \textit{ship without nationality}. \textit{Ships ‘without nationality’} are afforded no special protection in any other provision of the treaty.\textsuperscript{32}

Thus, if there is a distinction between the status of VWON and that of stateless vessel, it is arguably best expressed in terms of ‘stateless vessels’ being a sub-category of ‘VWON.’

This does not mean, however, that VWON and stateless vessels can in all respects be treated identically. Take, for example, a situation where there is no possible State affiliation—that is, there is no legitimately claimable nationality because the claimed nationality does not exist or is not recognized, thus endorsing characterization as a stateless vessel. In such a case, one might quite properly ask whether the vessel is simply condemnable without hindrance to the seizing State, with no compensation or explanation due to any sovereign, nor perhaps even to any owner, as the asset is not protected by any actual or effective jurisdiction. However, such an inquiry would not be circumspect with respect to every VWON precisely because, in many cases, there will often be a claimed or claimable legitimate nationality that will form the initial threshold for analysis. The point, however, is that there is commentary and state practice—limited perhaps, but in the absence of demurrer, nonetheless clear—that international law does not prohibit, and indeed in some cases actually mandates, the assertion of a very wide scope of boarding State jurisdiction over some types of vessels subject to an inconclusive or questionable nationality. It must also be noted, however, that some commentators have required more

\begin{enumerate}
\item \textit{Id.} at 127.
\item United States v. Cortes, 588 F.2d 106, 109 (5th Cir. 1979) (emphasis added).
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than simple presence and capacity in order to assert jurisdiction over a stateless vessel. In 1982, Brendel (citing Meyers,33 the ICJ in Nottebohm,34 and other sources), argued that “[a]ny nation may treat a stateless vessel as a vessel registered in that nation, but only if the ship meets the registration requirements of the nation; the nation also must maintain a genuine link through registration and discharge of its duties to protect and supervise the ship.”35 This conclusion, however, conflicts with that in United States v. Marino-Garcia, where the court expressly held that jurisdiction over the vessel and the people in it “exists solely as a consequence of the vessel’s status as stateless.”36 More recently, in a similar vein, Brodarick described the DTVIA as an “overzealous reach of United States jurisdiction on the high seas.”37 It is arguable, however, that State practice and legislation, along with decisions in both international and national courts, have not fully endorsed this analysis. The concept of “genuine link” in the law of the sea has been diminished;38 subsequent cases in the United States have not read into that legislative scheme any requirement that the United States formally register a stateless vessel prior to asserting its jurisdiction.39 Additionally, even in respect of VWON which may or may not ultimately be characterized as stateless, legislation such as the Australian Maritime Powers Act 2013 does not require any formal act of incorporation into the Australian vessel registration system before ‘maritime powers’ may be exercised over such vessels.40

35. Brendel, supra note 24, at 333; see also Reuland, supra note 11, at 1203–04.
36. United States v. Marino-Garcia, 670 F.2d 1373, 1383 (11th Cir. 1982).
38. M/V “Virginia G” Case (Pan./Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, 2014 ITLOS Rep. 4, ¶¶ 102–18 (“The Tribunal considers that article 91, paragraph 1, third sentence, of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships . . . .”); see also Reuland, supra note 11, at 1204–05 (“A ship is not stateless if she is registered with a recognized state, no matter how tenuous her connection to that state may be . . . .”).
39. Brodarick, supra note 37, 268–72, (discussing United States v. Ibarguen-Mosquera, 654 F.3d 1370, 1378 (11th Cir. 2011)).

(1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel if: (a) the vessel is not flying the flag of a State; or (b) the officer suspects, on reasonable grounds, that the vessel: (i) has been flying the flag of more than one State; or (ii) is flying the flag of a State that it is not entitled to fly; or
It is relevant, consequently, to ask whether the status of ‘stateless vessel’ might still be potentially manifested today. To this end, it is useful to briefly describe two situations in which the status of ‘stateless vessel’ might potentially arise. The first is the situation where an interdicted vessel has no apparent nationality but appears to have the right to claim a specific flag; however, it refuses to do so because return to that jurisdiction would or could entail very dangerous consequences. Take for example, a situation where the potential but disclaimed State of nationality of a vessel interdicted whilst illegally trafficking drugs has a policy of executing any persons involved in that trade who come to be within its jurisdiction, including within a vessel under its flag jurisdiction. In such a case, it may be that the interdicted vessel would seek to claim full statelessness (and thus to be subject to the full range of interdicting State counter-narcotics law) rather than entertain any prospect of being handed over to the authorities of a claimable but rejected potential nationality.

The second possibility is where the claimed flag is unrecognized by the boarding/seizing State. This was, of course, the situation in the “Asya,” flying as it was first the Turkish flag, and then the flag of an entity (the ‘Zionist flag’) at that time unrecognized as a State by the United Kingdom. An interesting example of the national implementation of what appears to be a permissive rule for interference with a vessel that is deemed by the boarding State to be ‘stateless’ in this sense is found in Article 9 of the since repealed 1972 Law on the Somali Territorial Sea and Ports.41 In claiming a territorial sea of 200 nautical miles,42 and purporting to regulate innocent passage within this claimed zone,43 the law also provided in Article 9(1) on “prohibited passage,” that “Passage in the Territorial Sea and internal waters is not allowed to vessels having the

(iii) is not entitled to fly the flag of any State.

*Meaning of vessels without nationality authorization.*

(2) An authorisation under subsection (1) is a vessels without nationality authorisation.

The consequence of this status under the MPA, as noted in s 21(1), is that “maritime powers” may then be exercised in relation to that vessel. These maritime powers include, as summarized in s 50: “(a) boarding and entry powers; (b) information gathering powers; (c) search powers; (d) powers to seize and retain things; (e) powers to detain vessels and aircraft; (f) powers to place, detain, move and arrest persons; (g) the power to require persons to cease conduct that contravenes Australian law.” *Id.* s 50.


42. *Id.* art. 1(1).

43. *Id.* arts. 6–8.
nationality of States not recognized by the Somali Democratic Republic.”44 A similar situation could readily arise today: a vessel flying the flag of Somaliland45 might be considered stateless, by a third State which recognized Federal Somalia. Similarly, a vessel flying a ‘Palestine’ flag when interdicted by a third State which did not recognize the capacity of Palestine to register vessels and give them nationality, could also raise this prospect (as indeed was the U.K. view in relation to Israel in the case of the “Asya”46). A third example might be a vessel flying the flag of a Syrian or Libyan rebel group not recognized as the sovereign representative of, respectively, Syria or Libya.47

This said, however, there are a number of complications that attend this limb of stateless vessel status. The first is the capacity of the boarding State to simply treat the vessel flying an unrecognized flag as a vessel of its ‘parent’ State—thus a vessel flying a Somaliland flag would be treated as simply a vessel carrying Somali nationality, or a Libyan faction/region vessel flying a different flag to that of the recognized Libyan authorities would be treated as simply a ‘Libyan’ vessel.

The second complication is the possible continuity of customary international law doctrines relating to insurgent status vessels.48 The maritime insurgency doctrine treated vessels ‘commissioned’ by a rebel entity afforded the political status of ‘insurgent’ by third States, and flying the flag of that insurgent group, as not susceptible to third State interference in terms of characterizing the vessel

44. Id. art. 9(1); for an account of the evolution and development of Somali laws in relation to the Somali Territorial Sea and EEZ, see, inter alia, Rob McLaughlin, The Continuing Conundrum of the Somali Territorial Sea and Exclusive Economic Zone, 30 Int’l J. Marine & Coastal L. 305 (2015).


as either stateless or as a pirate vessel.\footnote{See generally Hersch Lauterpacht, Recognition In International Law 295–310 (1947) (detailing the circumstances under which insurgents have historically been categorized and treated as pirates).} This concession was limited, however, to the proviso that the insurgent vessel take no action against third State vessels and confine its belligerent conduct to vessels flagged by its parent (but adversary) State.\footnote{See id. at 298. Jessup summarized the position thus: “The principal consequence of a recognition of insurgency is to protect the insurgents from having their warlike activities, especially on the high seas, from being regarded as lawless acts of violence which, in the absence of recognition, might subject them to treatment as pirates.” Philip C. Jessup, A Modern Law of Nations: An Introduction 53 (1956).} Thus, for example, in the SS \textit{Falke} incident in 1929, twenty-two Venezuelan insurgents boarded a German-flagged vessel with a cargo of arms for use against the Venezuelan government.\footnote{Falke with “Admiral” Stuck at Trinidad: Skipper Tells of Rank Conferred by Venezuelan Rebels and of Flying “Liberation Colors”, N.Y. Times, Aug. 17, 1929, at 2. \footnote{Id.; Samuel Menefee, Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective, in Maritime Terrorism and International Law 43, 55 (Natalino Ronzitti ed., 1990).}} The ship’s captain took “an oath on the rebel flag” and became “an ‘admiral’ of the insurgent forces.”\footnote{Venezuelan Rebels Rout Federal Force: Hold Cumana Against Attack of Troops and Plane - Junta Ridicules Falke Report, N.Y. Times, Aug. 21, 1929, at 7.} The vessel was then employed in support of a (failed) insurgency in Venezuela,\footnote{Leslie Green, The Santa Maria: Rebels or Pirates, 37 Brit Y.B. Int’l L. 496, 502 (1961); Menefee, supra note 52, at 55.} and \textit{SS Falke} was declared ‘piratical’ by the Venezuelan government.\footnote{Menefee, supra note 52, at 56.} The vessel was not, however, held to be so by U.K. and U.S. authorities, with the United States specifically recognizing that “[t]he weight of opinion is clearly to the effect that an insurgent vessel cannot be treated as piratical merely because the insurgents have not been recognized as belligerents.”\footnote{4 Marjorie M. Whiteman, Digest of International Law 666–67 (1965).} This view has retained some currency, as the 1961 \textit{Santa Maria} incident and the 1963 \textit{Anzoategui} incident attest.\footnote{56. 4 Marjorie M. Whiteman, Digest of International Law 666–67 (1965).} In the former incident, for example, rebels who took over the Portuguese-flagged \textit{Santa Maria} (after having boarded the vessel as passengers at various ports) were specific as to their claims of either belligerent or insurgent status. Additionally, Brazilian, British, and ultimately the United States, assessments that the rebels were not liable to treatment as pirates—both in the light of the absence of the ‘two-ship’ element of piracy, and as an incident of customary international law on the non-piratical status of insurgents, so long as they did not interfere with third State shipping—
clearly indicate an assumption that the doctrine remained extant as late as the 1960s.\(^{57}\)

A third complication that could attend this status today is the continuity (or not) of the recognition of the belligerency doctrine, which allowed formally recognized belligerent status rebel entities—such as (iconically) the Confederate States during the American Civil War—to be entitled to flag and commission vessels, and for those vessels to have equal rights of transit through neutral waters and the high seas, as well as the rights to call at neutral ports as those of their adversary (but parent) State.\(^{58}\) Such recognized belligerent entity vessels were also considered to have all the rights of a State warship in terms of the conduct of maritime hostilities, including the right of blockade, and of visit and search of neutral vessels.\(^{59}\) Thus Confederate warships were treated on an equal basis with Union warships by those third States (such as the United Kingdom) that had recognized Confederate belligerency and thus had adopted the legal rights and responsibilities of a neutral State as between the contesting parties.\(^{60}\) As with the doctrine on maritime insurgency, however, it is an open question as to the degree to which this highly particularized rule set relating to the law of naval warfare remains extant and effective. If it does remain afoot (as is


\(^{58}\) Letter from the Duke of Newcastle to Governor Hincks (Windward Islands) and relayed to other Colonial Governors (Nov. 30, 1861) (on file in U.K. Archives File: FO 881/2068, Item 5 Enclosure 1) (responding to a request for instructions regarding “the course which should be taken by the British authorities in regard to privateers carrying the flag of the so-styled Confederate States . . . .”).

\(^{59}\) Hyde described this consequence of recognition of belligerency thus: “By such action, the foreign State undertakes to treat both parties to the conflict as belligerents, and also to assume itself in relation to them the position of a neutral with the burdens and rights incidental to such a status.” 1 Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States § 47 (1922).

my view with respect to belligerency), then this customary international law doctrine arguably continues to affirm a subset within the category of stateless vessels, which consists of ‘formally’ stateless vessels which are nevertheless to be treated as vessels with a facsimile of ‘nationality.’ And whilst this quasi-nationality is quite limited in the case of insurgency, it is to all practical purposes akin to flag State nationality in the case of formally recognized belligerency.

III. JURISDICTION OVER VESSELS WITHOUT NATIONALITY

On the basis of current usage, the most useful legal status to explore in terms of an inquiry into the extent and scope of subject matter boarding State jurisdiction is that of VWON. This concept resides somewhere along the spectrum of subjection to lawful interference at sea that is more than the prima facie operational trigger of ‘unflagged,’ but less than the status of true ‘stateless vessel.’ As Ted McDorman noted in relation to a vessel entering Canadian waters in 2004, “When a ship has no flag and no markings, it’s considered an unflagged ship. Anyone has the authority to board it and that ship immediately comes under the jurisdiction of the country whose officials board her.” However, Natalie Klein, Efthymious Papastavridis, and others have likewise observed (to quote Klein), “[t]here is an important distinction drawn between the right of visit and the rights associated with the exercise of enforcement jurisdiction (such as detention and arrest). There must be a separate basis of authority to exercise this enforcement jurisdiction.”

In assessing the degree and scope of jurisdiction available to the boarding State in respect of a VWON, it is thus useful to analyze this jurisdiction in two stages: (i) the ‘immediate’ triggering jurisdiction to board; and (ii) ‘follow-on’ or continuing subject matter

61. In which case the vessel—because it has no sovereign—may be readily assimilated, in full, to a vessel flying the flag of the boarding State, which acts in effect as the newly asserted sovereign.


63. Klein, supra note 8, at 9; Papastavridis, supra note 17, at 161–62. As Klein continues, “For example, art 105 of the LOSC provides states with authority to arrest pirate vessels. However, under art 99, if a vessel is being used to transport slaves then it is incumbent on the flag state to take enforcement action against the relevant vessel and those on board engaged in slave-trading.”
jurisdiction once the initial purpose of the boarding has been achieved.64

A. Immediate triggering jurisdiction

There appear to be two authorizations implicit in the assertion of immediate triggering jurisdiction over a VWON by the agent of the boarding State:

1. The jurisdiction and authority necessary to confirm the vessel’s nationality, including – if necessary – use of force to halt and board the vessel; and
2. Such incidental jurisdiction as is necessary to facilitate this process, in that the Article 110 scheme clearly anticipates actions that may result in:
   (i) Temporary restraint of those in the VWON posing a danger to others or themselves;65
   (ii) Searching – such as an Article 110(2) ‘further examination on board the ship’,66
   (iii) Document checks,67 and
   (iv) Delay, with subsequent compensation if ‘the ship boarded has not committed any act justifying’ the interference.68

One example of the scope these two iterative and linked assertions of jurisdiction and authorization is offered by the response of the Japanese Coast Guard (JCG) to a 21 December 2001 incursion into the Japanese Exclusive Economic Zone (EEZ) by an ‘unidentified’ vessel (ultimately suspected to be a DPRK auxiliary general intelligence (AGI) vessel) which presented as a fishing vessel, but which was not displaying a flag or any other nationality or registration indicia. As Atsuko Kanehara reported:

Japan Coast Guard (JCG) vessels gave chase until the unidentified vessel entered an EZ claimed by the People’s Republic of China. After an exchange of fire between the ship and the Japanese vessels, the former later sank on December 22, apparently from an explosion the cause of which remains unknown.69

Although the precise legal reason for the JCG’s pursuit and use of force against the vessel is opaque, it is reported as being one of, or a combination of, authorizations residing in the vessel’s ‘unidenti-

64. Another approach, as elaborated by Martin Fink, is to adopt a three-part assessment scheme: ‘legal basis for boarding’; “scope of authority during the boarding”; and “legal regime during boarding.” Fink, supra note 11, at 156–57.
65. See LOSC 1982, supra note 9, art.105 (with respect to piracy, for example).
66. See id. art. 110(2).
67. Id.
68. See id. art. 110(3).
fied’ (VWON) status, and the suspicion based on appearance—regardless of the presence of unusual antennae and other AGI-like equipment—that the vessel may have been an unlicensed fishing vessel. There was, however, great inconsistency in the legal explanations provided. Mrs. Chikage Ogi, Minister of Land, Infrastructure and Transport, stated that

In an EZ, foreign ships may be suspected of illegal fishing as fishing boats. They also may be suspected of something other than fishing since the foreign ships do not show their flags or names and since they do not seem to engage in fishing regardless of their appearance as fishing boats. JCG may take measures against foreign ships whenever it determines that they are suspicious in any sense in Japanese territorial waters and in EZs as well.70

However, Mr. Katsuhiko Nawano, Director-General of the JCG, explained the legal basis differently, asserting that “[i]n EZs, under UNCLOS coastal States have limited sovereign rights solely related to fishery, etc. Therefore, in this incident Japan could take measure against the foreign vessel since it had been suspected of a violation of the Law on Fishery in the EZ.”71

The example par excellence, however, is the interdiction of the So San—a vessel apparently without nationality that was boarded by Spanish forces on 8 December 2002. Whilst the vessel was ultimately released after its nationality and the destination of its cargo were confirmed, there was little doubt that halting and boarding the vessel on the basis that it appeared to be a VWON—including the use of warning shots—was clearly legitimate.72 Ultimately, VWON boardings are not operationally unusual, and there can be no doubt that the halting and boarding of a VWON, and if necessary the use of force to effect this outcome, is clearly understood to be an incident of the LOSC Article 110(1)(d) head of power.

This said, however, it is not correct to assert that such pursuit and use of force to halt and board a fleeing VWON, on the basis of its VWON status alone, could simply be an incident of Article 111 hot pursuit—a conclusion the JCG example appeared to indicate. This is because outside the Contiguous Zone, the jurisdictional trigger for Article 111 (in Article 111(2)) is as follows:

70. Id. at 120.
71. Id.
The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.\(^73\)

The key question, therefore, is whether the state of affairs of a vessel being a VWON is a matter on which the coastal State may make laws or regulations in respect of its EEZ and continental shelf. The very language would appear to militate against this conclusion, for the jurisdictional trigger is linked to rights, authorizations, and obligations in relation to the EEZ and the continental shelf rather than the high seas, which is a legally distinct—albeit in part physically co-located—maritime zone. Thus, the grant of authority for use of force to pursue, halt, and board a VWON must lay within Art 110 itself—in particular the unspoken but essential precondition to the right that “in the cases provided for in [Article 110] 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.”\(^74\) This conclusion is important as it removes Article 111 from consideration in terms of authorization and leads us back to the terms of Article 110 itself, with its granular and variable approach to jurisdiction individually hinged around each of the five heads of power. That is, there is no ‘default’ common jurisdictional assumption that applies across the five Article 110 heads of power, and a better understanding of the defined scope for each head of power must refer to how the LOSC organically and individually deals with them in other provisions. Boarding State jurisdiction over pirate vessels boarded under Article 110, for example, is total—as LOSC Articles 100-107 make clear. In contrast, boarding State jurisdiction over vessels engaged in unauthorized broadcasting is more prescribed. The jurisdiction of any State, including the boarding State, only continues provided the conditions of LOSC Article 109 are met.\(^75\)

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73. LOSC 1982, supra note 9, art. 111(2).
74. Id. art 110(2).
75. LOSC 1982 Article 109(3) states:
   Any person engaged in unauthorized broadcasting may be prosecuted before the court of:
   (a) the flag State of the ship;
   (b) the State of registry of the installation;
   (c) the State of which the person is a national;
   (d) any State where the transmissions can be received; or
   (e) any State where authorized radio communication is suffering interference.
More restrictively still, boarding state jurisdiction over a vessel boarded in relation to Article 110(1)(b)—‘engaged in the slave trade’—is limited by LOSC Article 99 which states:

Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.76

That is, whilst any State may exercise the right of visit over such a vessel, and any slave found therein is freed regardless of the nationality of either the boarding vessel or the slave trading vessel, the jurisdiction to ‘prevent the unlawful use of its flag’ by vessels engaged in the slave trade logically resides only with that flag State itself. The LOSC does not create a general offence of ‘being a vessel engaged in the slave trade’ which is prosecutable by any State; the boarding State’s jurisdiction is limited to halting, boarding, freeing the slaves, and then reporting to the relevant flag State. As a matter of international law, any follow-on action—such as detaining the vessel and steaming it to a port for further investigation—would then hinge around the consent of the flag State.77 Similarly, the LOSC itself also provides guidance as to the jurisdiction available to the boarding State in relation to Article 110(1)(e)—“though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.”78 In this case, the LOSC already provides that if the vessel is indeed of the nationality of the boarding State vessel, Articles 91, 92, and 94—setting out the rights and duties of flag States—apply. If the vessel is found not to be of boarding State nationality, then assumed jurisdiction ceases and compensation is due: “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.”79

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76. Id. art. 99.
77. See, e.g., Convention to Suppress the Slave Trade and Slavery art. 3(1), Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (“The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.”).
78. LOSC, supra note 9, art. 110(1)(e).
79. Id. art. 110(3).
What then is the situation with respect to the jurisdiction available to a boarding State in an Article 110(1)(d) VWON situation? As with the other heads of power under Article 110(1), clear guidance is found within LOSC 1982 itself. Article 92(2) provides that a ship utilising two or more flags 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.” Thus, in the first situation—a vessel determined to be without nationality in accordance with Article 92(2)—there is no standing ‘superior’ claim above that of the boarding State when it comes to asserting jurisdiction. It is, therefore, permissible for the boarding State to apply its jurisdiction over that ‘jurisdictional void’ insofar as there is no flag jurisdiction with a superior claim to the boarding State’s own jurisdiction in relation to the vessel. It is essential to note, of course, that nationality jurisdiction over individuals may still exist, depending upon the extraterritorial reach of the relevant national law for each person onboard.80

The vessel-centered consequence flowing from ‘double nationality’ has, however, long been understood—as the International Law Commission’s 1956 commentary to proposed Article 31 of its draft Law of the Sea articles81 specifically observed:

Double nationality may give rise to serious abuse by a ship using one or another flag during the same voyage, according to its convenience. This practice cannot be tolerated. There is a definite school of thought which recognizes the right of other States to regard a ship sailing under two flags as having no proper nationality. In view of the serious disadvantages in this “statelessness” for a ship, this sanction will do much to prevent ships from sailing under two flags and to induce those concerned to take the necessary steps to abandon this irregular practice. The Commission has therefore laid down this rule.82

However, this is not the same as an argument to the effect that “because a vessel’s stateless status does not affect the nationality of

80. Id. art. 97. This does not displace the jurisdiction of the boarding State, but it does create a legal and diplomatic jurisdiction de-confliction challenge in terms of competing and parallel obligations owed to the people on board by both the boarding State and their States of nationality. This is a critical question that warrants further analysis, but it is not the focus of this article.


the individuals on board,” the boarding State cannot therefore assert jurisdiction over those people.\(^{83}\) Clearly, practice does not support this conclusion, as the “Asya” case attests, and as subsequent U.S. procedural and legislative history of precisely this issue also attests.\(^{84}\) There are also multiple other examples and incidents from other jurisdictions, and in other more recent treaties, that similarly reflect to this understanding (see below). The position at law, consequently, is that Article 92(2) clearly anticipates that the boarding State may exercise ‘follow-on’ or subsequent jurisdiction in relation (as a minimum) to the act of being ‘without nationality’ (i.e., a VWON), in respect of a vessel using two or more flags according to convenience.

The second situation for assessment focuses upon whether there is any logical reason the same jurisdiction might not also be claimed in respect of a vessel which was boarded in accordance with Article 110(1)(d) as a ‘vessel without nationality,’ which was not using two flags, but rather only a single doubtful flag. That is, where the claim to the single flag flown is not verified, is the vessel—as with article 92(2)—then deemed to be stateless? Clearly, it must be so. From an operational perspective, the situation of a single flag which is found to be illegitimately claimed, is hardly distinguishable from the Article 92(2) situation, which precludes access to any of two or more claimed flags—there is no superior vessel jurisdiction in either case. Indeed, the Virginia Commentary does not draw a distinction:

In respect of paragraph 1(d) [of Article 110], under article 92, paragraph 2, a “ship without nationality” is any ship which “sails under the flags of two or more States, using them according to convenience”. It might also be applied to any ship not flying a national flag or bearing equivalent markings identifying its nationality.\(^{85}\)

Similarly, Reuland (as an indicative commentator) wrote in 1989 the following:

A ship properly registered with a state may lose her allocation of nationality by operation of law should she abuse her flag. The ascription of nationality of ships is so important to the regime of the high seas that a vessel which abuses that ascription is deprived of its protection. Such a vessel is assimilated to a vessel without nationality and risks seizure as a stateless vessel. . . As observed above, order on the high seas follows from the existence of a flag-state competent to ensure the good behavior of

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83. See, e.g., Brendel, supra note 24, 337–38.
84. See supra Section II.C.
85. Nordquist et al., supra note 30, at 245.
Article 110 of the Law of the Sea

ships under its flag. A ship that sails randomly under two or more flags is as repugnant to this principle as a ship with no flag at all. Accordingly, a ship may sail under no more than one flag at a time.86

It is difficult to see why—if we prefer a coherent approach to the LOSC 1982 scheme covering VWON—that a VWON claiming two or more flags interchangeably and thus barred from both should be legally or conceptually differentiated from a VWON inappropriately claiming a single flag as a matter of pure jurisdictional assessment. This holds regardless of whether the VWON also has a legitimate claim to yet another flag different from the one it has falsely claimed.

The third situation that arises is that the VWON flying no flag ultimately produces sufficient acceptable evidence of its right to fly a particular flag. At this initial stage, if the boarding State is indeed able to “verify the ship’s right to fly its flag”87 then it is faced with two options. The first is to allow the vessel to proceed, accompanied (potentially) by a report to the flag State regarding the circumstances of the interdicted vessel’s failure to appropriately display its proper flag or other indicia of registration, which triggered the original suspicion that the vessel was a VWON. Alternatively, the boarding State may instead assert that it has a valid jurisdiction in respect of an offence available for incorporation into national legislation of unlawfully failing to show a valid flag, or being a vessel not complying with the requirement that it properly display the indicators of its nationality, which the boarding State can nevertheless prosecute regardless of the ultimate disclosure of a nationality. It should be noted, however, that views as to whether international law discloses such an offence are mixed, as are views regarding the permissible scope of enforcement jurisdiction over such an offence.

B. Continued Assertion of Boarding State Jurisdiction Over Conduct

1. Introduction

It is clearly possible, as indicated above, for a boarding State to claim some specific and incidental initial jurisdictions over conduct in the boarded vessel. The next question, consequently, is whether the boarding State can continue to assert any broader jurisdictions over the vessel (and those in it) when (i) the flag is not verified, or

86. Reuland, supra note 11, at 1205–06.
87. See LOSC 1982, supra note 9, art. 110(2).
(ii) the VWON remains a VWON (e.g., by operation of Article 92(2)) even if a flag State is verified.

2. Violence Onboard

As is likely clear at this point, it is my view that this is indeed the case. The first example that tends to indicate this possibility for continuing additional subject matter jurisdiction (beyond that required for and incidental to halting and boarding) is where there is a violent incident in the VWON. In any situation where a person in the boarded VWON assaults and injures or kills a boarding team member, for example, such conduct is clearly liable to boarding State jurisdiction. This may be via a direct nationality of victim nexus,88 and/or the fact that the conduct was situated in a ‘place’ over which the boarding State is exercising temporary control and thus held (at the relevant time) some jurisdiction enlivening responsibility for security and safety. For example, the Australian Criminal Code Act 1995 (Commonwealth) offence of “recklessly causing serious harm to an Australian citizen or a resident of Australia”89 is subject to a very broad geographical jurisdiction90 allowing that such an act would indeed fall within that Australian jurisdiction temporarily in place of a VWON during a boarding (and indeed even if it occurred on a vessel properly flying the flag of another State). Another example of this jurisdictional assumption is evident in the EU’s initial guidance for the Mediterranean operation, which provides that: (i) after boarding a VWON where the vessel “has not been granted by any State the right to fly its flag or when it sails under the flags of two or more

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88. For example, the “passive personality principle.” See Cedric Ryngaert, Jurisdiction in International Law 92–96 (2d ed. 2015) (the passive personality principle, giving jurisdiction based on the nationality of the victim, is likely to be the most aggressive basis for extraterritorial jurisdiction).

89. Criminal Code Act 1995 (Cth) s 115.4, “Recklessly Causing Serious Harm to an Australian Citizen or a Resident of Australia” (Austl.):

(1) A person commits an offence if:
(a) the person engages in conduct outside Australia; and
(b) the conduct causes serious harm to another person; and
(c) the other person is an Australian citizen or a resident of Australia; and
(d) the first-mentioned person is reckless as to causing serious harm to the Australian citizen or resident of Australia or any other person by the conduct.

Penalty: Imprisonment for 15 years.

90. See id. s 115.8, “Geographical Jurisdiction”:
Each offence against this Division applies:
(a) whether or not a result of the conduct constituting the alleged offence occurs in Australia; and (b) if the alleged offence is an ancillary offence and the conduct to which the ancillary offence relates occurs outside Australia—whether or not the conduct constituting the ancillary offence occurs in Australia.
States, using them according to convenience” and (ii) there is “rea-
sonable grounds to suspect that the ship is engaged in the smug-
gling of migrants by sea in accordance with the Protocol against
the Smuggling of Migrants by Land, Sea and Air, supplementing
the United Nations Convention against Transnational Organised
Crime,” then (iii) the boarding unit can take a specified set of
actions, which include requesting information, stopping and
boarding, seizing the vessel and apprehending those on board,
“conducting the ship or persons on board to a third country.”

3. Treaty-based Continuing Jurisdiction

A second situation of continuing jurisdiction that is broader
than that associated with halting and boarding the VWON is where
further jurisdictional assertions are mandated in accordance with a
treaty. One example is the Caribbean Agreement 2003 which
provides, at Article 23:

Each Party shall take such measures as may be necessary to
establish its jurisdiction over the offences it has established in
accordance with Article 3, paragraph 1, of the 1988 Convention,
when: . . .
c. the offence is committed on board a vessel without nationality
or assimilated to a ship without nationality under international
law, which is located seaward of the territorial sea of any State . . . .

Similarly, where a VWON is engaged in illegal, underreported,
and unregulated (IUU) fishing on the high seas, treaties may also
provide for additional exercises of jurisdiction unrelated to the ini-
tial jurisdiction incidental to facilitating a VWON boarding. Such a
vessel could in many circumstances be, for example, subject to the
Article 21(17) authorizations set out in the U.N. Fish Stocks Agree-
ment 1995, which provide that an enforcement vessel encounter-
ing a VWON engaged in fishing “may board and inspect the
vessel,” and that “[w]here evidence so warrants, the State may take
such action as may be appropriate in accordance with international
law.” Whilst thin as to the detail regarding what that subsequent
action as may be appropriate in accordance with international law

111) 20.
92. Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Traff-
icking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, Apr. 10,
93. Id. art. 23(c).
94. Agreement for the Implementation of the Provisions of the United Nations Con-
vention on the Law of the Sea of 10 December 1982 Relating to the Conservation and
might be, it is clear that it is more than simply attempting to confirm nationality; there is a clear inference that the legitimacy of assertions as to a wider scope of subject matter jurisdiction is assumed. This authorization thus clearly anticipates that there is scope for continuing jurisdiction beyond that immediately afforded for the purposes of conducting the boarding and verification operation. This jurisdictional scope is expansive on three consequence levels: (i) as to subject matter jurisdiction; (ii) as to freedom to expansively define the concept of ‘VWON’; and (iii) the fact of the venue/site of an infringement being a VWON acting as an aggravating factor in the offence, allowing a harsher liability as a consequence. Fishing, as just noted, is an example of the first consequence level. An example of the second consequence level is the Western and Central Pacific Fisheries Commission’s Conservation and Management Measure 2009-09, which states that VWON means “vessels not flying the flag of any state”—a wider category than VWON, and perhaps reflective of ‘unflagged’—as well as vessels rendered VWON by virtue of Article 92 LOSC. An example of the third consequence level is the Norwegian Marine Resources Act (2009), which provides as follows:

Section 5: Personal scope . . .

The Act applies to foreign natural and legal persons in areas outside the jurisdiction of any state if this follows from an international agreement. In such areas, the Act also applies to stateless vessels and for vessels that are assimilated to vessels without nationality.96

Additionally, this Norwegian legislation provides that statelessness can remove the general application of the no prison for fisheries offences approach of the LOSC:

If a foreign vessel has contravened provisions such as are mentioned in sections 60 to 63 [fisheries offences for which criminal liability is incurred] outside the territorial sea, a term of imprisonment may not be imposed. Nor may a term of imprisonment be imposed in default of payment of a fine. A term of imprisonment


ment may nevertheless be imposed if this follows from an agreement with a foreign state or if the vessel is stateless.\textsuperscript{97}

Again, the assimilation of the consequence of being a VWON under Article 92 with the consequences more generally for VWON (which may claim only one flag) under Article 110 is clear and indicates that continuing jurisdictional reach may legitimately be claimed.

4. LOSC 1982 Article 108

A third situation that provides evidence of a threshold approval for continued boarding State assertions of jurisdiction with respect to a VWON is where action is taken in accordance with Article 108 of LOSC 1982,\textsuperscript{98} requiring all States to cooperate in the suppression of the traffic in illegal narcotics by sea. A jurisdiction thus exists to the extent of seizing and disposing of such drugs, including where a boarded VWON is found to be engaged in the illicit traffic of narcotics. This has been routinely affirmed in the operational practice of a number of states engaged in maritime security and counter-narcotics operations in the Indian Ocean region.\textsuperscript{99} Further, the United States (amongst others) has legislated an explicit domestic jurisdiction over VWON engaged in drug trafficking, and over the act of operating a VWON. For example, the U.S. Maritime Drug Law Enforcement Act (MDLEA)\textsuperscript{100} specifically provides that VWON and vessels assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas (the equivalent of Article 92(2) LOSC 1982) are subject to the MDLEA. Significantly, this U.S. law further defines the category of VWON to include:

46 U.S. Code § 70502 - Definitions

(d) Vessel Without Nationality -

(1) In general. In this chapter, the term ‘vessel without nationality’ includes -

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


(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and
(C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.\footnote{101}

5. Legislation

A fourth situation that indicates boarding State jurisdictional reach beyond that simply required for and incidental to effecting the halting and boarding of a VWON is legislation that facilitates the collection of evidence, seizing of items, and even prosecutions in accordance with boarding State domestic legal authorizations. For example, the Australian Maritime Powers Act 2013—operating in conjunction with other Australian law—provides scope for asserting further jurisdiction over VWON in terms of the authorization to “retain things” found in the vessel. Once onboard a vessel—including a vessel boarded under a “vessels without nationality authorization”\footnote{102}—two of the directly relevant “maritime powers”\footnote{103} which may then be utilized include the sections 67 and 68 powers to seize and retain things, including weapons. The key, however, is that the power to “retain” is founded upon a threshold test: “Retaining things. (1) A maritime officer may retain any thing that the officer suspects, on reasonable grounds, could be seized under an Australian law.”\footnote{104} Another example is a “contravention authorization”\footnote{105} under the Maritime Powers Act, which offers a


103. Id. s 50.

104. Id. s 68.

105. Id. s 17 (“Contraventions. Vessels, installations, protected land areas and isolated persons. (1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel, installation, protected land area or isolated person if the officer suspects,
further pathway for the application and exercise of additional jurisdiction over a VWON to the extent of enlivening that Act’s maritime powers, including the “seize” and “retain” powers. One such offence that may furnish grounds for such a “contravention authorization” might be “obstruction of a Commonwealth official” under Criminal Code Act 1995; another could be drawn from Division 145 of the Criminal Code Act 1995—offences relating to forgery—in that the presence of forged or false registration instruments, cargo manifests, or consignment documents may enliven offences in this Division in relation to “false documents.” There are a number of other similarly interlinked mechanisms within the Maritime Powers Act that also appear to offer firm segues into the application of other elements of Australian law over both the VWON, and those within the VWON.

6. UNSCRs

A final example of uncontentious continued assertions of jurisdiction by a boarding State over a VWON are those carried out in accordance with certain UNSC Chapter VII mandates. In this respect, as noted previously, the Somali charcoal UNSCRs, and then UNSCR 2240 and its successor resolutions dealing with the migrant smuggling crisis in the Mediterranean Sea, are very significant. I shall focus upon the three-step authorization granted in UNSCR 2240 as the primary case study. First, UNSCR 2240 (et seq.) clearly reiterates existing law in (as noted previously) operative paragraph 5, which authorizes boarding of “any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organized criminal enterprises for migrant smuggling or human trafficking . . . .” Second, UNSCR 2240 then introduces a further special and particularized regime via operative paragraphs 6 to 11, which is to function alongside the reiteration of the VWON authorization in operative paragraph 5. Operative paragraph 6 covers flag State consented searches, and operative paragraph 7 covers situations in which flag State consent has not been positively afforded subsequent to good faith attempts to obtain that consent. The third step is operative

107. Id. s 143.2. This offense is subject to “category D” jurisdiction and would thus clearly encompass a VWON.
109. Id. ¶¶ 6–7.2.
paragraph 15, which culminates with the authorization to seize and dispose of each of these vessel types, in addition to VWON. To that end, UNSCR 2240 appears to anticipate that the ‘special’ jurisdictional grants to boarding States for operative paragraph 6 and operative paragraph 7 type vessel boardings is already in place for operative paragraph 5 vessels (VWON) because of their ‘unflagged’ status.

A different sort of relevant UNSC authorization is evidenced by the UNSC’s approach to small arms and light weapons trafficking as a matter of broad international security concern. The UNSC has passed (for example) resolutions 2117 (2013) and 2220 (2015) in relation to the threat posed to international peace and security by “the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world,” specifically “reaffirming its decision that States shall eliminate the supply of weapons, including small arms and light weapons, to terrorists . . . .” However, neither resolution is specifically adopted under Chapter VII; similarly, neither provides any additional power to seize such cargoes outside of existing legal authorizations. Nevertheless, these UNSCRs do create additional obligations for States. For example, quite apart from the UNSCR 2117 (2013) operative paragraph 9, and UNSCR 2220 (2015) operative paragraph 19 decision that “States shall eliminate the supply of weapons, including small arms and light weapons, to terrorists,” the UNSC has also—at UNSCR 2220 (2015) operative paragraph 10—recognized the following:

the need for Member States to put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients . . . .

Despite the absence of specific Chapter VII language, this requirement—reiterated for member States—is still an obligation for these States. Chapter VII is unnecessary in this context as the UNSC is simply reminding States of an obligation they already pos-

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110. Id. ¶ 15.
113. E.g., Id. ¶¶ 4, 13; S.C. Res. 2117 ¶ 9 (Sept. 26, 2013).
Article 110 of the Law of the Sea

It is certainly arguable that there are clear jurisdictional grants in international law—as indicated in Article 92 and given further effect in Article 110 of the LOSC 1982, and as reflected in customary international law—to assert both immediate triggering jurisdiction and continuing subject matter specific ‘follow-on’ jurisdictions with respect to VWON. These jurisdictional grants include authorizations to:

1. Board, search, detain, and divert for the purposes of confirming nationality.

2. If no mitigating circumstance presents, for the boarding State to assert jurisdiction—even if a nationality is claimable—for the offence of ‘being a VWON,’ provided the State interprets international law to create such an offence and has in fact incorporated such an offence into its domestic law.

3. If the boarding State’s domestic jurisdiction has implemented the requisite international permissions, it may proceed to assert a broader scope of jurisdiction over matters such as:
   a. Acts of violence onboard that VWON;
   b. Treaty obligations specifically mandated to apply over VWON (such as with respect to fisheries); and
   c. Jurisdiction to enforce a more general obligation in relation to a VWON, such as the Article 109 counter-narcotics cooperation obligation, or the UNSCR 2240 counter-people smuggling obligation applicable in the Mediterranean Sea.

4. More contentiously—but as is nevertheless clearly evident in some explicit state practice—additional seize and retain jurisdiction in relation to collection of evidence or proscribed material, and even prosecutorial jurisdiction over other domestically legis-
lated matters such as hindering an official, culpable possession of fraudulent documents, and so on.

Additionally, if the vessel falls into the subset of VWON that is ‘stateless vessels,’ then leaving aside uncertainties as to the residual efficacy of the customary rules on insurgent and belligerent status vessels, it is arguable that the full suite of boarding State jurisdiction is available to be asserted over the vessel and those in it. This is separate to and independent of the fact that those onboard will also likely be subject to the jurisdiction of their own states of nationality, assuming each of those states asserts sufficient extraterritorial jurisdiction to this effect.

V. CONCLUSION

“Commentators agree that stateless vessel status is undesirable in the scheme of international maritime law. The registration of ships is essential to the maintenance of order on the high seas.”115 This conclusion is in many respects obvious (albeit perhaps relatively scarcely analyzed) and LOSC 1982 Articles 91 and 92 make it clear that all ships are required to have a nationality.116 It would thus be anathema to international law and the interests of States as the primary actors in the regulation of shipping, that a vessel could simply avoid any regulation, and also any liability to an available regulatory jurisdiction, simply through the artifice of not taking a nationality. This would undermine precisely the purpose of this regulatory regime—that is, to ensure that all vessels, and all conduct of and within vessels, wheresoever located, are subject to the jurisdiction of a State. If, as is the case with VWON, that jurisdiction in some circumstances must actually be that of the State which

115. Brendel, supra note 24, at 332.
116. LOSC 1982, supra note 9, Articles 91 and 92 state:
   Article 91 Nationality of ships.
   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 . . .
   Article 92 Status of ships.
   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.
from time to time has cause to assert control over a delinquent vessel via the act of boarding, then international law clearly anticipates and supports this assertion of jurisdiction.

There is, undeniably, a relative paucity of commentary and debate on the extent to which a boarding State may continue to assert subject matter-specific jurisdiction over a VWON beyond that immediately necessary or incidental to effecting the boarding, and confirming (or not) nationality. Yet there are equally quite clear indicators that such authority exists. To a large extent, this conclusion is both logical and necessary—as noted just above, it cannot be the intent of States, or of international law, that a vessel may side-step regulation and jurisdiction simply through the artifice of being stateless or without nationality. Nor it cannot be the intent of States that VWON is treated with an uncertain and hesitant jurisdictional touch in respect of follow-on or continuing jurisdiction merely through conduct that results in a consequence—such as the LOSC 1982 Article 92(2) denial of a right to claim any of two or more interchangeably utilized nationalities—which appears to create a jurisdictional void. Indeed, the proper and consistent tendency of international law in such situations has always been to facilitate application of a jurisdiction so as to avoid precisely this outcome. Through a deft combination of specific international permissions and concurrent domesticated national authorizations, it is, consequently, entirely possible and appropriate to fix a set of conditions under which a boarding State may continue to enforce discrete aspects of its jurisdiction over VWON, regardless of whether a flag State has been verified. Whether the parameters of this jurisdictional grant differ as between a VWON which ultimately asserts a valid claim to a single nationality, and all other types of VWON—such as stateless vessels and VWON of Article 92(2) typologies—is more vexing. As will be apparent from the course of this analysis, I would respond to this query with the argument that all VWON—regardless of typology—may be subject to continuing boarding State jurisdiction where it is clear that a specific grant of such jurisdiction exists in both international and national law. This may be via a treaty regime, a UNSC mandate, or through the concurrent application of an additional jurisdictional grant such as the passive personality principle. In the case of stateless vessels, however, it is arguable that the absence of any jurisdiction—regardless of the parallel extraterritorially applicable nationality jurisdictions available over those in the stateless vessel—creates a broad authority for the boarding State to treat the vessel as if it
were, essentially, under that boarding State’s flag, and thus to apply its full suite of jurisdiction over the vessel and those in it.